



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
[NAME REDACTED])	ADP Case No. 12-09373
)	
Applicant for Public Trust Position)	

Appearances

For Government: Chris Morin, Esquire, Department Counsel
For Applicant: *Pro se*

05/09/2014

Decision

MALONE, Matthew E., Administrative Judge:

Applicant accrued more than \$31,000 in delinquent debt between 2007 and 2011. Although he has paid three of the debts, most of his past-due obligations have not been addressed. His current finances are characterized by a negative monthly cash flow, which precludes him from resolving his debts and correcting his financial problems. His circumstances are not likely to improve in the near future. His request for a position of trust is denied.

Statement of the Case

On September 29, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to obtain eligibility for an ADP I/II/III position¹ for his job with a defense contractor. After reviewing the results of the ensuing background investigation, which included his responses to Department of Defense (DOD)

¹ As defined in Chapter 3 and Appendix 10 of DOD Regulation 5220.2-R, as amended (Regulation).

interrogatories,² DOD adjudicators were unable to determine that it is clearly consistent with the interests of national security to grant Applicant's request for a position of trust.³

On December 9, 2013, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise trustworthiness concerns addressed in the adjudicative guidelines (AG)⁴ for financial considerations (Guideline F). Applicant timely answered the SOR and requested a hearing. The case was assigned to me on March 10, 2014, and I convened a hearing on April 2, 2014. Department Counsel presented Government Exhibits (Gx.) 1 - 5.⁵ Applicant testified and submitted Applicant's Exhibits (Ax.) A and B. All exhibits were admitted without objection. I also left the record open to receive additional relevant information from Applicant. His timely post-hearing submission is admitted without objection as Ax. C.⁶ DOHA received a transcript of the hearing (Tr.) on April 17, 2014.

Findings of Fact

Under Guideline F, the Government alleged that, as of December 2013, Applicant owed \$31,242 for 11 past-due or delinquent debts. (SOR 1.a - 1.k) Applicant admitted all of the allegations except SOR 1.i. (Answer) His admissions are incorporated in my findings of fact. Having reviewed Applicant's response to the SOR, the transcript, and exhibits, I make the following additional findings of relevant fact.

Applicant is 52 years old and is employed by a defense contractor for work that requires access to sensitive automated information to perform his duties as a desktop analyst and network administrator. He has worked in information technology (IT) jobs since he was honorably discharged from the U.S. Navy in 1992 after eight years of service. He was trained as a fire control technician, held a security clearance during his enlistment, and left active duty as a petty officer third class. Applicant started working at his current location in September 2011 as a temporary agency hire but soon was hired as a permanent employee by the company that is sponsoring his request for a position of trust. (Gx. 1; Tr. 34 - 35)

Applicant and his wife have been married since December 1992. They have three children, ages 26, 18, and 13. The younger two children are still living with Applicant and his wife. (Gx. 1; Gx. 2)

² Authorized by DOD Directive 5220.6 (Directive), Section E3.1.2.2.

³ Required by the Regulation, as amended, and by the Directive, as amended.

⁴ The adjudicative guidelines were implemented by DOD on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

⁵ A copy of Department Counsel's letter forwarding Gx. 1 - 5 to Applicant in advance of hearing is included in the record as Hearing Exhibit (Hx.) 1. Also, an index listing each exhibit is included in the record as Hx. 2.

⁶ Emails documenting Applicant's post-hearing submission and Department Counsel's waiver of objection are included in the record as Hx. 3.

In his eQIP, Applicant disclosed one delinquent debt for which his pay was being garnished. The ensuing background investigation produced credit reports that document the debts addressed in the SOR allegations. Applicant discussed those debts with Government investigators in two May 2012 interviews. Applicant indicated most of his debts arose in 2011, but that he has been unable to make any progress in resolving them. He also indicated that his debts were overwhelming, but that he would start contacting his creditors and seek assistance in resolving his debts. An examination of his monthly finances at that time showed that his expenses exceeded his income by about \$630. (Gx. 2)

Applicant's wife is a registered nurse. She was unemployed by her own choice from June 2012 until December 2013. Although she is once again working, she has her own bank account and her income has not been included in calculating their household income. She helps pay their utilities and some clothing costs occasionally, but Applicant was not able to provide information about her earnings. He avers that the loss of his wife's income has caused his financial problems. (Answer; Gx. 2; Tr. 43, 55, 58)

In October 2013, when Applicant responded to interrogatories from DOD adjudicators, he indicated he was living paycheck to paycheck. A personal financial statement (PFS) reflected a negative net monthly remainder of \$357. At the hearing, Applicant testified that his monthly net income has increased by about \$125, but that his monthly expenses, namely, day care and rent, have increased by about \$260. Although Applicant testified that he has about \$300 remaining each month after expenses, he did not support this claim. Applicant does not use a written budget, and he did not present any information about his wife's income despite being afforded extra time after the hearing to do so. All of the available information probative of what his actual monthly cash flow is shows his expenses still far exceed his income. (Gx. 2; Tr. 55 - 63, 70 - 71)

Four of the debts alleged (SOR 1.a - 1.d) are being enforced by civil judgments obtained against Applicant in 2007 and 2008. Applicant knew about all of the judgments sometime after they were filed, but before he was interviewed in May 2012. He has satisfied the \$720 civil judgment alleged at SOR 1.b, but he has taken no action regarding the other three. Two of the judgments (SOR 1.a and 1.c) are for delinquent car loans and represent the remainder due after resale of the repossessed vehicles. The SOR 1.d judgment is for an unpaid retail furniture account. Applicant still has the furniture but, as with the car loan obligations, he has never contacted the creditors to try to resolve the debts. (Gx. 2 - 4; Ax. C; Tr. 38 - 45)

Applicant also established that he has paid the \$1,043 debt for a delinquent cell phone account alleged at SOR 1.i. However, he disclosed at hearing that he now has a new delinquent account with the same creditor. (Answer; Ax. C; Tr. 45 - 46)

Of the remaining debts alleged in the SOR, Applicant established that in March 2014, he used a credit card to pay the \$226 debt alleged at SOR 1.g. Applicant has not been in direct contact with any of his other creditors. In December 2013, after he received the SOR, Applicant retained a credit repair firm to examine his credit history and correct any inaccuracies so that he could improve his credit rating. Applicant paid \$400 for one year of services that do not include establishment of any repayment plan

or structured financial counseling. His use of this company has not resulted in resolution of any of the debts alleged in the SOR. (Answer; Ax. A; Tr. 26 - 29, 47, 50 - 55)

Applicant has a good reputation in his workplace. His references praised his expertise, reliability, and hard work. He has also received at least one pay raise because of his excellent work. (Ax. A; Tr. 35 - 36)

Policies

Positions designated as ADP I or II are classified as “sensitive positions.”⁷ In deciding whether a person should be assigned to an ADP position, it must be determined that his or her loyalty, reliability, and trustworthiness are such that it is “clearly consistent with the interests of national security” to do so.⁸ The Regulation also requires that DOD contractor personnel are entitled to the procedural protections in the Directive before any adverse determination may be made.⁹

The Directive requires that each decision be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,¹⁰ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

(1) The nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of eligibility for a position of trust.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a position of trust for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to

⁷ Regulation, ¶ C3.6.15.

⁸ Regulation, ¶ C6.1.1.1.

⁹ Regulation, ¶ C8.2.1.

¹⁰ Directive. 6.3.

refute, extenuate, or mitigate the Government's case. Because no one is entitled to a position of trust, an applicant bears a heavy burden of persuasion. A person who has access to sensitive information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring applicants possess the requisite judgment, reliability, and trustworthiness of one who will protect sensitive information as his or her own. Any reasonable doubt about an applicant's suitability for access should be resolved in favor of the Government.

Analysis

Financial

The Government's information and Applicant's admissions in response to the SOR, are sufficient to support the allegations in the SOR. The facts thereby established raised a security concern addressed, in relevant part, at AG ¶ 18 as follows:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Since 2007, Applicant has accrued significant delinquent debt in the form of civil judgments and collection accounts for past-due obligations. Although he has resolved the debts alleged at SOR 1.b, 1.g, and 1.i, he recently incurred a new delinquency payable to the SOR 1.i creditor. All of his other debts remain unresolved. All of this requires application of the disqualifying conditions listed at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*); and AG ¶ 19(c) (*a history of not meeting financial obligations*).

I have also considered the following pertinent mitigating conditions at AG ¶ 20:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g. loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.¹¹

Applicant has multiple debts that have been present for several years, and are still unresolved. AG ¶ 20(a) does not apply. Applicant averred that his financial problems were caused or exacerbated by his wife's discretionary unemployment between June 2012 and December 2013. However, he incurred many of the debts alleged between 2007 and 2011, and he did not establish any other specific unforeseen or uncontrollable cause of his financial troubles. AG ¶ 20(b) does not apply. Nor did he establish that his current circumstances will support efforts to resolve his past-due debts and avoid future financial problems. His monthly finances reflect a negative cash flow. While he is credited with paying three of his debts, the record as a whole shows that he generally has been inactive in trying to resolve his debts. His retention of a credit repair firm happened only after he received the SOR, and that firm will not help in the actual repayment of Applicant's debts. He has not made good-faith efforts to resolve his debts. AG ¶¶ 20(c) and (d) do not apply.

Applicant's finances are not likely to improve in the near future. On balance, he has failed to mitigate the security concerns about his history of indebtedness.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guideline F. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is a 52-year-old father of three who has been married for more than 20 years. Aside from two brief periods of unemployment, Applicant has provided for his family and has been a responsible adult. His military service was honorable and has been given due consideration. However, all of the positive information in Applicant's background does not outweigh the trustworthiness concerns raised by his financial problems. Applicant did not adequately explain how he incurred his debts, and he did not present sufficient information from which to conclude that his debts are being resolved and will not recur. A fair and commonsense assessment of all of the available information shows that Applicant has not resolved the doubts about his suitability for a public trust position that have been raised by the Government's information. Because protection of the national interest is the primary concern here, those doubts must be resolved against the individual.

Formal Findings

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:

AGAINST APPLICANT

¹¹ AG ¶¶ 20(e) (*the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue*) and 20(f) (*the affluence resulted from a legal source of income*) have no relevance to these facts and circumstances.

Subparagraphs 1.a, 1.c - 1.f, 1.h, 1.j, 1.k: Against Applicant

Subparagraphs 1.b, 1.g, 1.i: For Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the interests of national security for Applicant to have access to sensitive automated information. Request for a position of trust is denied.

MATTHEW E. MALONE
Administrative Judge