



**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*

07/24/2014

Remand 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. He failed to support his claims that he is able and willing to resolve his financial problems. 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.

I issued an unfavorable decision in this case on May 9, 2014, and Applicant timely appealed. On July 17, 2014, the DOHA Appeal Board remanded the case to me to issue a decision that clearly shows I considered Applicant's post-hearing submission along with all other available information.

Findings of Fact

In addition to the facts contained in my original decision, and consistent with the guidance provided in the Appeal Board's remand order and a proper assessment of Ax. C, I make the following findings of fact.

In May 2012, Applicant was interviewed (hereinafter, subject interview) about his finances as part of his background investigation. During that interview, he was confronted with information from two credit reports that showed several past-due or delinquent debts, including all of the debts alleged in the SOR. Applicant stated he was aware of most of the listed debts and agreed that they were his responsibility. He averred that his financial problems were the result of his own low-paying jobs and his wife's decision to quit her job. (Gx. 2)

During the subject interview, Applicant and the investigating agent reviewed Applicant's monthly finances together. It was determined at that time that Applicant's expenses exceeded his monthly net income by about \$631. In his October 2013

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.

response to DOD interrogatories, Applicant provided updated financial information through a personal financial statement (PFS). The PFS showed that despite a \$600 increase in Applicant's net monthly income, his expenses exceeded his income by about \$731. In response to interrogatories, he again cited the fact that his wife's unemployment was one factor of his indebtedness. (Gx. 2)

In response to the SOR, Applicant admitted all of the alleged debts, except for the cell phone debt alleged at SOR 1.i. Applicant claimed he had paid that debt. At his hearing, Applicant also claimed that he had paid or otherwise resolved the debts at SOR 1.b and 1.g. In support of his claim, he emphasized the contents of Ax. A, a two-page excerpt from a credit report produced on April 1, 2014. However, at the hearing, I discussed with Applicant the shortcomings in Ax. A, insofar as it was incomplete and did not appear to support Applicant's claims of payment. I left the record open so that Applicant could submit additional information about his credit history and claims of repayment. As to the credit history, I suggested that Applicant provide a more complete version of the credit report he proffered as Ax. A. Applicant timely submitted documents containing, in relevant part, an 11-page credit report produced on April 15, 2014. Also included was proof of payment of the debts at SOR 1.g and 1.i. (Ax. C; Tr. 64 - 66)

Regarding his wife's income, Applicant has claimed, during his subject interview, in response to interrogatories, and at hearing, that his financial difficulties stemmed, in part, from the fact his wife was unemployed from June 2012 until December 2013. However, Applicant also testified that he actually now has about \$300 remaining each month after expenses because his wife is again employed. However, he was not prepared to discuss in detail the impact his wife's income has on their finances. He testified that they have a strained relationship, and that he does not know what she earns as their finances are managed separately. I left the record open so Applicant could document the positive impact of his wife's income on his overall financial well-being. (Tr. 55 - 60). Applicant's post-hearing submission included, in relevant part, a single-page copy of a deposit slip indicating Applicant's wife received \$1,981.44 on March 28, 2014. No other information about his or his wife's finances was submitted. (Ax. C)

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

⁷ Regulation, ¶ C3.6.15.

⁸ Regulation, ¶ C6.1.1.1.

⁹ Regulation, ¶ C8.2.1.

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 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 were 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

¹⁰ Directive. 6.3.

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, 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.

Applicant has multiple debts that have been present for several years, and are still unresolved. He 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(a) and 20(b) do not apply.

Applicant did not establish that his current circumstances will support efforts to resolve his past-due debts and avoid future financial problems. Information about his monthly finances provided at his subject interview and in response to interrogatories showed he had a negative cash flow. The information he submitted at hearing and in Ax. C did not show that he now has a positive cash flow. Also, 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. As discussed in my original decision, Applicant's 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.

In support of his claim that he now has about \$300 remaining each month after expenses, Applicant submitted a deposit slip showing money paid to his wife in March of this year. This likely represents a paycheck. However, Applicant did not provide information showing she is contributing to their finances so as to alleviate the well-documented negative cash flow. Applicant's testimony that he and his wife have a tenuous relationship and are managing their finances separately undermines his claim that his wife's income will now help Applicant resolve his financial problems and avoid similar issues in the future.

The Appeal Board correctly noted that in my original decision, my treatment of Ax. C was inconsistent. Applicant clearly made a timely post-hearing submission in response to my inquiries about his claims of debt payments and improved financial health. Nonetheless, a detailed review on remand of Applicant's post-hearing submission, together with all other available information about Applicant's finances, does not alter my original conclusion that Applicant's finances have not improved as he claimed. Nor is Applicant likely to be able to resolve his financial problems in the near future. In consideration of the Appeal Board's guidance on remand, and having considered all of the available information, I conclude Applicant has failed to mitigate the security concerns about his history of indebtedness. In reaching my decision, I have also considered the whole-person factors at AG ¶ 2(a).

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
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