



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ADP Case No.: 13-01076
)
Applicant for Public Trust Position)

Appearances

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

06/19/2014

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns pertaining to Guideline F (financial considerations). Eligibility for access to sensitive information is denied.

Statement of the Case

On April 21, 2010, Applicant submitted a Questionnaire for Public Trust Position (SF-85P). On November 19, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) detailing security concerns under Guideline F (financial considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in an undated reply. Department Counsel was prepared to proceed on February 10, 2014. The case was originally assigned to another

administrative judge on March 10, 2014, and a hearing scheduled for April 1, 2014 was cancelled at Applicant's request. The case was reassigned to me on April 9, 2014. DOHA issued a second notice of hearing on April 17, 2014, rescheduling the hearing on May 13, 2014. On April 24, 2014, DOHA issued a third notice of hearing and the hearing was held on May 15, 2014.

At the hearing, the Government offered Government Exhibits (GE) 1 through 4, and Hearing Exhibit (HE) I, which were admitted into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A and B, which were received into evidence without objection.

I held the record open until June 4, 2014, to afford the Applicant the opportunity to submit additional documents. Applicant did not submit any post-hearing documents. DOHA received the hearing transcript (Tr.) on May 23, 2014.

Findings of Fact

Applicant admitted 4 of the 17 debts (SOR ¶¶ 1.a, 1.b, 1. f. and 1.n) alleged under financial considerations and denied the remaining 13 debts alleged.

Background Information

Applicant is a 32-year-old information technology triage specialist, who has been employed by a defense contractor since June 2006. He seeks a position of public trust to enhance his position within his company. (GE 1, Tr. 15-18, 59.)

Applicant graduated from high school in June 2000. He attended college from December 2007 to January 2009, but did not earn a degree. Applicant estimates that he is "about a semester short of getting my associate's" in electrical engineering. (GE 1, Tr. 18-20.) He served in the Navy Reserve from July 2001 to May 2002, and was honorably discharged under medical conditions as a Seaman Apprentice (pay grade E-2). (GE 1, Tr. 20-22.)

Applicant married in June 2006, and has a four-year-old daughter. He has two other children from two separate relationships – a 14-year-old son and a 12-year-old daughter. Applicant pays monthly child support of \$240 and \$360, respectively, to the mothers of his non-custodial children. His wife is employed full time as a training manager for a cable company. (GE 1, Tr. 22-26.)

Financial Considerations

The SOR alleges 17 debts totaling \$31,770. The debts include charged-off and collection debts in varying amounts ranging from \$50 to \$8,859. Applicant attributes his financial difficulties to being unemployed from May 2005 to December 2005 and not having enough income to meet family bills. (Tr. 26-27.)

Applicant testified that his two student loans for \$8,859 and \$6,396 (SOR ¶¶ 1.b and 1.n) are consolidated and in deferment. His February 2014 credit report substantiates this claim. Also, the same credit report reflects a zero balance on the \$5,000 charged-off account (SOR ¶ 1.d) and the \$1,119 debt to the U.S. Government (SOR ¶ 1.f). Applicant also claimed that he was the victim of identity theft with regard to the \$406 cable bill collection account (SOR ¶ 1.c). He provided a copy of a police report wherein he reported that he was an identity theft victim to substantiate this claim. Apart from those five SOR debts, Applicant was unable or unwilling to provide documentation of payment or resolution for the remaining 12 debts.¹ Applicant has not sought financial counseling. (Tr. 27-49.)

Applicant's personal financial statement reflects that his gross monthly salary is \$4,300 and his wife's gross monthly salary is \$3,000. After deductions, his net monthly remainder is a negative \$250. At his hearing, Applicant stated that he had "about a hundred dollars" in his checking account and no money in his savings account. He reported he had \$10,000 in his 401(k) account and "no idea" how much money his wife had in her checking and savings accounts. Applicant stated that his wife pays the bills. He also stated that he cuts lawns to earn extra money. Applicant filed his federal and state income tax forms and owes \$800 to the Internal Revenue Service (IRS) and received a \$12 refund from the state. He claimed that he made payment arrangements with the IRS and would provide that documentation post-hearing. Applicant stated that should he be granted a public trust position, he would be eligible for enhanced work responsibilities and a pay increase and would be in a better position to pay off his debts. He is current on his child support obligations for his two children. (GE 2, Tr. 49-57.)

Character Evidence

Applicant testified that in addition receiving his five-year work anniversary award, his manager acknowledged his favorable customer satisfaction surveys and production levels. He stated that his evaluations were rated as "exceeds expectations." (Tr. 58.) See *fn. 1*.

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) "The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security." (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness

¹ As noted *supra*, I held the record open until June 4, 2014, to provide Applicant with an opportunity to submit additional documents, which would have included proof of payment or resolution of debts, proof of having sought financial counseling, work evaluations, awards, letters of recommendation, etc. He did not submit any additional documents. (Tr. 60-63, 69-70.)

adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. DOD contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

A person who seeks access to sensitive information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Section 7 of Executive Order (EO) 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

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.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" and "(c) a history of not meeting financial obligations." In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

Id. (internal citation omitted). Applicant's history of delinquent debt is documented by his admissions as well as by his credit reports. Applicant's SOR lists 17 delinquent debts totaling \$31,770. Applicant has mitigated five of those debts, discussed *infra*, leaving the remaining 12 debts unresolved. The majority of his debts have been delinquent for several years or more. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

(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;

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

(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.

Considering the record evidence as a whole,² I conclude none of the five financial considerations mitigating conditions fully apply. Applicant is able to receive partial credit under AG ¶ 20(d) for debts listed under SOR ¶¶ 1.b, 1.d, 1.f, and 1.n as well as partial credit under AG ¶ 20(e) for the debt listed under SOR ¶ 1.c. If Applicant resolved or disputed his debts as he claimed, he did not provide documentation of same. His debts remain listed on his credit reports. There is no evidence in the record that satisfactorily mitigates the remaining debts alleged. Absent such evidence, I am unable to fully apply mitigating conditions under this concern and find against Applicant on this concern.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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 ultimate determination of whether to grant access to sensitive information must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c).

² See ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). When making a recency analysis for AG ¶ 20(a), all debts are considered as a whole.

The comments in the Analysis section of this decision are incorporated in the whole-person concept analysis. To Applicant's credit, he honorably served briefly in the Navy Reserve and has successfully held a job with his current defense contractor employer for eight years. Also to his credit, he is current on his child support obligations for his two non-custodial children.

However, I cannot overlook his history of financial irresponsibility. After the Government put Applicant on notice that his finances were a concern, he failed to take appropriate corrective action. Even after being given additional time to provide mitigating evidence after the record closed, he failed to engage further in the process. I can only conclude that Applicant is unable or unwilling to take the necessary steps to regain financial responsibility. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude he has not mitigated security concerns pertaining to financial considerations.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to a public trust position.

Formal Findings

Formal findings for or against Applicant 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
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b – 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraphs 1.g – 1.m:	Against Applicant
Subparagraph 1.n:	For Applicant
Subparagraphs 1.o – 1.q:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

ROBERT J. TUIDER
Administrative Judge