



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



In the matter of:)	
)	
)	ADP Case No. 14-02825
)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Ray T. Blank, Jr., Esq., Department Counsel
For Applicant: *Pro se*

12/23/2014

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate financial considerations' trustworthiness concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

On July 31, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline F, financial considerations. The action was taken under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation); and the adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

On August 28, 2014, Applicant submitted an answer to the SOR, and he elected to have his case decided on the written record. On September 26, 2014, Department Counsel submitted the Government's file of relevant material (FORM). The FORM was provided to Applicant on October 2, 2014, and he received it on October 13, 2014.

Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant submitted additional information. The case was assigned to me on November 21, 2014.

Findings of Fact

Applicant admitted all of the SOR allegations except ¶¶ 1.f and 1.g. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits, I make the following findings of fact.

Applicant is 42 years old. He is not married and has no children. He served in the military from 1994 to 1999 and was honorably discharged. He has an associate's degree awarded in 1996, and continued to attend college from August 2006 to August 2007, and from May 2008 to January 2009. He has not earned an advanced degree.

Applicant had periods of unemployment from March 2003 to July 2003; December 2008 to June 2009; December 2009 to January 2010; August 2011 to April 2012; and from December 2013 to the present.¹

Applicant failed to file his 2012 federal income tax returns. On his security clearance application (SCA), he stated the reason was because "the government has been for three years garnishing my wages for educational expenses accrued by student loans."² In his answer to the SOR he stated: "No excuse for this."³ During his background investigation interview on January 29, 2014, he indicated that he was upset and frustrated because the federal government was withholding his tax refunds to apply to delinquent student loans He planned on filing his 2012 federal tax return with his 2013 federal tax return. He did not provide proof that he filed the delinquent tax return.

SOR ¶¶ 1.b through 1.e alleged approximately \$153,152 in delinquent student loans. At some point, Applicant was making \$100 monthly payments on his student loans, but defaulted in 2000 because he did not have the financial means to pay them. He admitted he owes the loans, but disputed the total amount because when he was working his wages were being garnished to pay the debts. In his answer to the SOR, he stated the garnishment has been in place for six years. He does not know the current balance of the debts. He indicated that his tax refunds are also involuntarily withheld to apply to the delinquent debts. He defaulted on the loans because he did not have money to pay them.⁴ In his answer to the FORM, Applicant provided documents showing his wages were garnished in 2009 for \$103 a month. It is unknown how long the garnishment was imposed, but presumably it stopped when he was unemployed. Applicant provided documents to show his federal income tax refunds for 2010 of

¹ Item 4, 7.

² Item 4.

³ Item 2.

⁴ Item 7.

\$1,767 and \$1,683 for 2006, were withheld. He provided documents to show that other amounts were withheld by the federal government, presumably the amounts garnished. They were: \$718 in 2011, \$300 in 2008, \$976 in 2008, \$345 in 2002, and \$48 in 2007. He also provided a “notice of withholding” document dated May 31, 2013 for garnishment in the amount of \$99,003 to the U.S. Department of Education.

In his answer to the SOR, Applied admitted he broke a lease on an apartment he was renting. He stated that there were three months remaining on the lease. He denied that the amount reflected in SOR ¶ 1.f (\$9,628) is the correct amount. During his background interview he explained that when he vacated the apartment he did not leave a forwarding address, so he did not receive the correspondence regarding the collection of the debt. He made no arrangements with the landlord prior to moving. He learned of the amount when he completed a new rental application for a home and was advised of the outstanding debt. He stated during his background interview that he had worked out an agreement to begin paying this debt. He stated in his answer to the SOR that he worked out an agreement with the creditor to begin paying the debt. He failed to provide proof he has taken action to resolve the debt.⁵

Applicant stated in his SOR answer that he does not recognize the debt in ¶ 1.g (\$1,410). During his background interview he indicated that he was familiar with the debt and that he would contact the creditor to make payment arrangements to resolve the debt, but he did not agree with the credit report. He has not resolved the debt. He admitted he owes the debt in SOR ¶ 1.h (\$351) but has not paid it.⁶ Applicant is a leader in his church and community. He teaches Sunday school.⁷

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 adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense 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

⁵ Item 2, 7.

⁶ Item 2, 7.

⁷ Item 2.

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."

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 to obtain 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 safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline F, Financial Considerations

The trustworthiness concern for financial considerations is set out in AG ¶ 18:

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.

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 19. Three are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and

(g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant failed to file his 2012 Federal income tax returns. He has delinquent student loans and other debts totaling approximately \$153,152, which he is unwilling or unable pay. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate financial considerations trustworthiness concerns are provided under AG ¶ 20. The following 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.

Applicant's delinquent debts are recent and he has not provided evidence of voluntary efforts to resolve them. The government has garnished his wages and withheld his tax refunds. It appears he was frustrated by the government's actions and decided not to file his 2012 federal income tax return. He has not provided proof that he filed his 2010 tax return. I am not convinced his behavior is unlikely to recur. His conduct casts doubt on his reliability, trustworthiness and good judgment. AG ¶ 20(a) does not apply.

Applicant had periods of unemployment. His unemployment was beyond his control. However, in order to fully apply AG ¶ 20(b), Applicant must present evidence that he acted responsibly under the circumstances. He did not. When he was employed he did not voluntarily pay his delinquent debts. Instead, the government garnished his wages and withheld his tax refunds. AG ¶ 20(b) does not apply.

Applicant has not initiated good-faith efforts to pay or resolve his delinquent debts. Garnishment actions and involuntary withholding his tax refunds does not constitute a good-faith effort to repay or otherwise resolve his delinquent debts. There is no evidence he has received financial counseling or that his financial problems are under control. AG ¶¶ 20(c) and 20(d) do not apply.

Applicant disputed the amounts owed for his delinquent student loans, on a defaulted lease, and on the legitimacy of one of the debts. He provided documents showing the amounts the federal government has withheld from his tax refunds and garnishment of his wages. Considering his loans are still in default status, he is likely still accruing interest and penalties, so the delinquent balance is unknown. He did not provide documents to support the other debts he disputed or any action he has taken to resolve them. AG ¶ 20(e) does not apply to these debts.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is 42 years old. He served honorably in the military. He failed to file his 2012 income tax returns, and has not voluntarily paid any of his delinquent debts. His financial problems are not under control and he has demonstrated poor judgment in managing them. Overall, the record evidence leaves me with serious questions and doubts about Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant failed to mitigate financial considerations trustworthiness concerns.

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
Subparagraphs 1.a-1.h:	Against Applicant

Conclusion

In light of all of the circumstances 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.

Carol G. Ricciardello
Administrative Judge