



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



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| In the matter of: |) | |
| |) | |
| |) | |
| [NAME REDACTED] |) | ADP Case No. 14-00860 |
| |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

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

12/12/2014

Decision

MALONE, Matthew E., Administrative Judge:

Applicant accrued significant delinquent debt due, in part, to circumstances beyond his control. However, his response to his financial problems did not reflect good judgment or responsibility. Applicant had significant resources with which to resolve his debts, but he made poor financial decisions with his money and he has not yet paid or otherwise resolved most of the debts attributable to him. His request for eligibility to occupy a position of trust is denied.

Statement of the Case

On August 27, 2013, 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, Department of Defense (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.²

On April 28, 2014, DOD issued to Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise trustworthiness concerns addressed through the adjudicative guideline (AG)³ for financial considerations (Guideline F). On May 23, 2014, Applicant responded to the SOR (Answer) and requested a decision without a hearing. On July 10, 2014, Department Counsel for the Defense Office of Hearings and Appeals (DOHA) submitted a file of relevant material (FORM) in support of the SOR.⁴ Applicant was given 30 days in which to respond to the FORM, and he timely submitted additional materials.

On September 25, 2014, Applicant and Department Counsel agreed that this matter should be submitted for resolution at a hearing. The case was assigned to me on September 29, 2014, and I convened a hearing on October 21, 2014. At the hearing, I included in the record as Hearing Exhibit (Hx. 1) Department Counsel's FORM and its six exhibits (Items 1 - 6).⁵ Applicant's response to the FORM is included as Hx. 2.

Also included in the record were the email documenting the conversion of this case for hearing (Hx. 3) and a copy of Department Counsel's pre-hearing discovery letter (Hx. 4). Department Counsel also presented Government Exhibit (Gx.) 1, an updated copy of Applicant's credit report.⁶ Applicant testified and presented Applicant's Exhibits (Ax.) A - C. I also held the record open after the hearing to receive additional relevant information from Applicant. His timely post-hearing submission is included in the record as Ax. D. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on November 19, 2014.

¹ As defined in Chapter 3 and Appendix 10 of DOD Regulation 5200.2-R, as amended (Regulation).

² Required by the Regulation, as amended, and by the Directive, as amended.

³ 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).

⁴ See Directive, Enclosure 3, Section E3.1.7.

⁵ Item 1 is a copy of the SOR; Item 2 is a transmittal letter that forwarded the FORM to Applicant; Item 3 is Applicant's answer to the SOR; Item 4 is Applicant's EQIP; Item 5 is a summary of Applicant's interview with a Government investigator; and Item 6 is a credit report of Applicant.

⁶ Tr. 9 - 18.

Findings of Fact

Under Guideline F, the Government alleged that Applicant owed \$12,000 in unpaid state income taxes for 2012 (SOR 1.a) and \$126,000 in unpaid federal income taxes for 2012 (SOR 1.b). It was also alleged he owed another \$106,160 for 12 delinquent or past-due accounts (SOR 1.c - 1.n). Applicant denied the allegations at SOR 1.d, 1.e, 1.l, and 1.k, claiming that they were in dispute. He admitted, with explanations, the remaining allegations. In addition to the facts established by Applicant's admissions, and based on all available information, I make the following findings of fact.

Applicant is 57 years old and was hired by his current employer in August 2013. He is an information systems support analyst. His performance evaluations reflect above average performance, and he recently received a salary increase based on his performance.

Applicant and his wife have been married since March 1995. A previous marriage in October 1982 ended by divorce in October 1991. Applicant has one child from his first marriage. His current wife has three adult children from a previous relationship. (Hx. 1, Items 4 and 5)

When Applicant submitted his EQIP, he disclosed all of the debts alleged in the SOR, except for SOR 1.f, 1.l, and 1.n. A credit bureau report obtained during his background investigation documented those debts. (Hx. 1, Items 4 and 6)

Applicant's financial problems began in March 2009, when he was laid off from an information systems job he had held with a large banking corporation for 25 years. He was generally unemployed until being hired by his current employer. By November 2009, he and his wife had to leave the house they had owned since 2005. It was foreclosed in early 2010. They lived with his stepdaughter and her husband from November 2009 until March 2011. Applicant and his wife rented a townhouse until they purchased their current home in March 2012.

When Applicant was laid off in 2009, he and his wife earned a combined annual salary of about \$160,000. Applicant also was already carrying the balances reflected in the personal credit debts alleged at SOR 1.c, 1.f, 1.h, 1.j, 1.m, and 1.n. The debt at SOR 1.g is for the balance remaining on a car loan after the vehicle was repossessed and resold. The debt at SOR 1.l is for a home equity loan on the house that was foreclosed in 2010. Applicant purchased the home for about \$430,000 in 2005 using a primary mortgage for 80% of the price and the home equity loan for the remaining 20% so as to not pay out any cash in the purchase. The home's value increased to about \$525,000 before dropping to around \$300,000 around the time Applicant was laid off. (Hx. 1, Item 3; Tr. 38 - 39, 63 - 66)

Applicant's denials of SOR 1.d, 1.e, 1.l, and 1.k are based on his claimed disputes with those creditors. As to SOR 1.d, he stated that is an erroneous bill for a

cable television box he returned when he left his house in 2009. He claimed that SOR 1.l and 1.k are bills for medical services that were either covered or that he had already paid. As to SOR 1.e, Applicant has been unable to verify that it is his responsibility. The only dispute he has documented pertains to SOR 1.d. (Hx. 1, Item 3; Hx. 2; Gx. 1; Tr. 43)

After he became unemployed, Applicant relied on his savings, a modest retirement savings account, and a severance package. He withdrew about \$12,000 from a 401k account to pay for the townhouse he and his wife rented after moving out of her daughter's home in March 2011. In doing so, Applicant incurred a tax liability for the 2011 tax year, which he initially was unable to pay. That tax debt was enforced by a lien. When Applicant turned 55 years old in December 2011, he was eligible to receive funds from a pension plan at the company where he worked until 2009. In 2012, he withdrew a total of \$384,000 from the pension fund. He used that money to pay the 2011 tax lien. He also bought a house in March 2012 for \$271,000. At the time he bought the house, he did not have a job, but he reasoned that it would somehow help his chances of finding work if he had a stable address. Applicant has not used any of his pension or retirement funds to repay the debts listed at SOR 1.c - 1.n, and he has not presented a plan for resolving those debts. (Hx. 1, Items 3 and 5; Hx. 2; Tr. 31 - 32, 45 - 47, 61 - 63)

As a result of his pension fund withdrawals, Applicant incurred the tax liabilities alleged at SOR 1.a and 1.b. In February 2014, the state garnished his wages. In response, he was able to establish a repayment plan whereby he pays \$500 each month to satisfy the debt at SOR 1.a. In October 2014, around the time of his hearing, he established a repayment plan to begin in December 2014, whereby he will pay \$354 each month to satisfy the debt alleged at SOR 1.b. In May 2014, Applicant made a \$150 payment to the IRS to show his intent to repay his delinquent taxes. He also changed his W-4 statement so as to claim no exemptions from tax withholdings in the hopes any excess will be applied to his tax debts. Applicant claimed he would have started his IRS repayments sooner but that he was slowed by unexpected medical and car repair bills. (Hx. 1, Items 2, 4 - 6; Hx. 2; Ax. A; Ax. B; Ax. D; Tr. 47 - 49)

Applicant is meeting all of his current expenses and estimates he has about \$700 remaining each month. He has no mortgage to pay, but still must pay property taxes twice each year. He has not sought any financial counseling or tax advice regarding debts.

Policies

Positions designated as ADP I/II/III 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

⁷ Regulation, ¶ C3.6.15.

“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 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 Considerations

Available information is sufficient to support all of the SOR allegations. The facts established raise a trustworthiness concern about Applicant’s finances that is addressed at AG ¶ 18, as follows:

⁸ Regulation, ¶ C6.1.1.1.

⁹ Regulation, ¶ C8.2.1.

¹⁰ Directive. 6.3.

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. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

More specifically, available information requires application of the disqualifying conditions at AG ¶¶ 19(a) (*inability or unwillingness to satisfy debts*); and 19(c) (*a history of not meeting financial obligations*).

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

(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.

None of the mitigating conditions apply. Applicant's financial problems continue, in that he has only addressed his tax debts after liens were obtained by state and federal authorities. He has no plan to repay the remaining ten debts alleged in the SOR. Despite having access in late 2011 to more than enough money to pay those debts, he chose instead to buy a house without first having a job. Applicant's poor judgment in this regard only exacerbated his financial problems and sustains the Government's concerns about his suitability for access to sensitive information. There is no indication that his finances are under control; that he made a good-faith effort to repay his debts; or that his disputes of certain debts are substantiated. In light of all available

information, I conclude Applicant has not mitigated the Government's trustworthiness concerns under this guideline.

Whole-Person Concept

I have evaluated the facts 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 good employee, whose financial problems arose through circumstances beyond his control. For nearly four years, he was unable to find work after being laid off from a job he held for 25 years. He lost a house to foreclosure and a car to repossession. Debts that he had amassed before he was laid off went unpaid. Fortunately, in 2011 Applicant gained access to a large retirement savings fund after he turned 55. But rather than apply that money to his past-due debts, he used the money to buy a house outright and still has not resolved even the smallest of his debts. To make matters worse, his use of all or most of his retirement savings created onerous state and federal tax debts that he will not be able to resolve for several years. All available information shows that significant doubts remain about Applicant's financial circumstances. More important, however, are the remaining doubts about his judgment. Because protection of the interests of national security is the focal point of these adjudications, 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:

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| Paragraph 1, Guideline F: | AGAINST APPLICANT |
| Subparagraphs 1.a - 1.n: | Against Applicant |

Conclusion

In light of all of the foregoing, it is not clearly consistent with the interests of national security for Applicant to occupy a position of trust. Applicant's request for ADP eligibility is denied.

MATTHEW E. MALONE
Administrative Judge