



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 14-00933

Appearances

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

10/20/2014

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the security concerns regarding financial considerations. Eligibility to occupy an automated data processing (ADP) I/II/III (public trust position) is granted.

Statement of the Case

On November 25, 2013, Applicant applied for a public trust position and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86).¹ On April 24, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility – Division A (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the

¹ GE 1 ((SF 86), dated November 25, 2013).

Directive, effective September 1, 2006. The SOR alleged trustworthiness concerns under Guideline F (Financial Considerations), and detailed reasons why the DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue Applicant's eligibility for occupying an ADP I/II/III position to support a contract with the DOD, and recommended referral to an administrative judge to determine whether such eligibility should be granted, continued, denied, or revoked.

Applicant received the SOR on May 21, 2014. In a sworn statement, dated June 9, 2014, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on August 20, 2014. The case was assigned to me on August 21, 2014. A Notice of Hearing was issued on August 27, 2014, and I convened the hearing, as scheduled, on September 16, 2014.

During the hearing, 3 Government exhibits (GE 1 through GE 3) and 14 Applicant exhibits (AE A through AE N) were admitted into evidence without objection. Applicant testified. The transcript (Tr.) was received on September 30, 2014. I kept the record open to enable Applicant to supplement it. Applicant took advantage of that opportunity. He submitted an additional document which was marked as exhibit AE I and admitted into evidence without objection. The record closed on September 23, 2014.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the factual allegations pertaining to financial considerations (¶¶ 1.a. and 1.b.). Applicant's answers and explanations are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 50-year-old employee of a defense contractor, and he is seeking to retain his eligibility for occupying an ADP I/II/III position to support a contract with the DOD. Applicant received an associate's degree in 1984, a bachelor's degree in 1986, and a master's degree in 1992.² He has never served with the U.S. military.³ Applicant was employed as a software quality assurance engineer by a major U.S. company from August 1992 until July 2013, when a large lay-off occurred.⁴ He received a severance package. Applicant was unable to obtain another full-time position and remained unemployed until October 2013, when he joined his current employer as a senior enterprise infrastructure engineer.⁵ Applicant has also been employed by a department store as a customer service representative on a part-time basis during evenings and

² GE 1, *supra* note 1, at 9-10.

³ GE 1, *supra* note 1, at 14.

⁴ GE 1, *supra* note 1, at 12-13; Tr. at 47, 56-57.

⁵ GE 1, *supra* note 1, at 10-11; Tr. at XX

weekends since December 2011.⁶ He has never held a security clearance.⁷ He has never been married.⁸

Financial Considerations

(SOR ¶ 1.a.): There was nothing unusual about Applicant's finances until about 2013. In 2010, Applicant purchased a new residence financed, in part, by an early distribution of \$85,000 from his 401(k) retirement plan.⁹ He had previously reviewed the Internal Revenue Service (IRS) website and determined he was eligible for the distribution since it was to be used to purchase his principal residence. What he failed to realize or understand was that the eligibility only applied if the residence was an initial residential purchase. This purchase was actually Applicant's second residential purchase.¹⁰ When he completed his income tax return for 2010, he indicated on his Form 1040 that the distribution was non-taxable.¹¹ He was wrong. He was audited in December 2012.¹² In 2013, Applicant first learned of his error and learned he owed the IRS between \$30,000 and 35,000.¹³ It was agreed that he would repay the unpaid tax, the ten percent penalty, and interest in August 2013 when he would take out a loan from his 401(k). Unfortunately for Applicant, in July 2013 he was laid off and no longer had access to the proposed loan-source.¹⁴

Applicant commenced negotiations with the IRS to reduce or cancel the penalties and interest owed, but his application was denied.¹⁵ An Installment Agreement for the amount owed (\$45,676.64) was reached in April 2014, and Applicant agreed to make automatic monthly payments of \$610 to the IRS starting in May 2014.¹⁶ The balance owed was reduced to \$42,489.21, when his \$3,957 overpayment of his 2013 income taxes was applied.¹⁷ He has continued making his monthly payments to the IRS and

⁶ GE 1, *supra* note 1, at 11-12; GE 2 (Personal Subject Interview, dated December 18, 2013), at 1; Tr. at 41.

⁷ GE 1, *supra* note 1, at 35-36.

⁸ GE 1, *supra* note 1, at 16.

⁹ Tr. at 50-51.

¹⁰ Applicant's Answer to the SOR, dated May 21, 2014, at 1; Tr. at 29-30, 52.

¹¹ AE B ((Form 1040, U.S. Income Tax Return 2010), undated); Tr. at 31-32.

¹² GE 2, *supra* note 6, at 2.

¹³ Applicant's Answer to the SOR, *supra* note 10, at 1; GE 2, *supra* note 6, at 2; Tr. at 33.

¹⁴ Applicant's Answer to the SOR, *supra* note 10, at 1; Tr. at 34-35, 55.

¹⁵ Tr. at 35.

¹⁶ AE A (Installment Agreement, dated April 28, 2014); Tr. at 37.

¹⁷ AE C (IRS Notice, dated March 10, 2014); Applicant's Answer to the SOR, *supra* note 10, at 1; Tr. at 36-

believes his current balance is about \$40,000.¹⁸ It is Applicant's intention to continue making the automatic monthly payments, and he anticipates increasing the amount of those monthly payments to about \$810.¹⁹ The account is in the process of being resolved.

(SOR ¶ 1.b.): As a direct result of his early distribution of those 401(k) assets and his erroneous entry on his Form 1040, the information was forwarded to the state department of revenue and in October 2013, it notified him of his newly calculated state income tax deficiency (\$8,889.40).²⁰ Not wishing to enter into a simultaneous federal and a state tax dispute, Applicant promptly agreed to the state's proposed installment agreement.²¹ Commencing in February 2014, two months before the SOR was issued, Applicant started making his monthly payments of \$736.²² By August 4, 2014, he had overpaid the state, and was due a refund of \$376.14.²³ The account has been resolved.

During the hearing, Applicant indicated he had about \$3,000 in his checking account, about \$100 in his savings account, a 401(k) valued at \$300,000, a mutual fund worth about \$85,000, a \$500,000 residence (with a mortgage), and a rented rental property of unspecified value.²⁴ He guesstimated that he had approximately \$300 available for discretionary spending or savings each month.²⁵ He subsequently furnished a monthly budget which reveals a monthly income of \$8,308.44, estimated expenses of \$7,732.59, and \$575.85 available for discretionary spending or savings each month.²⁶ Applicant is current on all other accounts.²⁷ He has filed all of his annual federal and state income taxes in a timely manner.²⁸ Applicant is active in his community and serves as a volunteer at his church and at the restaurant that his church owns.²⁹

¹⁸ AE H (Account Transactions, undated); Tr. at 37.

¹⁹ Tr. at 37, 59.

²⁰ Applicant's Answer to the SOR, *supra* note 10, at 1; Tr. at 38.

²¹ Applicant's Answer to the SOR, *supra* note 10, at 1; Tr. at 38-39.

²² AE D (Installment Agreement Request, undated).

²³ AE G (Notice of Individual Income Tax Adjustment, dated August 4, 2014); Tr. at 40, 64-65.

²⁴ Tr. at 42-47.

²⁵ Tr. at 41-42.

²⁶ AE I (Household Monthly Budget, dated September 18, 2014).

²⁷ GE 2, *supra* note 6, at 2.

²⁸ Tr. at 50.

²⁹ Tr. at 50.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.”³⁰ As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. Positions designated as ADP I/II/III are classified as “sensitive positions.”³¹ “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.”³² DOD contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made.³³

When evaluating an applicant’s suitability for a public trust position, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for a public trust position.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”³⁴ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation,

³⁰ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

³¹ Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

³² *Id.* at ¶ C6.1.1.1.

³³ *See Id.* at ¶ C8.2.1.

³⁴ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “Substantial evidence” is “more than a scintilla but less than a preponderance.” *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.³⁵

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of sensitive information. Furthermore, security clearance determinations, and by inference, public trust determinations, "should err, if they must, on the side of denials."³⁶

Public trust eligibility decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."³⁷ Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a public trust eligibility determination. 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.

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline 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. . . .

³⁵ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

³⁶ *Egan*, 484 U.S. at 531.

³⁷ See Exec. Or. 10865 § 7.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an *inability or unwillingness to satisfy debts* is potentially disqualifying. Similarly, under AG ¶ 19(c), a *history of not meeting financial obligations* may raise security concerns. In 2010, Applicant purchased a new residence financed, in part, by an early distribution of \$85,000 from his 401(k) retirement plan. When he completed his income tax return for 2010, he erroneously indicated on his Form 1040 that the distribution was non-taxable. He was wrong. He subsequently learned he owed the IRS between \$30,000 and 35,000, and he owed the state an additional sum. AG ¶¶ 19(a) and 19(c) apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where *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*. Also, under AG ¶ 20(b), financial security concerns may be mitigated where *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*. Evidence that *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* is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*.³⁸

AG ¶¶ 20(a), 20(b), 20(c), and 20(d) apply. Applicant's misunderstanding of the federal tax provisions pertaining to early distributions from retirement accounts for the purpose of purchasing a primary residence was the sole cause of his financial difficulty with the IRS. Once the error was uncovered, he had already been laid off and was unable to resolve the error in a more timely fashion because he no longer had loan-access to his retirement account and he had no salary for several months to address the issue. Applicant's financial problems were not caused by frivolous or irresponsible spending, and he did not spend beyond his means. Instead, his financial problems were in some measure beyond Applicant's control. He acted responsibly and in good faith under the circumstances by enrolling in installment agreements with both the IRS and

³⁸ The Appeal Board has previously explained what constitutes a good-faith effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good-faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good-faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

the state department of revenue. The state income tax balance has been paid off. In fact, he paid too much and was expected to receive a refund. The IRS balance has been steadily diminished by his monthly payments. All of Applicant's newer accounts are current. A review of his monthly budget reveals that he now has approximately \$575.85 each month available for discretionary spending or savings. Applicant acted responsibly by addressing both of his delinquent accounts, and working with his creditors.³⁹ With his current job, there are clear indications that Applicant's financial problems are under control. Applicant's actions under the circumstances confronting him, do not cast doubt on his current reliability, trustworthiness, or good judgment.⁴⁰

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance or suitability for a public trust position by considering the totality of the applicant's conduct and all the 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 security clearance or suitability for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.⁴¹

There is some evidence against mitigating Applicant's conduct. His misreading and misunderstanding of the federal tax provisions resulted in his claiming no tax liability for his early distribution of \$85,000 from his 401(k), and the resulting federal and state income tax delinquencies of substantial amounts.

³⁹ "Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

⁴⁰ See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

⁴¹ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

The mitigating evidence under the whole-person concept is more substantial. Applicant's financial problems were not caused by frivolous or irresponsible spending, and he did not spend beyond his means. Rather, his problems were primarily due to his misunderstanding and misreading of federal tax provisions pertaining to early distributions from retirement accounts for the purpose of purchasing a primary residence. His inability to resolve both his federal and state income tax delinquencies was to some degree beyond Applicant's control when he was laid off and unemployed, and later denied loan-access to his retirement account. Applicant did not ignore his two debts. Instead, he set up installment agreements. Applicant has already resolved his state tax issue and is in the process of resolving his federal tax issue. There are clear indications that Applicant's financial problems are under control. His actions under the circumstances confronting him do not cast doubt on his current reliability, trustworthiness, or good judgment. The entire situation occurred under such circumstances that it is unlikely to recur.

The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:⁴²

In evaluating Guideline F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts." However, an applicant is not required, as a matter of law, to establish that he [or she] has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he [or she] has ". . . established a plan to resolve his [or her] financial problems and taken significant actions to implement that plan." The Judge can reasonably consider the entirety of an applicant's financial situation and his [or her] actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) ("Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.") There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

Applicant has demonstrated a "meaningful track record" of debt reduction and elimination efforts. Overall, the evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a public trust position. For all of these reasons, I conclude Applicant has mitigated the security concerns arising from his financial considerations. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

⁴² ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted).

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility to occupy an ADP I/II/III position to support a contract with the DOD. Eligibility for public trust position is granted.

ROBERT ROBINSON GALES
Administrative Judge