



**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. 14-01848

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro se*

12/23/2014

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the trustworthiness concerns regarding financial considerations. Eligibility to occupy a public trust position is denied.

Statement of the Case

On December 26, 2012, Applicant applied for a public trust position and submitted an Electronic Questionnaire for Investigations Processing (E-QIP).¹ On June 13, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility – Division A (CAF) issued a Statement of Reasons (SOR) to him, pursuant to Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (effective within the Department of Defense on September 1, 2006) (AG) for all adjudications and other determinations made under the Directive. The SOR alleged trustworthiness concerns under Guidelines F (Financial Considerations) and E (Personal Conduct), and detailed reasons why the DOD adjudicators could not make a preliminary affirmative

¹ Government Exhibit 1 ((e-QIP), dated December 26, 2012).

finding under the Directive that it is clearly consistent with the interests of national security to grant or continue Applicant's eligibility for occupying a public trust position to support a contract with the Department of Defense, and recommended referral to an administrative judge to determine whether such eligibility should be granted, continued, denied, or revoked.

Applicant acknowledged receipt of the SOR on June 30, 2014. In a written statement, notarized on July 18, 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 September 29, 2014, and the case was assigned to me on October 14, 2014. A Notice of Hearing was issued on October 27, 2014, scheduling the hearing for November 18, 2014. I convened the hearing, as scheduled.

At the commencement of the hearing, Department Counsel moved to amend the SOR by withdrawing the allegation under Guideline E. There being no objection by Applicant, the motion was granted, and SOR ¶ 2 and its subparagraph (2.a.) were withdrawn.² During the hearing, three Government exhibits (GE 1 through GE 3) and one Applicant exhibit (AE A) were admitted into evidence, without objection. Applicant testified. The transcript (Tr.) was received on November 26, 2014. I kept the record open to enable Applicant to supplement it, but he did not take advantage of that opportunity. The record closed on November 21, 2014.

Findings of Fact

In his Answer to the SOR, Applicant admitted nearly all of the factual allegations pertaining to financial considerations (¶¶ 1.a. through 1.f., and 1.h. through 1.j.) of the SOR. He denied the one remaining allegation as well as the one factual allegation related to personal conduct.

Applicant is a 40-year-old employee of a defense contractor, and he is seeking to retain his eligibility for occupying a public trust position to support a contract with the Department of Defense. He served on active duty with the U.S. Army from July 1992 until July 1997, and received an honorable discharge.³ He is a June 1992 high school graduate.⁴ He was unemployed from May 2011 until August 2011.⁵ Applicant joined his current employer in February 2013.⁶ He was married in May 1993, divorced in June 1999, married again in June 2006, and divorced in August 2008.⁷ He has three sons, aged 19, 16, and 8.⁸

² Tr. at 13-14.

³ GE 1, *supra* note 1, at 16-17; Tr. at 24.

⁴ GE 1, *supra* note 1, at 11; Tr. at 24.

⁵ GE 1, *supra* note 1, at 13.

⁶ Tr. at 28.

⁷ GE 1, *supra* note 1, at 19-20; Tr. at 25.

Financial Considerations

Applicant initially started experiencing financial difficulties when he was going through his first divorce in 1999. He was in the process of recovering from those difficulties when a series of events occurred, resulting in the exacerbation of his financial problems.⁹ In early 2007, he accompanied his second wife (who was in the U.S. Army) to a new duty station in an area where the living expenses were higher. As a result of the move, he also relinquished a job that paid him roughly \$20,000 more each year than the one he was able to obtain following the move.¹⁰ He had greater expenses and less money to pay them, and things “kind of snowballed from there.”¹¹ As he subsequently noted: “I wasn’t in a good place, and I let things fall behind, and rather than being responsible and addressing these problems head on, I shamefully closed my eyes to them, and let it - - I couldn’t deal with it. I didn’t deal with it, I should say.”¹² He added: “I decided that making her happy was more important than doing the things that I felt probably would have been right, and so that’s when things really started to pile up.”¹³

Applicant has child support agreements with both ex-wives. He is supposed to pay his ex-wives approximately \$400 per month for his two oldest sons and \$670 a month for his youngest son.¹⁴ While he contends he is making the payments for his youngest son,¹⁵ the same is not true regarding his two older children. Because of his decreased salary, the amount he pays for his youngest son “is almost equal to the amount that [he brings] home.”¹⁶ Accordingly, he is not making the support payments for the two older children, and claims he has an unspecified arrangement with their mother.¹⁷ Although not alleged in the SOR, Applicant is apparently delinquent in paying his child support for his two older children in the amount of \$4,330.¹⁸ He stated: “I’m not making enough money to make ends meet. I’m eating Ramen noodles, and still I’m falling further and further behind.”¹⁹

⁸ Tr. at 25.

⁹ Tr. at 31.

¹⁰ Tr. at 32-34.

¹¹ Tr. at 32-33.

¹² Tr. at 31-32.

¹³ Tr. at 32.

¹⁴ Tr. at 27-29.

¹⁵ Tr. at 27.

¹⁶ Tr. at 28.

¹⁷ Tr. at 27-28, 50.

¹⁸ GE 2 (Combined Experian, TransUnion, and Equifax Credit Report, dated January 11, 2013), at 6.

¹⁹ Tr. at 35.

The SOR identified ten purportedly continuing delinquencies as generally reflected by credit reports from January 2013²⁰ and March 2014,²¹ totaling approximately \$14,643. Three of those accounts, while not listed in the credit reports, total \$7,400, and are for unpaid income taxes for the years 2004, 2007, and 2008.

(SOR ¶ 1.a.): While Applicant was out of town, someone broke into his apartment. The landlord never contacted him and simply repaired the door. Although he was in the middle of his lease, Applicant broke his lease and, as he characterized it, “unwisely” moved out.²² The account, with a remaining balance of \$3,301, was placed for collection in 2011.²³ Applicant explained that he no longer had a job and was unable to afford the rent.²⁴ He also claimed he would dispute the amount,²⁵ but offered no evidence of a dispute or any documentation to support any such action. He acknowledged he never contacted the creditor in an attempt to resolve the matter because he was not in a financial position to do so.²⁶ The account has not been resolved.

There are two telephone accounts (SOR ¶¶ 1.b. for \$370, and 1.f. for \$148) that were placed for collection;²⁷ one credit card account (SOR ¶ 1.c. for \$450) that was charged off and sold or transferred;²⁸ two credit card accounts (SOR ¶¶ 1.d. for \$2,346, and 1.e. for \$532) that were placed for collection;²⁹ and one utility account (SOR ¶ 1.g. for \$96) that was placed for collection.³⁰ Applicant contended he paid the utility account,³¹ but offered no documentation to support his contention. As for the other accounts identified above, Applicant made no efforts to contact the various creditors to set up repayment arrangements, and has made no payments on any of those accounts.³² None of the accounts have been resolved.

²⁰ GE 2, *supra* note 18.

²¹ GE 3 (Equifax Credit Report, dated March 4, 2014).

²² Tr. at 34-35.

²³ GE 2, *supra* note 18, at 10.

²⁴ Applicant’s Answer to the SOR, dated July 18, 2014.

²⁵ Applicant’s Answer to the SOR, *supra* note 23.

²⁶ Tr. at 35, 52.

²⁷ GE 2, *supra* note 18, at 11.

²⁸ GE 2, *supra* note 18, at 8; GE 3, *supra* note 21, at 2.

²⁹ GE 2, *supra* note 18, at 6.

³⁰ GE 2, *supra* note 18, at 11.

³¹ Tr. at 38.

³² Tr. at 36, 38, 52; Applicant’s Answer to the SOR, *supra* note 23.

(SOR ¶¶ 1.h. through 1.j.): Applicant filed his federal income tax return for 2004 on time, may have received a refund, but subsequently was notified that he owed additional money.³³ He currently owes the Internal Revenue Service (IRS) approximately \$1,887 in unpaid taxes.³⁴ He filed his federal income tax return for 2007 in 2010, and owes the IRS approximately \$2,351.³⁵ He filed his federal income tax return for 2008 in 2010, and owes the IRS approximately \$3,161.³⁶ At one point, Applicant and the IRS agreed to a repayment arrangement under which \$25 would be garnished from his wages each week, but when he left his employer in mid-2011, he failed to notify the IRS of his relocation or to reestablish the automatic debit from his salary.³⁷ Applicant has still not contacted the IRS.³⁸ Although he currently has money withheld from his salary for current salary, he has insufficient funds available to pay his old income tax delinquencies.³⁹ None of the accounts have been resolved.

Although not alleged in the SOR, Applicant failed to timely file his state or federal income tax returns for 2012 or 2013.⁴⁰ He has no excuse for not timely filing his income tax returns.⁴¹ He is currently a month and a half behind in his rent payments.⁴² Applicant has never received financial counseling.⁴³

Character References

One of Applicant's friends has known him for over 13 years. He has noted that Applicant demonstrates loyalty to his family, and serves as a provider and support system for those who need him.⁴⁴

³³ Tr. at 40-42.

³⁴ Applicant's Answer to the SOR, *supra* note 23; Tr. at 41-42.

³⁵ Applicant's Answer to the SOR, *supra* note 23; Tr. at 40-41.

³⁶ Applicant's Answer to the SOR, *supra* note 23; Tr. at 42.

³⁷ Tr. at 44-45.

³⁸ Tr. at 45, 52.

³⁹ Tr. at 46.

⁴⁰ Tr. at 48-49, 51-52.

⁴¹ Tr. at 52.

⁴² Tr. at 50.

⁴³ Tr. at 50.

⁴⁴ AE A (Character Reference, dated November 17, 2014).

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.”⁴⁵ 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.”⁴⁶ “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.”⁴⁷ 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.⁴⁸

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 common sense 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.”⁴⁹ 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,

⁴⁵ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

⁴⁶ Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

⁴⁷ *Id.* at ¶ C6.1.1.1.

⁴⁸ See *Id.* at ¶ C8.2.1.

⁴⁹ “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.⁵⁰

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.⁵¹ 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 trustworthiness 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. . . .

The guideline notes several conditions that could raise trustworthiness 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 concerns. As noted above, Applicant has been experiencing financial problems since 1999, and while he may have recovered from some of those difficulties, he was beset by new and continuing financial issues in early 2007. With insufficient funds to make his monthly payments, accounts were placed for collection, one account was charged off, and some federal income taxes remain unpaid. AG ¶¶ 19(a) and 19(c) apply.

⁵⁰ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

⁵¹ *Egan*, 484 U.S. at 531.

The guideline also includes examples of conditions that could mitigate trustworthiness 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 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.”⁵²

AG ¶ 20(b) minimally applies, but ¶¶ 20(a), 20(c), and 20(d) do not apply. The conditions that may have contributed to Applicant’s initial financial problems were his first divorce in 1999, but he failed to specify how that divorce negatively impacted his finances. His relocation in 2007, reduced salary, unemployment in 2011, and second divorce also caused some financial strain, but aside from some generalities regarding his second wife, and his child support payment obligations, he has offered very little specificity as to the negative impact those matters had upon his finances. Over the years, Applicant did not act aggressively, timely, or responsibly to resolve his delinquent debts. As to his non-tax accounts, he never contacted any of his creditors and failed to initiate any effort, much less a “good-faith effort,” to start repaying any of them before the hearing. As to his IRS delinquencies, while he contends he made payments in early 2011, he offered no documentary evidence to support his contentions, and he failed to reinstitute any such payments once he relocated to a new job. Instead, Applicant ignored his debts and continues to do so. He never received any financial counseling. Applicant failed to act responsibly under the circumstances.⁵³

⁵² 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 [or statute of limitations]) 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)).

⁵³ “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. 03-13096 at 4 (App. Bd. Nov. 29, 2005); ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999)).

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 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 public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

There is some evidence in favor of mitigating Applicant's conduct. He served honorably with the U.S. Army, and has been supporting his youngest son.

The disqualifying evidence under the whole-person concept is more substantial. Applicant generally ignored his creditors and did not make any efforts to pay them. His long-standing failure to repay creditors, at least in reasonable amounts, or to arrange payment plans, as well as his apparent failure to support his older children or file his federal income tax returns on time, while not alleged in the SOR, reflect traits which raise concerns about his fitness to hold a public trust position. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

Overall, the record evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has failed to mitigate the concerns arising from his financial considerations.

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
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant

