



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



In the matter of:)
)
) ADP Case No. 08-06841
)
)
Applicant for Public Trust Position)

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel
For Applicant: *Pro Se*

July 22, 2009

Decision

CREAN, THOMAS M., Administrative Judge:

Applicant submitted a Questionnaire for Public Trust Position (SF 85P), on January 10, 2008. On March 2, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns for financial considerations under Guideline F. 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); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006. Applicant acknowledged receipt of the SOR on March 13, 2009.

Applicant answered the SOR in writing on March 29, 2009. He denied the three allegations under Guideline F, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on April 20, 2009, and the case was assigned to me on May 4, 2009. DOHA issued a Notice of Hearing on May 20, 2009, for a hearing on June 9, 2009. I convened the hearing as scheduled. The government offered four exhibits, marked Government Exhibits (Gov. Ex.) 1 through 4, which were

received without objection. Applicant submitted nine exhibits, marked Applicant Exhibits (App. Ex.) A through I, which were received without objection. Applicant testified on his own behalf. The record was held open for Applicant to submit additional documents. Applicant timely submitted five documents marked App. Ex. J through N. Department Counsel had no objection to consideration of four of the documents (Gov. Ex. 5, Memorandum, dated June 22, 2009). These four documents were admitted as App. Ex. J through M. The document that was objected to will be discussed below. DOHA received the transcript (Tr.) of the hearing on June 24, 2009. Based on a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is granted.

Procedural Issues

Applicant signed for the Notice of Hearing on May 28, 2009. Applicant is entitled to 15 days notice of hearing (Directive E3.1.8). Applicant discussed with Department Counsel the hearing date of June 9, 2009, prior to the Notice of Hearing being mailed so actual notice was given more than 15 days prior to the hearing. However, Applicant signed for the Notice of Hearing only 13 days prior to the hearing. If there was an issue on notice, Applicant waived the 15 days notice requirement (Tr. 5).

Applicant in his post-hearing submissions provided a reference to his home state's Civil Remedies and Procedures Statute of Limitation (App. Ex. N, State Statute, Title 15, Chapter 3, Article 1). Applicant contends that collection of his outstanding delinquent debts is barred by this statute of limitation. Department Counsel objected to consideration of the statute because a state's statute of limitations has only limited application in security clearance cases. Department Counsel's objection is overruled and the statute of limitation is admitted for the limited purpose of determining how the statute affects the facts and circumstances of Applicant's debt payments as well as his trustworthiness, judgment, and reliability.

Findings of Fact

Applicant is a 53-year-old network engineer for a defense contractor. He served 20 years on active duty with the Air Force retiring in 1991 as a staff sergeant (E-6). He held a security clearance for over 18 year of his time on active duty. He has an associate's degree and computer certifications. Applicant has been married for over 37 years and has two daughters who have disabilities. One daughter is still at home being cared for by his wife. Applicant's net monthly income is approximately \$7,000 from his salary, Air Force retired pay, Veteran's Administration disability, and payments for his disabled daughter. His monthly expenses are approximately \$3,000, leaving a monthly remainder in discretionary funds of about \$4,000. He also has about \$10,000 in cash in his home (Tr. 32-45, 66-68, Gov. Ex. 1, Questionnaire for Public Trust Position, dated January 10, 2008).

Credit reports (Gov. Ex. 3, dated November 3, 2008, and Gov. Ex. 4, dated January 25, 2008) listed for Applicant a delinquent debt of \$23,518 for a repossessed vehicle (SOR 1.a); a delinquent credit card debt of \$13,027 (SOR 1.b); and another

delinquent credit card debt of \$2,390 to the same creditor (SOR 1.c). Applicant presented his most recent credit reports showing that all other obligations are either paid or paid as agreed, including his house mortgage (App. Ex. D, E, and F, Credit Reports, dated May 25, 2009). His credit score indicators are favorable when compared with the national average (App. Ex. G, Credit rating, dated May 25, 2009).

Applicant was employed by a computer network firm in December 2000. In the spring of 2001, he was promoted to regional manager and administrator in his home state and an adjoining state with a considerable increase in pay and responsibilities. His employer projected that he would be required to travel extensively to various sites in the states. Applicant purchased a new car in the summer of 2001 so he had a reliable car for the projected extensive travels in his new position. He also opened two credit card accounts at the request of his employer to use to charge expenses for his travels. At the recommendation of the credit card company, he also purchased payment protection benefits from the company in case he became unemployed (Tr. 21-23). He paid for the payment protection benefits as part of his credit card monthly payments (App. Ex. A, Credit card statement, dated December 25, 2002; App. Ex. B, Credit card statement, dated January 9, 2003).

His company started to lose contracts because of the events of September 11, 2001. The company terminated operations and Applicant became unemployed in November 2001. He applied for and collected unemployment until March 2002 when he received a short contract for work in Saudi Arabia. He completed that contract in August 2002, and returned home. He continued to draw the remainder of his unemployment entitlements. Applicant was able to find only sporadic work until January 2008 when he started working for his present employer (Tr. 23-26). In addition, his wife required kidney surgery in November 2001 that was partially paid by military medical insurance. He had a debt of approximately \$5,000 from the surgery. The debt was paid off in late 2004 after Applicant made monthly payments (Tr. 26, 53-54).

SOR 1.a is a delinquent debt for the repossession of the new car he purchased for his new position in 2001. Applicant made payments on the car loan until November 2002 when his unemployment payments ran out and he was unable to continue to make payments on the loan. The car was repossessed on the night of February 9, 2003. The repossession company towed the car from his driveway and it was damaged in the process. Applicant found car parts in his driveway as well as skid marks where the car had been dragged (Tr. 29-30). Applicant paid over \$35,000 for the car when purchased. It was still in excellent condition with low mileage. By the time the car was repossessed, he had paid approximately a third of the cost. Credit reports show a balance owed after repossession of \$23,158. However, the bank notified Applicant after the repossession that the loan amount remaining together with repossession charges was \$24,469.91. The car sold for \$19,236. Applicant received other credits for total credits of \$20,016, leaving an amount owed by Applicant of \$4,453.55 (App. Ex. C, Bank Letter, dated May 7, 2003). Applicant also contends that the wholesale value of the car at the time of repossession was not \$19,000 but over \$26,000. If the car had not been damaged in the repossession, it would have sold for more than the \$19,236 and he would have no debt or he would have been owed a remainder from the bank.

He verbally protested the repossession charge with the bank but was informed they were not responsible for the damage to the car. Applicant does not believe he has a valid debt for the repossessed car and he refuses to pay this charge (Tr. 30-31, 56-60, 63-66, 69-71; Gov. Ex. 2, Answers to Interrogatories, dated May 19, 2008 at 3).

SOR delinquent debts 1.b and 1.c are for the remainder from the credit cards opened by Applicant to use while traveling with his former employer. When Applicant first opened these accounts, he purchased payment protection benefits at the suggestion of the credit card company in case he was unemployed (Tr. 29; App. Ex. A, Credit card statement, dated December 25, 2002; App. Ex. B, Credit card statement, dated January 9, 2003). Applicant continued to make payments on these accounts after he was laid off until late 2002 when he no longer had sufficient income to meet his expenses. He applied for the payment protection benefits but was advised that since he did not request payment within one year of loss, he was not eligible for the payment protection benefits (Gov. Ex. 2, Answers to Interrogatories, dated May 19, 2008 at 3-4; App. Ex. H and I, Letters, dated January 3, 2003). Even after receiving these letters, the credit card company notified him that he was eligible for payment protection coverage (App. Ex. J and K, Letters, dated January 31, 2003). He has not received any benefits from the payment protection account.

Applicant acknowledges that he owes approximately \$5,000 on one account and \$500 on the other account. He is willing to pay these amounts if he can reach an agreement with the creditors (Tr. 71-77). He has attempted to settle the accounts with the collection agencies for the amount owed. One collection agency refused to settle the account and requests full payment (App. Ex. L, Letter, dated June 10, 2009). The other company agreed to settle the alleged debt of \$2,518.45 for \$1,400 (App. Ex. N, Letter, date June 9, 2009). Since Applicant believes he owes the creditor only \$500, this is not an acceptable settlement for him. Applicant also notes that under the state statute of limitation both debts are barred from collection (App. Ex. J, Applicant's letter, dated June 11, 2009; App. Ex. N, Statute of Limitations, undated).

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 human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching 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.

Analysis

Guideline F, Financial Considerations

There is a public trust concern for a failure or inability to live within one's means, satisfy debts, and meet financial obligations indicating 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 sensitive information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds (AG ¶ 18). Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in their obligation to protect classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed

terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a situation of risk inconsistent with the holding of a public trust position. An applicant is not required to be debt free, but is required to manage his finances in such a way as to meet his financial obligations. Applicant's delinquent debts from a car repossession and two credit cards, as established by credit reports and Applicant's statements and testimony, are a security concern raising Financial Consideration Disqualifying Conditions (FC DC) ¶19(a) (inability or unwillingness to satisfy debts), and FC DC ¶ 19(c) (a history of not meeting financial obligations). Applicant has three delinquent debts over six years old indicating a history of not meeting financial obligations as well as an inability or unwillingness to satisfy his debts.

I considered Financial Considerations Mitigating Conditions (FC MC) ¶ 20(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), and FC MC ¶ 20(b) (the conditions that resulted in the financial problems were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce, or separations) and the individual acted responsibly under the circumstances). While the debts were incurred some time ago, they are still unpaid and thus considered current. The debts occurred when Applicant's company closed after the tragedy on September 11, 2001, and Applicant lost employment. These circumstances were beyond his control. He was able to make payments on his debts after being laid off for at least a year because of his retired pay and sporadic employment. In fact, he paid most of his debts except for the three listed in the SOR. One of the debts he did pay was a significant debt for his wife's kidney surgery. The circumstances of the delinquent debts being beyond his control and his actions to manage and pay his debts in light of these circumstances show he acted responsibly and reasonably. There are strong indications that delinquent debt is not likely to recur. The three debts do not now cast doubt on his reliability, trustworthiness, and good judgment.

I have not considered FC MC ¶ 20(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). While Applicant's financial problems are under control or being resolved, he presented no information concerning financial counseling.

I considered FC MC ¶ 20(d) (the individual has initiated a good-faith effort to repay the overdue creditors or otherwise resolve debts). For FC MC ¶ 20(d) to apply, there must be an "ability" to repay the debts, the "desire" to repay, and "evidence" of a good-faith effort to repay. A systematic method of handling debts is needed. Applicant must establish a "meaningful track record" of debt payment. A "meaningful track record" of debt payment can be established by evidence of actual debt payments or reduction of debt through payment of debts. An Applicant is not required to establish that he paid off each and every debt listed. The entirety of an Applicant's financial situation and his actions can reasonably be considered in evaluating the extent to which that Applicant's plan for the reduction of his outstanding indebtedness is credible and

realistic. Available, reliable information about the person's, 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. All that is required is that Applicant demonstrates he has established a plan to resolve his financial problems and taken significant actions to implement that plan.

Applicant has the ability to pay the debts. He has a large sum of money in cash and has significant discretionary funds left each month. Applicant presented significant and credible reasons for not paying the three outstanding debts. His documents show that at most the amount owed on the repossessed car was approximately \$4,453. Prior to the repossession, he paid over 30% of the loan. He presented significant information to challenge the value of the car at repossession because of the damage done during repossession. If the car had not been damaged, there would be no remaining amount due and he would not have a repossessed car debt. Applicant refuses to pay the debt because he reasonably believes he does not have a debt for the car.

Applicant acknowledges that he owes some part of the credit card debts. He presented sufficient information to establish that he paid the credit card company for a payment protection benefit that was denied by the creditor because it was not filed within one year of loss. Applicant states the claim was filed within one year. Applicant lost employment in November 2001. He continued to make payment on his credit cards until late 2002 when he did request payment protection. The creditor denied payment protection coverage on January 3, 2003. This denial was sufficiently close to the one year mark to indicate Applicant filed within the one year period. Applicant has a reasonable belief that he was wrongly denied payment protection benefits for which he paid. His determination that he owes \$5,000 on one account and \$500 on the other account is reasonable. Applicant's attempts to settle the debts with the collection agencies are reasonable and in good faith. He was willing to settle for the amount of the debt owed. It is the collection agencies that indicate an unwillingness to settle and be reasonable.

I considered FC MC ¶ 20(e) (the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provided documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue). Based on the information provided by Applicant, it is reasonable to conclude that he does not have a debt for the car repossession. Likewise, Applicant disputed the credit card debts because he should have received the payment protection benefit for which he contracted and paid. He does acknowledge that he owes an amount on these accounts that is significantly less than requested and he is willing to settle the accounts. He has a reasonable basis for dispute and he provided documentation that he has disputed the charges.

Applicant acted responsibly towards his debts. His finances are under control. Applicant presented sufficient information to mitigate security concerns for financial

considerations by establishing his good-faith efforts to resolve his debts. His finances do not indicate a security concern.

Whole Person Concept

Under the whole person concept, an 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) 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. Applicant held a security clearance for over 18 year with no indication of any security violation. He has presented sufficient information to contest the public trust significance of the three delinquent debts. He raised sufficient information to doubt a debt to him under the circumstances of the repossession. He established that his claim not to pay the car repossession debt is reasonable because he paid over 30% of the car loan and the value of the car except for damage in the repossession process should have been sufficient to pay the remainder.

Applicant established a good-faith reasonable offer to pay the amount he owed on the two credit cards. The amount of the debt should be lower than alleged if he had received the payment protection benefits for which he paid the credit card company. He indicated he would pay the debts if a settlement in the amount originally owed on the debts could be reached. It is noted that Applicant in his post-hearing submissions discussed the state statute of limitation on the enforcement of the debt. However, it is not his reliance on the statute of limitation that is reasonable but his attempts to settle the debts. It is the creditors who are being unreasonable in view of the amount needed to settle the debts.

Applicant established a meaningful track record of debt payment. He has paid all of his debts as agreed except for the three listed in the SOR. He has a reasonable and prudent reason for not paying the three SOR debts. He established that he acted reasonably and responsibly towards his finances indicating he will act reasonably and

responsibly to protect sensitive information. The three debts in question were directly work related debts. He acted reasonably before the debts became delinquent by making car loan payments on time, and signing up and paying for payment protection benefits for his credit cards. He acted reasonably by paying his debts as best he could after losing his job. He tried to find meaningful employment and paid his debts until he no longer could afford to pay them. When he lost his job, he did not back away from his debts but paid them for over a year. He pays all of his other obligations as agreed including paying a significant expense for his wife's kidney surgery. He demonstrated he is responsibly managing his present finances under the circumstances. The management of present finances indicates he will be concerned, responsible, and not careless concerning sensitive information. Overall, the record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has mitigated the trustworthiness concerns arising from his financial situation.

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
Subparagraph 1.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

THOMAS M. CREAN
Administrative Judge