



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



In the matter of:)
)
) ADP Case No. 08-10098
)
Applicant for Public Trust Position)

Appearances

For Government: Raashid Williams, Esq., Department Counsel
For Applicant: *Pro se*

September 27, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s debts were discharged in a 1998 bankruptcy proceeding. Since then, he acquired 19 debts, totaling close to \$40,000, that have been delinquent for many years. He failed to establish a track record of financial responsibility in addressing his legal obligations. Additionally, his unmitigated personal conduct security concern create doubt about his judgment, reliability, trustworthiness, and his ability to follow the law, rules, and regulations. Eligibility to occupy a public trust position is denied.

Statement of the Case

Applicant submitted a Questionnaire for Public Trust Positions (SF 85P) on August 8, 2008. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with national security to grant Applicant eligibility to occupy a public trust position.

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial*

On October 15, 2010, DOHA issued Applicant a Statement of Reasons (SOR), indicating trustworthiness concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the adjudicative guidelines (AG).²

Applicant answered the SOR on December 1, 2010, and requested a hearing before an administrative judge. The case was assigned to me on June 3, 2011, to determine whether Applicant's eligibility for a public trust position should be granted or denied. DOHA issued a notice of hearing on June 9, 2011, convening a hearing on July 13, 2011. At the hearing, the Government offered exhibits (GE) 1 through 13. Applicant testified and presented exhibits (AE) 1 through 3. AE 3 was timely received post-hearing. DOHA received the hearing transcript (Tr.) on July 20, 2011.

Findings of Fact

Applicant admitted the factual allegations in SOR ¶¶ 1.a, 1b, 1.d through 1.h, 2.a through 2.c, 2.e through 2.i, 2.l, and 2.n through 2.t.³ He denied the allegations in SOR ¶¶ 1.c, 2.d, 2.j, 2.k, and 2.m. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, including Applicant's answer to the SOR, his March 2009 statement, and his demeanor and testimony, I make the following additional findings of fact.

Applicant is a 46-year-old employee of a defense contractor. He attended college from 1983 until 1988, and received a bachelor's degree in business marketing. He married his wife in June 1997, and they separated in June 2010. His wife has a 16-year-old daughter from a previous relationship who is currently living with Applicant. He did not adopt his stepdaughter. Applicant's disabled mother also lives with him. He provides financial support for his step-daughter and his mother. His wife provides limited financial support for her daughter.

Applicant worked for a Government law enforcement agency from June 1989 until August 2005. He possessed a security clearance at the secret level during the 17 years he worked for that agency. He was terminated from his employment after his security clearance was revoked as a result of criminal misconduct, personal conduct, and financial problems. (GE 9) In November 1997, Applicant issued a bad check for over \$200. In March 1998, he was arrested and charged with issuing a bad check with the intent to defraud, a Class 6 felony. (GE 3) Because he worked for a law enforcement agency, Applicant was required to notify his employer of his arrest,

Personnel Security Clearance Review Program (Directive), dated January 2, 1992, as revised; and DoD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation).

² Adjudication of this case is controlled by the AGs implemented by the DOD on September 1, 2006.

³ In his answer to the SOR, Applicant admitted in part, and denied in part, SOR ¶¶ 1.d and 1.e. However, during his hearing he admitted the factual allegations in both paragraphs.

charges, and financial problems. He failed to do so, and he was issued a letter of reprimand. (GE 4)

In April 2001, Applicant was arrested and charged with reckless driving for driving 36 miles over the speed limit. He was convicted and sentenced to 60 days in jail (56 days suspended), to pay a fine, and to 12 months probation. His driver's license was suspended for six months. (GE 5) He retained an attorney to represent him in the reckless driving trial. He issued a bad check to pay for his legal fees. In February 2002, Applicant was charged with issuing a bad check for over \$200. He pled guilty to a misdemeanor charge. He was sentenced to pay a fine, to perform community service, and to serve 12 months supervised probation. In October 2002, Applicant received a letter of reprimand and was suspended from work for three days for recklessly driving a Government car, and for his failure to timely report an accident involving a Government car. (GE 7)

In 2002, Applicant went on a family vacation and used his Government credit card to pay for his personal rental car expenses. He then failed to timely reimburse the Government. He was reprimanded and suspended for one day from his employment because of his misuse of a Government credit card, and for his failure to fulfill his financial obligations. (GE 8) As a result of Applicant's personal conduct and financial problems, his security clearance was revoked in August 2005. Shortly thereafter, he was terminated from his employment.

At his hearing, Applicant disclosed that he issued another bad check in June 2010. He was arrested in August-September 2010, and charged with issuing a bad check with the intent to defraud. (Tr. 48) Applicant admitted to issuing the three bad checks, but he claimed that he reviewed his bank account balance prior to issuing the checks. In all three occasions, his wife withdrew money from his checking account without his knowledge and that caused the checks to bounce. He also claimed that his improper use of the Government credit card was an honest mistake. He was in a hurry and used the wrong credit card.

After his termination, Applicant was unable to find a steady, full-time job for three years. He was unemployed and underemployed until August 2008, when he was hired by his current employer, a Government contractor. He provided financial support for his family by working part-time jobs and accepting unemployment benefits.

Concerning his financial problems, Applicant explained that his 1998 Chapter 7 bankruptcy filing was the result of his wife bringing numerous personal debts into the marriage. He claimed that he sought the discharge of his individually accumulated debts because he wanted to be in a better financial posture to assist his wife to pay the debts she brought into the marriage. (GE 10)

Applicant submitted his application for a public trust position in August 2008. In his application, he disclosed that he issued a bad check in 2002. He failed to disclose the bad check he issued in March 1998, and the subsequent criminal charge filed

against him. He disclosed no legal judgments filed against him. He also indicated that he had no loans or financial obligations over 180 days delinquent.

The subsequent background investigation disclosed the 19 delinquent debts alleged in the SOR, totaling close to \$40,000. In March 2009, Applicant was questioned by a Government investigator concerning his personal conduct, delinquent debts, and current financial problems. During the interview, Applicant claimed he was not aware of the judgments alleged in SOR ¶¶ 2.c (filed in October 2007), and 2.d (filed in October 2006). Additionally, he claimed not to recognize the delinquent debts alleged in SOR ¶¶ 2.g, 2.h, 2.i, 2.q, and 2.s. He admitted that he was aware of the delinquent debts alleged in SOR ¶¶ 2.i,⁴ 2.m (delinquent since July 2004), 2.o (delinquent since April 2006), 2.p (delinquent since April 2007), and 2.q (delinquent since November 2004). The debts alleged in SOR ¶¶ 2.o and 2.p were the result of personal loans taken by Applicant in 2003-2004, to pay other delinquent debts. (Tr. 43)

Applicant admitted during his 2009 interview that he had not taken any steps to pay, settle, dispute, or resolve any of his delinquent debts. He claimed that he was employing the services of a debt consolidation company to help him pay his debts. He attributed his financial problems to being unemployed for two years. He indicated that his family combined monthly income was \$4,200 (Applicant's income was \$2,200 and his wife's income was \$2,000). His total monthly expenses were \$4,135, with a net monthly remainder of \$65.

Considering the evidence as a whole, I find that all the debts alleged in the SOR are Applicant's delinquent debts, most of which have been delinquent for many years. At his hearing, Applicant explained that his current financial problems were the result of his and his wife's periods of unemployment and underemployment, his 2010 separation from his wife, and him being the sole financial support for his mother and stepdaughter. He explained that most of his debts were acquired by him and his wife when he was making \$70,000 a year and she was also working. Since August 2008, he has been making only around \$40,000 a year, and his wife contributes very little to her daughter's support.

At his hearing, Applicant claimed he considered employing the services of a debt consolidation company to help him resolve his debts. He decided against it because he currently does not have the financial resources to do so. Applicant has not paid or resolved even his small delinquent debts (less than \$300). He testified he only has sufficient income to pay for his day-to-day living expenses and necessities, but not to pay for his delinquent debts. He averred that he was working with a mortgage lender to repair his credit. He plans to take a second job sometime in the future to expedite the payment of his debts.

⁴ Applicant claimed he paid this debt. However, he failed to present documentary evidence to support his claim. The debt is reported as delinquent in both the February and July 2010 credit reports, GE 11 and 12, respectively.

Applicant further claimed that in December 2010, he sent letters to his creditors to ascertain the validity of the debts, to dispute some debts, to inform creditors of his financial problems, and to request reduced payment schedules and a reduction of the debt owed. Applicant presented no documentary evidence of any payments made, contacts with creditors, disputed debts, or of any other actions taken to otherwise resolve his delinquent financial obligations since he acquired them.

Applicant repeatedly stated that he is an honest and forthright person. He considers himself to be a hard-working, Christian family man. Applicant expressed remorse for his financial problems. He believes that his financial problems are due to circumstances beyond his control, and that he is currently doing all that he can to address his delinquent obligations. He noted he worked for another Government agency for 17 years, and that he held a security clearance at the secret level without any security violations.

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 that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The government’s authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. See *Id.* at 527.

Positions designated as ADP I and II are classified as “sensitive positions.” 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.” Regulation ¶ C6.1.1.1. 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, an 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 an evaluation of the whole person. An administrative judge’s controlling adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to sensitive information. See *Egan*, 484 U.S. at 531. “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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security and trustworthiness suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance [or trustworthiness] determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

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.”

Analysis

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a trustworthiness concern stating:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Applicant issued bad checks in March 1998, February 2002, and August 2010. He was arrested and charged with issuing bad checks with the intent to defraud. In 1998, he was reprimanded for his failure to notify his employer that he was arrested and

charged with a criminal offense. He was convicted in April 2001, for reckless driving. In October 2002, he was suspended for three days from his job because of his reckless driving charges, and for his failure to timely notify his employer that he was involved in an accident with a Government vehicle. In 2003, he misused a Government credit card and failed to pay the charges on time.

Applicant's overall behavior triggers the applicability of disqualifying condition AG ¶ 16:

(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

After considering all the AG ¶ 17 mitigating conditions, I find none apply. Applicant's frequent questionable behavior established a pattern of misconduct. His repeated offenses show that he is not learning from his mistakes, and that his questionable behavior is likely to recur. Considering his age, education, and job experience holding a security clearance, his misconduct cannot be considered minor, and it is not mitigated by the passage of time. His overall behavior shows questionable judgment, untrustworthiness, unreliability, lack of candor, and an unwillingness to comply with rules and regulations.

Guideline F, Financial Considerations

Under Guideline F, the trustworthiness concern is that 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 sensitive information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. AG ¶ 18.

Applicant filed for bankruptcy protection in 1998 and was discharged of his financial obligations. His financial problems have continued through the years as

demonstrated by him issuing bad checks and abusing the Government credit card. He accumulated 19 delinquent debts, totaling nearly \$40,000. His financial problems worsened after he was terminated from his employment because of his personal misconduct. Later, he was unable to pay his debts because of his periods of unemployment, underemployment, and his separation from his wife. AG ¶ 19(a): “inability or unwillingness to satisfy debts” and AG ¶ 19(c): “a history of not meeting financial obligations,” apply.

AG ¶ 20 lists conditions that could mitigate the financial considerations trustworthiness concerns. AG ¶ 20(a) does not apply because Applicant’s financial problems are ongoing. His periods of unemployment and underemployment were the result of his job termination because of his personal and criminal misconduct. Thus, his unemployment and underemployment were not the result of circumstances beyond his control. As such, they do not mitigate his financial considerations concerns.

Moreover, Applicant failed to establish that he acted responsibly under the totality of his circumstances. He filed for bankruptcy protection in 1998, and he did not learn from that experience. He has continued to accumulate significant delinquent debt, most of which remains unresolved. He presented little or no evidence of contact with creditors, settlements, payments, or of efforts to otherwise resolve his delinquent financial obligations since he acquired them. AG ¶ 20(b) does not apply.

During his 17 years working for a law enforcement agency and holding a security clearance, Applicant was made aware of the Government’s financial considerations security concerns through his submissions of security clearance applications and when he was disciplined for issuing bad checks. He was made aware of those concerns again during his 2009 interview and through the October 2010 SOR. Notwithstanding, he took little action to resolve even his small debts. Applicant should have been more diligent in his efforts to resolve his delinquent financial obligations. On balance, and considering the evidence as a whole, Applicant’s financial irresponsibility casts doubt on his current reliability, trustworthiness, and judgment.

AG ¶ 20(c) does not apply. Applicant has not received counseling, his financial problem is ongoing, and there are no clear indications that his financial problems are under control. AG ¶ 20(d) does not apply. AG ¶ 20(f) is not raised by the evidence in this case.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant’s eligibility for a public trust position by considering the totality of the applicant’s conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable

participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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. AG ¶ 2(c). I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated in my whole-person analysis my comments on the analysis of Guidelines F and E.

Applicant receives credit for being a good son and a good father. Notwithstanding, public trust concerns remain. Applicant acquired financial obligations beyond his financial means and then showed disregard for his legal obligation to pay his debts. He failed to establish a track record of financial responsibility. The record evidence fails to convince me of Applicant's suitability for a public trust position. For all these reasons, I conclude Applicant failed to mitigate the trustworthiness concerns arising from his financial considerations and personal conduct.

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 E:	AGAINST APPLICANT
Subparagraphs 1.a - 1.e:	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraphs 2.a – 2.e, 2.g – 2.j, and 2.l – 2.t:	Against Applicant
Subparagraphs 2.f and 2.k:	For Applicant ⁵

⁵ These two debts were paid by Applicant's wife. (AE 3)

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with national security to grant or continue Applicant's eligibility to occupy a public trust position. Applicant's eligibility to occupy a public trust position is denied.

JUAN J. RIVERA
Administrative Judge