



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



In the matter of:

ADP Case No. 09-02543

Applicant for Public Trust Position

Appearances

For Government: Alison O'Connell, Esquire, Department Counsel

For Applicant: *Pro se*

November 30, 2010

Decision

ANTHONY, Joan Caton, Administrative Judge:

I have carefully reviewed the administrative file, pleadings, and exhibits in this case and conclude that Applicant failed to mitigate security concerns under the Financial Considerations adjudicative guideline. Eligibility for access to sensitive information is denied.

Applicant submitted his Questionnaire for Public Trust Positions (SF 85P) on May 14, 2008. On December 4, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging trustworthiness concerns under Guideline F, Financial Considerations. 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On January 8, 2010, Applicant answered the SOR in writing. On July 22, 2010, he requested that his case be determined on the record in lieu of a hearing. The

Government compiled its File of Relevant Material (FORM) on August 31, 2010. The FORM contained documents identified as Items 1 through 10. By letter dated September 2, 2010, a copy of the FORM was forwarded to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received the file on September 27, 2010. His response to the FORM was due on October 27, 2010. He did not file any additional information or objections within the required time period. The case was assigned to me for a decision on November 9, 2010.

Findings of Fact

The SOR is comprised of 21 allegations that raise trustworthiness concerns under AG F, Financial Considerations. The 21 alleged financial delinquencies total approximately \$169,130. (Item 1.)

Applicant is 38 years old, never married, and employed by a government contractor as an analyst. He has been steadily employed for the past five years. He lists no dependents on his SF 85P, but the record reflects that he pays child support. Applicant seeks eligibility for access to sensitive information for the first time. (Item 5.)

In his Answer to the SOR, Applicant admitted four of the delinquent debts (SOR ¶¶ 1.c., 1.h., 1.r., and 1.s.), which totaled approximately \$92,370. One of the four delinquent debts that Applicant admitted was a \$25,152 tax lien entered against him in October 2007 by the Internal Revenue Service (IRS) (SOR ¶ 1.c.). Applicant denied the 17 remaining debts (SOR ¶¶ 1.a., 1.b., 1.d., 1.e., 1.f., 1.g., 1.i., 1.j., 1.k., 1.l., 1.m., 1.n., 1.o., 1.p., 1.q., 1.t., and 1.u.). Included in Applicant's denials was a state tax lien entered against him in 2002 for \$761 (SOR ¶ 1.a.) and a federal tax lien entered against him in 2007 for \$57,612 (SOR ¶ 1.b.).¹ The state tax lien, the two federal tax liens, and all other delinquent debts alleged on the SOR appear on Applicant's credit reports of August 31, 2010, April 21, 2009, November 13, 2008, and May 30, 2008. (Item 4; Item 7; Item 8; Item 9; Item 10.)

When Applicant completed his SF 85P in May 2008, he answered "No" to Question 19, which asked if he had been subject to a tax lien in the last seven years. He answered "Yes" when asked if, in the last seven years, he had been over 180 days delinquent on any debt. He then listed two student loan debts he incurred in 2005 and 2006. (Item 5 at 5.)

Applicant was interviewed by an Office of Personnel Management (OPM) investigator about his finances on January 10, 2009. The investigator asked Applicant about accounts that were delinquent or in collection status and identified on his credit report. In the interview, Applicant did not recognize delinquent accounts which were later identified on the SOR at ¶¶ 1.d., 1.i., 1.k., 1.l., 1.o., 1.t., and 1.u. He told the investigator that if those debts were his, he did not want to recognize them because he

¹ In his personal subject interview, Applicant opined that the \$57,612 federal tax lien represented his consolidated student loan indebtedness. However, he failed to provide documentation establishing a link between the two debts. (Item 6 at 3-4.)

feared that if they were valid and over seven years old, the creditors would attempt to collect the delinquent debts from him. He further stated that he would prefer to let the accounts “drop off” his credit report, and he did not intend to contact these creditors to determine if the debts were valid.² As of the date of the SOR, the debts remained unpaid. In his Answer to the SOR, Applicant denied the debts, along with five additional consumer debts identified at SOR ¶¶ 1.g., 1.m., 1.n., 1.p., and 1.q. (Item 4; Item 6 at 3.)

In his interview with the OPM investigator, Applicant reported that he attended college from 1990 to 1996 but did not earn a degree. He stated that he twice entered into agreements to pay his student loan accounts but stopped payments during periods of unemployment. He did not resume payments after gaining employment, and the student loan debts remain unresolved. Applicant told the investigator that he intended at some time to take a second job so that he could pay his student loan accounts. In his Answer to the SOR, Applicant admitted that he was 120 days or more past due on a student loan account of approximately \$66,430. This debt appears as a collection account on Applicant’s credit reports of August 31, 2010 and April 21, 2009. (Item 4; Item 6 at 3-4; Item 7; Item 8.)

In his Answer to the SOR, Applicant denied medical debts alleged at SOR ¶¶ 1.e. and 1.f. These debts appear on Applicant’s credit reports of August 31, 2010 and April 21, 2009. In his interview with the OPM investigator, Applicant admitted that he incurred the \$496 debt alleged at SOR ¶ 1.f. when he had his tonsils removed in 2007. He told the investigator he would contact the creditor and pay the debt in full. Nothing in the record establishes that the debt has been resolved. (Item 4; Item 6 at 4; Item 7; Item 8.)

In his interview with the OPM investigator, Applicant admitted a \$415 debt alleged at SOR ¶ 1.r. and a \$374 debt alleged at SOR ¶ 1.s. He stated that the debts arose in 2003 or 2004 when he overdrew his checking account during a period of unemployment. He stated that he intended to contact the creditor at some unspecified future date to arrange payment. In his Answer to the SOR, Applicant admitted the debts. Nothing in the record establishes that the debts have been satisfied. (Item 4; Item 6 at 4.)

In his interview with the OPM investigator, Applicant admitted that he owed a \$2,700 delinquent debt to a company for software support. He stated that he stopped paying on the account in 2008 when he became dissatisfied with the company’s service. He also told the investigator he had contacted the creditor and intended to work out a payment agreement. In his Answer to the SOR, Applicant denied the debt, which is alleged at SOR ¶ 1.j. Nothing in the record establishes that the debt has been satisfied. (Item 4; Item 6 at 4.)

² On July 22, 2009, in response to DOHA interrogatories, Applicant signed a statement affirming that he had read the summary of the interview and found it to be true and correct. He made no changes, corrections, or revisions to the investigator’s summaries. (Item 6 at 6-7.)

Applicant failed to provide documentation to establish that he had paid or had payment plans in place for the four delinquent debts he admitted. Additionally, he provided no documentation to establish that he was not responsible for the 17 delinquent debts he denied. He failed to provide documentation to establish that any of the 21 debts alleged on the SOR had been paid or otherwise satisfied. Nothing in the record suggests that Applicant has received financial credit counseling. (Item 6.)

Burden of Proof

The Government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the Government must establish by substantial evidence a *prima facie* case that it is not clearly consistent with the national interest for an applicant to have access to classified information. The responsibility then shifts to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a right to a security clearance, the applicant carries a heavy burden of persuasion. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to sensitive information in favor of protecting national security.

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. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge must apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching 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 in seeking to obtain 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.

Section 7 of Executive Order (EO) 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

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 [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶19 provides two financial considerations disqualifying conditions that could raise security concerns and may be disqualifying in this case. 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 trustworthiness concerns. In ISCR Case No. 08-12184 at 7 (App. Bd. Jan.7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted.) Applicant's history of delinquent debt is documented in his credit reports, his SF 85P, his interview with the OPM investigator, and his SOR response. Since about 2003, Applicant accumulated considerable delinquent debt and was unable to pay or satisfy his financial obligations. The evidence is sufficient to raise financial considerations disqualifying conditions identified at AG ¶¶ 19(a) and 19(c).

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 trustworthiness, or good judgment." Applicant's financial delinquencies began in approximately 2003, and they have continued to the present. He has not resolved his financial delinquencies, and they are likely to recur. Applicant's failure to satisfy his delinquent debts over a period of at least seven years casts doubt on his current reliability, trustworthiness, and good judgment. Accordingly, I conclude that AG ¶20(a) does not apply to the facts of Applicant's case.

Under AG ¶ 20(b), mitigation can occur 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." Applicant reported that he did not pay his student loans on two occasions when he experienced unemployment. However, he also acknowledged that when he regained employment, he did not resume paying his student loans. Applicant has been steadily employed for the past five years, and yet he appears to have made no effort to resolve his student loans and his many other financial delinquencies. He offered no explanation for his failure to resolve or settle his financial delinquencies even when he was employed. I conclude that he failed to act responsibly in identifying and resolving his substantial debts. I find that AG ¶ 20(b) does not apply to the facts of Applicant's case.

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." Nothing in the record establishes that Applicant has received financial counseling or that he has otherwise taken positive action to resolve his financial problems. Moreover, nothing in the record establishes that he has made good-faith efforts to resolve his delinquent debts. Accordingly, I conclude that AG ¶¶ 20(c) and 20(d) do not apply to the facts of Applicant's case. AG ¶¶ 20 (e) and 20 (f) are not raised by the facts of 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.

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 is a mature adult. His financial delinquencies occurred repeatedly over a period of seven years or more, suggesting lack of interest or inability to learn to manage his financial commitments responsibly. During his interview with the OPM investigator, he stated that he intended to pay some of his delinquent debts at some unspecified future date. In determining an individual's security worthiness, the Government cannot rely on the possibility that an applicant might resolve his or her outstanding debts at some future date. ISCR Case No. 98-0614 at 5 (App. Bd. Jul. 12, 1999).

Applicant also said he did not want to contact his creditors to determine the validity of his delinquent debts because he did not want the creditors to seek payment from him even if the debts had been delinquent for seven years or more. He indicated he preferred to say nothing and to let the delinquent debts "drop off" his credit report.

DOHA's Appeal Board has noted that "a strategy of merely waiting out creditors is not an adequate substitute for serious and reasonable efforts to pay off debts." Moreover, it is well settled that failure to discharge debts over a period of time constitutes a continuing course of conduct that raises concerns about an applicant's reliability and trustworthiness. ISCR Case No 07-10575 at 4 (App. Bd. Jul. 3, 2008).

Applicant has been steadily employed for over five years. He provided no documentation to show that he had paid or had payment plans in place to satisfy his delinquent debts. He failed to demonstrate that his financial problems will not continue to be a trustworthiness concern in the future.

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

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. – 1.u.: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Joan Caton Anthony
Administrative Judge