



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



In the matter of:)
)
-----) ADP Case No. 09-07941
)
Applicant for Public Trust Position)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

February 28, 2011

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) lists nine debts totaling \$39,611. He did not provide proof of any payments to his SOR creditors. He failed to make sufficient progress in resolving his SOR debts, and financial considerations concerns are not mitigated at this time. Applicant's eligibility to occupy a public trust position is denied.

Statement of the Case

On April 14, 2009, Applicant submitted a Questionnaire for Public Trust Positions (SF 85P) (Item 6). On June 24, 2010, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised; Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation); and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline F (financial considerations). (Item 1) The SOR detailed reasons why DOHA could not make the preliminary

affirmative finding under the Directive that it is clearly consistent with national security to grant or continue Applicant's access to sensitive information or assignment to a public trust position, and recommended referral to an administrative judge to determine whether Applicant's access to sensitive information or assignment to a public trust position should be granted, continued, denied, or revoked.

On July 23, 2010, Applicant responded to the SOR allegations and waived his right to a hearing. (Item 3) A complete copy of the file of relevant material (FORM), dated October 19, 2010, was provided to him on November 10, 2010. He was afforded an opportunity to file objections and to submit material in refutation, extenuation, or mitigation.¹ On January 14, 2011, Applicant responded to the FORM. On January 20, 2011, Department Counsel indicated he did not object to consideration of Applicant's response. The case was assigned to me on February 17, 2011.

Procedural Issues

On October 19, 2010, Department Counsel moved to amend the SOR by striking all language referring to Guideline E, and substituting language from Guideline F. (FORM at 4-5) Applicant did not object to the amendment, and Department Counsel's motion to amend the SOR is granted.

Findings of Fact²

In Applicant's response to the SOR, he admitted the debts in SOR ¶¶ 1.a-1.i. (Item 3) His admissions are accepted as factual findings.

Applicant is a 57-year-old employee of a defense contractor, who has been employed since May 2009 as a material handler.³ He was unemployed from April 2006 to May 2009. He served in the Navy from 1972 to 1975. He married in 1984, and he is separated from his spouse. His daughter was born in 1980, and his stepson was born in 1972. When he completed his SF 85P, he responded in the affirmative to the question seeking information about any debts more than 180 days delinquent in the last seven years, and he disclosed his mortgage became delinquent in October 2006.⁴

¹The DOHA transmittal letter is dated October 26, 2010, and Applicant's receipt is dated November 10, 2010. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

²Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

³Unless stated otherwise, the information in this paragraph is from Applicant's SF 85P. (Item 6)

⁴According to Applicant's September 9, 2009 Office of Personnel Management (OPM) personal subject interview (PSI), Applicant renegotiated his mortgage payment in August 2009, eliminating \$31,899 in overdue interest, reducing his monthly payment from \$1,700 to \$833, and bringing his account to current status. (Item 10 at 3) He said he did not list his other delinquent debts on his SF 85P because he believed the Government would obtain a credit report, which would reflect all of his delinquent debts. (Item 10 at 5)

Financial Considerations

Applicant's SOR lists nine debts, totaling \$39,611: (a) credit card collection account (\$8,573); (b) collection account for home alarm system (\$347); (c) collection account (\$264); (d) department store collection account (\$1,164); (e) telecommunications collection account (\$2,265); (f) collection account (\$1,180); (g) vehicle repossession collection account (\$24,840); (h) collection account (\$883); and (i) pest control collection account (\$95). (Item 10 at 3-4)

Applicant's largest delinquent SOR debt related to \$24,840 owed for voluntary repossession of a vehicle. (SOR ¶ 1.g; Item 10 at 3) In 2005, Applicant co-signed for the purchase of a 2005 Nissan Altima with his daughter and son-in-law. They failed to make payments and the vehicle was repossessed. *Id.* In his September 9, 2009 OPM PSI, Applicant said he would ask his daughter and son-in-law to make payment arrangements. *Id.* The result of Applicant's request to his daughter and son-in-law or other follow-up information about resolution of this debt is unknown.

The debts in SOR ¶¶ 1.a (\$8,573) and 1.d (\$1,164) relate to the same credit card company. (Item 10 at 3) He may have actually owed about \$19,000 total on these two cards in August 2008. (Item 10 at 3-4) There is no documentation of attempts to resolve these two delinquent debts.

Applicant's September 9, 2009 OPM PSI indicated that he would pay four of his smaller SOR debts as soon as possible: 1.b (\$347), 1.c (\$264), 1.h (\$883), and 1.i (\$95). (Item 10 at 3-4) However, he did not provide any evidence that he paid these creditors or otherwise attempted to resolve these four debts.

Applicant's September 9, 2009 OPM PSI contains his personal financial statement (PFS). This PFS indicates the following information about his monthly income and expenses: gross pay (including U.S. Civil Service Retirement of \$1,000) \$3,200; net pay \$2,700; mortgage \$930; utilities \$150; food \$200; vehicle \$400; insurance \$100; miscellaneous \$125; and remainder after expenses \$795. (Item 10 at 5) He did not explain why he could not apply some of the remainder to his delinquent SOR accounts.

Applicant explained during his September 9, 2009 OPM PSI that in 2006 he resigned from his employment because of hernia surgery. (Item 10 at 3) His unemployment compensation was insufficient to pay his debts. In 2008, he had a tumor on his gum, and he received radiation therapy for prostate cancer. (Item 10 at 3; FORM response) He also suffers from diabetes, obesity, and depression (major recurrent). (FORM response) In 2009, he considered filing for bankruptcy under Chapter 13 of the Bankruptcy Code. (Item 10 at 3-4) There is no evidence of financial counseling or that he actually filed for or obtained bankruptcy protection.

Applicant's SF 85P does not include any reportable information concerning abuse of alcohol or drugs, or any derogatory involvement with law enforcement or the courts. He concluded his FORM response with the comment, "I have served my country

proudly and faithfully for over 30 years as a member of the USN, a Civil servant and a DOD contractor and I would never betray her for anything.”

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 [or access to sensitive information].” *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 ADP 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 overarching 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. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance [or access to sensitive information]." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). 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." 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."

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant trustworthiness concern is under Guideline F (financial considerations).

Financial Considerations

AG ¶ 18 articulates the trustworthiness concern relating to financial problems:

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.

AG ¶ 19 provides two disqualifying conditions that could raise a trustworthiness concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" and "(c) a history of not meeting financial obligations." 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 OPM PSI, his responses to DOHA interrogatories, and his SOR response. Applicant's SOR lists nine debts totaling \$39,611. Some of his debts became delinquent in 2006, when he became unemployed. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

(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;

(b) 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;

(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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant's conduct in resolving his debts warrants very limited application of AG ¶¶ 20(b), 20(c), and 20(d).⁵ There is no evidence of financial counseling. He showed

⁵The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

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

some good faith when he admitted responsibility for his SOR debts in his OPM PSI and his SOR response. Applicant's financial situation was damaged by insufficient income, unemployment, and medical problems. However, Applicant's financial circumstances have been relatively stable since May 2009 when he obtained employment with his current employer, and he has not provided sufficient information about why he did not follow through and pay at least some of the smaller delinquent debts listed on his SOR. His documented efforts to resolve his delinquent debts after May 2009 are insufficient to fully establish any mitigating conditions.

Applicant did not establish that he acted responsibly under the circumstances. The file lacks proof that he maintained contact with all of his creditors.⁶ There are no receipts or account statements from creditors, establishing any payments to his SOR creditors. There is insufficient evidence that his financial problem is being resolved and is under control. The file lacks evidence that he has acted responsibly on any of his SOR debts.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for assignment to 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.

The ultimate determination of whether to grant eligibility for assignment to 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 have incorporated my comments under Guideline F in my whole-person analysis. Some of the

(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)).

⁶“Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties.” ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

factors in AG ¶ 2(a) were addressed under Guideline F, but some warrant additional comment.

Although the rationale for reinstating Applicant's access to sensitive information or assignment to a public trust position is insufficient to support a favorable determination at this time, there are several factors tending to support approval of his access to sensitive information or assignment to a public trust position. Applicant is a 57-year-old material handler, who has retained employment by the same government contractor since May 2009. He is sufficiently mature to understand and comply with his security responsibilities. He deserves some credit for volunteering to support the U.S. Government in the U.S. Navy, as a civil servant, and as an employee of a Department of Defense contractor. There is every indication that he is loyal to the United States and his employer. There is no evidence that he abuses alcohol or uses illegal drugs. Applicant's financial situation was damaged by unemployment and serious medical problems, including radiation treatment for cancer. During his lengthy period of unemployment and convalescence, he had insufficient income to address his delinquent debts. I give Applicant substantial credit for admitting responsibility for his SOR debts in his SOR response and in his OPM PSI. He made a substantial effort to keep his mortgage current. He was honest in his OPM PSI about his failure to address most of his delinquent debts. These factors show some responsibility, rehabilitation, and mitigation.

The whole-person factors against reinstatement of Applicant's access to sensitive information or assignment to a public trust position are more substantial at this time. Applicant's SOR lists nine debts totaling \$39,611. Applicant's employment has been stable since May 2009. On September 9, 2009, he told an OPM investigator that he would pay his four smallest SOR debts, which total \$1,589, as soon as possible. He also completed a PFS, which indicated he had a monthly remainder of \$795. He did not explain why he did not provide proof of any payments to his SOR creditors over the next 18 months. He did not provide enough information to explain why he did not address his delinquent debts. He did not provide any documentation showing attempts to establish payment plans. He did not pay the three smallest SOR debts in 1.b (\$347), 1.c (\$264), and 1.i (\$95), even though his PFS indicates he had the means to do so. Applicant has failed to make sufficient progress resolving his delinquent SOR debts to establish his financial responsibility.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude financial considerations concerns are not mitigated. Eligibility for assignment to a public trust position is denied.

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

Subparagraphs 1.a to 1.i: Against Applicant

Conclusion

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

MARK HARVEY
Administrative Judge