



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



In the matter of:)	
)	
-----)	ADP Case No. 10-00210
)	
Applicant for Public trust Position)	

Appearances

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

January 31, 2011

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the case file, pleadings, and exhibits, eligibility for holding a public trust position is denied.

Statement of Case

On July 8 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing reasons why DOHA could not make the preliminary affirmative determination of eligibility for a public trust position, and recommended referral to an administrative judge to determine Applicant's eligibility to hold a public trust position. 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); and the Adjudicative Guidelines (AGs), implemented by the Department of Defense on September 1, 2006.

Applicant responded to the SOR on August 12, 2010, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant

Material (FORM) on October 6, 2010, and did not respond with any information within the 30 days permitted. The case was assigned to me on November 24, 2010.

Summary of Pleadings

Under Guideline F, Applicant is alleged to have accumulated nine delinquent debts, exceeding \$99,000, as follows: creditor 1.a (\$233); creditor 1.b (\$82); creditor 1.c (\$33,593); creditor 1.d (\$1,010); creditor 1.e (\$18,715); creditor 1.f (\$380); creditor 1.g (\$188); creditor 1.h (\$9,089); and creditor 1.i (\$14,098). In his response to the SOR, Applicant admitted all but one of the alleged delinquent debts. He provided no explanations to his answers.

Findings of Fact

Applicant is a 40-year-old TRICARE customer service representative who seeks eligibility to hold a public trust position. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Applicant has been married to his spouse since August 1977 (see Item 1). He has four children from this marriage. He attended college between September 1992 and August 1997 at accredited institutions of higher learning. He has no degree from either institution.

While attending college, Applicant accumulated a number of student loans. Records document he accrued student loans exceeding \$73,000 (Items 4 through 6 and 9). Unemployed for much of the period spanning December 2007 and April 2009, he was unable to pay on any of his student loans. Consequently, his loans were placed in delinquent status. (Item 7) Applicant has made no payments on any of his delinquent student loans.

Besides his delinquent student loans, Applicant accumulated a number of delinquent consumer debts. Credit reports document that he accrued delinquent debts with four creditors in excess of \$1,500 (*viz.*, creditor 1.a for \$233, creditor 1.b for \$82, creditor 1.d for \$1,010, and creditor 1.g for \$188) between 2002 and 2006. (see Item 5)

In an interview conducted by an agent from the Office of Personnel Management in November 2009, Applicant listed net monthly income of \$2,022, monthly expenses of \$1,060 and monthly debt payment outlays of \$145. (Item 7) He reported monthly discretionary funds of \$417 and assets of \$11,600. (Item 7) He provided no explanations why he could not make monthly payments on his student loans with the remaining funds available to him every month. He indicated only that he intended to contact the listed four consumer creditors to explore payment options available to him. Once he is able to do so, he wants to resolve his student loan accounts. (Item 7)

Afforded an opportunity to supplement the record, Applicant provided no endorsements or performance evaluations on his behalf. Nor did he provide any proof of community and civic contributions.

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to occupy a public trust position. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate public trust concerns." These guidelines must be considered before deciding whether or not a determination of eligibility to occupy a public trust position should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable trust risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

Financial Considerations

The Concern: 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. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known

sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts. AG ¶ 18.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's eligibility to hold a public trust position may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a public trust position depends, in large part, on the relevance and materiality of that evidence. See *Kungys v. United States*, 485 U.S. 759, 792-800 (1988). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to hold a public trust position. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused privacy information before it can deny or revoke an applicant's eligibility to hold a public trust position. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard privacy information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her public trust worthiness through evidence of refutation, extenuation, or mitigation.

Analysis

Applicant is a TRICARE customer service representative who accumulated a number of delinquent debts (mostly student loan obligations) during a period of extended unemployment. His reported delinquent debts include four student loan obligations exceeding \$82,000 and four consumer debts exceeding \$1,500. His accumulation of delinquent debts and his past inability and unwillingness to address these debts warrant the application of two of the disqualifying conditions (DC) of the Guidelines: DC ¶ 19(a), "inability or unwillingness to satisfy debts," and ¶19(c) "a history of not meeting financial obligations."

Applicant's pleading admissions of most of the debts covered in the SOR negate the need for any independent proof (see *McCormick on Evidence*, § 262 (6th ed. 2006)). Each of Applicant's listed debts, though, are fully documented in Applicant's latest credit reports and provide ample corroboration of his debts.

Moreover, some judgment problems persist, too, over Applicant's unexplained delinquencies and his failure to demonstrate he acted responsibly in addressing his listed debts once the underemployment conditions that contributed to the delinquencies had passed or eased, and his finances had improved. See ISCR Case 03-01059 at 3 (App. Bd. Sep. 24, 2004). Not only are his listed debt delinquencies ongoing, but he has failed to address them in any tangible way. Mitigation credit is not available to Applicant based on the evidence developed in this record.

Holding a public trust position involves a fiduciary relationship between the Government and the position. Quite apart from any agreement the position occupant may have signed with the Government, the nature of the position occupant's duties and access to information protected by privacy laws impose important duties of trust and candor on the position occupant that are considerably higher than those typically imposed on Government employees and contractors involved in other lines of Government business. See *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Failure of the applicant to make concerted efforts to pay or resolve his debts when able to do so raises concerns about whether the applicant has demonstrated the trust and judgment necessary to protect privacy-covered information in his possession.

Based on the documented materials in the FORM, some extenuating circumstances are associated with Applicant's inability to pay or otherwise resolve his debts. Available to Applicant is MC ¶ 20(b), "the conditions that resulted in the behavior 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."

Whole-person assessment does not enable Applicant to surmount the judgment questions raised by his accumulation of delinquent debts. Since his return to full-time employment in 2009, he has not shown any manifest effort in addressing any of his covered student loan and consumer debts to mitigate his still delinquent accounts. Resolution of his delinquent accounts is a critical prerequisite to his regaining control of his finances.

While unemployment conditions played a considerable role in his accumulation of so much delinquent debt, Applicant failed to provide any explanatory material for consideration. Endorsements and performance evaluations might have been helpful, too, in making a whole-person assessment of his public trust position eligibility, but were not provided. Overall, public trust position eligibility assessment of Applicant based on the limited amount of information available for consideration in this record does not enable him to establish judgment and trust levels sufficient to overcome trust concerns arising out of his accumulation of delinquent debts.

Taking into account all of the documented facts and circumstances surrounding Applicant's debt accumulations and his failure to provide any proof of corrective actions taken to address his old debts, it is still soon to make safe predictive judgments about Applicant's ability to repay his debts and restore his finances to stable levels commensurate with the minimum requirements for holding a public trust position. Unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.i.

In reaching my decision, I have considered the evidence as a whole, including each of the 2(a) factors enumerated in the AGs.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE F (FINANCIAL CONSIDERATIONS): AGAINST APPLICANT

Subparas. 1.a through 1.i:

Against Applicant

Conclusions

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

Roger C. Wesley
Administrative Judge

