



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



In the matter of:)
)
) ADP Case No. 10-04533
)
Applicant for Public Trust Position)

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: *Pro se*

August 9, 2011

Decision

HEINY, Claude R., Administrative Judge:

Applicant owes \$53,000 in past due federal taxes. He owes approximately \$6,000 on four other delinquent accounts. His monthly expenses exceed his monthly income. He has failed to rebut or mitigate the trustworthiness concerns under financial considerations. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to sensitive information and eligibility for a public trust position is denied.

Statement of the Case

On November 4, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing 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 (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

On December 16, 2010, Applicant answered the SOR and requested a hearing. On April 28, 2011, I was assigned the case. On June 3, 2011 DOHA issued a Notice of Hearing for the hearing held on June 29, 2011. On June 10, 2011, an Amended Notice of Hearing was issued changing the start time of the hearing.

The Government offered exhibits (Ex.) 1 through 8, which were admitted into evidence without objection. Applicant testified and submitted Exhibits A through I, which were admitted into evidence without objection. The record was held open to allow Applicant to submit additional information. No additional information was received. On July 9, 2011, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, he denied the debts listed in SOR ¶ 1.g, 1.i, 1.j, and 1.k. He neither admitted nor denied the debt listed in SOR ¶ 1.h. The remaining debts he admitted. I incorporate Applicant's admissions to the SOR allegations. After a thorough review of the pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 46-year-old network administrator and computer help-desk technician who has worked for a defense contractor since July 2006, and seeks to maintain a position of public trust. (Tr. 54) Applicant called no witnesses other than himself. He submitted numerous emails attesting to his good work performance. (Ex. H and I) He received employee excellence awards for his work performance in November 2008 and January 2009. (Ex. J) He has completed a number of DoD training sessions and completed the requirements to be a Microsoft certified professional. (Ex. J)

Applicant's current monthly gross salary is \$2,800. He currently lives with his mother who suffers from HIV. He helps pay for his mother's medicine, which is expensive. His mother pays the rent. (Tr. 81) In September 2010, he completed a personal financial statement that showed his monthly expenses exceeded his income. His net monthly income was \$927, monthly expenses were \$1,371, and monthly debt payments were \$385. On the day of the hearing, he had less than \$10 in his checking account and savings account. (Tr. 85)

Applicant has three children: a daughter (age 3) born in June 2008, a daughter (age 18) born in January 1993, and a step-son (age 26) born in July 1985. (Ex. 1, 5) Although separated, Applicant has been married to the same woman throughout his financial problems. A hearing regarding Applicant's child support for his oldest daughter had been set for mid-June 2011, but was continued until August 3, 2011. (Ex. C) His oldest daughter, now age 18, lives with her grandmother; however, the state is sending the child support (\$547) he pays each month to his daughter's mother. (Tr. 65) Because the mother fails to send the money to the grandmother, Applicant and the grandmother have brought suit to have the money sent to the individual raising the child, *i.e.*, the grandmother. (Tr. 35) He is current on his child support obligations. (Tr. 46) He pays \$300 a month for child support for his youngest daughter. (Tr. 81)

In 1997 or 1998, Applicant's two full time jobs working as a computer local area network (LAN) administrator ended. (Ex. 3) He remained unemployed until 2002. He had worked for the companies for ten years and had accumulated sizable 401(k) retirement funds (\$260,000). (Tr. 55) He used his 401(k) funds for living expenses. At the time he withdrew the funds, he was unaware of the tax ramifications resulting from his use of the funds. (Tr. 19) Because he was not 59 and one half years of age when he withdrew the funds, the funds were subject to penalty in addition to being ordinary income in the year used. In August 2003, the IRS entered a \$40,194 federal tax lien against him (SOR 1 f). As of October 2008, \$53,385 was owed for past due taxes. (Ex. E)

Also in 1997 or 1998, Applicant and his spouse filed for Chapter 13, Wage Earner's Plan, bankruptcy protection. The bankruptcy was dismissed after three or four months because the required payments were not being made. He could not make the payments because of his wife's mental illness, his loss of employment, and his wife's unemployment. (Ex. 3) From the mid 1980s until the 1990s, his wife was hospitalized three times suffering from schizophrenia and bipolar disorder. (Tr. 33) His wife's credit card over spending was a manifestation of the disorder. He attributes the loss of a job due to her stalking. (Tr. 33) In June 2000, he and his wife separated. (Ex. 1)

In 2000, Applicant's home went into foreclosure. (Tr. 75) He filed for Chapter 13 bankruptcy protection in an attempt to prevent the foreclosure. (Tr. 87) In January 2001, the bankruptcy was dismissed and the home sold as part of the foreclosure. (Tr. 17)

In 2005 or 2006, Applicant had separated from his wife and was living with a male roommate. Each individual was to pay half of the monthly rent. Applicant allowed his step-son to live with him and did not charge his step-son rent. This resulted in his roommate refusing to pay his half of the \$398 monthly rent. (Ex. 3) Applicant then paid the entire amount of rent each month. (Tr. 47) Two months prior to the end of the year's lease, Applicant notified the property manager that he had to leave because his roommate was refusing to pay his share of the rent and he could no longer pay the full amount. After he left, his roommate continued to live in the apartment. (Tr. 48) His ex-roommate was later incarcerated. (Tr. 88) He has received notice that the landlord is attempting to collect \$3,190 from him for past-due rent (SOR 1. d). In March 2010, during a personal subject interview, he said he intended to contact the apartment complex to resolve this debt.

Applicant and his wife entered into an agreement to purchase a home schooling curriculum for his two children. He believes the \$841 debt on this is his wife's responsibility. (Tr. 3)

Applicant's 2008 income was \$28,644. (Ex. D) In 2009, his income was \$34,071 and in 2010, his income was \$36,400. For tax year 2008, 2009, and 2010, his anticipated tax refunds were intercepted and applied to his tax obligation. (Ex. F, Ex. 3, D)

In September 2010, Applicant paid a \$400 telephone service debt. (Ex. G-2) The debt was incurred due to early termination of the service. (Ex. 3) In November 2010, his 1995 Honda Accord was stolen. (Tr. 84) On June 24, 2011, five days before the hearing, Applicant retained a law firm to assist him in filing for Chapter 7 bankruptcy protection. (Ex. B) As part of the bankruptcy filing, he has attended financial counseling sessions. (Tr. 40)

A summary of Applicant's judgment, accounts charged off, accounts placed for collection and other unpaid obligations and their current status follows:

	Creditor	Amount	Current Status
a	Chapter 13 bankruptcy January 2001		Applicant entered into bankruptcy attempting to prevent the foreclosure on his home, which failed.
b	Collection account for failing to return cable box.	\$569	Account has been settled. Applicant obtained the cable equipment from his wife and returned it to the cable company. \$155 remains due to the cable company for the debt listed in SOR 1.c. (Tr. 43, Ex. G-3)
c	Collection account for the cable bill.	\$191	Applicant's cable bill balance is \$155 (Tr. 44, Ex. G-3)
d	Collection account for unpaid rent.	\$3,190	Unpaid. Applicant has made inquiries about this debt. (Tr. 48)
e	Collection agency collecting on a delinquent credit card account.	\$1,695	Paying. Creditor agreed to accept \$25 per month. Applicant has been making monthly payments since September 2010. (Tr. 38, Ex. G-1)
f	Internal Revenue Service tax lien entered in August 2003.	\$53,000	Unpaid. No agreement has been reached. Applicant's yearly tax refunds have been intercepted, but no repayment agreement has been established with the IRS.
g	Collection account.	\$76	Paid in September 2010. (Tr. 49)
h	Telephone service collection account.	\$2,218	Unpaid. Applicant does not believe this is his debt. He thinks his wife may have opened it in his name. (Tr. 50) He has not contacted the creditor. (Tr. 50)

	Creditor	Amount	Current Status
i	Gas utility service at his home, which went to foreclosure.	\$397	Unpaid.
j	Telephone service collection account.	\$246	Applicant asserts this debt was paid and he currently has telephone service with the successor-in-interest of the company. (Tr. 51)
k	Collection account for home schooling course.	\$841	Applicant disputes this is his bill. He believes his wife is solely responsible for this debt. (Tr. 52)
	Total SOR debt	\$9,423	This amount does not include past due taxes.

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 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 sensitive information 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.

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

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns 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.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding confidential 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 as agreed. Absent substantial evidence of extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is

inconsistent with holding a position of trust. An applicant is not required to be debt free, but is required to manage his finances to meet his financial obligations.

Applicant has a history of financial problems. Applicant has resorted to bankruptcy protection three times in 1997 or 1998, 2000, and most recently in 2011. The first two Chapter 13 bankruptcies were dismissed shortly after being filed because he could not make the required payments. He owes approximately \$6,000 on four delinquent accounts and owes \$53,000 in past due federal income tax. His monthly expenses exceed his monthly income. Disqualifying Conditions AG ¶ 19(a), "inability or unwillingness to satisfy debts" and AG ¶ 19(c), "a history of not meeting financial obligations," apply.

Five Financial Considerations 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 shows limited mitigation under AG ¶ 20(b) and 20(d) for financial considerations. His financial difficulties are both recent and multiple. Since monthly expenses exceed his monthly income, he is unlikely to be able to do much more than to address the account on which he pays \$25 monthly (SOR 1.e). If he follows through on filing for Chapter 7 bankruptcy protection, the debts other than his tax liability may be discharged. It is uncertain how his federal income tax obligation will be affected by a bankruptcy filing.

The mitigating factor listed in AG ¶ 20(a) does not apply. His debts are numerous, and since they remain unpaid, they are recent. Since his monthly expenses exceed his monthly income, his financial problems are unlikely to continue.

The mitigating factor listed in AG ¶ 20(b) partially applies. In 1998, Applicant was laid off from two jobs and his wife suffers from medical problems. Additionally, in June 2000, he separated from his wife. All of these were conditions beyond his control that adversely impacted his finances. Even though these factors were beyond his control and added to his financial problems, his income is such that his financial problems will continue for the foreseeable future.

In preparation for filing for Chapter 7 bankruptcy relief, Applicant has attended financial counseling. What impact that counseling has had on him is unknown. Merely attending counseling without a change in the handling of his finances is insufficient for AG ¶ 20(c) to apply.

For AG ¶ 20(d) to apply there must be a good-faith effort to repay the creditors. This is evident with the debt in SOR 1.e (\$1,695) on which he pays \$25 monthly. This also applies to the returned cable box (SOR 1.b, \$569), the \$76 debt listed in SOR 1.g, the \$246 phone bill listed in SOR 1.j, and the home study course his wife obtained listed in SOR 1.k (\$841). I find for Applicant as to these debts. I also find for him as to SOR 1.a, the bankruptcy filing caused by his and his wife's unemployment.

The mitigating condition in AG ¶ 20(e) does not apply because Applicant has failed to document any reasonable basis to dispute the legitimacy of the past-due debt.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a position of trust 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 position of trust 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. The largest of Applicant's debts, the unpaid federal income tax, was incurred when he used his 401(k) retirement account to pay living expenses after being laid off from the two jobs he held for ten years. Although he did not understand the tax ramifications of withdrawing this money when he did so, the \$53,000 tax debt remains unpaid.

Applicant leads a frugal lifestyle. He is making sure his child support is paid as agreed so that his children are properly cared for. He appears to want to pay his past due obligations, but lacks the income to do so. The issue is not simply whether all his debts are paid—it is whether his financial circumstances raise concerns about his fitness to hold a position of trust. (See AG ¶ 2(a)(1).) At his current income, his expenses exceed his income. This is unlikely to change in the near future. Because of the large unpaid tax debt and his monthly expenses exceeding his monthly income, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a position of trust. For all these reasons, I conclude he has not mitigated the security concerns arising from his financial considerations.

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, F, Financial Considerations:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b	For Applicant
Subparagraphs 1.c and 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraphs 1.h and 1.i:	Against Applicant
Subparagraphs 1.j and 1.k:	For Applicant

Conclusion

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

CLAUDE R. HEINY II
Administrative Judge