



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



In the matter of:)	
)	
)	ADP Case No. 10-04540
)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Gregg A. Cervi, Esquire, Department Counsel
For Applicant: *Pro se*

May 31, 2011

Decision

MASON, Paul J., Administrative Judge:

Based on a review of the case file, pleadings, and exhibits, Applicant’s eligibility for a public trust position is denied.

Statement of the Case

Applicants completed and certified his Questionnaire for Public Trust Position (SF 85P) (SCA) on July 8, 2009. On March 3, 2010, Applicant was interviewed about his delinquent debts by an investigator from the Office of Personnel Management (OPM). A summary of his interview appears in his interrogatory answers dated September 3, 2010. Applicant agreed with the investigator’s summary and that it could be used at a hearing to determine his security suitability.

On November 19, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under financial considerations (Guideline F). The action was taken pursuant to 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 (AG) made effective within the Department of Defense on September 1, 2006.

Applicant submitted his answer to the SOR on December 15, 2010. He requested a decision be made on the record in lieu of a hearing. A copy of the Government's File of Relevant Material (FORM, the Government's evidence in support of the allegations of the SOR) was sent to Applicant on March 14, 2011. Applicant received the FORM on March 16, 2011. His response was due on April 15, 2011. No response was received. The case file was assigned to me on May 11, 2011.

Findings of Fact

The SOR alleges 11 delinquent accounts totaling more than \$456,897 under the financial considerations guideline. The delinquent debts consist of two mortgages, one cellular phone account, a student loan account, and credit cards. The accounts became delinquent between August 2008 and March 2009. Applicant admitted all the debts except for SOR 1.b and 1.j. He claimed he paid SOR 1.b, and SOR 1.j was sold to a third party. Applicant provided no supporting documentation to substantiate his claims.

Applicant is 43 years old and has been married since September 2002. He made reference to child support in his interview with OPM, however, there is no mention of children in his SCA. Applicant has been employed as a software packager since January 2009. Between December 2007 and January 2009, Applicant was employed for less than two months.

Applicant had been working as a systems programmer for a global computer company for ten years when he was suddenly laid off in December 2007. His wife was laid off in February 2008. Fortunately, he and his wife were able to pay their bills for almost a year because of his \$11,000 severance package, their savings account, and unemployment compensation.

Between December 2007 and early 2009, Applicant unsuccessfully tried to sell his house that he purchased in 2003, and refinanced on two occasions. In 2008, he was told to stop paying his mortgage in order to justify a loan modification. In late 2008, he stopped paying the mortgage, but the loan modification requests were denied on four occasions in the first half of 2009.

In June 2009, Applicant was informed his house would be foreclosed. He moved out of the house in September 2009 with a \$3,000 moving allowance provided by a bank. The house was sold, but Applicant was not aware of the purchase price and whether there was a deficiency balance due.

Once Applicant found his current employment in January 2009, it took him several months to bring his debts to a current status. One reason was child support that

was in arrears by \$900. He eliminated the arrearage by May 2009. Except for his credit cards, Applicant is currently in an improved financial condition.

Applicant provided his financial status to the OPM investigator during his interview on March 3, 2010. His net monthly income was \$5,000 a month; monthly debts consisted of \$700 in monthly child support; monthly expenses of \$1,250; leaving a monthly net remainder of \$1,550. Applicant was aware of most of the delinquent accounts and intends to repay his credit debt through a debt consolidation plan. He never had financial counseling.

Character Evidence

During his unemployment in 2008, Applicant never contemplated violating the law to pay the delinquent bills. Applicant's financial plan of repaying the delinquent accounts will not reach fruition until his wife regains employment.

Policies

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. An administrative judge's objective is a fair, impartial and commonsense decision that embraces all available, reliable information about the person, past and present, favorable and unfavorable.

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 security decision.

A person who seeks a public trust position enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship is not restricted to normal duty hours. Rather, the relationship is a 24-hour responsibility between an applicant and the federal government. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified 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.

Analysis

Financial Considerations (FC)

The security concern for financial considerations is set forth 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 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.

The SOR lists two delinquent mortgages, one cellular phone debt, a student loan account, and eight delinquent credit accounts totaling \$456,897. AG ¶ 19(a) (*inability or unwillingness to satisfy debts*) applies due to Applicant's inability to pay the debts. AG ¶ 19(c) (*a history not meeting financial obligations*) applies as the credit reports show that the accounts became delinquent between August 2008 and March 2009.

Applicant's financial delinquencies may be mitigated by AG ¶ 20(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 reliability, trustworthiness, and good judgment*); AG ¶ 20(b) (*the conditions that resulted in the financial problem were largely beyond the person's control and the individual acted responsibly under the circumstances*); AG ¶ 20(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*); and, AG ¶ 20(d) (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*).

AG ¶ 20(a) does not apply due to the number of debts and Applicant's failure to take action to resolve the debts after returning to work in January 2009. AG ¶ 20(b) is applicable to the circumstances of this case because Applicant was laid off in December 2007, and his wife was laid off in February 2008. The weight given to AG ¶ 20(b) is lessened by Applicant's decision not to retain a debt consolidation company to address the delinquent accounts. In addition, even though Applicant's wife was not working when he was interviewed by the OPM investigator, Applicant indicated he had a \$1,550 monthly remainder after payment of his debts and expenses. In sum, Applicant receives only limited mitigation under AG ¶ 20(b) for not addressing his debts responsibly.

AG ¶ 20(c) does not apply. Applicant has never had financial counseling, and he receives no mitigation under this condition because there is no indication the debts are being resolved or are under control. There is no evidence demonstrating that Applicant

has paid any of the listed creditors as required under AG ¶ 20(d). In sum, the mitigating evidence under AG ¶ 20(b) does not surmount the negative evidence presented under AG ¶¶ 19(a) and 19(c).

Whole-Person Concept

I have examined the evidence with the disqualifying and mitigating conditions in my ultimate finding for Applicant under the financial guideline. I have also weighed the circumstances within the context of nine variables known as the whole-person concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors:

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 the participation was 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.

I have considered the disqualifying and mitigating conditions in light of the whole-person concept. Applicant is 43 years old and married. In December 2007, he suddenly lost his job after 10 years. In February 2008, his wife lost her job. For the next year, he was employed less than two months.

Applicant exercised good judgment by continuing to pay his bills for most of 2008 while unemployed. However, as the credit bureau reports show, Applicant's credit accounts began to fall delinquent in August 2008 when he could not longer pay the delinquent bills. He tried but failed to sell his home. In early 2009, he tried but failed to obtain a loan modification agreement to reduce his mortgage. By September 2009, his house was foreclosed and sold.

Applicant has been working as a software packager since January 2009. In March 2010, he told the OPM investigator he recognized most of the listed accounts and planned to take action to resolve the accounts. To his credit, he eliminated the child support arrearage by May 2009. He restored his car payments to a current status and believed his financial situation had improved. With discretionary income of \$1,550 every month remaining after payment of his debts and expenses, Applicant has had extra money to repay some of the SOR debts, specifically two accounts that are less than \$150. Alternatively, Applicant could have used the extra money to retain a debt consolidation company. Because Applicant did not act responsibly to deal with the listed delinquent debts since January 2009, he has not met his burden of demonstrating he is eligible for a public trust position.

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 (Financial Considerations, Guideline F): AGAINST APPLICANT

Subparagraph 1.a through 1.k

Against Applicant

Conclusion

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

Paul J. Mason
Administrative Judge