



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



In the matter of:)	
)	
)	ADP Case No. 10-05648
)	
Applicant for Public Trust Position)	

Appearances

For Government: Fahryn E. Hoffman, Esquire, Department Counsel
For Applicant:

October 24, 2011

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to sensitive information is denied.

Applicant submitted his Questionnaire for Public Trust Position (SF 85P) on November 4, 2009. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F on March 24, 2011. The action was taken under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the *Adjudicative Guidelines For Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR on March 31, 2011. He answered the SOR in writing on April 18, 2011, and he requested a hearing before an administrative judge. DOHA received the request on April 21, 2011. Department Counsel was prepared to proceed on June 2, 2011, and DOHA assigned the case to me on June 20, 2011. DOHA issued a notice of hearing on July 11, 2011, and I convened the hearing as scheduled on July 28, 2011. The Government offered exhibits

GE 1 through GE 9, which were received and admitted without objection. Applicant testified and submitted exhibits AE A and AE B, which were received and admitted without objection. DOHA received the transcript of the hearing (Tr.) on August 11, 2011. I held the record open until August 29, 2011, for the submission of additional matters. Applicant timely submitted AE C through AE O, which were received and admitted without objection. The record closed on August 29, 2011.

Notice

Applicant received the hearing notice on July 15, 2011. (Tr. at 8) I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived his right to 15 days notice. (*Id.*)

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in the SOR, contingent upon proof the debts were his, as he disputed owing five debts to one creditor. He also provided additional information to support his request for eligibility for a public trust position.

Applicant, who is 39 years old, works as a data analyst for a Department of Defense contractor. Applicant began his current position in November 2009 and has not violated his employer's confidentiality procedures. Prior to his current employment, Applicant worked as an operations analyst for three years.¹

Applicant graduated from high school and immediately enlisted in the United States Army in 1990. The Army honorably discharged him in December 1992. The Army awarded him an Army Achievement Medal, a National Defense Service Medal, Southwest Service Medal with two bronze stars, and several ribbons. After his military service, Applicant attended a technology school, but did not graduate.²

In 1998, Applicant started working for a major bank as a contractor. The bank later hired him as a permanent employee. In 1999, on his way to work, Applicant sustained several knife wounds in a road rage incident. One wound penetrated his neck muscles, requiring treatment at the hospital and an overnight hospital stay. He did not seek further treatment until 2003. By this time, he had experienced severe and ongoing pain in his neck, which he self-treated with over-the-counter pain and sleep medicines. Because these medicines did not relieve his pain or solve his sleep problems, he increased his use until he sought medical help. His doctor placed him on disability, which lasted at least 14 months. When his doctor did not release him for work by

¹GE 1; Tr. 38-39.

²GE 1; AE A; Tr. 19, 39.

January 2005, the bank terminated his employment. He remained unemployed until September 2006, and he received six months of unemployment.³

Applicant's financial problems began when his was disabled from working. The disability insurance carrier did not always send his disability check, causing him to lose his disability income for several weeks at a time. He used his savings and credit cards to pay his bills. When his unemployment ended, he again used his credit cards to pay his bills and living expenses.⁴

Applicant married in August 2005. He has a fifteen-year-old daughter, who began living with him in the summer of 2010. His wife works.⁵

Applicant's monthly salary increased from \$3,848 in gross income to \$4,082 in gross income in July 2011. His monthly net income increased from \$2,837 to \$3,009. His wife receives \$4,847 in net monthly income, for a total household net income of \$7,856. His monthly expenses include \$1,295 for rent, utilities for \$360, insurance for \$150, cable for \$170, telephones for \$335, car payments for \$1,011, \$250 for school loans, \$600 for groceries, \$530 for family therapy, \$585 for medical expenses, \$260 for school and work expenses, \$1,000 payment on a credit card debt, and \$59 a month to a credit repair company.⁶ His monthly expenses total \$6,610, leaving approximately \$1,240 a month for debt payment. His monthly income pays his monthly living expenses.⁷

Applicant submitted his income tax returns for the years 2007 through 2010. His tax returns reflect an income of \$41,000 in 2007, of \$59,000 in 2008, of \$89,600 in 2009, and of \$103,000 in 2010.⁸

The SOR identified eight purportedly continuing delinquencies as reflected by credit reports from 2009, 2010 and 2011, totaling approximately \$85,668. Some accounts have been transferred, reassigned, or sold to other creditors or collection agents. Other accounts are referenced repeatedly in both credit reports, in many instances duplicating other accounts listed, either under the same creditor or collection agency name or under a different creditor or collection agency name. Some accounts are identified by complete account numbers, while others are identified by partial

³GE 1; GE 5; Tr. 20-22, 44-49.

⁴GE 1; GE 4; Tr. 21, 51.

⁵GE 1; Tr. 24, 34.

⁶The November 11, 2009 credit report shows a bank credit card with a balance of \$20,555 and the notation "pays as agrees". See GE 3. The August 10, 2010 credit report shows a balance of \$18,909 and the July 18, 2011 credit report shows a balance of \$15,227. See GE 4, AE B. I find the \$1,000 monthly payment is for this account.

⁷GE 5; AE D; AE E; AE F; Tr. 69-74.

⁸AE G- AE J.

account numbers, in some instances eliminating the last four digits and in others eliminating other digits. Applicant defaulted on six of his SOR debts in 2007, one in 2008 and one in 2009.

When he met with the security investigator, Applicant denied obtaining five credit accounts with one bank. He admitted he had two accounts with this bank. The SOR lists four debts with this bank, and Applicant is paying monthly, a large debt with the bank. Applicant also disagreed with the balances on many accounts when he met with the security investigator.

Applicant has not received credit counseling. However, in February 2011, Applicant hired a law firm to review his credit report and verify the debts he owes. This firm has written to his creditors asking for information he is entitled to receive under the Fair Credit Reporting Act. The firm's efforts led to the removal of the judgment list in SOR ¶ 1.a and two collection accounts without explanation. I am unable to determine if the removed collection accounts are the same as accounts listed in the SOR, although it is possible. The firm has challenged eight other debts on his credit report with the credit reporting agencies and has written directly to the creditors for information. The firm is awaiting responses to its letters. Applicant also wrote letters to three creditors asking for information on his debts in July 2010, but did not receive a response.⁹

The status of the SOR debts in ¶¶ 1.b through 1.h is unpaid, but disputed. Applicant acknowledged to the security investigator that he owed the debts listed in SOR ¶¶ 1.a, 1.c, and 1.f, but disputed the balance. He also listed these three accounts on his SF 85P and one account from the bank. I find the debts in SOR ¶¶ 1.a, 1.c, and 1.f are Applicant's. The validity of the remaining debts is unknown, as the creditor has not responded to the letters from the firm, and the credit reports dated August 11, 2010 and February 7, 2011 indicate that the debts in SOR ¶¶ 1.b, 1.c, and 1.h are disputed. The July 18, 2011 credit report indicates more debts are disputed. The information on the credit reports does not provide a clear picture of the status of Applicant's debts.¹⁰

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

⁹GE 6; GE 9; AE A; AE K-AE O.

¹⁰SOR; GE 1; GE 4; GE 6; GE 8; AE B; AE K-AE O.

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 over-arching 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 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 describes the disqualifying conditions that could raise trustworthiness concerns. I have considered all the conditions, and the following are potentially applicable:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Appellant developed significant financial problems when he did not receive his disability checks and after he lost his job in January 2005. He used his credit cards to pay his living expenses and eventually stopped his payments. Most of the debts have not been resolved. These two disqualifying conditions apply.

The Financial Considerations guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 20(a) through 20(f), and the following 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 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 credit card debts occurred because he was unemployed for more than 18 months and because he did not always receive his disability income. He stopped paying most of his debts in 2007 about one year after he returned to work. His tax return for 2007 supports his inability to pay these debts at that time. He last defaulted on a debt in February 2009. He is paying one large debt not listed in the SOR, but none of the debts in the SOR. He retained the services of a law firm to help him verify the debts and the balances of these debts, as he denied some debts and disputed the balance owed on others. The law firm succeeded in removing three debts from his credit reports, but only one debt is clearly identified as an SOR debt. The reason for removal of the judgment is unclear, as judgments in his state of residence are collectible for five years after the date of judgment and can be renewed.¹¹ Based on the evidence in this record, AG ¶¶ 20(b) and (20)(c) are partially applicable in 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 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) 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. The decision to grant or deny a trustworthiness determination requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a trustworthiness concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a public trust position should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate trustworthiness concern.

¹¹The judgment could have been removed because it was not his or improperly obtained.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's financial problems began during his disability and increased after the bank terminated his employment. He did not return to work for more than 18 months after his termination. He relied on his credit cards to pay his expenses, creating more financial problems for himself. As his income improved, he began to remain current on most of his living expenses, except one car payment. The reasons for his car loan default in 2009 are unexplained and raise questions about his judgment. Applicant and his wife are paying one large credit card bill and their monthly living expenses. However, he has not paid any of the debts listed in the SOR. He hired a law firm to help verify his debts, when he did not get a response from the creditors when he wrote to them. At this time, the status of his unpaid debts is unknown.

Applicant has sufficient monthly income to meet his current monthly expenses and does so. He has taken steps towards the resolution of his SOR debts, but, at this time, these debts remain unpaid. He is moving in the right direction with his efforts to determine the validity of all the bank debts, since he denies owing the bank on five accounts. The record contains confusing information on the debts listed in the SOR, making it difficult to determine the status of his debts. The confusing evidence is insufficient to establish that Applicant has mitigated the Government's concerns about his trustworthiness. I recognize that Applicant served honorably in the Army, and that he has not violated his employer's confidentiality rules. However, his significant unpaid debts remain a concern.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has not mitigated the trustworthiness concerns arising under the financial considerations guideline.

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-1.h:	Against Applicant

Conclusion

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

MARY E. HENRY
Administrative Judge