



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



In the matter of:)	
)	
)	ADP Case No. 10-06287
)	
Applicant for Public Trust Position)	

Appearances

For Government: Paul M. Delaney, Esq., Department Counsel
For Applicant: *Pro se*

April 28, 2011

Decision

HEINY, Claude R., Administrative Judge:

Applicant has one unpaid judgment and 12 charged-off accounts or accounts placed for collection, which total in excess of \$16,000. Applicant provided false answers on his Questionnaire for Public Trust Positions, which he admits. He admits owing the money, but is unable to pay his delinquent debt. Applicant has failed to rebut or mitigate the trustworthy concerns under financial considerations and personal conduct. Based upon a review of the pleadings and exhibits, eligibility for access to sensitive information and eligibility for a public trust position is denied.

Statement of the Case

On November 23, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline F, financial considerations, and Guideline E, personal conduct. 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); Department of Defense (DoD) Regulation 5200.2-R, *Personnel*

Security Program, dated Jan. 1987, as amended (Regulation), and the adjudicative guidelines (AG).

On January 19, 2011, Applicant answered the SOR, and elected to have the matter decided without a hearing. Department Counsel submitted the Government's case in a File of Relevant Material (FORM), dated March 4, 2011. The FORM contained ten attachments. On March 21, 2011, Applicant received a copy of the FORM, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions. On April 7, 2011, Applicant answered the FORM. Department Counsel did not object to the response, which was admitted into the record. On April 18, 2011, I was assigned the case.

Findings of Fact

In Applicant's Answer to the SOR, he admitted all of the factual allegations in the SOR, and his admissions are incorporated herein. After a thorough review of the pleadings and exhibits, I make the following findings of fact.

Applicant is a 46-year-old custodian, who has worked for a defense contractor since January 2001. He is seeking to maintain a public trust position. He is currently divorced.¹ As of July 2010, when he had a personal interview concerning his finances, he made \$12 per hour. His monthly gross pay was \$1,920, his net pay was \$1,200, and his monthly expenses were \$1,313, which is \$113 more than his monthly income. (Item 6) He deals with this negative monthly balance by borrowing from coworkers between paychecks. (Item 6)

Applicant admits owing the two judgments and 23 collection or charged-off accounts, totaling approximately \$17,000.² Applicant did not attend the court proceedings that resulted in the two judgments against him. (Item 6) One judgment and nine delinquent accounts, totaling approximately \$9,000, were unpaid medical accounts. In 2008, Applicant was taken from work to the hospital complaining of chest pains. He spent two days in the hospital. (Item 6) Some of the unpaid medical accounts may have also been incurred when he broke his nose in 2000. (Item 6)

Applicant's wages are garnished \$39 per pay period to repay the judgment listed in SOR ¶ 1(a) for a debt incurred due to the repossessed automobile.

In November 2009, Applicant completed a Public Trust Position Application, Standard Form (SF) 85P. (Item 5) Section 22 a. of that form asked if he had any legal judgments rendered against him in the previous seven years. He answered "no" to the question even though he had two judgments entered against him, one in March 2009 (SOR ¶ 1(a)) and the other in February 2007 (SOR ¶ 1(b)). He also answered "no" to question Section 22 b., which asked if he was currently more than 180 days delinquent

¹The record does not contain the date of the divorce.

²The judgment (\$1,486) listed in SOR ¶ 1(a) for a repossessed vehicle and the charged-off auto loan account (\$1,079) listed in SOR ¶ 1(s) represent the same obligation.

on any loan or financial obligation. The delinquent accounts (SOR ¶ 1(c) through 1(y)) were incurred between June 2004 and October 2008 and were unpaid. In his SOR answer (Item 3), Applicant admits he falsified his SF 85P.

In Applicant's April 2011 response to the FORM, he states he is aware of his debts, but is unable to pay them because his take home pay is \$430 every two weeks. From this amount he must pay his rent, cable, gas, water, groceries, and car expenses.

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 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 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 trustworthiness 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 sensitive 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 under agreed upon terms. Absent evidence of strong 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 public trust position. An applicant is not required to be debt free, but is required to manage his finances so as to meet his financial obligations.

The evidence supports a conclusion Applicant has a history of financial problems. Applicant has two unpaid judgments and 23 charged-off accounts or accounts placed for collection, which total in excess of \$17,000. 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(a) – (e) 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;

(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.

None of the mitigating conditions apply. The mitigating condition listed in AG ¶ 20(a) does not apply because there are numerous unpaid debts, which do not appear to have been incurred under circumstances that are unlikely to recur. The mitigating condition listed in AG ¶ 20(b) does not apply. Applicant's medical bills from his broken nose and chest pains may be events beyond his control, but he must also show he has acted reasonably under the circumstances. Those medical debts from his broken nose occurred more than ten years ago and remain unpaid. Those from his stay in the hospital following his chest pains were incurred more than three years ago and remain unpaid. With the delinquent debt remaining unpaid, I find Applicant has not acted reasonably under the circumstances.

There is no showing he has received counseling and is current on his debts other. None of the SOR debts have been addressed with the exception of the \$39 per pay period garnishment to address the judgment listed in SOR ¶ 1(a). There are no clear indications that the problem is being resolved or is under control. The mitigating condition listed in AG ¶ 20(c) does not apply

The mitigating condition listed in AG ¶ 20(d) does not apply to the judgment being paid by garnishment. The garnishment does not represent a good-faith effort to repay overdue creditors or otherwise resolve his debts. Applicant admits all his delinquent debt. Since Applicant does not dispute the debt, the mitigating condition listed in AG ¶ 20(e) does not apply.

The charged-off account listed in SOR 1.s (\$1,079) is a duplication of the debt listed in SOR 1.a (\$1,486). Because these two delinquent obligations represent the same debt, I find for Applicant as to SOR 1.s.

Personal Conduct

Applicant admits he falsified his answers to questions 22(a) and 22(b) on his SF 85P. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government, when applying for a public trust position, is a security concern. He offered no explanation why he provided false information on his SF 85P. None of the mitigating factors apply.

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) 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 public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

The issue is not simply whether all of Applicant's debts have been paid – they have not – it is whether his financial circumstances raise concerns about his fitness to hold a public trust position. (See AG ¶ 2(a)(1).) One of his judgments is being paid by garnishment. None of the other delinquent accounts or the other judgment have been paid nor have repayment arrangements been made regarding these debts. Applicant admits he owes the money on his delinquent debt, but his current pay is insufficient to address those debts. Each month his expenses are greater than his income. He is unable to address his past due debts. He offered no explanation for why he provided false information on his SF 85P. His long-standing failure to repay his creditors, at least in reasonable amounts, or to arrange payment plans, reflects traits which raise concerns about his fitness to hold a public trust position.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a public trust position. This decision should not be construed as a determination that Applicant cannot or will not attain the state of true

reform and rehabilitation necessary to justify the award of a public trust position. The awarding of eligibility for a public trust position is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under the Applicant's current circumstances, a public trust position is not clearly consistent with national security, but should the Applicant be afforded an opportunity to reapply for a public trust position in the future, having paid the delinquent obligations, established compliance with a repayment plan, or otherwise addressed the obligations, he may well demonstrate persuasive evidence of his eligibility for a public trust position.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. 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 failed to mitigate the trustworthiness 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, Financial Considerations: **AGAINST APPLICANT**

Subparagraphs 1.a – 1.r:	Against Applicant
Subparagraphs 1.s:	For Applicant
Subparagraphs 1.t – 1.y:	Against Applicant

Paragraph 2, Personal Conduct: **AGAINST APPLICANT**

Subparagraphs 2.a and 2.b:	Against Applicant
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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 sensitive information is denied.

CLAUDE R. HEINY II
Administrative Judge