



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



In the matter of:)
)
) ADP Case No. 10-06574
)
Applicant for Public Trust Position)

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

December 8, 2011

Decision

CREAN, THOMAS M., Administrative Judge:

Based on a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

Statement of the Case

On October 21, 2009, Applicant submitted a Questionnaire for Public Trust Position (SF 85P), as part of his employment with a defense contractor. After an investigation conducted by the Office of Personnel Management, the Defense Office of Hearings and Appeals (DOHA) issued two interrogatories to Applicant to clarify and augment information from the investigation. On April 8, 2011, DOHA issued to Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns for 15 allegations of delinquent debt under financial considerations (Guideline F), and one allegation of personal conduct (Guideline E). 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 January 1987, as amended (Regulation); and the adjudicative guidelines (AG) effective in the

Department of Defense on September 1, 2006. Applicant acknowledged receipt of the SOR on April 19, 2011.

Applicant answered the SOR on April 27, 2011. He admitted two of the financial consideration allegations (SOR 1.a and 1.b) and denied the remaining financial consideration allegations and the personal conduct allegation. He requested a hearing before an administrative judge. Department Counsel was prepared to proceed on June 13, 2011, and the case was assigned to me on July 25, 2011. DOHA issued a Notice of Hearing on August 3, 2011, for a hearing on August 22, 2011. I convened the hearing as scheduled. The Government offered five exhibits which I marked and admitted into the record without objection as Government Exhibits (Gov. Ex.) 1 through 5. Applicant testified and submitted two exhibits which I marked and admitted into the record without objection as Applicant Exhibits (App. Ex.) A and B. I left the record open for Applicant to submit additional documents. Applicant timely submitted one additional document which I marked and admitted into the record without objection as App. Ex. C. Department Counsel had no objection to admission of the document. (Gov. Ex. 6, Memorandum, dated September 12, 2011). DOHA received the transcript (Tr.) of the hearing on September 7, 2011.

Procedural Issues

Applicant received the written notice of hearing on August 10, 2011. Applicant is entitled to 15 days advance notice of hearing. (Directive E3.1.8.) Applicant discussed with Department Counsel the hearing date of August 22, 2011, prior to the Notice of Hearing being mailed on August 3, 2011. Applicant was ready to proceed on August 22, 2011, and stated that he had sufficient time to prepare. He waived the 15-day notice requirement. (Tr. 7-8)

Findings of Fact

Applicant admitted two and denied the remaining 13 allegations under Guideline F. He denied the one allegation under Guideline E. After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is 32 years old and has been a computer systems engineer for a defense contractor since 2009. He is a high school graduate with an associate's degree in computer technology. He has never married but has a ten year old daughter that he supports. He has not served in the military. Applicant's net monthly pay is \$2,000. He also has a part-time position earning \$400 to \$600 monthly. His monthly expenses are about \$1,600, leaving about \$700 to \$900 in monthly discretionary funds. (Tr. 12-13, 53-56)

Applicant was employed at a mill for over eight years. His pay was over \$35,000 annually, and he had excellent health benefits. He did not have delinquent debt. The mill closed in December 2007, and he was laid off. His severance package was less than \$1,000. During the next year, he worked a few months under a temporary agency for his present employer. When the temporary position was completed, he went to

school full time to earn an associate's degree. He used unemployment benefits for living expenses and student financial aid to pay his tuition. He also had a temporary seasonal position with a package delivery company from November 2008 until January 2009. He was hired full time by the defense contractor employer in October 2009. His annual pay with the defense contractor is \$24,000. (Tr. 23-31)

Credit reports (Gov. Ex. 4, dated October 24, 2009, and Gov. Ex. 5, dated September 24, 2010), and Applicant's response to Interrogatories (Gov. Ex. 2, and Gov. Ex. 3, dated October 26, 2010) show the following delinquent debt for Applicant: a credit card in collection for \$14,476 (SOR 1.a); a cell phone debt in collection for \$377 (SOR 1.b); a debt to an internet service provider in collection for \$267 (SOR 1.c); a mortgage account for \$27,830 more than 180 days past due on a mobile home (SOR 1.d); and 11 medical debts in collection for \$189 (SOR 1.e), \$83 (SOR 1.f), \$570 (SOR 1.g), \$233 (SOR 1.h), \$194 (SOR 1.i), \$26 (SOR 1.j), \$17 (SOR 1.k), \$18 (SOR 1.l), \$32 (SOR 1.m), \$137 (SOR 1.n), and \$184 (SOR 1.o). The total amount of the delinquent debt is approximately \$17,000.

Applicant had one credit card prior to being laid off from his job at the mill. The maximum limit for the card was \$8,000. While employed at the mill, he always paid the card as agreed. After losing his job, he used the card to make child support payments, car payments, and purchase necessities such as food. He believes the original amount that he charged was only \$7,000 and the remaining portion of the debt is due to interest and penalties. He has not made any payments on the credit card debt and has had no contact with the creditor in three to four years. (Tr. 33-36, 56)

The delinquent debt at SOR 1.b is for Applicant's previous cell phone. He stated he made a \$100 payment on the debt about a month before the hearing but was unable to provide a receipt for the payment. Applicant has not made any other payment. (Tr. 36-37, 56)

The delinquent debt at SOR 1.c is for Applicant's previous internet service. When Applicant moved from his house when he was laid off, he notified the internet service provider of the move and told them to discontinue the service. The provider did not immediately stop service and charged Applicant for two additional months. Applicant disputed the charge with the service provider by voice over the telephone. He did not file a written dispute. He has no further information on the dispute. (Tr. 37-38, 56)

The delinquent debt at SOR 1.d is for payments on the mobile home owned by Applicant's mother. He resides with her. He believes his mother purchased the house for approximately \$32,000 11 years ago. The payments are \$380 per month. He helps his mother with the payments. He believes his mother may have been a month or two behind in payments. After the hearing, Applicant provided a receipt to show two months of payments. It appears the payments are current. (Tr. 39-43, 56; App. Ex. C, Receipt, dated September 3, 2011)

The remaining debts are medical debts. When Applicant worked in the mill, he had health insurance and no medical debts. When he was laid off, he lost his health

insurance 30 days after the lay off. Since he has been working for the defense contractor, he also has good health insurance. Applicant had emergency room visits in 2007 for migraine headaches. He did not have health insurance at the time and remembers receiving mail concerning medical bills from collection agencies. He also injured his ankle in 2004 and was treated at the hospital. He does not believe the debts were from co-pays for doctor visits since he had to pay the co-pays before he could see the doctor. He contacted the collection agency to determine the origin of the debts. The collection agency could not provide him with sufficient information to determine the nature of each debt. He is not even sure that whether all of the debt and bills belong to him. His father has the exact same name as Applicant. However, his father has had good health insurance coverage for almost 30 years. Applicant has only received negative results from the collection agency. He has not contacted the hospital or the medical provider to learn if they can provide him information on the bills. He has not made payments on the debts. (Tr. 44-49, 54-55)

When Applicant realized his credit would be an issue for his employment, he knew he needed financial assistance but did not know how to proceed. He contacted his local bank for assistance. The bank provided him with a service to protect his financial identity and to daily monitor his credit report. They did not provide him assistance in paying or resolving his delinquent debts. (Tr. 50-52; App. Ex. A, Credit Monitoring Pamphlet, undated. App. Ex. B, Daily Monitoring Alert, dated August 11, 2011).

When Applicant completed the Application for a Position of Public Trust on October 21, 2009, he listed only the debt at SOR 1.a in response to the question at Section 22b that asked if he had any debts more than 180 days delinquent. In fact he had medical and other debts that were more than 180 days delinquent. However, the Government noted that Applicant listed his most significant delinquent debt on the application, and that it is questionable whether he knew of some of the other debts or knew other debts were more than 180 days delinquent. The Government conceded there was insufficient information to establish that Applicant deliberately failed to inform the Government of his delinquent debts past-due over 180 days with the intent to deceive. (Tr. 57-60)

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." 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." Trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. (See The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004.) 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 or a sensitive 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. 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. (AG ¶ 2(c))

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, an 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 for 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 safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline F, Financial Considerations

There is a public trust concern for a failure or inability to live within one's means, satisfy debts, and meet financial obligations because such actions 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 ¶ 18) Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in his or her obligation to protect 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 terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a situation of risk inconsistent with the holding of a public trust position. An applicant is not required to be debt free, but is required to manage his finances in such a way as to meet his financial obligations. Applicant's delinquent debts, as established by credit reports and Applicant's statements, testimony, and admissions, are a security concern raising Financial Consideration Disqualifying Conditions (FC DC) ¶ 19(a) (inability or unwillingness to satisfy debts), and FC DC ¶ 19(c) (a history of not meeting financial obligations). Applicant incurred delinquent debt when he was laid off from a position in a mill that paid well. He was unemployed, except for short periods, from December 2007 until October 2009. When he finally found employment, his yearly salary went from \$35,000 to his present yearly salary of \$24,000. This information indicates there may be both an inability and an unwillingness to satisfy debts.

The Government produced substantial evidence to establish the disqualifying conditions as required in AG ¶¶ 19(a) and 19(c). The burden shifts to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns under financial considerations. An applicant has the burden to refute an established allegation or prove a mitigating condition, and the burden to prove or disprove it never shifts to the Government.

I considered Financial Considerations Mitigating Conditions (FC MC) ¶ 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 current reliability, trustworthiness, or good judgment), and FC MC ¶ 20(b) (the conditions that resulted in the financial problems were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce, or separations and the individual acted responsibly under the circumstances). These mitigating conditions have some applicability to Applicant's financial problems. Applicant incurred delinquent debt when he was laid off from a job with good pay and was only sporadically employed from December 2007 until October 2009. During this period of unemployment, he used his time productively to get an associate's degree that enhanced his employment opportunities. The causes of his financial problems were unusual, beyond his control, and are unlikely to recur. However, he has not acted responsibly and reasonable under the circumstances. While he has made some efforts to contact creditors, his efforts have been only minimal and ineffective. He has not paid any of the delinquent SOR debts. One debt for the mobile home mortgage has been made current by his mother, the owner of the house. Applicant has not established a pattern of acting responsibly towards his finances, so his past-due debts cast doubt on his reliability, trustworthiness, and good judgment.

I have considered FC MC ¶ 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). This mitigating condition does not apply. Applicant contacted his bank when he realized his credit was an issue. However, the bank did not

provide him assistance but only daily credit monitoring. It did nothing to assist him in paying past-due obligations. His financial problems are not being resolved and are not under control.

I considered FC MC ¶ 20(d) (the individual has initiated a good-faith effort to repay the overdue creditors or otherwise resolve debts) and it does apply. For FC MC ¶ 20(d) to apply, there must be an "ability" to repay the debts, the "desire" to repay, and "evidence" of a good-faith effort to repay. Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty and obligation. A systematic method of handling debts is needed. Applicant must establish a "meaningful track record" of debt payment. A "meaningful track record" of debt payment can be established by evidence of actual debt payments or reduction of debt through payment of debts. An applicant is not required to establish that he paid each and every debt listed. All that is required is that Applicant demonstrates an established plan to resolve his financial problems and shows he has taken significant actions to implement that plan.

Applicant did not present any information to establish that he paid any of the delinquent debts. He did present information that his mother, the owner of the mobile home, is current with the mortgage payments. He attempted to contact some of the creditors but his attempts were limited. He has not made any payments or established any payment plans for any of the delinquent debts. Applicant claims he made a payment on one debt and disputed another. He provided no documentation at the hearing to support his assertions. Applicant was provided the opportunity after the hearing to present documentation of debt payments and disputes filed. He did not present any post-hearing documents on these issues. Without documentation, I cannot give him credit for either the payment or the dispute. Applicant contacted the collection agency on the medical debts but they were unable to provide him any information on the medical debts. He has not taken the opportunity to contact the medical provider or the hospital to learn the nature and origin of the medical debts. Some of these debts are small and could easily be paid within the discretionary funds Applicant has each month. He just has to determine they are his debts. He can learn this information from the hospital or the medical providers. Applicant's lack of sufficient action shows he has not acted responsibly towards his debts. He has not presented sufficient information to mitigate public trust concerns for financial considerations. His finances create and establish a public trust concern.

Personal Conduct

A trustworthiness concern is raised for personal conduct based on Applicant's responses to financial and employment questions on his SF 85(P). Personal conduct is a trustworthiness concern because conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect sensitive information. Of special interest is any failure to provide truthful and candid answers during the process to determine eligibility for a public trust position or any other failure to cooperate with this process (AG ¶ 15). Personal conduct is always a

trustworthiness concern because it asks whether the person's past conduct justifies confidence the person can be trusted to properly safeguard sensitive information. Authorization to hold a public trust position depends on the individual providing correct and accurate information. If a person conceals or provides false information, the trustworthiness process cannot function properly to ensure that granting access to sensitive information is in the best interest of the United States Government.

Applicant, on his application for a public trust position, listed only one debt as more than 180 days past due. His failure to list his other debts past-due more than 180 days raises a public trust concern under Personal Conduct Disqualifying Condition (PC DC) AG ¶ 16(a) (the deliberate omission concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history, or similar form used to conduct investigations, to determine security eligibility or trustworthiness).

Applicant denied an intentional falsification for the incorrect or missing material information on the application. While there is a security concern for an omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance, not every omission, concealment, or inaccurate statement is a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully with intent to deceive. The Government conceded that since Applicant listed his largest debt in response to the question concerning debts more than 180 days past-due, and it is not clear that his other debts were either past-due or past-due more than 180 days. The Government has agreed that there is no information to establish an intentional falsification by Applicant with intent to deceive.

Whole-Person Concept

Under the whole-person concept, an 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I consider that Applicant incurred delinquent debt under unusual circumstances that were beyond his control. I also considered that he has sufficient discretionary funds to pay and resolve his delinquent debts.

Applicant has not established that he took positive action to resolve his financial problems. He has not established that he has paid any of the debts except for the mobile home mortgage which is really his mother's debt that she made current. He has not established that he made sufficient attempts to contact his creditors and resolve his debts. He made only limited contact with his creditors. When he was told that the collection agencies did not have sufficient information to identify debts, he made no further inquiry on the medical debts from the medical provider or the hospital. He did not contact the creditors for his largest debt on a credit card as well as a cell phone bill. He disputed a bill for an internet service provider but provided no documentation to substantiate the dispute. Applicant was provided the opportunity after the hearing to present documentation on his financial actions, but he provided only a document to show the mobile home payments were current. Applicant has not established a history of responsible resolution of his debts.

The record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has not mitigated the trustworthiness concerns arising from his financial situation. The personal conduct security concern is resolved in favor of Applicant.

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.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraphs 1.e – 1.o:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For 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.

THOMAS M. CREAN
Administrative Judge