



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



In the matter of:)
)
) ADP Case No. 11-00719
)
)
Applicant for Public Trust Position)

Appearances

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

September 29, 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 granted.

On September 20, 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 (OPM), the Defense Office of Hearings and Appeals (DOHA) issued an interrogatory to Applicant to clarify or augment potentially disqualifying information in his background. After reviewing the results of the background investigation and Applicant's response to the interrogatory, DOHA could not make the preliminary affirmative findings required to issue a security clearance. On May 27, 2011, DOHA issued to Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns for financial considerations (Guideline F). 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 June 7, 2011.

Applicant answered the SOR on June 16, 2011. He admitted one allegation (SOR 1.a) and denied the other six allegations under Guideline F. He requested a hearing before an administrative judge. Department Counsel was prepared to proceed on July 19, 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 and one witness testified. Applicant submitted six exhibits which I marked and admitted into the record without objection as Applicant Exhibits (App. Ex.) A through F. DOHA received the transcript (Tr.) of the hearing on September 7, 2011.

Procedural Issues

Applicant received the notice of hearing on August 15, 2011, only seven days before the hearing. Applicant is entitled to 15 days advanced 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 and had sufficient time to prepare. He waived the 15 days notice requirement. (Tr. 5-6)

Findings of Fact

Applicant admitted one allegation and denied six allegations under Guideline F in the SOR. Applicant's admission is included in my findings of fact. After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is 29 years old, and has been a senior server technician for a defense contractor for approximately two years. He is a high school graduate, single, with no children. He completed an associate's degree at a technical school. (Tr. 12-14, 28-30; Gov. Ex. 1, SF 85P, dated September 20, 2009)

When Applicant was a college student his finances were good. He was attending his first semester of college when his mother, sister, and niece had a severe automobile accident in November 2002. His mother and niece were hospitalized for a period of time. Applicant immediately left school to help his mother in her recovery. He left so fast he was unable to make arrangements to turn off the utilities or phone service. In December 2003, Applicant started his own franchised janitorial service. His father had been a franchisee for the same company for years. Applicant's franchise business was successful until October 2006 when he was severely injured in an accident at work and was immobile for over six months. He returned his franchise business to the franchise company and lost the income he had been receiving. After his recovery, he attended the technical school from May 2007 until May 2009. Applicant's current yearly salary is \$47,000. He is current with his student loans and taxes. His mother testified that he

helps support both her and his sister with approximately \$200 each per month. (Tr. 38-40)

Credit reports (Gov. Ex. 3, dated August 22, 2009; Gov. Ex. 4, dated January 16, 2010; and Gov. Ex. 5, dated March 31, 2011), and Applicant's answers to the interrogatory (Gov. Ex. 2, dated March 16, 2011) show the following delinquent debts for Applicant; a medical collection account for \$37,399 (SOR 1.a); a credit card collection account for \$1,184 (SOR 1.b); a credit card debt charged off for \$376 (SOR 1.c); a gym membership debt in collection for \$1,548 (SOR 1.d); a utility bill in collection for \$562 (SOR 1.e); a telephone account in collection for \$430 (SOR 1.f); and a medical account in collection for \$254 (SOR 1.g). The debts arose when he abruptly left his apartment to care for his mother without making arrangements for the utilities or as a result of his accident at work. Applicant's latest credit report lists most debts, including student loans, as current or paid. The only delinquent debts listed on Applicant's latest credit reports are the medical debt listed at SOR 1.a, and the medical debt listed at SOR 1.g. Applicant paid a telephone debt of \$2,359 incurred by his family when he allowed his mother and sister to be part of his phone plan. He also paid a \$854 cable debt that was incurred when his mother did not pay the bill even though Applicant provided her with the funds to do so. (Tr. 27-33; App. Ex. A, Credit Report, dated June 8, 2011; App. Ex. E, Credit Report, dated August 18, 2011)

Applicant was the franchise owner of a janitorial service from December 2003 until October 2006. In October 2006, Applicant fell down a flight of stairs while working and severely broke and injured his ankle. His company did not have health insurance. He required extensive medical treatment and was on bed rest for over four months. He gave up the franchise since he was physically unable to continue the janitorial work. All of the medical costs associated with treatment of his injury were consolidated and listed at SOR 1.a, except for the \$254 medical debt at SOR 1.g for medical equipment required after he injured his ankle. Applicant has been unable to pay the debts. However, he discussed the debts with the creditors and collection agency. The collection agency offered a settlement agreement of either a lump sum payment of \$29,000, or monthly payments of \$450 until the debt is satisfied. As noted below, Applicant just prior to the hearing completed paying the debt at SOR 1.b. He will start making monthly payments on the medical debt settlement in September 2011. He will also pay the medical equipment supplier now that he has the funds. (Tr. 30-33)

The debt at SOR 1.b was for his technical school tuition. He settled the debt for \$1,000, with a payment of \$800 in June 2011, and \$200 in July 2011. (Tr. 24-26; App. Ex. F, Cancelled checks, June 30, 2011, and July 30, 2011)

The credit card debt at SOR 1.c was for a credit card Applicant's father opened in Applicant's name when he was only 13 year old. Applicant never knew the credit card or the debt existed. He disputes the debt and it is no longer on his credit report. (Tr. 33-34; App. Ex. A, Credit Report, dated June 8, 2011; App. Ex. E, Credit Report, dated August 18, 2011)

The debt listed at SOR 1.d is for a gym membership. Applicant and his sister entered a joint two year gym membership in 2004. After paying for approximately six or seven months, his sister stopped paying her part of the bill when she lost her job. Applicant tried to pay the debt to the gym but they had no record of the debt since it was sent for collection. He contacted the collection agency but they also had no record of the debt. He has a present current membership with the gym. (Tr. 34-35, 42-44)

The utility debt for \$562 at SOR 1.e was incurred when Applicant abruptly left his apartment when his mother had an accident and was hospitalized. He left the heat on and did not return to turn it off. He contacted the utility company to settle the debt but they have no record of the debt since the debt was sent for collection. The collection agency also had no record of the debt. Applicant is unable to pay the debt. The debt is no longer on his credit report. (Tr. 35-37)

The telephone debt at SOR 1.f was also incurred when Applicant left his apartment after his mother's accident. Most of the debt is for penalties and interest. He tried to pay the debt but the telephone company and the collection agency do not have a record of the debt. (Tr. 41-42)

Applicant is a highly regarded employee. His performance rating shows that he meets or exceeds expectations. He was commended by his instructors in technical school for his work habits, integrity, responsibility, and academic achievements. He was a student leader who was organized, smart, and dedicated. (App. Ex. D, Letters, dated April 6, 2009; App. Ex. C, Performance Review, dated June 16, 2011)

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 answers to questions in the interrogatory, 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). The delinquent debts show a history of not meeting financial obligations because of an inability, and not unwillingness, to satisfy debt.

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 separation, and the individual acted responsibly under the circumstances). Both of these mitigating conditions apply to Applicant's financial problems.

Applicant was reasonably managing his finances until his mother was involved in an automobile accident and he left college to assist her. The debts were incurred because of the hasty departure from his apartment. He again incurred delinquent medical debts when he severely injured his ankle on the job. His medical costs were not covered by health insurance. The accidents that caused the financial problems were not the fault of Applicant and were beyond his control. Applicant acted responsibly by contacting his creditors and attempting to reach settlement plans. He paid or is paying on the payment plans he was able to negotiate. Applicant established a pattern of acting responsibly towards his finances. His present credit report shows his debts are current indicating his financial management is sound and responsible. It is unlikely that he will have additional or recurring financial problems. His past-due debts do not 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). Applicant did not present any information concerning financial counseling. However, his present credit report shows his financial problems are being resolved or are under control.

I considered FC MC ¶ 20(d) (the individual initiated a good-faith effort to repay the overdue creditors or otherwise resolve debts) and it applies. 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 reduction of debt through payment of debts. All that is required is that Applicant demonstrates he has established a plan to resolve his financial problems and has taken significant actions to implement that plan.

Applicant's debts were incurred by conditions beyond his control. He paid one of the SOR debts in full. He also paid other debts in full not listed on the SOR. One SOR debt was not his debt but his father's debt. He was unable to make payments on three debts because the creditors did not have sufficient records or information to determine

his responsibility for the debt and accept payments. He has received settlement offers on the two big medical debts incurred when he was injured on the job. He will start to make payments according to the settlement agreement. He is current with his taxes and student loans. Applicant's financial management of his debts provides significant and credible information to establish a meaningful track record of debt payment. His actions are reasonable and prudent under his financial circumstances and shows honesty and an adherence to his financial duties and obligations. He established a good-faith effort to repay his creditors and resolve debt. His reasonable and responsible efforts indicate that his past delinquent debts do not reflect adversely on his trustworthiness, honesty, and good judgment. He has mitigated public trust concerns based on financial considerations.

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 considered that Applicant is a trusted and highly regarded employee with a good work record and reputation for honesty, reliability, and trustworthiness. Most of Applicant's debts were incurred by circumstances beyond his control. He acted responsibly by contacting creditors and arranging payment plans when he could. Most of the creditors did not have records of his debts and they could not present him with a payment plan. He paid those debts he could and is current with his present debts. The record evidence leaves me without questions and doubts about Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has mitigated the trustworthiness concerns arising from his financial situation.

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: FOR APPLICANT

Subparagraphs 1.a - 1.g: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

THOMAS M. CREAN
Administrative Judge