



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



In the matter of)
)
) ADP Case No. 11-05227
)
Applicant for Public Trust Position)

Appearances

For Government: Tovah Minster, Esquire, Department Counsel
For Applicant: *Pro se*

11/30/2012

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings and exhibits, Applicant has not mitigated the concerns raised under the guideline for financial considerations. Eligibility to occupy a position of public trust is denied.

Statement of the Case

Applicant submitted a Questionnaire for Public Trust Positions, signed on April 28, 2010. On May 29, 2012, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) alleging trustworthiness concerns under Guideline F (Financial Considerations) of the Adjudicative Guidelines (AG).¹

In his Answer to the SOR, Applicant denied all of the SOR allegations under Guideline F, and requested a hearing before an administrative judge. Department

¹ Required by Executive Order 10865, as amended, and DoD 5200.2.R (Regulation), as amended.

Counsel was prepared to proceed on September 17, 2012, and the case was assigned to me September 20, 2012. I convened the hearing as scheduled on October 25, 2012. I admitted four Government Exhibits identified as GE 1 through 4. Applicant testified and presented the testimony of one witness. He also offered ten exhibits, which I admitted as Applicant's Exhibits (AE) A through J. DOHA received the transcript on November 5, 2012.

Findings of Fact

After a thorough review of the pleadings, Applicant's response to the SOR, and the evidence, I make the following additional findings of fact.

Applicant is 43 years old, single, and has no children. He earned a degree in computer network systems in 2003. From 2003 to 2004, he attended a technical school to obtain an additional certification, but the school closed before he completed the program. Applicant has worked in his current position as a help desk analyst since April 2010. (Tr. 27-29, 31)

Applicant's delinquencies stem from his sporadic employment. Between 2006 and 2009, Applicant was unemployed for all but a few months. While unemployed, he lived with his brother or his uncle. He has been employed continuously since July 2009. Applicant earns about \$35,000 per year. After deductions, his monthly take-home pay is about \$1,800. He pays about \$1,700 per month in expenses, including \$90 per month to Company L, a credit repair company. His monthly net remainder is approximately \$110. He does not support anyone else, and does not have any sources of income other than his employment. He does not have a budget. (GE 1; Tr. 32-33, 67-75)

In about March 2010, Applicant retained a firm, Company C, to assist him with debt settlement. The monthly fee was \$54.17. He hired Company C to help him pay his automobile loan. However, he subsequently hired a credit repair firm, Company L, and did not use the services of Company C. He testified that he retained company L after he started his employment in 2010, although the "Welcome" email he provided shows he began in September 2011. The company works with Applicant to identify errors in his credit report and assists him with disputing the errors; it does not negotiate settlements with creditors. He has not had any responses from Company L as of the date of the hearing about his disputed debts, but recently requested a faster response from the company. He did not present documentation showing a contract with company L or listing which debts are included in their agreement. (GE 2; Tr. 25-26, 44, 60-65)

When Applicant sought assistance from a tax-preparation firm to file his 2010 taxes, he was informed that a return had already been filed under his name. He believes that he was the victim of identity theft. In early 2011, he filed complaints with his local police department, the Internal Revenue Service (IRS), and the Federal Trade Commission (FTC). (AE D; Tr. 22)

The 11 delinquent debts listed in the SOR total \$109,215. The debts appear in credit reports dated January 2011, February 2012, and May 2012. (GE 2, 3, 4; AE E, F, G-J)

Allegation 1.a – \$3,082: Applicant stated in his Answer that he paid this debt in full. He testified that he paid \$100 per month on this account for 12 to 18 months, starting in 2010. He then clarified that he had two accounts with this creditor, and paid one of them, but he was unsure whether the account in the SOR is the one he paid. He did not have documentation showing he paid either debt. He did not testify that he disputed this debt, but his May 2012 credit report shows that the account is in collection status, and has been disputed. (AE E, I, J; Tr. 33-36)

Allegations 1b, 1.d, 1.e, and 1.f – Student loans totaling \$94,998:

- **1.b - \$40,510 – Disputes:** Applicant is not sure if he applied for this loan. He believes it may be fraudulent, because he was the victim of identity theft in 2010. He is disputing the debt with the assistance of Company L. He did not provide documentation supporting his dispute through Company L. His May 2012 credit report shows that it has been in collection status since October 2007. (AE E, G, I; Tr. 22, 36-38, 59-60)
- **1.d - \$15,713; 1.e, \$10,946–** Applicant admits that when he attended school in 2000, he applied for and received these two student loans from the same lender. His student loans became due at the end of 2003. During his security interview, he stated that he made two or three payments, and then stopped because he did not have funds to continue paying on the loans. Applicant denied these loans because he was the victim of identity fraud, and has found inaccuracies in his credit report. He is awaiting written confirmation from the lender that the loans are his. In 2010, Company L sought confirmation from the lender that these loans belong to Applicant. He has not yet received confirmation. (GE 2; AE G, H, I, J; Tr. 41-45, 48-51)
- **1.f - \$27,829 – Disputes:** Applicant received this student loan for his schooling at a training institute from 2003 to 2004. In 2004, the institution ceased operation and filed for bankruptcy protection, and Applicant was unable to receive his certification. He believes that some students have filed suit against the school, but had no documentation to support that belief. Applicant testified that since 2004, he has not had the financial resources to pay the loan or file suit. He now disputes the debt because he was unable to receive his certification. He provided a letter from Company L indicating that the debt has been removed from his credit report. (GE 2; AE C, G, I, J; Tr. 25, 51-54, 59-60)

Allegation 1.c - \$7,166, Auto loan: Applicant purchased a used truck in 2003, and it was repossessed in 2006. The debt represents the deficiency balance he owes to the lender. He testified that he made some payments after the repossession, but none since 2007. It appears on his May 2012 credit report, but not on his July 2012 report.

Applicant testified that it has been removed from his credit report based on the statute of limitations. He provided a letter from his consumer credit repair agency confirming that the debt has been removed. (GE 2; AE B, E, F, H, J; Tr. 38-41)

Allegation 1.g - \$2,900, judgment: During his January 2011 security interview, Applicant told the investigator that in 2003, he hit a truck while driving. The owner of the other vehicle sued him for vehicle damage. Applicant did not have insurance. He testified that he and the other driver settled the matter, but Applicant did not follow through. He has made no payments since the 2004 judgment. At his January 2011 security interview, Applicant said he intended to start payments at the end of 2011. As of the hearing date, he had not made any payments, which he attributed to his sporadic employment. This 2004 debt appears in his January 2011 credit report, but does not appear in his May or July 2012 credit reports. (GE 3, 4; AE E, F; Tr. 54-55)

Allegation 1.h - \$688, cell phone – Applicant admits he had an account with this company, but testified that it has been removed from his credit report because of the passage of time. The debt appears in Applicant's January 2011 credit report, but does not appear in his May or July 2012 credit reports. (GE 4; AE E, F, H, J; Tr. 55-57)

Allegation 1.i - \$173, insurance – Applicant testified that this debt has been removed from his credit report because of the passage of time. The debt appears in Applicant's January 2011 credit report, but does not appear in his May or July 2012 credit reports. (GE 4; AE E, F; Tr. 57-58)

Allegation 1.j - \$168, cable – Applicant believes that this debt became delinquent in 2008. The debt appears in Applicant's January 2011 credit report, but does not appear in his May or July 2012 credit reports. (GE 4; AE E, F; Tr. 58-59)

Allegation 1.k - \$40, cable - The debt appears in Applicant's January 2011 credit report, but does not appear in his May or July 2012 credit reports. (GE 4; AE E, F; (Tr. 59)

Applicant's uncle, who was a government employee for 36 years, testified that he is familiar with Applicant's financial status. He assisted Applicant by offering him a place to live for two years when he was unemployed, and directing him to job sources and resources to help him improve his credit. He loaned Applicant money, which Applicant has repaid. (Tr. 77- 83)

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. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge must apply the guidelines 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. 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 in seeking 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

AG ¶ 18 expresses the following security concern about financial considerations:

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 over-extended is at risk of having to engage in illegal acts to generate funds.

The relevant disqualifying conditions are AG ¶19 (a) (*inability or unwillingness to satisfy debts*) and AG ¶19 (c) (*a history of not meeting financial obligations*). The SOR alleges more than \$109,000 in delinquent debts. They have been accruing for several years, indicating that Applicant has been either unable to unwilling to resolve them. AG ¶¶ 19(a) and (c) apply.

Under AG ¶ 20, the following potentially mitigating factors are relevant:

- (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;
- (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 was on notice that delinquent debts were a concern when he completed his application more than two years ago. He was reminded that debts were a concern when he met with an investigator in January 2011. Again, when he completed DOHA interrogatories in March 2012, he was reminded that delinquent debts were an issue. However, the debts in the SOR remain unpaid, with no documented plan in place to resolve them. With more than \$100,000 in bad debt, Applicant's delinquencies are

both frequent and recent. His failure to make consistent efforts to resolve them raises questions about his reliability and judgment. AG ¶ 20(a) does not apply.

AG ¶ 20(b) mitigates financial problems that stem from unexpected events beyond an applicant's control. Applicant experienced a significant period of unemployment from 2006 to 2009, and his current annual income is modest. However, to apply this mitigating condition, an applicant must also show that he acted responsibly under the circumstances. He has been continuously employed since 2009, but has not contracted creditors or paid any debts. Applicant receives partial mitigation under AG ¶ 20(b) for retaining Company L to assist him in reviewing his credit report.

Under AG ¶ 20(d), an applicant must demonstrate a good-faith effort to resolve debts. AG ¶ 20(d) applies in part because Applicant made some effort since 2011, by contacting a debt resolution company and a credit repair firm. However, he did not use the services of the debt resolution firm, company C, to help him resolve his debts. Other than disputing debts through Company L, the record contains scant evidence that Applicant worked with creditors or established payment plans over the past three years since he has been steadily employed. The delinquent SOR debts that no longer appear on his credit report are stale debts that have been dropped not through his good-faith efforts, but through operation of the statute of limitations.

AG ¶ 20(e) is relevant because Applicant has disputed several student loans SOR debts through Company L. However, his basis for disputing them is not reasonable. He admits that he received the loans between 2000 and 2003 through the cited creditor, and that he has paid on the loans in the past. Yet he now disputes them based on identity theft that occurred in 2010. Although he provided evidence that he filed notice of identity theft with various agencies, he provided no documentation to support a connection between the student loans and the identity theft. AG ¶ 20(e) does not apply.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility by considering the totality of the applicant's conduct and all the relevant circumstances. I have evaluated the facts presented and have applied the appropriate adjudicative factors under the cited guidelines. I have also reviewed the record before me in the context of the whole-person factors listed in 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant access to sensitive information must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the appropriate guidelines, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant started to make some efforts to resolve his debts in 2010, at about the time he was applying for a public trust position. He contacted a debt resolution firm to assist him in paying his auto loan. However, he did not follow through with that company. He then retained Company L to review his credit report and dispute inaccurate debts. It has notified Applicant that some debts have dropped from his credit report. The debts that no longer appear on his credit report are not resolved, but only dropped from the reports because they are stale. An applicant does not have to pay all his debts to qualify for a public trust position, but he does have to show evidence that he has a plan in place to pay them, and has taken concrete steps to implement that plan. Other than disputing debts, Applicant has taken no steps to resolve his financial obligations by contacting creditors, negotiating settlements, or arranging payment plans. Applicant has not established a record of meeting his financial obligations.

Overall, the record evidence fails to satisfy the doubts raised about Applicant's suitability to occupy a public trust position. For all these reasons, I conclude Applicant has not mitigated the concerns arising from the cited adjudicative guideline.

Formal Findings

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a. – 1.k	Against Applicant

Conclusion

In light of the foregoing, it is not clearly consistent with national security to grant Applicant access to sensitive information. Applicant's eligibility to occupy a position of public trust is denied.

RITA C. O'BRIEN
Administrative Judge