



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



In the matter of:

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ADP Case No. 11-05321

Applicant for Public Trust Position

Appearances

For Government: Gina Marine, Esquire, Department Counsel

For Applicant: *Pro Se*

10/22/2012

Decision

WHITE, David M., Administrative Judge:

Applicant incurred more than \$62,000 in delinquent debts over the past six years. He did not demonstrate either changed circumstances or sufficient income to resolve those debts or remain solvent in the future. Financial security concerns were not mitigated. Based upon a thorough review of the pleadings, testimony, and exhibits, eligibility for access to ADP I/II/III sensitive information is denied.

Statement of the Case

On April 9, 1993, the Composite Health Care Systems Program Office (CHCSPO), the Defense Office of Hearings and Appeals (DOHA), and the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASD C3I), entered into a memorandum of agreement for DOHA to provide trustworthiness determinations for contractor personnel employed in Sensitive Information Systems Positions (ADP I/II/III), as defined in Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation).

Applicant submitted his Public Trust Position Application (SF 85P), on September 10, 2010.¹ On March 8, 2012, DOHA issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guideline F (Financial Considerations). 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); the Regulation (*supra*); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* effective within the Department of Defense on September 1, 2006.

Applicant acknowledged receipt of the SOR on March 30, 2012. He answered the SOR in writing (AR) on May 9, 2012, and requested a hearing before an administrative judge.² Department Counsel was prepared to proceed on June 25, 2012. The case was assigned to me on July 2, 2012. DOHA issued a Notice of Hearing on July 20, 2012, and I convened the hearing, as scheduled, on August 15, 2012. The Government offered Exhibits (GE) 1 through 5, which were admitted without objection, and Hearing Exhibit (HE) I, a Government exhibit list. Applicant offered Exhibits (AE) A and B, which were also admitted without objection, and testified on his own behalf. I granted Applicant's request to leave the record open for submission of additional evidence until September 5, 2012. DOHA received the transcript of the hearing (Tr.) on August 21, 2012. Applicant timely submitted AE C and D, which were admitted without objection (See HE III), and the record closed as scheduled.

Findings of Fact

Applicant is a 33-year-old employee of a federal contractor, where he has worked since late September 2010 as a customer service representative. He is married, with three young children. He is a high school graduate.³ In his answer, Applicant admitted the truth of 19 of the 22 allegations in the SOR.⁴ Those admissions, and his sworn responses to DOHA interrogatories⁵ are incorporated in the following findings.

Applicant admitted owing the nineteen delinquent debts alleged in SOR ¶¶ 1.a through 1.o, 1.q, 1.r, 1.t, and 1.v, totaling \$59,427. These accounts became delinquent during and since 2006, when Applicant accepted a severance offer from his employer of six years to avoid relocation and began a period of voluntary unemployment. He held a well paying job again from January 2008 to March 2010, when he quit working in order

¹GE 1.

²Applicant's initial answer was ambiguous on the subject. Department Counsel clarified the options for him and he confirmed that he desired to have a hearing in an email dated June 12, 2012. See HE II.

³GE 1.

⁴AR.

⁵GE 3.

to help his wife with an unsuccessful internet “pyramid-type” life insurance home business. This business generated no income for them, and Applicant started working in his current position during September 2010. In his interview with an investigator from the Office of Personnel Management (OPM) on March 3, 2011, he said that he was struggling financially and was capable of meeting his current obligations, but was still unable to pay his past-due accounts. He further said that he had undergone no financial counseling or debt consolidation.⁶

Applicant offered no evidence of any payment toward these debts, or of any other attempts to effectively resolve them. He denied owing the \$1,782 delinquent debt alleged in SOR ¶ 1.p because he did not recognize or remember it. That debt appears on his credit report and he has made no effort to dispute it or inquire further with the creditor.⁷ He claimed that some or all of the delinquent judgment debts alleged in SOR ¶¶ 1.t, 1.u, and 1.v had been paid through a wage garnishment while he was working between 2008 and 2010, but was unsure of the details and provided no evidence to corroborate the payments.⁸ Applicant provided documentation from the Internal Revenue Service (IRS) showing that during June 2011 it retained \$1,987 from his 2010 income tax refund to satisfy his delinquent 2009 income tax debt that is alleged in SOR ¶ 1.s. He used the remainder of that refund to repay loans and other obligations to his family members, and was therefore unable to use it for a vacation he had hoped to take. He did not intend to use any of the refund to repay other delinquent debts.⁹

During his OPM interview, Applicant claimed that his monthly gross income is \$2,200; with net take-home pay of \$1,800, plus \$700 per month from the state for food assistance. He said that his monthly living expenses totaled \$2,380; leaving \$120 per month in surplus discretionary income. He provided no documentation to substantiate these figures, but testified during his hearing that his net monthly income was \$900 to \$1,000, that his food assistance was reduced to \$195 per month since he had resumed working, and that they lived paycheck to paycheck with no planned budget. His wife remains unemployed. His only assets are a car worth \$2,000 and about \$500 in a 401(k) account. Applicant provided no other evidence concerning his budget, or his actions to curb spending in response to any periods of unemployment or reduced income. Nor did he demonstrate either the ability or willingness to attempt resolution of his admittedly delinquent debts.¹⁰

Applicant thinks that he will lose his current job in March 2013 because his employer lost the contract to a competitor for services after that date. He provided four

⁶AR; GE 3; Tr. 84-94, 99-100.

⁷AR; GE 3; GE 5; Tr. 66-67.

⁸AR; GE 3; Tr. 77-82.

⁹AR; AE C; Tr. 70-77.

¹⁰GE 3; Tr. 93-100.

months of performance “Scorecards” indicating that he met or exceeded expectations in all evaluation areas. His wife testified that he is a hard working and humble family man who loves his job and works to help young people. He submitted no other character references or other evidence tending to establish good judgment, trustworthiness, or reliability.¹¹

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” (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.” (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. (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, “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable [trustworthiness] decision.”

¹¹AE A; AE B; AE D; Tr. 33-34, 38-48, 100-102.

A person who applies for access to sensitive information seeks to enter 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 10865 provides that “Any determination under this order adverse to an applicant shall be a determination 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 security concerns pertaining to 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. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

AG ¶ 19 describes conditions that could raise a security concern and may be disqualifying. Department Counsel argued persuasively that the evidence raised two of these potentially disqualifying conditions: “(a) inability or unwillingness to satisfy debts;” and “(c) a history of not meeting financial obligations.” (Throughout this Analysis, the terms “security” and “trustworthiness” are used interchangeably.)

Applicant admitted owing nineteen SOR-listed delinquent debts, and provided no evidence to substantiate his denial of two others. These debts total more than \$61,500. The record shows an almost-six-year history during which Applicant has been regularly unable or unwilling to voluntarily satisfy any of these debts. Having evaluated the nature, quantity, and amounts involved in Applicant's debts, I find insufficient evidence to establish irresponsible or frivolous spending. There were neither allegations nor proof of compulsive, addictive, or problem gambling. Nor was there any evidence of drug

abuse, alcoholism, or deceptive financial practices. Accordingly, no other Guideline F disqualifying condition was established. The evidence supporting application of AG ¶¶ 19(a) and 19(c) shifts the burden of proof to Applicant to establish mitigation of the resulting trustworthiness concerns.

AG ¶ 20 provides conditions that could mitigate security concerns arising from a history of unpaid debt, and a present unwillingness or inability to meet financial obligations:

(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; 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 delinquencies arose and continued over the past six years, and remain unpaid or unresolved at present. He did not demonstrate that any of the circumstances giving rise to those debts is unlikely to recur, or that his reliability, trustworthiness, and judgment are not implicated by the ongoing situation. Accordingly, he did not establish mitigation under AG ¶ 20(a).

I find minimal, if any, mitigation under AG ¶ 20(b). Applicant's periods of unemployment were not lengthy, compared to the time he has been employed, and they both resulted from his voluntary departures from fairly well paying jobs. Some of his smaller debts were for medical expenses, but they were not shown to have resulted from unexpected emergencies. Applicant did not demonstrate that he took responsible measures to limit expenses after choosing to leave his prior jobs, or that his financial circumstances have a foreseeable probability of improving in the future.

Applicant gave no indication that he sought or received any effective financial counseling, or that he had either a plan or the means to address over \$61,500 in delinquent debt on his \$1,200 net monthly income while feeding and housing his family. He did not demonstrate solvency going forward, or otherwise indicate that his financial situation is under control. His only demonstrated resolution of an SOR-listed debt occurred involuntarily when the IRS retained part of his 2010 income tax refund to satisfy his prior year tax deficiency. Given the record evidence, repayment or other resolution of his remaining substantial delinquent debt is unlikely. Financial trustworthiness concerns are therefor not mitigated under AG ¶¶ 20(c) or (d). Applicant failed to demonstrate a reasonable basis to dispute the validity of any SOR-listed delinquent debt, so AG ¶ 20(e) is inapplicable.

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 relevant 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 relevant facts and circumstances surrounding this case. Applicant's conduct of concern involves the substantial amount of delinquent debt that arose during the past six years and remains unpaid. The concerns are exacerbated by the absence of evidence that the circumstances leading to his inability or unwillingness to repay these debts have changed, or will change, for the better. He has not sought financial counseling. There is no evidence suggesting any reduction in the potential for pressure, coercion, exploitation, or duress that could tempt Applicant to abuse his public trust position.

On balance, Applicant presented insufficient evidence to mitigate the reliability and trustworthiness concerns arising from his financial considerations, including his failure to pay substantial delinquent debts over the past six years and his apparent inability to do so going forward. Overall, the record evidence leaves significant doubt as to Applicant's present eligibility and suitability for a public trust position.

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 through 1.r:	Against Applicant
Subparagraph 1.s:	For Applicant
Subparagraphs 1.t through 1.v:	Against Applicant

Conclusion

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

DAVID M. WHITE
Administrative Judge