



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



In the matter of:)
)
) ADP Case No. 11-05401
)
Applicant for Public Trust Position)

Appearances

For Government: Braden Murphy, Esquire, Department Counsel
For Applicant: *Pro se*

04/15/2013

Decision

DAM, Shari, Administrative Judge:

Applicant accumulated over \$67,000 in delinquent debt since 2006. He offered some evidence of conditions beyond his control that caused this debt. He did not demonstrate sufficient arrangements to repay the debt or ability to avoid future financial irresponsibility. Resulting trustworthiness concerns were not mitigated. Based upon the record evidence, eligibility for access to sensitive information is denied.

Statement of the Case

On April 13, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of his public trust position application (SF-85P). On November 7, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) effective in DOD on September 1, 2006.

The SOR alleged security concerns under Guideline F (financial considerations). The SOR detailed reasons why DOD adjudicators could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue eligibility for a public trust position for Applicant. The SOR recommended referral to an administrative judge to determine whether Applicant's eligibility should be granted, continued, denied, or revoked.

Applicant responded to the SOR and requested a hearing. (Answer.) On January 4, 2013, Department Counsel indicated he was ready to proceed on Applicant's case. On January 10, 2013, the Defense Office of Hearings and Appeals (DOHA) assigned Applicant's case to me. On January 24, 2013, DOHA issued a hearing notice, and on February 21, 2013, Applicant's hearing was held. At the hearing, Department Counsel offered six exhibits (GE 1-6) and Applicant offered six exhibits (AE A-F). There were no objections, and I admitted GE 1-6 and AE A-F. Applicant and his wife testified. The record remained open until March 18, 2013, to give Applicant additional time to submit documents. On March 1, 2013, I received the hearing transcript (Tr.). On March 20, 2013, Department Counsel forwarded to me 20 additional pages of exhibits that he received from Applicant, which were marked AE 1-20. All were admitted without objection. After reviewing the file, I requested additional clarifying information from Applicant that he timely submitted via an email on April 5, 2013. I marked it AE 21 and entered it into the record without objection.

Findings of Fact¹

Applicant's Answer admits responsibility for the debts in SOR ¶¶ 1.a to 1.ee. His admissions are accepted as factual findings.

Applicant is a 55-year-old employee of a defense contractor. (Tr. 18.) He has been married to his second wife for 26 years. His wife had two children from a previous marriage, and he had one child from his first marriage. He and his current wife have one child. He became a registered nurse in May 1998. He is working on a bachelor's degree. He served in the Army from 1976 to 1982. He received a General Discharge. (Tr. 35; GE 5.) He is a disabled veteran, and receives payments from the Veteran's Administration for a 20% disability for hearing and arm problems. (*Id.*) His SF-85P did not include any reportable involvement with illegal drugs, excessive alcohol consumption, or criminal offenses. (GE 1.)

Applicant began working for his current employer in December 2009. As a registered nurse he performs quality assurance reviews for the National Guard. (Tr. 18-21.) Prior to this job he worked as a clinician for a temporary agency from March 2009 to December 2009. From approximately September 2000 until March 2009, he was employed by the federal government in a clinical position. (GE 1.)

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Applicant attributed his financial problems to both his and his wife's medical issues. In 2006, his wife was diagnosed with multiple sclerosis (MS). By 2007, she was unable to work as a licensed practical nurse and their family income decreased by \$3,000 per month. (Tr. 23.) Prior to that loss of income, Applicant's financial situation was stable. (Tr. 24.) Subsequently, they began incurring medical and other bills that they could not pay. In 2009, they purchased a home from a builder and moved to another location closer to family members. The purchase price of the home was between \$80,000 and \$90,000, financed by the builder. Applicant withdrew \$30,000 to \$40,000 from his 401(k) for the down payment. He made monthly payments of \$1,000 to the builder. (Tr. 40.) He did not understand the tax consequences of withdrawing retirement funds, resulting in taxes being levied for 2008 and 2009. (Tr. 41; AE 10-15.) In 2010, he lost the house because the builder did not make payments to the bank, resulting in a repossession and foreclosure of the property. (Tr. 47.) Applicant did not pursue the recovery of his down payment. (Tr. 49.) He and his wife subsequently moved to another state. Applicant's wife continues to have serious medical problems related to MS.

In January 2011 a government investigator interviewed Applicant regarding his delinquent debts. He was not familiar with many of the debts and indicated that he would inquire about them. He told the investigator that some of his debts accumulated as a result of his inattention and living outside of his income. (GE 5.) In April 2012, he completed a set of Financial Interrogatories, and submitted documentation that 35 debts remained delinquent. He noted on the Interrogatories that he planned "to file bankruptcy within 30-60 days." (GE 4.)

Applicant explained that his medical conditions, diabetes, anxiety, and depression also contributed to his financial problems. (Tr. 72.) Shortly before the hearing, he had emergency dental surgery because he was losing some teeth as a consequence of diabetes. That emergency resulted in a dental bill for which he does not have insurance. (Tr. 69.) His wife stated that she is no longer able to help manage their finances because of her physical and mental limitations. (Tr. 70-72.)

Applicant's SOR listed 31 debts totaling \$67,620. Of that amount, \$45,160 represented two automobile repossessions, one of which was a 2010 judgment and the other a loan that he stopped repaying after making monthly payments of \$564 for 72 months (SOR ¶¶ 1.a and 1.t). (AE E.) Neither debt is resolved. Twenty-one medical debts totaled \$11,728 (SOR ¶¶ 1.b through 1.s, 1.u, 1.aa, and 1.bb). None of those are resolved, and some of them appear to be co-pays or bills not covered by his medical insurance. Six debts total \$3,144 and are owed to credit card companies, an insurance company, and utility companies (SOR ¶¶ 1.w, 1.x, 1.z, 1.cc, 1.dd, and 1.ee). None of those are resolved. Applicant successfully disputed the \$987 debt listed in SOR ¶ 1.y. It is resolved. (GE 2 at 242.) He has been making monthly payments of \$78 on his student loan for about two years. The SOR-listed balance on this loan is \$7,588 (¶1.v); however that is not correct and should be less. He is no longer in default on that loan, and may be able to reduce the interest. (Tr. 42, 68; AE B, E.) It is being resolved.

In addition to paying his student loan, Applicant has been making automatic monthly payments to the Internal Revenue Service. Since June 2011, he has paid about \$225 toward his 2008 tax liability for early withdrawal of money from his 401(k). He used his 2011 tax refund of \$1,753 to further reduce the balance, which he thinks is about \$1,300. He thought the original amount owed was around \$4,000. (Tr. 41; AE 10.) He also owes \$2,948 for a 2009 tax liability related to the early withdrawal of money from his 401(k). (AE 13.) He will begin making payments on that debt after the 2008 tax is paid. (AE 21.) According to a February 2013 credit bureau report, Applicant paid a 2010 medical judgment for \$523 in June 2012. (AE E.) He is current on an auto loan. (AE D.)

Applicant's financial plan has been to address his unpaid taxes first, and then begin paying other bills. He did not appreciate the significance or adverse consequences that delinquent debts could have on his security clearance status and employment. (Tr. 83.) He never considered the possibility that these financial problems could indicate a lack of trustworthiness. (Tr. 83.)

Applicant submitted a personal financial statement. His monthly family income is approximately \$4,498 and includes his disability payment and his wife's social security payment. His monthly expenses are about \$3,736, and the monthly remainder is about \$150.² (AE 1.) Since January 2013, he has not worked for about three weeks because of federal budget issues. (Tr. 60.)

Applicant testified candidly. He did not make excuses for failing to manage his debts promptly (Tr. 66.) He acknowledged that in April 2012 he notified the Government that he intended to file a Chapter 7 bankruptcy within 30 to 60 days. (Tr. 66; GE 4.) In December 2012, he and his wife met with a credit counseling/debt consolidation company. During that meeting the counselor worked out a budget. (AE C.) He would like to resolve his debts through a repayment plan, but was unaware of the amount of fees involved in implementing the company's program. (Tr. 64.) He said that he never reviewed his credit report until he received one through this investigative process. (Tr. 68.) He and his wife have not used credit cards since 2006 or 2007. After the hearing, he spoke with his company's Employee Assistance Program (EAP), and subsequently with a lawyer regarding his debts. (AE 21.)

Applicant submitted his most recent performance evaluation. His supervisor rated him with an average score of 1.67, slightly below 'Level 2: At Expectations'. The evaluation noted that the quality and quantity of Applicant's work had deteriorated. It raised concerns regarding his knowledge, planning, and organizational skills. It noted his attendance was problematic. (AE 16-20.)

² Applicant submitted three separate budgets. The first one he established with the counselor at the debt consolidation company. (AE C.) The second one he prepared for the hearing. (AE F.) The third one he prepared after the hearing. (AE 1.) In addition, he discussed his income and expenses with an investigator in January 2011. (GE 5.) None of the budgets are consistent in the recordation of income and expenses, and all are inconsistent with information given during his interview.

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 AGs. 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 AG ¶ 2(a) describing 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.

According to 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.”

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 “[a]ny 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

Financial Considerations

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.

AG ¶ 19 provides two disqualifying conditions that could raise trustworthiness concerns and may be disqualifying in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant has been unable or unwilling to satisfy numerous debts since 2006, totaling \$67,620. The evidence raises trustworthiness concerns under both disqualifying conditions, and shifts the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline includes five mitigating conditions under AG ¶ 20 that could mitigate trustworthiness concerns arising from Applicant’s financial difficulties:

- (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 delinquent debts, in excess of \$67,000, arose over the past six years and continue to date. Applicant failed to demonstrate that such problems are unlikely to continue or recur, or that his reliability and trustworthiness have improved during the course of those years. The evidence does not support the application of AG ¶ 20(a).

Applicant presented evidence that a portion of his delinquent debt is attributable to his wife's loss of income in 2006 and their ongoing medical conditions. Those were circumstances largely beyond his control. However, he has been continuously employed throughout the period in question, and acknowledged during an interview that he failed to properly monitor and manage his finances while the debts were accumulating. Hence, AG ¶ 20(b) has limited application.

Application of AG ¶ 20(c) is not warranted. Applicant did not provide proof that he completed or enrolled in financial counseling, or sought financial advice. His three budgets are not credible and are incomplete. The evidence does not demonstrate that he has taken sufficient steps to establish clear indications that his financial problems are being resolved or are under control.

Applicant has been paying his student loan, resulting in a "current" status and demonstrating a good-faith effort to resolve it. However, he did not present evidence that while his other delinquent debts, totaling about \$59,000, were accumulating, he made a good-faith effort to contact those creditors and work out a settlement or minimal repayment plan. AG ¶ 20(d) applies to the debt listed in SOR ¶ 1.v, but none of the other debts.

AG ¶ 20(e) is fully applicable to one debt. Applicant disputed the debt in SOR ¶ 1.y (\$987), and it was removed from his credit report.

In sum, Applicant has resolved \$987 of the SOR-listed debts and is resolving his student loan that was listed with a balance of \$7,588. Approximately \$59,045 remains unresolved.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance 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.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline F, but some warrant additional comment.

Applicant is 55 years old. He has experienced several personal and family problems that have affected his finances beginning in 2006. However, he is also sufficiently mature to understand and comply with his trustworthiness responsibilities, which include reliably managing his finances, particularly given the ongoing notices he had received about the Government's concerns.

In April 2010, Applicant completed a SF-85P, in which he disclosed his financial problems. In a January 2011 interview with a DOD investigator, he discussed his financial problems and delinquent debts were brought to his attention by the investigator. During that interview, he acknowledged the reasons for the debts, including his lack of attention to them and to his finances in general. In April 2012, he completed a set of financial Interrogatories and submitted documentation that 35 debts remained delinquent. He wrote a note on the Interrogatories that he intended to file bankruptcy within 30 to 60 days. On November 7, 2012, he received the SOR. On December 20, 2012, he met with a debt consolidation company to review and discuss the resolution of his delinquent debts. On February 21, 2013, he attended his hearing. At the conclusion of the hearing, the record remained open for three weeks to give him time to submit additional documents, some of which he did. However, he did not submit evidence that he established a solid plan for resolution of approximately \$59,045 of the \$67,620 of delinquent debts either through the debt consolidation company he previously consulted or any other method. His plan to pay tax debts first, along with the student loans, is valid. However, it is insufficient to mitigate trustworthiness concerns, particularly in view of the amount of debt, the length of time the debts have been delinquent, and his knowledge of the Government's ongoing inquiry.

Applicant has had at least three years to manage and resolve his delinquent debts and straighten out his finances. It was clear during his testimony and in reviewing three budget exhibits that he has limited knowledge of his family income, expenses, and the status of debts. He has no financial plan or firm budget to achieve financial stability. It appears that the first time he drafted a budget was in December 2012, when he consulted the financial counselor in anticipation of his hearing. While some of Applicant's financial inattentiveness may be understandable based on family medical issues, the length of that inattentiveness and procrastination raises questions about his reliability and judgment.

Overall, the record evidence leaves me with sufficient doubts as to Applicant's present eligibility for a public trust position. He did not meet his burden 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, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a to 1.u:	Against Applicant
Subparagraph 1.v:	For Applicant
Subparagraph 1.x:	Against Applicant
Subparagraph 1.y:	For Applicant
Subparagraphs 1.x to 1.ee:	Against Applicant

Conclusion

In light of all circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a public trust position. Eligibility for access to sensitive ADP information is denied.

SHARI DAM
Administrative Judge