



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



In the matter of:)
)
 [Redacted]) ADP Case No. 11-11598
)
 Applicant for Public Trust Position)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

07/18/2013

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves trustworthiness concerns raised under Guideline F (Financial Considerations). Eligibility for a public trust position is denied.

Statement of the Case

Applicant submitted an application for a public trust position on May 4, 2011. On January 25, 2013, the Department of Defense (DOD) sent him Statement of Reasons (SOR), citing trustworthiness concerns under Guideline F. DOD acted under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant received the SOR on February 4, 2013; answered it on March 12, 2013; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on April 1, 2013, and the case was assigned an administrative judge on April 8, 2013. Scheduling of the hearing was delayed by budgetary constraints and unavailability of video teleconference facilities at the location where Applicant lives and works. The case was reassigned to me on May 8, 2013. DOHA issued a notice of

hearing on May 15, 2013, scheduling it for June 4, 2013. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified but did not present the testimony of any witnesses or submit any documentary evidence. I kept the record open until June 19, 2013, to enable him to submit documentary evidence. He timely submitted Applicant's Exhibits (AX) A through G, which were admitted without objection. Department Counsel's comments regarding AX A through G are attached to the record as Hearing Exhibit I. DOHA received the transcript (Tr.) on June 20, 2013.

Findings of Fact

Applicant is a 31-year-old warehouse specialist. He graduated from high school in June 1999. He worked as a driver for a large discount retailer from September 2000 to August 2010. He was laid off in September 2010. He returned to work for about a month in late 2010, but he quit when his hours were reduced to 20-35 hours per week. (GX 2 at 22.) He was unemployed until he began working for his current employer in March 2011. He has never held a security clearance.

Applicant and his wife have a seven-year-old son and an infant daughter. (GX 2 at 19.) He also has a 12-year-old daughter from a previous relationship, for whom he pays child support of \$359 per month. When he was interviewed by a security investigator in June 2011, he had a child support arrearage of about \$2,900. (GX 2 at 21.)

Applicant filed a Chapter 7 bankruptcy petition in October 2005 and received a discharge in January 2006. He told a security investigator that he filed the bankruptcy petition because he had acquired too much debt, but that he did not recall the details of the debts that were included. (GX 2 at 22; GX 3 at 4.) The bankruptcy is alleged in SOR ¶ 1.a.

In response to financial interrogatories in November 2012, Applicant stated that he had contacted the creditors alleged in SOR ¶¶ 1.b through 1.f and 1.h through 1.i and made payment arrangements. He submitted copies of letters addressed to each of these creditors. All the letters are unsigned and bear no indication that they were sent. He presented no documentary evidence that the creditors agreed to the payment terms. (GX 2 at 1-15.)

In his answer to the SOR, Applicant admitted the bankruptcy alleged in SOR ¶ 1.a, admitted the delinquent debts alleged in SOR ¶¶ 1.b and 1.c, and denied the debts alleged in SOR ¶ 1.d through 1.m. The status of the delinquent debts alleged in the SOR is set out below.

SOR ¶ 1.b, judgment for \$1,668, filed in June 2008. This debt is for furniture. Applicant testified that he has an agreement with the creditor to pay \$50 per month, but that the agreement was not reduced to writing. (Tr. 32.) On May 17, 2013, he made one \$50 payment. (AX A.)

SOR ¶ 1.c, medical bill for \$1,230, referred for collection in April 2011. Applicant testified that he has not made any payments on this debt. (Tr. 32-33.)

SOR ¶ 1.d, delinquent utility bill for \$483, referred for collection in August 2010. Applicant paid this debt in June 2013. (AX C.)

SOR ¶ 1.e, credit card account for \$590, referred for collection in April 2007. Applicant disputed this debt and it was deleted from his credit record. (Enclosure to Answer to SOR; GX 5 at 1.)

SOR ¶ 1.f, telephone bill for \$582, referred for collection in December 2007, charged off in March 2010. Applicant settled this debt in March 2013. (Answer to SOR; GX 3 at 5; GX 5 at 2.)

SOR ¶ 1.g, child support arrearage of \$4,891, referred for collection in September 2010. Applicant made several payments of less than the amount due between June 2012 and February 2013. The child support payments are now being deducted by garnishment of his pay. He testified that his state income tax deductions were being seized to satisfy the arrearage. The arrearage has been reduced to about \$3,800. (Tr. 37-40, 49; AX D.)

SOR ¶ 1.h, medical bill for \$373, referred for collection in June 2010. Applicant settled this debt for \$186.63 in October 2012. (Tr. 41-42; Answer to SOR.)

SOR ¶ 1.i, overdrawn credit union checking account for \$701, referred for collection in July 2006. Applicant testified that he telephonically contacted the credit union and was informed by an unknown person that he did not have a debt to the credit union. (Tr. 43.) His April 2013 CBR reflects that this debt is a "closed or paid account" with a zero balance. (GX 5 at 2.) The debt is resolved.

SOR ¶ 1.j, cell phone bill for \$450, referred for collection in May 2011. Applicant paid this debt in full in March 2013. (AX E.)

SOR ¶¶ 1.k and 1.l, medical bills for \$173 and \$387, referred for collection in December 2008 and January 2010. Applicant testified that he contacted the collection agency and was informed that it did not have any open collection accounts in his name. (Answer to SOR; Tr. 46-47.) The debts are not reflected on his September 2012 CBR or his April 2013 CBR. (GX 4; GX 5.)

SOR ¶ 1.m, federal income tax debt for about \$2,300. Applicant did not file federal income tax returns for several years. When he was interviewed by a security investigator in June 2011, he had been contacted by the IRS regarding a \$2,300 tax debt, but he had not made any payment arrangements. (GX 2 at 22.) In his answer to the SOR, he asserted that he was making payments on his delinquent taxes, and he submitted an account summary reflecting that he owed \$744 for tax year 2010. However, he has not presented evidence of a negotiated payment agreement. He testified that he has recently filed his returns for 2010 and 2011. (Tr. 47-48.) After the

hearing, he submitted an unsigned copy of a return for 2012, reflecting his calculation that he is entitled to a refund of \$2,740, which he believes will satisfy his federal tax debt. (AX F.)

Applicant and his wife received financial counseling for about three or four months in 2012. The counseling was intended to increase Applicant's credit score, and they terminated it because they believed that it was not worth the cost. (Tr. 55.)

In response to DOHA interrogatories, Applicant submitted a personal financial statement (PFS), which he updated at the hearing. He testified that his net monthly income is about \$4,200. His monthly expenses are about \$3,500, and his debt payments are about \$610, leaving a net remainder of about \$90. His net income reflects the involuntary deductions for child support. His debt payments reflected on the PFS do not include any of the debts alleged in the SOR. (GX 2 at 16; Tr. 50-53.) After the hearing, he submitted a printout of his family budget, which reflects monthly income of \$5,232, expenses of \$4,533 (including child support payments of \$973 and \$100 per month for past-due bills), and a monthly remainder of \$699. (AX G.)

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 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. DOD contractor personnel are entitled to the procedural protections in the Directive before any final unfavorable access determination may be made. Regulation ¶ C8.2.1.

A person in a public trust position 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. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information.

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 an evaluation of the whole person. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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. The Government must present substantial evidence to establish controverted facts alleged in the SOR.

Directive ¶ E3.1.14. Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). An applicant has the ultimate burden of demonstrating that it is clearly consistent with national security to grant or continue eligibility for access to sensitive information.

Analysis

Guideline F, Financial Considerations

The SOR alleges that Applicant filed a Chapter 7 bankruptcy petition in October 2005 and received a discharge in January 2006 (SOR ¶ 1.a). It also alleges that he accumulated 12 delinquent debts after his bankruptcy discharge, including a child support arrearage (SOR ¶ 1.g) and a federal income tax debt (SOR ¶ 1.m).

The concern under this guideline is set out in AG ¶ 18:

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.

This concern is broader than the possibility that an individual might knowingly compromise sensitive information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding sensitive information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's CBRs, his admissions, and his testimony at the hearing establish three disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts"), AG ¶ 19(c) ("a history of not meeting financial obligations"), and AG ¶ 19(g) ("failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same"). The following mitigating conditions are potentially relevant:

AG ¶ 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;

AG ¶ 20(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;

AG ¶ 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;

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(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.

AG ¶ 20(a) is not established. Applicant's delinquent debts are numerous, ongoing, and not the result of unusual circumstances making them unlikely to recur.

AG ¶ 20(b) is not fully established. Applicant encountered a condition beyond his control when he was laid off in September 2010. However, he returned to work for about a month in late 2010, and he voluntarily quit when his hours were reduced. Furthermore, the judgment alleged in SOR ¶ 1.b was entered against him more than two years before he was laid off, and the debts alleged in SOR ¶ 1.d-1.f, 1.h, 1.i, 1.k, and 1.l were all referred for collection before he was laid off. His unemployment affected his ability to resolve his delinquent debts, but he has not acted responsibly. He did not resolve the medical debt alleged in SOR ¶ 1.h until October 2012. He did not make payments on the delinquent debts alleged in SOR ¶¶ 1.b, 1.d, 1.f, 1.h, and 1.j until March, May, and June of 2013, long after beginning his current employment. His loss of employment in late 2010 reduced his ability to pay any federal income taxes due, but it does not excuse his failure to file his tax returns.

AG ¶ 20(c) is not fully established. Applicant received counseling for three or four months in 2012, but his financial situation is not yet under control.

AG ¶ 20(d) is not fully established. This mitigating condition requires a "good-faith effort." Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Adjudication of eligibility for a public trust position is not a debt-collection procedure; it is an evaluation of an individual's judgment, reliability, and trustworthiness. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) Thus, evidence of past irresponsibility is not mitigated by payment of debts motivated primarily by the pressure of qualifying for a public trust position. Applicant did not begin to address his delinquent debts until he submitted his application for a public trust position in May 2011 and was questioned about his delinquent debts by a security investigator in June 2011. He did not contact most of his creditors until he responded to

DOHA financial interrogatories in November 2012. Applicant's single \$50 payment on the judgment alleged in SOR ¶ 1.b, and his belated settlement of the debts alleged in SOR ¶¶ 1.d, 1.f, 1.h, and 1.j do not demonstrate good faith within the meaning of this guideline. The involuntary garnishment of his pay to satisfy his child support arrearage "is not the same as, or similar to, a good-faith initiation of repayment by the debtor." ISCR Case No. 09-5700 (App. Bd. Feb. 24, 2011), citing ISCR Case No. 08-06058 (App. Bd. Sep. 21, 2009). Similarly, the seizure of his federal income tax refunds to satisfy his delinquent taxes does not constitute a good-faith effort to resolve them. On the other hand, the evidence indicates that Applicant made periodic efforts, separate from the involuntary garnishment of his pay, to keep up with his child support payments and reduce the arrearage after he began his current job. Thus, I conclude that AG ¶ 20(d) is established for the child support arrearage alleged in SOR ¶ 1.g, but not for the other delinquent debts alleged in the SOR.

AG ¶ 20(e) is established for the medical debts alleged in SOR ¶¶ 1.e, 1.i, 1.k, and 1.l and the credit union debt in SOR ¶ 1.i, which Applicant successfully disputed. It is not established for the other delinquent debts alleged in the SOR.

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.

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. In applying 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 relevant circumstances. An 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.

I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant has a long history of financial problems. The judgment alleged in SOR ¶ 1.b was entered against him within six months of his bankruptcy discharge. Most of

the debts alleged in the SOR were delinquent before he was laid off in September 2010. After he began his current job, he did not pay attention to his delinquent debts until he realized that they were an impediment to obtaining a public trust position. He was candid and sincere at the hearing. He made considerable progress in resolving his financial situation once he decided to give it some attention. However, he has not established a track record of financial responsibility, and I am not convinced that he will continue his efforts to resolve his debts once the pressure of qualifying for a public trust position is removed. His failure to file federal income tax returns for several years is inexcusable.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the trustworthiness concerns based on financial considerations. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with national security to grant him eligibility for a public trust position.

Formal Findings

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

Subparagraphs 1.a-1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	For Applicant
Subparagraph 1.j:	Against Applicant
Subparagraphs 1.k-1.l:	For Applicant
Subparagraph 1.m:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for a public trust position is denied.

LeRoy F. Foreman
Administrative Judge