



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 14-01182

Appearances

For Government: Caroline E. Heintzelman, Esquire, Department Counsel

For Applicant: *Pro se*

09/11/2015

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, I conclude that Applicant did not mitigate the trust concerns regarding his finances. Eligibility to hold a public trust position is denied.

History of the Case

On April 28, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the affirmative determination of eligibility for granting approval to hold a public trust position, and recommended referral to an administrative judge to determine whether eligibility to hold a public trust position should be granted, continued, denied, or revoked. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AGs) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on November 6, 2014, and elected to have his case decided on the basis of the written record. Applicant received the Government's File of Relevant Material (FORM) on June 8, 2015, and did not respond to the FORM. The case was assigned to me on July 15, 2015.

Summary of Pleadings

Under Guideline F, Applicant allegedly (a) petitioned for Chapter 13 relief on November 2011, after which the bankruptcy petition was dismissed in October 2013 and (b) accumulated seven delinquent debts. Together, his delinquent debts exceed \$51,000.

In his response to the SOR (Item 1), Applicant admitted the allegations covered by the SOR with explanations. He claimed his wife encountered health issues around eight years ago, close to the time the housing market began crashing. Applicant claimed he took the advice of his lender, ceased paying on his mortgage, and filed for Chapter 13 relief to buy him some time while he worked to stabilize his home mortgage. He claimed he scheduled all of the debts listed in the SOR in his Chapter 13 petition. He claimed, too, that he believed in the importance of security and stability and exhibited an ethical track record in his Government assignments

Findings of Fact

Applicant is a 40-year-old contract center operations manager for a defense contractor who seeks eligibility to hold a public trust position. The allegations covered in the SOR and admitted to by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant married his spouse in September 2001 and has three children from his marriage. (Item 2) He earned a diploma more than ten years ago. (Item 3) He claimed no military service and provided no endorsements, performance evaluations, or evidence of community and civic contributions.

Applicant's finances

Applicant and his wife purchased their home in April 2006 and financed their purchase with a \$208,000 first mortgage with a recognized lender. In 2009, this lender sold the loan to Applicant's current lender. (Items 1-6)

Sometime after purchasing their home, Applicant's wife experienced health issues. (Items 1 and 3) At the suggestion of his lender, Applicant applied for a loan modification in 2009. The loan modification was not approved until 2011. By this time, the loan had become delinquent by over \$20,000. (Item 3) At the lender's suggestion, and to buy him some time while he worked to stabilize his finances, Applicant petitioned for Chapter 13 relief in November 2011. (Items 1-3, and 7) Two years later, in 2013,

Applicant's Chapter 13 petition was dismissed at Applicant's request, after he failed to make his final trustee payment. Currently, the status of his first mortgage is unclear. Recent credit reports reveal a balance owing of \$35,333 on a \$208,000 loan balance. (Items 4-6) Monthly payments of \$1,866 are noted to be continuing with no indication of any foreclosure proceedings in the initiation or planning stages. (Items 4-6)

Besides his first mortgage, Applicant took out a second mortgage on his residence in March 2011. (Items 4-6) This mortgage was for \$50,000 with a different lender and was obtained for purchase money purposes to meet his down payment requirements. Records show that this mortgage was transferred or sold during the pendency of the Chapter 13 bankruptcy proceeding. (Items 4-6)

Additional debts are listed in the SOR, with no indication of whether any of these debts were resolved in Applicant's Chapter 13 bankruptcy. One of these debts covered in Applicant's most recent credit reports is a judgment taken against him by creditor 1.b for \$1,920 in December 2010. (Item 6) This judgment has since been satisfied. (Items 4-6)

Other listed debts are comprised of delinquencies with creditor 1.c (a home equity line of credit with a stated \$3,221 past due balance; creditor 1.e (\$4,649); creditor 1.f (\$633); creditor 1.g (\$282); creditor 1.h (\$3,596); creditor 1.i (\$1,537); and creditor 1.j (\$280). Credit reports reveal that Applicant has paid or settled two of these debts (creditor 1.e and creditor 1.j) and made at least one payment on one other listed debt: creditor 1.h. (items 4-6) None of the remaining listed debts have been paid or otherwise resolved according to Applicant's most recent credit reports. (Items 4-6)

In Applicant's Chapter 13 petition, he scheduled listed real property assets valued at \$180,000 and personal property valued at \$53,900. (Item 7) He scheduled secured claims of \$277,853 and unsecured non-priority claims of \$57,384. (Item 7) Records document that Applicant made regular monthly payments of \$740 to the Chapter 13 trustee between November 2011 and October 2013, for a reported total of \$12,250. (Item 7) The trustee's final report and account listed \$4,840 in administrative expenses and \$7,407 in creditor disbursements. (Item 7) Applicant listed monthly income of \$6,454 and monthly expenses of \$5,714 for his two years of trustee reporting. The bankruptcy court's docket sheet confirmed that Applicant received a certificate of credit counseling, satisfying the court's credit counseling requirements. (Item 7). Applicant provided no additional evidence of financial counseling.

Since his December 2013 interview with an agent of the Office of Personnel Management (OPM), Applicant has provided no documentation of his addressing any of his still unresolved debts covered in the SOR. Afforded an opportunity to supplement the FORM, he furnished no supplemental materials

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could

create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect privacy-based information. These guidelines include "[c]onditions that could raise a security concern [public trust concern] and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." These guidelines must be considered before deciding whether or not eligibility to hold a public trust position should be granted, continued, or denied.

The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable trust risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

Financial Considerations

The Concern: 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. 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, ¶ 18.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's eligibility to hold a public trust position may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility to hold a public trust position depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain eligibility to hold a public trust position. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused a trust position before it can deny or revoke eligibility to hold a public trust position. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard privacy information in his custody and control.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her trust worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances [controls public trust eligibility as well] be clearly consistent with the national interest, access to sensitive information requires an applicant to demonstrate his public trust eligibility is clearly consistent with the national interest. In this regard, the applicant has the ultimate burden of demonstrating his or her public trust eligibility. "[S]ecurity-clearance determinations [and by extension, public trust position eligibility] should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Trust concerns are raised over Applicant's accumulation of delinquent debts over a considerable number of years that he failed to address with the resources available to him. Applicant's recurrent problems with managing his finances over an extended number of years (at least since 2007) reflect lapses of judgment in administering his financial responsibilities.

Applicant's pleading admissions of his delinquent debts covered in the SOR negate the need for any independent proof. See ISCR Case No. 94-1159 at 4 (App. Bd. Dec. 4, 1995 ("any admissions [applicant] made to the SOR allegations . . . relieve Department Counsel of its burden of proof"). See, generally, *McCormick on Evidence*, §

262 (6th ed. 2006). Each of the covered allegations are fully documented and provide ample corroboration of his admissions.

Since March 2004, Applicant has enjoyed steady gainful employment without any visible breaks in work status. Credit reports reveal, though, that Applicant neglected to manage his finances and cure the delinquencies in his listed consumer accounts before the issuance of the SOR. Applicant's wife's health issues contemporaneous with a falling housing market accounted for many of Applicant's payment problems.

Applicant's cited problems with his wife's health and housing weaknesses are not enough, though, to justify his unwillingness or inability to materially address his remaining debts. While he has since indicated his readiness to address his debts, he has provided insufficient documentary evidence of payment initiatives with any of his remaining creditors.

With his steady earnings from his full-time employment available to address his overdue accounts, Applicant could be expected to make concerted efforts to address his delinquent debts. Applicant's lack of any positive payment initiatives warrant the application of two of the disqualifying conditions (DC) of the Guidelines DC ¶ 19(a), "inability or unwillingness to satisfy debts;" and DC ¶ 19(c), "a history of not meeting financial obligations."

Positions designated as ADP I and ADP II are classified as "sensitive positions." See DOD Regulation 5200.2-R, *Personnel Security Program*, ¶¶ C3, 1.2, 1.1.7, and C3. 1.2..3 (Jan. 1987, as amended) (the Regulation). Holding a public trust position involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor.

Financial stability in a person cleared to protect privacy information is required precisely to inspire trust and confidence in the holder of the trust position. While the principal concern of a trust position holder's demonstrated financial difficulties is vulnerability to coercion and influence, judgment and trust concerns are explicit in cases involving debt delinquencies.

Although ADP I and ADP positions are not expressly covered in Executive Order 10865 or the Directive, which apply to contractor personnel, historically the same principles covering these positions have been applied in the Regulation governing military and civilian personnel. The definitions used in the Regulation to define ADP I and ADP II positions have equal applicability to contractors covered by the Directive.

Some extenuating circumstances are associated with Applicant's loss of income during his wife's extended dealing with her health issues and instability in the housing market during the 2009-2013 time frame. However, Applicant has had the benefit of continuous full-time employment to work to show more progress in addressing his finances. As a result, neither MC ¶ 20(a), "the behavior happened a long time 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,"

nor MC ¶ 20(b), “the conditions that resulted in the behavior 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,” are entitled to any more than partial application.

Financial counseling could have been helpful to Applicant in devising a repayment plan to address his debts. Records do not reveal any material financial counseling initiatives pursued by Applicant beyond his required credit counseling for his Chapter 13 petition. MC ¶ 20(c), “the person has received counseling for the problem and/or there are clear indications that the problem is being resolved or is under control,” has only partial application to Applicant’s situation.

Applicant’s finances have been marked by lengthy periods of financial instability and show insufficient signs of stabilizing in the foreseeable future. Still to be addressed are his remaining debts covered in the SOR before he can restore his finances to acceptable levels of stability commensurate with holding a public trust position. Afforded opportunities to follow through with updated payment documentation and initiatives, Applicant has failed to document any follow-through on his debts since his receipt of the FORM. His financial history reveals limited attention to exploring payment initiatives before or after the issuance of the SOR.

While an applicant need not have paid every debt alleged in the SOR, the applicant needs to establish that there is a credible and realistic plan to resolve identified financial problems, accompanied by significant actions to implement the plan. See ISCR Case No. 07-06482 (App. Bd. May 21, 2008). Applicant’s promises to address his delinquent debts in the future do not constitute a credible, realistic plan to resolve his debts and are entitled very little weight.

Whole-person assessment of Applicant’s financial problems is hampered by the limited documented corrective steps and the paucity of information about his work and personal life. While he is able to show some extenuating circumstances associated with his wife’s health issues and weaknesses in the housing market, his limited record of repayment initiatives with the income sources available to him reflect questionable resolve and accountability.

Taken together, Applicant’s limited amount of demonstrated corrective steps to improve his finances reflect continuing lapses in his overall judgment and still leaves doubts about the stability of his finances. These doubts cannot be reconciled with minimum requirements for retaining the Government’s confidence in his financial judgment, reliability, and trustworthiness. Applicant fails to mitigate trust concerns related to his outstanding debt delinquencies and judgment lapses associated therein.

Unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a, 1.c-1.d, 1.f-1.i, and 1.k- 1.l of the financial considerations guideline. Applicant is entitled to payment/settlement credit for his satisfaction of the debts owed to creditors 1.b, 1.e, and 1.j

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE F (FINANCIAL CONSIDERATIONS): AGAINST APPLICANT

Subparagraphs 1.a, 1.c-1.d, 1.f-1.i,
and 1.k- 1.l:

Against Applicant

Subparagraphs 1.b, 1.e, and 1.j:

For Applicant

Conclusions

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

Roger C. Wesley
Administrative Judge

