



**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. 14-04983

Appearances

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

For Applicant: *Pro se*

11/25/2016

Decision

HOWE, Philip S., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Public Trust Position (e-QIP), on April 2, 2014. On January 26, 2015, the Department of Defense Consolidated Adjudications Facility (DoDCAF) issued a Statement of Reasons (SOR) for Applicant detailing the trustworthiness concerns under Guideline F (Financial Considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation), effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing on February 25, 2015, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on June 9, 2015.

I received the original case assignment on June 15, 2015. It was transferred to another administrative judge on June 18, 2015, and attempted to be set for a video teleconference hearing on November 23, 2015. That hearing did not occur because of technical difficulties. The case was transferred back to me on February 26, 2016.

The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 14, 2016, and I convened the hearing as scheduled on June 30, 2016. The government offered Exhibits (Ex.) 1 through 5, which were received without objection. Applicant testified and submitted Exhibits A through N, without objection. DOHA received the transcript of the hearing (Tr.) on July 11, 2016. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

Findings of Fact

In his Answer to the SOR, Applicant did not specifically admit or deny each allegation of delinquent debt. He submitted documents addressing each allegation to show he took action on each debt to support his request for eligibility for a public trust position.

Applicant is 50 years old, unmarried, and is not employed. He seeks a trustworthiness decision to obtain a logistics position with a federal agency. Applicant served in the U. S. Army from 1985 to 1988 when he was discharged. He graduated from college in 2000 with a degree in computer music production. He has never held a long-term job and his only source of direct income is disability pay. His financial history shows his income comes from Social Security disability payments of currently about \$1,900 a month, and Veterans Administration (VA) medical benefits. His earnings, he claims, have never exceeded \$13,000 since 2008. He has savings of \$4,000 in a local bank and a checking account also. This money is the remainder of a \$12,000 back payment for disability in 2009. (Tr. 22, 28, 50, 57, 61, 62, 64, 67; Exhibit N)

In 2008 Applicant was hospitalized in a VA hospital for suicidal tendencies "for business turndown and economic hardship." As a result of this condition Applicant has not repaid his debts because he has been unable to obtain suitable employment commensurate with his education. (Tr. 36, 59)

Applicant has ten delinquent debts listed in the SOR. They total \$12,163. He did not file his Federal income tax returns for 2009 to 2013 (Subparagraph 1.k). He also has not filed income tax returns for 2014 and 2015. He claimed he made so little money that he did not have to pay any taxes or file tax returns. His student loans are deferred annually based on his income and disability status. They are not alleged as delinquent in the SOR. (Tr. 24, 27; Exhibits 3-5; SOR)

Applicant has not had taxable income since 2008. His earnings record from the Social Security Administration shows zero income since 2008 to 2014. He does not pay

rent, nor electricity costs, cell telephone fees, cable or internet fees, car insurance, or garbage pickup. He pays different amounts each month depending on use for gasoline, groceries, and restaurant eating. He asserts he repaid his credit card and is trying to repay the delinquent debts in the SOR. He is supported currently by a woman who lives in a house she owns outright. The woman's mother pays their property taxes and insurance premiums. He admitted that at various periods in his life he has had similar living arrangements and was supported by his girlfriends. (Tr. 25, 26, 56-58; Exhibit N)

Applicant owes \$9,231 on an apartment lease from 2008 (Subparagraph 1.a). He was hospitalized that year. The rent was \$2,200 per month. Applicant stated his roommate never paid her share of the rent and he could not afford it by himself. He testified they were in a joint business venture to raise a lot of money in media production but the work never materialized. He only lived in the apartment for two months in 2008. He stated further that his partner "ended up having many identity thefts of my identity which resulted in a catastrophic suicidal situation where the lease crumbled, the business crumbled. It was an over-extension of hope." Since 2008 Applicant's only communication with the creditor leasing company was a 2015 counter-offer on the debt, but it was not accepted. He has not made any payments on this debt and it is not resolved. Applicant stated the debt is no longer on his credit report and he does intend to pay it. (Tr. 28-36, 49; Exhibits 3-5 F)

Applicant owes \$1,388 on a medical account from 2014 (Subparagraph 1.b). Applicant testified he entered an installment payment agreement of \$25 monthly from March 2015 on this debt and has made the payments regularly. The balance now is \$1,263. He also stated there was an additional \$300 owed for another medical debt (Subparagraph 1.f). The debt has decreased since March 2015 by \$400 made in 16 payments in 2015 and 2016. These two debts are being resolved. (Tr. 36, 37, 42, 52; Exhibits 3-5, G, F)

Applicant owes a cable television debt of \$481 (Subparagraph 1.c). Applicant contends the debt is resolved. He stated he could not find any proof from the collector for this debt; therefore he must not owe it. He offers documents pertaining to the lease debt in Subparagraph 1.a and opines the cable debt may be part of the total debt owed on the lease. Applicant admitted he has not disputed the debt nor resolved it by payment. (Tr. 38-40; Exhibits 4, H)

Applicant thinks the three debts listed in the SOR owed to a collector for a city are for his "doing business as" licenses annually. They are \$380, \$336, and \$275 (Subparagraphs 1.d, 1.e, and 1.g). These debts are for a sound production company Applicant operated in that city. The city claims a total debt of \$1,284.83. Applicant does not believe he owes these debts. His exhibit shows the accounts were cancelled and deleted from his credit reports. (Tr. 40-42; Exhibits 3-5, I)

Applicant owed a gas company \$141 for heat in his residence. (Subparagraph 1.h) He claims he disputed the debt and it was removed from his credit report. He

denied having an account with that gas company. This debt is deleted by dispute, not paid. (Tr. 42, 54, 55; Exhibits 3-5, K)

Applicant owed a telephone company \$60 (Subparagraph 1.i). He claims he disputed it and it was removed from his credit report. He submitted a letter from the debt collector showing the debt was paid in full. It is resolved. (Tr. 43, 54, 55; Exhibits 3-5, L)

Applicant owed a collector \$52 on a medical account (Subparagraph 1.j). This debt is resolved as shown by the letter from the creditor showing a zero balance owed. (Tr. 43, 44, 54, 55; Exhibits 3-5, M)

Applicant actually paid only the debts owed for medical procedures. The remaining debts he disputed or ignored. He was confronted with them in 2014 by the government investigator. He waited until he received the SOR in January 2015 until he attempted to pay the medical debts. He claimed he did not recognize or remember the other delinquent debts. (Tr. 46-49, 51)

Applicant has not filed his federal income tax forms from 2009 to 2015 (Subparagraph 1.k). He claims his social security income is below the level required to file the tax returns. Applicant asserts based on his last exhibit that he is exempt from the filing requirement.¹ (Tr. 52, 53, 56; Exhibit N)

Applicant's e-QIP states in answering Section 22 thereof that he was arrested in June 1990 for taking indecent liberties with a child. He asserts the charges were reduced to furnishing malt liquor to a minor. He served 30 days in jail, served his probation, and community service. (Tr. 60, 61; e-QIP in Section 22)

Policies

Positions designated as ADP I/II/III 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

¹ The Internal Revenue Service (IRS) Publication 501, Table 1, states a single person under 65 making \$10,300 or more in 2015 must file an income tax form. The minimum amount rises each year.

Adjudicative Guidelines (AG) ¶ 2 (a). 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, 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 as to obtaining 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 *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The trustworthiness concern relating to the guideline for Financial Considerations 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 [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes three conditions that could raise trustworthiness concerns. Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly under AG ¶ 19(c), "a history of not meeting financial obligations" may raise security concerns. Applicant accumulated delinquent debt and was unable to pay some obligations since 2008. Finally, under AG ¶ 19 (g), Applicant "failed to file annual Federal, state, or local income tax returns as required." The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where "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." Applicant's financial worries arose after 2008 when his business and employment plans did not succeed and he entered a VA hospital for anxiety and depression. He has never earned more than \$13,000 since then and his only income was from disability payments. He pays no rent or other household expenses because he depends on the generosity of women he meets and befriends, to date about four of them since 2008. I find the behavior occurred under usual circumstances that it is likely to recur based on the pattern of his life since 2008. Applicant has not asserted himself since 2008 to become gainfully employed and earn sufficient income to support himself, including repaying his debts. It raises concerns about his current reliability, trustworthiness, or good judgment. The evidence does not raise this potentially mitigating condition.

Under AG ¶ 20(b), it may be mitigating where "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." As noted above, some of the financial problems arose from his medical problems, including the substantial medical bills. He did not act responsibly in identifying and resolving these debts. His lack of employment is by his own choice. He did have a medical emergency when he was hospitalized, but his testimony shows it resulted from feelings of a lack personal success as he defined it in his hoped for profession of sound technology. I find this potentially mitigating condition is not a factor for consideration in this case.

Evidence that “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” is potentially mitigating under AG ¶ 20(c). His delinquent debts problems are not under control and he has not received financial counseling by his own testimony. This mitigating condition does not apply.

Similarly, AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Applicant admitted he did not have financial counseling. His delinquent debts are in various stages of resolution, if at all. He had three debts deleted from his credit records without payment, he paid three other debts, has two medical debts he is paying on an installment basis, and has not paid two other debts. This mitigating condition applies to the delinquent debts he resolved. There are two debts he has not resolved.

Finally, his income tax returns are not filed from 2009 to 2015, allegedly because his income is too low to require filing. He did not demonstrate he was not required to file income tax returns. No mitigating condition applies to the failure to file his tax returns.

Applicant claims he disputed several debts but has not submitted documented proof of such actions. Some debts disappeared from his credit record. The burden of proof is on Applicant and he did succeed partially in this dispute effort. AG ¶ 20 (e) is applicable to debts listed in Subparagraphs 1.d, 1.e, 1.g, and 1.h.

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 the 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 the facts and circumstances surrounding this case. Applicant took a long time to address his delinquent debts and file Federal income tax returns. Some debts were

eliminated by deletion from his credit reports, two others remain unpaid, and two are being paid on an installment basis. Applicant has not sought employment in eight years to be able to resolve his debts. He relies on the generosity of others and his disability payments to survive. He shows a lack of initiative and responsibility. His 1990 arrest for serving alcohol to a minor is not the action of a responsible person. Even though it was not on the SOR, he admitted it in his e-QIP and it can be considered in his whole-person appraisal.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant did not 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 ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	For Applicant
Subparagraph 1.j:	For Applicant
Subparagraph 1.k:	Against Applicant

Conclusion

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

PHILIP S. HOWE
Administrative Judge