



**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. 15-00099

Appearances

For Government: Candace Garcia, Esquire

For Applicant: *Pro se*

12/12/2016

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant submitted sufficient evidence to mitigate Guideline F trustworthiness concerns. Applicant's eligibility to occupy a position of trust is granted.

Statement of the Case

On August 28, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing concerns under Guideline F (Financial Considerations) regarding his eligibility to occupy an automated data processing (ADP) position designated ADP-I/II/III. 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); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006. Applicant timely responded to the SOR, admitting 8 of the 10 allegations raised concerning a dismissed bankruptcy filing and nine delinquent debts. He also requested a hearing before a Defense Office of Hearings and Appeals (DOHA) Administrative Judge.

On June 6, 2016, I was assigned this case. On June 30, 2016, a notice of hearing was issued setting a hearing for August 17, 2016. The hearing was convened as scheduled. The government offered four exhibits (Exs.), which were accepted into the record without objection as Exs. 1-4. Applicant testified and offered no documents. The

record was left open through September 14, 2016, to permit the Applicant to provide any documents he wished to submit on his behalf. The transcript (Tr.) of the proceeding was received on August 25, 2016. On September 12, 2016, Applicant submitted documents which were accepted into the record without objection as Exs. A-D. The record was then closed. Based on my review of the file and submissions, I find Applicant mitigated financial considerations trustworthiness concerns.

Findings of Fact

Applicant is a 50-year-old lead technician at a medical facility, where he has worked since about mid-2007. He completed one year of college before he joined the United States military, where he served honorably for four-and-a-half years. While in the service, he was trained as a cardiovascular technician at a leading university. Divorced, he is the father of two grown children, one of whom is attending college. (Tr. 12-13) The other child is taking time off from college, recuperating after an automobile accident. Applicant, as a single father, raised the children. He was out of work for three periods of time due to medical issues: from March 2006 and August 2007, approximately eight months between 2013 and 2014 due to severe pain and rehabilitation, and about four months after a related surgery in late 2015. (Tr. 23-26) At one point in recent years, Applicant housed his elderly parents, who were reliant on Social Security and disability payments.¹ (Tr. 28)

Applicant acknowledges that he has had financial difficulties. He has disputed some of the entries in his credit report. (Tr. 14) He initially filed for Chapter 7 bankruptcy in October 2005, but his petition was dismissed in January 2006 after he declined to pay filing fees, which he found to be too costly. (Tr. 35-36, 45; SOR allegation 1a) He has had numerous medical issues related to his knees, hip, and back since at least 2005. Applicant, who suffers from intermittent health and medical issues, most recently voluntarily came off of four months of short term disability assistance in November 2015 in order to personally generate his own income through work.² (Tr. 15) In so doing, he was mindful to follow the Social Security Administration (SSA) Disability rules on transitioning back to work while staying within the prescribed income levels for receipt of such benefits.³ (Tr. 16, 26) Applicant devoted all such income to expenses related to

¹ Applicant housed and helped care for his parents from 2001 until 2013, before they were moved into a nursing facility and became recipients of Medicaid. (Tr. 30-31) They no longer need his monetary support.

² Applicant noted that in November 2015 he “took the leap of faith to try to get off [disability compensation] and try to do something on my own . . . just because I’m a firm believer that you don’t take handouts unless you absolutely need them,” while noting that he initially was a medical “mess at that time” and caring for both his ill parents while raising his own children as a single parent. (Tr. 15; 24) Applicant was in constant pain and in rehabilitation for his medical issues from about October 2013 through at least January 2014, causing him to be out of work and not receiving a regular salary through at least April 2014, followed by the four months without work in 2015 during which he received short term disability payments noted above. (Tr. 22-24)

³ The short term disability recoupment effort noted in the SOR is related to Applicant’s period of unemployment occurring between March 2006 and August 2007. (Tr. 25)

maintaining his family, as well as his medical problems and related surgeries.⁴ (Tr. 16) As the payments briefly overlapped with his transition to full-time employment, Applicant continued to apply the proceeds to his medical and family debts.⁵ He questioned whether they were still appropriate. He was later informed by the SSA that his income had exceeded the limit for an individual receiving disability payments. (Tr. 16-17) Partial recoupment was eventually instituted.

Applicant is presently in need of two hip surgeries as follow-up to earlier hip and knee surgeries, from which he has acquired over \$150,000 in medical debt. (Tr. 16-17) He is presently compiling documentation regarding these medical issues for the United States Government with regard to his present financial situation and his past disability payment eligibility. Meanwhile, he still aspires to a more lucrative position.

At issue are delinquent medical accounts with balances of approximately \$328, \$45, \$63, and \$18 (SOR allegations 1.b-1.e). Applicant stated these have been satisfied, and he provided evidence of payment for all of these balances except the debt for \$63, which he cannot find.⁶ (Ex. 3) In addition, there is a claim by the Social Security Administration for about \$28,260 (SOR allegation 1.h) due to the alleged overpayments described above. An account balance with a retail merchandiser for \$420 has been satisfied. (Tr.18-19; Ex. 1) A \$789 balance with a telecommunications provider (SOR allegation 1.g), created when his parents used his Social Security number to open an account, has since been resolved and removed from his credit report. (Tr. 17, 29; Ex. 2) An account balance of \$632 remains outstanding (SOR allegation 1.i), but his balance with a local county regarding a speeding ticket has been resolved. (Ex. 3)

At present, the main debt remaining at issue in the SOR is the Social Security obligation noted at SOR allegation 1.h for \$28,260. Applicant presented credible testimony he is working with the SSA to resolve his short term disability-related debt in light of the circumstances, his continued telephonic communication with the agency, and his medical situation. He is presently appealing the amount related to the approximately six-month period at issue. He now has his regularly recurring bills go through his bank for automatic payment. (Tr. 32) Applicant maintains a budget. (Tr. 44) In addition, his monthly financial needs have lessened now that his parents and his children are living independently. (Tr. 32) He has not opened any new lines of credit. (Tr. 32-33) Applicant initially planned to seek credit counseling, but, after reviewing the offerings of one organization, he concluded that it was more economical for him to make direct payments to his creditors himself. (Tr. 33-34)

⁴ Applicant, who is eligible to receive medical care through the Department of Veterans Affairs (VA) has incurred over \$150,000 in related medical obligations.

⁵ Applicant is contesting the amount sought for recoupment by SSA for about six months of temporary disability payments. (SOR allegation 1.h)

⁶ Applicant also provided evidence he satisfied a \$90.96 medical bill, but that debt does not appear to be set forth in the SOR. (Tr. 18-19; See Ex. 4) It may incorporate the medical debt noted at SOR allegation 1.d. He believes one or more of the cited medical debts may have been for care administered to his son. (Tr. 42-43) He has also satisfied a delinquent retail balance of \$664 not noted in the SOR. (Tr. 17-18)

Applicant is now current on his other accounts, including on-going medical bills. (Tr. 36-37, 41) After some contributions toward his daughter's college education, he has a monthly net remainder of about \$300-400 after expenses. (Tr. 43) He is capable of adopting a repayment plan for any balance determined to be owed to the SSA.

Otherwise, Applicant is devoting his energies to economic self-sufficiency. He has received solidly positive work evaluations. He is devoted to helping others through his work in the medical field. He has been a member of the same house of faith for 17 years, where he is an official and on a board. He is supportive of his children and enjoys helping others. He has been as proactive as possible with regard to his medical issues.

Policies

When evaluating an applicant's suitability for a position of trust, the administrative judge must consider the adjudicative guidelines. The adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to protected information.

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. Under 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 in making a decision.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable decision."

A person who seeks a public trust position enters into a fiduciary relationship with the Government predicated upon trust and confidence that transcends normal duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard information. Section 7 of Executive Order 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."

Analysis

Guideline F, Financial Considerations

Under Guideline F, AG ¶ 18 sets forth the applicable trustworthiness 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.

The Government introduced evidence showing Applicant filed, but voluntarily withdrew from, a petition for bankruptcy which he later voluntarily abandoned and which was ultimately dismissed. While this does not constitute disqualification by itself, it reflects on his past financial issues, which also include the nearly \$30,000 in delinquent debt now at issue. Such facts raise financial considerations disqualifying conditions:

AG ¶ 19(a) inability or unwillingness to satisfy debts, and

AG ¶ 19(c) a history of not meeting financial obligations.

Five conditions could mitigate these financial concerns:

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.

The primary debt at issue is related to the SSA disability repayments which Applicant acknowledges he acquired, but he questions the amount at issue. He did, however, provide persuasive testimony and evidence regarding his efforts to address the other delinquent debts at issue. To date, however, the SSA debt remains outstanding and unresolved, although Applicant's successful efforts to improve his understanding of his financial situation and the situation he faced when he received the overpayments are to his credit. Moreover, the genesis of the other delinquent debts at issue is clearly related to medical issues beyond Applicant's control, despite his efforts to mitigate their

acquisition by returning to work prematurely and continuing to seek higher paying positions. While he opted not to go through with financial counseling, he has made successful strides in addressing the non-SSA debts at issue, devised a budget, learned to live within his means, and now retains a positive financial monthly net remainder. Such facts raise mitigating conditions AG ¶ 20(a)-(d).

With regard to his current dispute regarding the SSA balance, Applicant admits he suspected his final SSA payments might be in error, but he deposited them in his bank account anyway. There is no documented evidence, however, that it was his intent to defraud the government or avoid repayment, nor has his personal conduct been alleged as a basis disqualifying him from trustworthiness position eligibility. Moreover, it is clear Applicant has a basis for, and a right to proceed with, seeking validation of the amount assessed. Because he corresponded with SSA mostly by telephone, however, he has no documentation substantiating any claims that the amount is inaccurate. Therefore, his presentation and materials do not give rise to AG ¶ 20(e). Taken together, however, the other mitigating conditions raised highlight his efforts toward resolving his debt and his efforts to take responsibility for all of his delinquent debt.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a position of trust by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the adjudicative process factors listed at AG ¶ 2(a). Under AG ¶ 2(c), the final determination of whether to grant eligibility for a position of trust must be an overall commonsense judgment based on 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. I incorporate my comments under the guideline at issue in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a 50-year-old lead technician who has worked in the same medical facility since 2007. He served honorably in the United States military, attended some college courses, and is a trained cardiovascular technician. He is divorced and the father of two adult children. Applicant took it upon himself to care for his aging parents before they were eligible for subsidized elder care at a nursing facility, and he helped put his children through college when he was financially able to do so. Since the mid-2000s, he has suffered from on-going, recurring, and related knee, back, and hip issues that have required and still require surgical care. As a result, he experienced three notable periods without employment. During one such period, he accepted short-term SSA disability insurance payments. It was during that period he received the overpayments that represent the main delinquent debt remaining at issue.

Applicant has substantially addressed or repaid all the financial debts noted in the SOR except for the SSA-related debt. In addition, he has comported his financial behavior

in such a way as to manage his budget and live within its limits going forward. He is presently trying to negotiate a validation of the SSA-related debt and devise a repayment plan. He currently has the resources to make modest monthly payments toward such a plan. Given his financial progress on the lesser debts, his improved financial outlook and management, and his willingness to address whatever is ultimately found to be owed to the SSA, I find that Applicant has presented sufficient evidence and information to mitigate financial considerations concerns.

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:	FOR APPLICANT
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Subparagraphs 1.a-1.j:	For Applicant
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Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to permit Applicant to maintain a public trust position. Eligibility for a public trust position is granted.

Arthur E. Marshall, Jr.
Administrative Judge