



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



In the matter of:

Applicant for Public Trust Position

)
)
)
)
)
)
)

ADP Case No. 15-01145

Appearances

For Government: Benjamin R. Dorsey, Esq., Department Counsel
For Applicant: *Pro se*

10/17/2016

Decision

WESLEY, Roger C., Administrative Judge:

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

History of the Case

On September 14, 2015, Department of Defense (DOD) Consolidated Adjudication Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the preliminary affirmative determination of whether to grant eligibility for a public 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, 2006.¹

Applicant responded to the SOR on October 6, 2015, 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 December 11, 2015, and did not submit any information in response to the FORM. The case was assigned to me on April 22, 2016.

Summary of Pleadings

Under Guideline F, Applicant allegedly accumulated three delinquent debts exceeding \$275,000 and concealed his assets by holding them in a private bank account in someone else's name. Allegedly, these listed debts remain outstanding.

In his response to the SOR, Applicant admitted each of the allegations with explanations. He claimed the delinquent debts covered in paragraphs 1.a-1.c represent written off accounts by the lender after its acceptance of Applicant's short sale offer. He claimed his credit report would reflect the paid off amounts. Applicant claimed he kept most of his cash at home while he was determining what his financial obligations were. Further, he claimed that in the event his liable debts exceeded his ability to pay, bankruptcy would have been his only viable option.

Findings of Fact

Applicant is a 61-year-old network engineer for a defense contractor who seeks eligibility to hold a public trust position. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant married his first spouse in January 1981 and divorced her in January 1984. (Item 3) He remarried in January 1994 and divorced his second spouse in January 1996. (Item 1) Applicant has two adult children from his first marriage. He claimed no post-high school educational credits or military service.

Applicant has been employed by his current employer since April 2014 as a network engineer. (Item 1) He was employed by another contractor as a network

¹ A memorandum from the Deputy Under Secretary of Defense for Counterintelligence and Security, titled "Adjudication of Trustworthiness Cases," covering the handling of trustworthiness cases under the Directive was issued on November 19, 2004. This memorandum directed DOHA to continue to utilize DOD Directive 5220.6 in ADP contractor cases for trustworthiness determinations (to include those involving ADP I, II, and III positions). (HE 1) Parenthetically, the Directive was designed to implement E.O. 10865.

engineer between July 2011 and April 2014, and was self-employed between January 2003 and July 2011. (Item 1)

Finances

In October 2005, Applicant opened a home equity line of credit with creditor 1.b for \$10,576. (Items 5-6). Applicant described the equity line as similar to a home equity loan. Credit reports document that creditor 1.b sold this account to a collection agency in June 2013. (Items 5-6) Applicant claimed in a September 2015 interview with an agent of the Office of Personnel Management (OPM) he does not owe the amount of money listed in the credit reports and SOR and has no intention of paying it. (Item 4) , and the account remains in collection status with the assigned collection agency.

In October 2006, Applicant obtained another home equity line of credit from creditor 1.a in the amount of \$228,938 on the same property securing the line of credit dispensed to Applicant by creditor 1.b. (Items 4-6) In April 2007, he obtained another home equity line of credit from a different lender on the same property (creditor 1.c) in the amount of \$31,400. (Items 4-6) After incurring difficulty selling the property, he eventually sold the property in a short sale in April 2011. (Items 5-6) Whether the sale brought enough in proceeds to cover Applicant's home equity mortgages with creditors 1.a-1.c is uncertain and underdeveloped by Applicant. Based on the reported information in his credit reports and the information he provided in his OPM interview, it is unclear whether the short sale covered all of the debts owing on his creditor 1.a-1.c home equity accounts.

All of Applicant's delinquent home equity loans covered by the listed creditor 1.b and 1.c accounts remain in default with no evidence of payment or payment plans (Items 4-6) Two of the delinquent mortgage debts (creditors 1.a and 1.c) are reported as charged-off accounts. (Items 5-6) The remaining debt with creditor 1.b continues to be reported in collection status with no reported payment action.

After failing to address his mortgage debts, Applicant continues to hold large assets in his sister's bank account that are reportedly worth in excess of \$100,000. (Item 4) Applicant continues to claim (albeit without any evidentiary support) that he is no longer obligated to pay the amounts claimed by creditors 1.a-1.c. (Items to 2 and 4) While contemplating filing for bankruptcy, he admitted to transferring ownership of his assets to his sister for holding in her bank account while he contemplated filing for bankruptcy. (Items 2 and 4) Whether his ownership transfers satisfy criteria for characterizing them as fraudulent conveyances, they certainly reflect dishonest actions on his part designed to place his assets beyond the reach of collection by his creditors (notably creditors 1.a-1.c).

Endorsements

Applicant provided no character references on his behalf, either with his answer or with his response to the FORM. Nor did he furnish any performance evaluations or evidence of community and civic contributions.

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 classified [privacy] information. These guidelines include "[c]onditions that could raise a trustworthiness concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security [trustworthiness] concerns."

The AGs 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 public 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 guideline is 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.

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. AG, ¶ 15.

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 for a security clearance 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 public trust position eligibility. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to protect privacy information.

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 trustworthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all trustworthiness determinations be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her trust eligibility. "[S]ecurity-clearance [T]rustworthiness] determinations should err, if they must, on the side of denials." *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Applicant is a fully employed network engineer for a defense contractor who accumulated delinquent mortgage-related debts exceeding \$275,000. Two of the

listed debts (i.e., the home equity lines of credit with creditors 1.a and 1.c) were charged off and remain outstanding with no evidence of their being addressed by Applicant to date. The remaining debt with creditor 1.b remains in collection status with no evidence of any initiated payment action by Applicant. The record evidence confirms that Applicant has made no payments on any of the listed lines of credit and expressed no plans to do so.

Applicant's collective accumulation of delinquent debts 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 obligation," apply to Applicant's situation.

Applicant's pleading admissions with respect to his accumulation of unaddressed delinquent debts covered in the SOR negate the need for any independent proof (*see McCormick on Evidence*, § 262 (6th ed. 2006)). Each of Applicant's listed filing lapses and debts are fully documented in his credit reports. Some judgment problems persist over Applicant's insufficiently explained accrual of mortgage-related debts with his lenders. To date, he has taken no documented corrective steps to resolve his delinquencies and demonstrate he acted responsibly in addressing his listed debts. See ISCR Case 03-01059 at 3 (App. Bd. Sep. 24, 2004).

Holding a public trust position involves a fiduciary relationship between the Government and the public trust position holder. Quite apart from any agreement the public trust position holder may have signed with the Government, the nature of the public trust position holder's duties and access to privacy information necessarily imposes important duties of trust and candor on the public trust position holder that are considerably higher than those typically imposed on Government employees and contractors involved in other lines of Government business. See *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980).

Dishonesty issues associated with Applicant's transfer of assets to his sister for holding compound judgment concerns over Applicant's trustworthiness and reliability. By placing his assets beyond the reach while contemplating filing for bankruptcy, Applicant impaired the ability of the creditors to enforcement their creditor rights.

Applicant's actions in placing his assets beyond the reach of his creditors raise judgment and trust issues independently of trust concerns over his finances. Applicable under the personal conduct guideline is the following disqualifying condition: DC ¶ 16(c), "credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information."

Whether Applicant ever pursues Chapter 13 bankruptcy relief is still very difficult to predict. Should he ever decide to petition for Chapter 13 relief, his asset

transfers are potentially at risk to being determined fraudulent transfers under his state's law governing fraudulent conveyances and set asides. Based on the evidence presented, none of the mitigating conditions covered by Guidelines F and E apply to Applicant's situation.

Whole-person assessment does not enable Applicant to surmount the judgment questions raised by his accumulation of delinquent mortgage debts and failure to resolve them. Resolution of his listed delinquent accounts is a critical prerequisite to his regaining control of his finances. His ensuing placement of his assets beyond the reach of his creditors adds to the judgment concerns associated with his accrual of delinquent mortgage-related debts only adds to the judgment concerns associated with his debt accruals.

While unanticipated financial burdens might have played a considerable role in his failures to address his delinquent debts, Applicant failed to provide more specific explanatory material for consideration. Endorsements and performance evaluations might have been helpful, too, in making a whole-person assessment of her overall clearance eligibility, but were not provided.

Overall, public trust position eligibility assessment of Applicant based on the limited amount of information available for consideration in this record does not enable him to establish judgment and trust levels sufficient to overcome trust concerns arising out of his lapses in judgment associated with his accumulation of delinquent mortgage debts and placing his assets beyond the reach of his creditors.;

Taking into account all of the documented facts and circumstances surrounding Applicant's accrual of delinquent mortgage-related debt and his lack of more specific explanations for his debt accruals and his lack of documented resolution of them, it is still too soon to make safe predictions of Applicant's ability to satisfactorily resolve his outstanding debts. Unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.c of Guideline F and subparagraph 2.a of Guideline E.

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

Subparas. 1.a through 1.d:	Against Applicant
----------------------------	-------------------

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Subpara. 2.a:	Against 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

