



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



In the matter of:)
)
) ADP Case No. 15-02304
)
Applicant for Public Trust Position)

Appearances

For Government: Caroline Heintzelman, Department Counsel
For Applicant: *Pro se*

12/07/2016

Decision

DAM, Shari, Administrative Judge:

Applicant's financial problems began in 2004 and continue to the present. He failed to present sufficient evidence to mitigate the financial trustworthiness concerns. Based upon a thorough review of the pleadings, exhibits, and testimony, eligibility for access to ADP I/II/III sensitive information is denied.

Statement of the Case

On November 21, 2012, Applicant submitted a public trust position application (SF 85P). On October 25, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline F, (Financial Considerations). The action was taken 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) effective within the DOD for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on January 4, 2016 (Answer), and requested a hearing before an administrative judge. The Department of Defense Office of Hearings and Appeals (DOHA) assigned the case to me on March 14, 2016. DOHA issued a Notice of Hearing on September 29, 2016. I convened the hearing as scheduled on October 18, 2016. Department Counsel offered Government Exhibits

(GE) 1 through 6 into evidence. Applicant testified and offered Applicant Exhibits (AE) A through C into evidence. All exhibits were admitted without objections. DOHA received the transcript of the hearing (Tr.) on November 2, 2016. The record remained open until November 18, 2016, to give Applicant an opportunity to submit other exhibits. He did not submit any post-hearing exhibits.

Findings of Fact

Applicant admitted the four allegations in the SOR. Those admissions are incorporated into these findings of fact.

Applicant is 48 years old and married for 21 years. He has two adult children. He attended trade school. His wife works. He coaches high school sports as a volunteer.

In 2011 Applicant began his current position with a defense contractor as a security specialist. Prior to this position he was unemployed from July 2010 to October 2011. Applicant's supervisor is aware of this proceeding, but not the financial trustworthiness concerns underlying it. (Tr. 13-17; GE 2.)

Applicant's annual salary is \$78,000 and his wife's salary is \$100,000. He borrowed \$10,000 in 2015 from his 401(k) for a down payment on a new house. (Tr. 17-18.) He and his wife do not have a budget. He participated in financial counseling in 2011. (Tr. 19.) He thinks he has about \$140,000 in his 401(k). (Tr. 28.)

In April 2012 a bank charged off Applicant's home equity loan on his former residence in the amount of \$16,975. (SOR ¶ 1.a.) The last payment on the account was made in September 2011. (Tr. 32; AE B.) Applicant thought this debt may have been forgiven when his house sold after a foreclosure, as noted below. He did not submit documentation confirming the status. This debt is unresolved.

In March 2012 Applicant's \$137,200 mortgage account on his former residence went into foreclosure. He purchased the home in 2004. (SOR ¶ 1.b.) In January 2011 he put the house on the market. His last mortgage payment was in September 2011. (Tr. 32.) Subsequently, he was unable to maintain the mortgage and pay other expenses he had because he started a new job in October 2011 in another location. (Tr. 33-34.) He said his last contact with the bank holding the mortgage was in September 2011. He did not receive an IRS form 1099A or 1099C regarding the debt from the bank and is unaware of any tax consequences. He said the house subsequently sold. (Tr. 35-36; GE 2.) The status of this debt is unresolved. Both this debt and the home equity loan debt are listed in credit reports. (GE 3, 4, 5, 6.)

In 2009 the Federal government filed a \$5,373 tax lien against Applicant for tax years 2004, 2005, and 2006. (SOR ¶ 1.c.) It was satisfied and released in July 2015. (AE C.)

Applicant said he disputed the \$288 utility debt alleged in SOR ¶ 1.d. He asserted that he was not living in the house during the time the bill accrued. He did not provide any evidence that he formally disputed it. (Tr. 37.) It is unresolved.

In February 2012 the Federal government filed a \$7,586 tax lien for another year. He is uncertain of which year. The lien was released in July 2012 through a garnishment on his wife's salary. He thinks the original tax debt was between \$12,000 and \$15,000.¹ (Tr. 22-31: GE 6.)

In May 2011 Applicant started a payment plan for additional taxes owed to the Federal government for years 2007, 2009, 2010, and 2011. He pays \$550 a month. He does not know the balance owed. He said his tax situation has been complicated. He attributed the tax issues to a tax preparation company, which did not competently handle his tax returns. He filed his 2015 tax returns and knows he owes taxes for the year, but does not know the amount. The taxes are unpaid.² (Tr. 28-27; GE 2.)

Policies

Positions designated as ADP I, II, and III 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, 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." (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. (Regulation ¶ C8.2.1.)

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to sensitive 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context of a number of variables known as the whole-person concept.

¹ This tax lien is not alleged in the SOR. Hence, it will not be considered in the analysis of disqualifying conditions, but may be considered in the analysis of credibility, mitigating conditions, and the whole person.

² This tax lien is not alleged in the SOR. Hence, it will not be considered in the analysis of disqualifying conditions, but may be considered for other purposes, as explained in the above footnote.

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 the 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. Directive ¶ E3.1.15 states that, “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”

A person applying for access to sensitive information seeks to enter 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 protected 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.

Analysis

Guideline F, Financial Considerations

The trustworthiness concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

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 sensitive information. An individual who is financially irresponsible may also be

irresponsible, unconcerned, or negligent in handling and safeguarding sensitive information.³

AG ¶ 19 describes two conditions that could raise trustworthiness concerns and may be disqualifying in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant has a history of not meeting his financial obligations, which began in 2004 when he did not pay Federal taxes. They continue to date because he has been unable or unwilling to fully satisfy all of his delinquent debts. The evidence raises both of the above disqualifying conditions, thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline includes five conditions in AG ¶ 20 that could mitigate trustworthiness concerns arising from Applicant's financial difficulties:

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

Applicant's debts are ongoing; hence, the evidence does not establish mitigation under AG ¶ 20(a). There is evidence that some of his financial problems are attributable to a long period of unemployment, which may have been a circumstance beyond his control. However, he did not produce evidence to demonstrate that he attempted to

³ See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

manage his debts while they were accumulating or subsequent to obtaining employment, which proof is necessary to establish full mitigation under AG ¶ 20(b).

There is evidence that Applicant participated in financial counseling, but not since 2011. He did not submit a budget or other documentation to demonstrate that his financial problems are under control. The evidence establishes minimal mitigation under AG ¶ 20(c). Applicant provided evidence that he resolved the tax debt alleged in SOR ¶ 1.c, albeit through a garnishment. He established some mitigation under AG ¶ 20(d) as to that debt, but he failed to establish that he made a good-faith effort to resolve defaulted mortgage and home equity loans associated with the foreclosed house, or that he is no longer responsible for them. He asserted that he does not owe the alleged utility bill, but he did not present evidence that he formally filed a dispute and substantiated the basis for it. AG ¶ 20(e) does not apply.

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 relevant 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. 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.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is an intelligent 48-year-old man, who has been fully employed since October 2011. Prior to that, he had been unemployed for over a year. While he has taken some steps to achieve financial stability, he has not established a track record of responsibly managing his financial issues, especially tax problems. Applicant's repeated failure to timely address those tax issues is a serious concern. Although he has paid some of them, it is only after tax liens have been filed. The SOR issued in October 2015 and the hearing was held in October 2016, about a year later. In the interim, Applicant did not contact his former mortgage company to resolve the status of the two debts alleged in the SOR and appearing on his credit report pertinent to them, or, gather a firm understanding of his finances. At the hearing, he exhibited a lack of knowledge about both. Although he was given time after the hearing to submit pertinent information, confirming that he did not owe any monies on the mortgage or home equity loan, he did not submit any evidence. After weighing

the disqualifying and mitigating conditions, and all facts and circumstances in the context of the whole-person, the record evidence leaves me with doubt as to Applicant's eligibility and suitability for a position of trust. For these reasons, I conclude that Applicant did not mitigate the trustworthiness concerns arising under the guidelines for financial considerations.

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:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant

Conclusion

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

Shari Dam
Administrative Judge