



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



In the matter of:)
)
) ADP Case No. 15-02320
)
Applicant for a Public Trust Position)

Appearances

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

03/08/2017

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for a public trust position to work in the defense industry. Although Applicant's financial problems were not caused by irresponsible or reckless behavior, he failed to produce sufficient information to mitigate the security concerns. Accordingly, his eligibility to occupy a position of trust is denied.

Statement of the Case

On November 24, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing trustworthiness concerns under the financial considerations guideline.¹ DOD adjudicators were unable to find that it is clearly consistent with the interests of national security to grant or continue Applicant's access to sensitive information and recommended that the case be submitted to an administrative judge for

¹ This case is adjudicated under DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). The *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG replace the guidelines in Enclosure 2 to the Directive.

a determination whether to revoke or deny Applicant's eligibility to occupy a public trust position.

Applicant timely answered the SOR and requested a hearing. On June 23, 2016, I issued a pre-hearing order to the parties regarding the exchange and submission of discovery, the filing of motions, and the disclosure of any witnesses. Department Counsel submitted documents by the July 6, 2016 deadline. At the hearing, which proceeded as scheduled on July 12, 2016, I admitted Government's Exhibits (GE) 1 through 5 and Hearing Exhibits I – IV, without objection. After the hearing, the record remained open until August 31, 2016. Applicant did not submit any documents. The Defense Office of Hearing and Appeals (DOHA) received the transcript (Tr.) on July 20, 2016.

Procedural Matters

SOR Amendments

At hearing, Department Counsel moved to amend the SOR to add three allegations under the financial considerations guideline, specifically: ¶ 1.r, that Applicant is indebted to a veterinarian for \$196; ¶ 1.s, that Applicant has a delinquent medical account for \$168; and 1.t, that Applicant owes an \$18,855 child-support arrearage to State 1. Applicant received notice of the proposed amendment in March 2016, he responded to each allegation, denying ¶ 1.r and admitting ¶¶ 1.s and 1.t. I granted Department Counsel's motions and amended the SOR without objection from Applicant. His answers are incorporated into the record.²

At the conclusion of Applicant's testimony, Department Counsel moved to amend SOR ¶ 1.a regarding Applicant's failure to file his 2010 and 2011 federal income tax returns as required. The proposed amendment would have expanded the allegation to include Applicant's failure to file his state and federal income tax returns from 2010 to 2012. Given the conflicting information in the record about Applicant's returns, I denied the motion.³

Findings of Fact

Applicant has worked for a federal contractor since September 2012. His position requires access to personally identifiable information (PII), and requires him to obtain eligibility to occupy a public trust position. Based on the disclosures in his October 2012 eligibility application, his January 2013 subject interview, and the credit reports in the record, the SOR alleges that Applicant owes \$36,000 in delinquent accounts; including an \$18,855 child-support arrearage and that he failed to file federal income tax returns for 2010 and 2011.⁴

² Tr. 10-11; HE III.

³ Tr. 68-69.

⁴ GE 3, 5-6.

Applicant incurred the child-support arrearage during periods of unemployment over the years. Although he was not always able to pay his court-order child-support obligation, he would give his child's mother cash as he was able. The arrearage is being resolved through wage garnishment. Applicant also admits failing to file his 2010 and 2011 federal income tax returns (SOR ¶ 1.a). He blames his ex-wife, with whom he lived from 2007 to 2012 for mismanaging the couple's finances, including their tax obligation. He also admits having an outstanding federal tax liability, which is not alleged. Although Applicant has not entered into a payment plan with the IRS, he has increased the amount of federal taxes being withheld from his pay. In doing so, he overpays his federal tax liability, causing a refund that is captured by the IRS and applied to his outstanding balance. The record is unclear regarding Applicant's standing with the IRS. He did not provide any documentation to clarify the conflicting information about his federal tax record.⁵

At hearing, Applicant testified that he has not been in a position to pay his delinquent accounts. Despite this, Applicant has made attempts to resolve his delinquent accounts and rehabilitate his finances. In 2013, he consulted a tax preparer for assistance; however, he was unable to afford the service. In January 2016, Applicant decided to file for Chapter 13 bankruptcy protection. The petition was dismissed a month later because Applicant could not afford the plan payments. Applicant contacted his employer's employee assistance program (EAP) to seek financial counseling. He was scheduled to attend his first session in the weeks after the hearing. Despite being given the opportunity to do so, Applicant did not provide any documentation regarding the status of the alleged debts. All of the accounts appear to be unresolved.⁶

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions."⁷ "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."⁸ 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.⁹ An administrative judge's objective is a fair, impartial, and commonsense decision that embraces all available, reliable information about the person, past and present, favorable and unfavorable.

⁵ Tr. 26-44, 53-56

⁶ Tr. 23-25, 38, 60-61, 69-71.

⁷ DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation) ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

⁸ Regulation ¶ C6.1.1.1.

⁹ See Regulation ¶ C8.2.1.

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 the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable decision.

A person who seeks access to a public trust position 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 safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline F, Financial Considerations

Unresolved delinquent debt is a serious security concern because failure to “satisfy debts [or] 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.”¹⁰

The record establishes a *prima facie* case that Applicant has a history of not meeting his financial obligations and that he has demonstrated an inability to do so.¹¹ He admits that he failed to timely file his federal income tax returns in 2010 and 2011 as required.¹² Applicant did not produce sufficient evidence to mitigate the concerns raised in the SOR. While Applicant’s efforts to engage a tax preparation service, to repay his creditors through a Chapter 13 bankruptcy payment plan, and to obtain financial counseling through his employer’s EAP, shows a willingness to repay his creditors and rehabilitate his finances, it is not enough to mitigate the concerns. With the exception of the child-support arrearage, which is being resolved through garnishment, the remainder of the alleged debts remain unresolved and Applicant’s status with the IRS remains unclear. Accordingly, Applicant’s financial problems are ongoing and remain a concern.

After reviewing the record, it is not appropriate to grant Applicant access to sensitive information based on his current financial situation. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(a). Applicant’s financial problems do not appear to be caused by irresponsible or reckless behavior.

¹⁰ AG ¶ 18.

¹¹ AG ¶¶ 19(a) and (c).

¹² AG ¶ 19 (g).

However, Applicant failed to demonstrate a record of financial reform or rehabilitation. This decision should not be construed as a determination that Applicant cannot or will not attain the type of financial stability necessary to justify the granting of a public trust position in the future. The award of eligibility is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Applicant may well demonstrate persuasive evidence of his eligibility to occupy a position of trust in the future.

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, Financial Considerations:	AGAINST APPLICANT
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Subparagraphs 1.a-1.t:	Against Applicant
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Conclusion

In light of all of the circumstances, it is not clearly consistent with the interests of national security to grant Applicant access to sensitive information. Applicant's eligibility to occupy a position of trust is denied.

Nichole L. Noel
Administrative Judge