



**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. 15-03664

Appearances

For Government: Julie R. Mendez Esq., Department Counsel
For Applicant: *Pro se*

10/21/2016

Decision

LYNCH, Noreen A., Administrative Judge:

On December 1, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant listing trustworthiness concerns arising 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); and the adjudicative guidelines (AG), implemented in September 2006.

Applicant timely answered the SOR and requested a decision based on the written record in lieu of a hearing. Department Counsel submitted a File of Relevant Material (FORM), dated January 29, 2016.¹ Applicant received the FORM on February 25, 2016. He submitted additional information for the record. I received the case assignment on October 14, 2016. Based on a review of the case file, I find Applicant has not mitigated the trustworthiness concerns raised. Eligibility for a position of trust is denied.

¹The Government submitted six items in support of its case.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations under Guideline F, with explanations. He stated that his state does not have an income tax, and the Government concurred. He noted that a few accounts were already paid. (Item 2)

Applicant is 30 years old. He is employed with a health insurance company. He graduated from high school in 2004 and he obtained a technical degree in phlebotomy in June 2009. He never married and has no children. (Item 3) He has been employed with his current employer since August 2010. This is his first application for a position of trust, which he completed on April 24, 2013. (Item 3)

The SOR alleges 10 delinquent debts totaling approximately \$8,700. These debts include medical accounts and collection accounts. (Item 1) Credit reports confirm the debts. (Items 4 and 5) The SOR also alleges that a 2011 state tax lien was filed in the amount of \$12,177, and a failure to file federal and state tax returns for tax years 2008 through 2012. (Item 1)

Applicant explained in his Answer that he was unemployed from January 2009 through May 2010, save for two, one-month employments. (Item 3) He worked about 20 hours a week. (Item 6) He drew unemployment benefits of approximately \$300 a week during the period of unemployment. A tax lien was issued to Applicant because he unintentionally failed to abide by a requirement of the state unemployment office, which resulted in the forfeiture of the previously paid benefits in the amount of \$12,177. (Item 6)

In 2013, during an investigative interview, Applicant explained that he did not file or pay taxes since 2008. He claimed that he did not receive a W-2 from an employer in 2008 and therefore, he was not able to file tax returns or pay taxes for that year. He elaborated that he had not filed or paid taxes any year since then because he had not had his tax return from the previous year. (Item 6) During the 2013 interview he stated that he had not received any notices or correspondence from the IRS regarding the taxes. However, he noted that he had prepared his tax returns every year and had the paperwork ready at his residence. He may talk to an accountant. (Item 6) In his Response to the FORM, Applicant stated that the lien (SOR 1.f), was garnished from his pay for a number of years and is now paid. He just wrote that he contacted the state unemployment office and their records show the lien as paid. There is no submitted document to confirm his assertion.

As to the remaining SOR debts, Applicant stated that SOR 1.a, in the amount of \$3,359 for a repossession was settled. He sent a settlement agreement confirmation letter that reflected he agreed to settle the account for \$503.99. The one-time payment was due by March 31, 2016. However, there is no evidence that the payment was made. (Response to FORM)

The SOR debts in 1.b, 1.c, 1.d, 1.e, 1.g, 1.j, and 1.k, are admitted but there is no indication that they have been paid or are in a payment plan. As to the SOR debts in 1.h, and 1.i, totaling \$1,355, Applicant stated they have been paid. He did not submit any evidence to prove his assertion.

The record does not indicate Applicant's current salary. Applicant did not list any financial counseling or provide a budget. There is no record of use of a credit counseling organization. He stated that he was working with a lawyer to file his federal income tax returns, but he also stated that in his 2013 interview. He intends to fulfill his financial obligations. He noted in his Response to the FORM that he filed his tax returns for 2013, 2014, and 2015 because "he can only file the past 3 years." At the bottom of his Response To the FORM, Applicant wrote that he is in the process of declaring bankruptcy.

Policies

Positions designated as ADP I and ADP II 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 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 Department of Defense contractor personnel are entitled to the procedural protections in the Directive before any final unfavorable access determination may be made. Regulation ¶¶8.2.1

When evaluating an applicant's suitability for a public trust position, an 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. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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 interest."

The Government must present evidence to establish controverted facts alleged in the SOR. 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. . . .² The burden of proof is something less than a preponderance of evidence.³ The ultimate burden of persuasion is on the applicant.⁴

A person seeking access to sensitive information enters into a fiduciary relationship with the Government based on 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 sensitive information.

Analysis

Guideline F, Financial Considerations

The trustworthiness concern for Financial Considerations is set out in AG ¶ 18:

Failure or an 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.

Applicant's admissions establish his delinquent debts and his credit reports confirm the debts. He admits to not filing tax returns from 2008 through 2012. Consequently, Financial Considerations Disqualifying Conditions (FC DC) AG ¶ 19(a) (inability or unwillingness to satisfy debts), and FC DC AG ¶ 19(c) (a history of not meeting financial obligations) apply. Also FC DC AG ¶ 19(g) (failure to file annual Federal, state, or local income tax returns as required by law) applies. With such conditions raised, it is left to Applicant to overcome the case against him and mitigate trustworthiness concerns.

The nature, frequency, and relative recency of Applicant's financial difficulties make it difficult to conclude that it occurred "so long ago." An unpaid debt is a continuous course of conduct for the purposes of adjudications. See, ISCR Case No. 10-11083 at 2 (App. Bd. Dec. 17, 2012). Applicant has not provided any documentation that any debt or lien is paid, although he claimed that he paid two debts and his wages were garnished for the lien. Consequently, Financial Considerations Mitigating Condition (FC MC) 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

² See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

³ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁴ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

not cast doubt on the individual's current reliability, trustworthiness, or good judgment) does not apply.

FC MC AG ¶ 20(b) (the conditions that resulted in the behavior 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) partially apply. Applicant listed information concerning unemployment from January 2009 through May 2010. He did work a part-time job for a while and he received unemployment benefits of \$300 a month. However, he did not produce documentary evidence when he answered the SOR, or the Response to the FORM that any debts had been paid. He entered a settlement agreement for one debt, but he did not present evidence of any payment. He also noted a garnishment for the lien, but he did not provide documentation to confirm his position. He has not filed his federal tax returns for the years in question, although he promised to do so. This mitigating condition does not apply.

FC MC AG ¶ 20(d), (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) does not apply. Applicant entered into a settlement agreement for one delinquent debt and was to pay it by March 2016. He did not provide evidence of payment. He has not provided any documentation for any delinquent bills or tax lien. He now states that he is in the process of filing bankruptcy. He did not present evidence that he received financial counseling. AG ¶ 20(c) (the person has received or is receiving counseling for the problem) does not apply. Consequently, I do not find that there are clear indications that his financial problems are being resolved and are under control.

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 an applicant's conduct and all the relevant 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 position of trust must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. As noted above, the ultimate burden of persuasion is on the applicant seeking a public trust position.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant is 30 years old. He has worked for his current employer since 2010. He has been unemployed, but he has not presented any evidence that he has acted responsibly. He noted that he intended to fulfill his financial obligations, but a promise in the future is not sufficient. He has not shown a track record of acting responsibly with his delinquent debts. His lack of payments and continued failure to file his federal income tax returns prevent the application of mitigating conditions. He has not met his burden of proof in this case. The fact that he now is in the process of filing bankruptcy, which is a legitimate way of resolving debts, has not been established either for mitigation. He has not mitigated the trustworthiness concerns for a position of public trust.

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-1.l:	Against Applicant
Subparagraph 1.m:	For 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 a position of public trust. Eligibility for a position of public trust is denied.

NOREEN A. LYNCH
Administrative Judge