



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



In the matter of:

Applicant for Public Trust Position

ADP Case No. 15-06852

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel

For Applicant: *Pro se*

07/27/2017

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense's (DoD) intent to deny his eligibility for a public trust position to work in the defense industry. The Statement of Reasons (SOR) alleges he is delinquent on nine charged-off and collection accounts, which total in excess of \$63,000. Applicant failed to mitigate the trustworthiness concerns arising from his finances. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

History of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on May 18, 2016, the DoD issued an SOR detailing the trustworthiness concerns under financial considerations. DoD adjudicators could not find that it is clearly consistent with the

¹ 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 (AG) effective within the DoD on September 1, 2006, and as amended on June 8, 2017.

national interest to grant or continue Applicant a public trust position. On June 3, 2016, Applicant answered the SOR and elected to have the matter decided without a hearing. Defense Office of Hearings and Appeals (DOHA) Department Counsel (DC) submitted the Government's case in a File of Relevant Material (FORM), dated July 29, 2016. The FORM contained eight attachments (Items). On August 3, 2016, Applicant received a copy of the FORM, along with notice of his opportunity to object to the Government's evidence and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions. His August 23, 2016 response to the FORM is admitted without objection as Exhibit (Item) A. No additional documents were received from Applicant. On April 24, 2017, I was assigned the case.

While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs) which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the Sept. 1, 2006 AGs and are effective "for all covered individuals" on or after June 8, 2017. Accordingly, I have evaluated Applicant's trustworthiness eligibility under the new AGs.²

Findings of Fact

In Applicant's answer to the SOR, he denied four delinquent obligations listed in the SOR: SOR 1.a, \$15,719; SOR 1.d, \$167; SOR 1.h, \$13,103; and SOR 1.i, \$5,296. (Item 4) He admitted the remaining delinquent obligations. I incorporate Applicant's admissions as facts. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact.

Applicant is a 64-year-old team lead test technician who has worked for a defense contractor since Sept 2013, and he seeks to eligibility to occupy a position of trust. (Item 1) He states his severe financial hardship was caused by periods of unemployment, his wife being able to locate only part-time employment, and having a child in college. (Item 4). In his August 2016 Answer to the FORM, he stated he had retained an attorney and would be filing for Chapter 7 bankruptcy relief in the first quarter of 2017. No documentation confirming a bankruptcy filing was submitted. Documents accompanying his response to the SOR mitigated the collection account in SOR 1.d (\$167) and the Internal Revenue Service (IRS) Form 1099C, Cancellation of Debt, mitigated the charged-off obligation listed in SOR 1.h (\$13,103).

From May 1998 to October 2008, Applicant worked as a senior buyer for a technology company. From October 2008 through July 2012, he worked as a subcontract administrator for a defense contractor. In July 2012, Applicant was laid off from a defense contractor job. (Item 5) He was unemployed for four months before accepting a position at a welding and fabrication company. He worked for the firm four months through March

² Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case. The new AGs are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

2013. (Item 5) He was then unemployed for five months until obtaining his current job in September 2013.

In 2000, Applicant credit score was 730. (Item 6) That year his wife gave up her job because it was too stressful and unhealthy and returned to school. (Item 6) In 2002, she completed her degree in elementary education, but she has been unable to locate a full-time teaching position. (Item 6) In September 2012, his wife obtained part-time employment as a substitute teacher where she is unemployed each summer. (Exs. 5 and 6)

In Applicant's March 2015 Electronic Questionnaires for Investigations Processing (e-QIP), he stated he had retained the services of an attorney in order to file for Chapter 13, Wage Earners Plan, bankruptcy protection. (Item 5) At that time, he hoped to file a bankruptcy petition within the next four to six months. At that time, he was also attempting to modify his mortgage payments. (Item 5) He provided no documentation concerning these hopes.

When Applicant completed his March 2015 e-QIP, he listed 12 delinquent obligations totaling more than \$71,000 in addition to his home loan. (Item 5) Those listed obligations included SOR 1.a through 1.h.

During an April 2015 enhanced subject interview his delinquent financial obligations were discussed including specifically each of the SOR delinquent obligations (Item 6). He indicated that SOR 1.a (\$15,719), a debt he is currently disputing, was a credit card used for clothing, school expenses, gas, and travel expenses. (Item 6) The debt in SOR 1.i, which Applicant also denies, was not discussed during the interview. (Item 6) This debt does not appear in his March 2015 credit report nor his April 2016 credit report. (Items 7 and 8) During the interview, he again indicated he had retained an attorney to file for Chapter 13 bankruptcy protection.

Applicant provided no documentation showing the resolution on any of his delinquent obligations other than the delinquent obligations in SOR 1.d and SOR 1.h. Additionally, SOR 1.h was resolved by a cancellation of the debt and not by payment. Applicant did not set forth what efforts he undertook to pay or otherwise resolve most of the SOR debts. He provided no information about his monthly income or expenses.

Policies

In issuing the SOR, DOD acted 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);³ and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG) implemented by DOD on September 1, 2006. The case will be decided under Security Executive Agent Directive (SEAD) 4, National Security Adjudicative Guidelines (AG), effective June 8, 2017.

³ ADP cases are adjudicated under the provisions of the Directive. (Deputy Under Secretary of Defense's Memorandum for the Director, Defense Office of Hearings and Appeals, dated November 19, 2004.)

The DOD considers ADP positions to be sensitive positions. For a person to be eligible for sensitive duties, the person's loyalty, reliability, and trustworthiness must be such that assigning the person to a sensitive position is clearly consistent with the national security interests of the United States. SEAD 4, E(4); SEAD 4, App. A ¶ 2.d. Applicants for ADP positions are entitled to the procedural protections in the Directive before any final unfavorable access determination is made.

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

A public trust position decision resolves whether it is clearly consistent with the interest of national security to grant or continue an applicant's access to sensitive information. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national security interest of the United States to grant or continue his or her access to sensitive information.

Persons with access to sensitive information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national security as their own. The "clearly consistent with the national security interest of the United States" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government. Access to sensitive information determinations should err, if they must, on the side of denials. SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Eligibility for a public trust position decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing access to sensitive information.

Analysis

Guideline F, Financial Considerations

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

Failure 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 or sensitive information . . . An individual who is financially overextended is at greater risk of having to engage in illegal acts or other questionable acts to generate funds.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed upon terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a position of trust. An applicant is not required to be debt free, but is required to manage his finances to meet his financial obligations.

AG ¶ 19 includes three disqualifying conditions that could raise a security concern and may be disqualifying in this case: "(a) inability to satisfy debts;" "(b) unwillingness to satisfy debts regardless of the ability to do so;" and "(c) a history of not meeting financial obligations."

The Government's evidence and Applicant's own admissions raise security concerns under AG ¶¶ 19(a), 19(b), and 19 (c). The burden shifts to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005))

Five of the seven Financial Considerations mitigating conditions under AG ¶¶ 20 are potentially applicable:

(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, a death, divorce or separation, clear victimization by predatory lending practices or identity theft), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to 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.

Concerning AG ¶ 20(a), Applicant's delinquent obligations were not incurred under unusual conditions such that they are unlikely to recur. He has known of the Government's concern about his delinquent obligations since April 2015, and there is no indication that he has since paid or resolved the majority of his debts. He provided insufficient evidence to conclude that his financial problems are unlikely to recur. His delinquencies continue to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 20(a) does not apply.

From May 1998 through July 2012, Applicant was full-time employed. In 2012, he was unemployed for five months, and in 2013, he was unemployed for seven months. He has been employed full-time since September 2013. In September 2012, his wife obtained a part-time position as a substitute teacher. AG ¶ 20(b) only partially applies because he was unemployed for 12 months in 2012 and 2013, which is a factor beyond his control. However, he has had three and a half years of full-time employment and he has provided little documentation as to addressing the majority of his delinquent obligations.

AG ¶ 20(c) does not apply because there is no clear indication the financial problems are being resolved or are under control. AG ¶ 20(d) does apply to the delinquent obligations in SOR 1.d and 1.h because Applicant paid the debt in SOR 1.d and received a 1099-C for the debt in SOR 1.h. AG ¶ 20(e) does apply to the debt in SOR 1.i. Although there is no documented proof to substantiate the basis of Applicant's dispute, there is also no substantiated basis establishing the debt. The debt does not appear on Applicant's credit reports and was not discussed in his interview.

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 all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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(d), the ultimate determination of whether to grant eligibility for a trustworthiness position must be an overall commonsense judgment based upon careful 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. Applicant has failed to document any payment on the majority of his delinquent accounts. Applicant has been aware of the Government's concern about his delinquent debts since his April 2015 interview when he was specifically confronted about all but one of the delinquent accounts listed in the SOR. Those concerns set forth in the July 2015 interview were reinforced by the March 2016 SOR and July 2016 FORM. There is no evidence he has contacted the majority of his creditors. He provided no information regarding his past efforts to address his delinquent debt except for the two mitigated debts and has failed to show documentation that he has established repayment agreements to address the remaining delinquent debts.

In Applicant's March 2015 e-QIP and April 2015 interview, he stated he had obtained the assistance of an attorney in order to file for Chapter 13 bankruptcy protection. In March 2015, he said he hoped to file in four to six months. In his August 2016 response to the FORM, he stated he had retained an attorney and hoped to file for Chapter 7 bankruptcy protection in the first quarter of 2017. He provided no documentation as to a bankruptcy filing nor any documentation addressing the majority of his delinquent obligations.

In requesting an administrative determination, Applicant chose to rely on the written record. However, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances and facts that would mitigate the financial considerations security concerns. He failed to offer evidence of financial counseling or provide documentation regarding his past efforts to address his delinquent debt. He failed to provide such information, and by relying solely on his scant explanation in his SOR and FORM responses, he failed to mitigate the trustworthiness concerns arising from his financial considerations.

The issue is not simply whether all Applicant's debts are paid—it is whether his financial circumstances raise concerns about eligibility and suitability for a public trust position. (See AG ¶ 2(d)) This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to be eligible for a public trust position. The determination of an individual's eligibility and suitability for a public trust position is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under Applicant's current circumstances, I cannot find him eligible for a public trust position. In

the future if Applicant paid his delinquent obligations, established compliance with a repayment plan, or otherwise substantially addressed his past-due obligations, he may well demonstrate persuasive evidence of his security worthiness.

Overall, the record evidence leaves me with questions or doubts about Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant failed to mitigate the trustworthiness concerns arising from his financial problems.

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

Subparagraphs 1.a – 1.c: Against Applicant

Subparagraph 1.d: For Applicant

Subparagraphs 1.e – 1.g: Against Applicant

Subparagraphs 1.h and 1.i: 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 eligibility for a public trust position. Eligibility for access to sensitive information is denied.

CLAUDE R. HEINY II
Administrative Judge