



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



In the matter of:)
)
) ADP Case No. 15-06006
)
Applicant for Public Trust Position)

Appearances

For Government: Chris Morin, Department Counsel
For Applicant: *Pro se*

03/19/2018

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. Applicant owes approximately \$29,000 on two collection accounts. No documentation was presented showing payment on the delinquent obligations. Based upon a review of the case file, pleadings, testimony, and exhibits, eligibility for a public trust position is denied.

Statement of the Case

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a public trust position. Acting under the relevant DoD Directive,¹ the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) on March 17, 2017, detailing financial considerations trustworthiness concerns. On April 11, 2017, Applicant answered the SOR and elected to have the matter decided without a hearing. On April 25, 2017, Defense Office of Hearings and Appeals (DOHA)

¹ Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Department Counsel (DC) submitted the Government's case in a File of Relevant Material (FORM). The FORM contained five attachments (Items). On May 5, 2017, 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. On June 8, 2017, two letters were received from Applicant. DC did not object to the admission of the letters, which were admitted as exhibits (Ex.) A and B. On October 1, 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 the *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 September 1, 2006 AGs and are effective "for all covered individuals" on or after June 8, 2017. Accordingly, I have evaluated Applicant's public trust position eligibility under the new AGs.²

Findings of Fact

In Answer to the SOR, Applicant admitted the two delinquent debts, which totaled \$29,311. I incorporate Applicant's admissions as facts. After a thorough review of the pleading and exhibits, I make the following additional findings of fact.

Applicant is a 38-year-old training specialist who has worked for a defense contractor since June 2007, and seeks to obtain a public trust position. (Item 1) From June 1987 through June 2007, Applicant honorably served in the U.S. Navy, retiring in June 2007. (Item 3) Applicant's household has three sources of income: Applicant's military retirement, his work for a defense contractor, and his wife's income for her full-time employment at an auto dealership. (Ex. B)

The Officer-in-Charge (OIC) of the logistics training center has worked alongside Applicant in a small executive office for 31 months. (Ex. B) The OIC states Applicant is honest, dependable, trustworthy, hardworking, responsible, has a positive attitude, and has made significant contributions to the job. (Ex. B) Applicant is dedicated to his career, country, and family. (Ex. B) The OIC believes there is little risk of Applicant jeopardizing his position of trust. (Ex. B)

In Applicant's March 2015 Electronic Questionnaires for Investigations Processing (e-QIP), he indicated he owed approximately \$15,000 on the credit card account listed in SOR 1.a. (Item 3) He indicated he had attempted to work with the credit card company when his pay had been reduced by \$1,200 per month. (Item 3) He also indicated he had withdrawn \$5,000 from his 401(k) retirement fund. (Item 3) The record provides no additional information about his reduction in pay or his attempt to work with the creditor.

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.

A letter from an attorney retained by Applicant indicated Applicant had filed for Chapter 13, Wage Earner's Plan, bankruptcy protection. (Ex. A) The plan required \$850 monthly payments for 60 months. As of May 12, 2017, Applicant's proposed Chapter 13 plan had not been confirmed by the bankruptcy court. (Ex. A)

Department Counsel expressed concerns in the FORM about Applicant's failure to provide evidence of efforts to resolve the debts, as follows:

He has not provided any documentary evidence showing that either delinquent account is paid, is the subject of an agreed upon and current payment plan, or is otherwise resolved. Nor is there any specific, concrete evidence showing the he acted responsibly under the circumstances leading to either delinquent account, provided documentary proof to substantiate the basis for any dispute, or any action take to resolve any disputed accounts.(FORM page 2)

Applicant's response to the FORM provided no documentation showing payment of any of his delinquent obligations. He did not set forth what efforts he undertook to pay or otherwise resolve his delinquent debts, nor did he provide any documentation as to payment on or the current status of his delinquent debts or documentation on the current status of his proposed Chapter 13 bankruptcy plan.

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." 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. 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.

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 the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." 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 sensitive information 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. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

A person who seeks access to sensitive information 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 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

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

Failure 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 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 sensitive 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 public trust position. An applicant is not required to be debt free, but is required to manage his finances so as to meet his financial obligations.

Applicant owes two collection accounts totaling approximately \$29,000. Disqualifying Conditions AG ¶ 19(a), "inability to satisfy debts" and AG ¶19(c), "a history of not meeting financial obligations" apply.

None of the seven Financial Considerations Mitigating Conditions under AG ¶ 20 apply. Those potentially mitigating conditions are:

(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 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;

(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.

(f) the affluence resulted from a legal source of income; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant provided no documentation establishing that any of his delinquent obligations have been paid, that his Chapter 13 plan has been court approved, or he has made his monthly payments in accord with the plan. AG ¶ 20(a) does not apply because the delinquent debts remain unpaid, and because they remain unpaid, they cannot be considered as behavior that happened long ago. There is nothing in the record supporting that conditions under which the debts were incurred were unusual other than his

unexplained e-QIP statement that his pay had been reduced by \$1,200 per month. Applicant provided no information concerning factors beyond his control in recent years that could mitigate his inattention to his delinquent debts. There is some evidence that Applicant has filed for a Chapter 13 bankruptcy, which could be considered a responsible step to address his past-due debts. However, without knowing the status of his bankruptcy plan, AG ¶ 20(b) has minimal applicability.

There is no evidence of financial counseling or clear indications that Applicant's financial problems are being resolved or are under control. AG ¶ 20(c) does not apply. There is no showing of Applicant having made good-faith payments towards his delinquent obligations or evidence to establish that he is executing a reasonable ongoing plan to pay or resolve his debts. AG ¶ 20(d) does not apply.

The mitigating condition listed in AG ¶ 20(e) does not apply since Applicant admits the delinquent obligations. There is no documented proof substantiating the basis of a dispute. Neither AG ¶ 20(f) nor AG ¶ 20(g) apply since neither affluence nor taxes have are issues of security concern in this case.

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 the 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(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.

Applicant has been aware of the Government's trustworthiness concerns about his delinquent debts since the March 2017 SOR and the April 2017 FORM. He provided scant information regarding his past efforts to address his delinquent debts, that he has contacted his creditors, established repayment agreements to address the delinquent debts, or is in compliance with a Chapter 13 plan.

In requesting a decision without a hearing, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient information or evidence to

supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the financial trustworthiness concerns. He failed to offer evidence of financial counseling or provide sufficient documentation regarding his past efforts to address his delinquent debt. By failing to provide such information, and in relying on only the very limited response in his SOR Answer, financial considerations trustworthiness concerns remain.

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 position of trust 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, a public trust position is not warranted. In the future, if Applicant has paid his delinquent obligations, established compliance with a repayment plan, or compliance with the Chapter 13 plan, or otherwise substantially addressed his past-due obligations, he may well demonstrate persuasive evidence of his worthiness for a public trust position.

The issue is not simply whether all his debts are paid—it is whether his financial circumstances raise concerns about his fitness to hold a public trust position. (See AG ¶ 2(a)) Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a position of public trust. For all these reasons, I conclude Applicant has not mitigated the trustworthiness concerns arising from his 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, Financial Considerations: AGAINST APPLICANT

Subparagraphs 1.a and 1.b: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interest of national security to grant Applicant eligibility for a public trust position. Eligibility for a public trust position is denied.

CLAUDE R. HEINY II
Administrative Judge