



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



In the matter of:

ADP Case No. 15-07842

Applicant for Public Trust Position

Appearances

For Government: Tovah Minster, Esquire, Department Counsel

For Applicant: *Pro se*

10/25/2017

Decision

WHITE, David M., Administrative Judge:

Applicant was convicted of felony wire fraud and accumulated more than \$80,000 in delinquent debts over the past decade. He did not mitigate resulting trustworthiness concerns. National security eligibility to occupy a sensitive public trust position is denied.

On October 8, 2014, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). (Item 2.) On March 26, 2016, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline F (Financial Considerations) and Guideline J (Criminal Conduct). (Item 1.) 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) effective within the Department of Defense for SORs issued after September 1, 2006.

On May 24, 2016, Applicant answered the SOR in writing and elected to have the case decided on the written record in lieu of a hearing. (Item 1.) On June 28, 2016, Department Counsel prepared a File of Relevant Material (FORM), containing seven

Items. The Defense Office of Hearings and Appeals (DOHA) mailed Applicant a complete copy of the FORM on August 18, 2016. He received the FORM on August 22, 2016, and was provided 30 days from its receipt to file objections and submit additional information. Applicant submitted an undated but timely response to the FORM, which was received by DOHA on September 23, 2016. He expressed no objection to consideration of any contents of the FORM, and submitted copies of numerous checks that he issued between July 2015 and August 2016, to partially repay the two court-ordered obligations identified in SOR ¶¶ 1.a and 1.f. On May 22, 2017, DOHA assigned the case to me.

The SOR in this case was issued under the adjudicative guidelines that came into effect within the DoD on September 1, 2006. Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (December 10, 2016), implements new adjudicative guidelines, effective June 8, 2017. All national security eligibility decisions¹ issued on or after June 8, 2017, are to be decided using the new *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), as implemented in Appendix A of SEAD 4. I considered the previous adjudicative guidelines, as well as the new AG, in adjudicating Applicant's trustworthiness and national security eligibility. My decision would be the same under either set of guidelines, although this decision is issued pursuant to the new SEAD 4 AG.

Findings of Fact

Applicant is 29 years old. He has worked as a computer operator for the health insurance division of a leading integrated healthcare organization since April 2014. He graduated from high school in June 2007, and has taken some community college and on-line university classes. He has never served in the military or held a civilian position with the Federal Government. He has never married, has no children, and has lived with his mother in her apartment since January 2004. (Items 2 and 3.)

The SOR alleged that Applicant had eight delinquent debts, totaling \$90,770.² The debts range in amount from a \$72,450 Federal criminal restitution order entered in 2007, to an unpaid \$173 insurance premium that became delinquent in 2009. In his response to the SOR, Applicant admitted to all of the delinquent debts except the \$336 charged-off credit card alleged in SOR ¶ 1.g. He also denied SOR ¶ 1.b, which alleges the \$72,450 Federal tax lien entered against him by the Internal Revenue Service (IRS) in February 2008, apparently because it resulted from and is identical to the Federal court-ordered criminal restitution debt alleged in SOR ¶ 1.a, to which he admitted. (Item 1.)

¹ SEAD 4 ¶ D.7 defines "National Security Eligibility" as, "Eligibility for access to classified information or eligibility to hold a sensitive position, to include access to sensitive compartmented information, restricted data, and controlled or special access program information."

² SOR ¶¶ 1.a and 1.b allege, respectively, the Federal criminal court restitution order and the resulting Federal tax lien concerning the same \$72,450 debt to the Federal Government.

On two separate occasions in 2006 or 2007, Applicant used routing numbers from other people's checks to commit wire fraud and steal about \$70,000 that he deposited through online transactions into his bank account. He was convicted of this Federal felony offense in December 2007. He was sentenced to serve one day of imprisonment, six months of home confinement, three years of supervised release, and ordered to pay \$72,450 in restitution. He violated the terms of his probation in July 2009, and was sentenced to serve an additional 10 days in jail in April 2010.³ On February 25, 2008, the IRS obtained a judgment and Federal tax lien against Applicant for the \$72,450 in unpaid restitution. Applicant documented that he made monthly \$100 payments to the clerk of the Federal court from August 2015 through August 2016 toward this debt. At the rate of \$100 per month, it will take more than 59 years for Applicant to complete paying this court-ordered restitution. (Items 1, 2, 3, and 6; AE A.)

Applicant denied owing the \$336 credit card debt alleged in SOR ¶ 1.g, which involved a credit card account opened by his mother on which he was an authorized user. He claimed that the debt was incurred by his mother, and he did not intend to pay it. The record credit report that listed this debt confirms that he was an authorized user on the account. In the absence of any evidence showing this debt to be Applicant's personal responsibility, no security concerns were established based on this allegation. (Items 3 and 5.)

The remaining six delinquent debts, to which Applicant admitted, total \$17,984. Other than the payments toward the judgment debt, alleged in SOR ¶ 1.f, Applicant neither claimed nor documented any action toward resolution of any of them. In his response to the FORM, Applicant provided copies of cancelled checks showing that he had made biweekly \$60 payments toward the SOR ¶ 1.f judgment debt from July 2015 through August 2016. These payments totaled \$1,740. If he continues making payments at that rate, this debt will be satisfied sometime in late 2018. (Items 1, 5, and 6; AE A.)

Applicant submitted no evidence of financial counseling, or of budget estimates from which to analyze his current financial situation. He did not justify spending about \$70,000 in stolen funds and \$18,000 in unrepaid credit debts while living in his mother's apartment over the last decade. No character references were submitted to describe Applicant's judgment, trustworthiness, integrity, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

Policies

Positions designated as ADP-I/II/III are classified as "sensitive positions," and require a national security eligibility trustworthiness determination. The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases

³ Applicant's probation violation was not alleged in the SOR, so it will not be considered with respect to establishing additional disqualifying security concerns under AG ¶ 31(d).

forwarded to the DoD and DOHA by the Defense Security Service and Office of Personnel Management. DoD 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 AG ¶ 2, describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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 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 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.

Directive ¶ E3.1.14 requires the Government to 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, and has the ultimate burden of persuasion as to obtaining a favorable [trustworthiness] decision."

A person who applies for access to sensitive ADP 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 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

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

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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personal security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

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

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations; and
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, expense account fraud, mortgage fraud, filing deceptive loan statements and other intentional financial breaches of trust.

Applicant accumulated substantial delinquent debt since 2007, which he has been unable or unwilling to repay. More than \$70,000 of this debt was a result of his felony theft of funds through wire fraud. This evidence raises trustworthiness concerns under these 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual 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.

Over the past ten years, Applicant accumulated more than \$87,000 in delinquent debts that were alleged in the SOR. He did not provide evidence that these debts arose from conditions beyond his control, or that he acted responsibly under the circumstances. He documented no counseling to assist with debt resolution, nor did he demonstrate either willingness or ability to avoid recurrence of financial problems. He only documented payments toward his two court-ordered debts beginning in July 2015, well after he submitted his e-QIP. Other than the \$336 debt alleged in SOR ¶ 1.g, no documented basis to dispute the legitimacy of any of his alleged delinquencies was provided. Applicant therefore failed to establish sufficient mitigation of trustworthiness concerns under AG ¶¶ 20(a) through 20(e).

Guideline J: Criminal Conduct

The security concern relating to the guideline for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

The guideline at AG ¶ 31 contains five disqualifying conditions that could raise a security concern and may be disqualifying. One of those conditions was established, as discussed below:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant's felony conviction and sentencing for two wire fraud occurred in December 2007, and he only recently made minor progress toward repaying more than \$70,000 in court-ordered restitution. Security concerns under this guideline were raised by this evidence.

The guideline in AG ¶ 32 contains four conditions that could mitigate criminal conduct security concerns:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) no reliable evidence to support that the individual committed the offense; and
- (d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant's felonies were committed almost ten years ago, but his ongoing financial irresponsibility and subsequent probation violation demonstrate the absence of sufficient rehabilitation, maturity, trustworthiness, or good judgment. He offered insufficient evidence to establish mitigation for his deliberate, computer-based criminal conduct.

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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security 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 the facts and circumstances surrounding this case. Applicant is accountable for the decisions and choices that led to his felonious financial crimes and ongoing financial difficulties. He failed to demonstrate a basis for finding current good judgment, or permanent behavioral change, concerning his history and pattern of financial irresponsibility and criminal conduct. His substantial and unaddressed delinquent debts establish continuing potential for pressure, coercion, or duress.

Overall, the record evidence leaves me with questions and doubts as to Applicant's present eligibility and suitability to occupy a sensitive public trust position. For these reasons, I conclude Applicant did not meet his burden to mitigate the trustworthiness concerns arising from his financial considerations and criminal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a through 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraphs 1.h and 1.i:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against 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 to occupy a public trust position. National security eligibility for access to sensitive ADP information is denied.

DAVID M. WHITE
Administrative Judge