



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



In the matter of:

Applicant for Public Trust Position

)
)
)
)
)

ADP Case No. 17-00263

Appearances

For Government: Erin Thompson, Esq., Department Counsel
For Applicant: *Pro se*

09/07/2018

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges 16 delinquent debts totaling \$48,787. This total includes eight student loans totaling \$34,640. In July 2018, all of his delinquent debts, except for his student loans, were discharged under Chapter 7 of the Bankruptcy Code. He is making payments to address his student loan debts. Financial considerations trustworthiness concerns are mitigated. Eligibility for access to sensitive information is granted.

Statement of the Case

On March 14, 2016, Applicant completed and signed an Electronic Questionnaire for National Security Positions (e-QIP) (SF-86). (Government Exhibit (GE) 1). On September 15, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, and modified; DOD Manual 5200.02, *Procedures for the DOD Personnel Security Program (PSP)* (effective April 3, 2017), and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG) (effective June 8, 2017).

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue Applicant's

access to sensitive information, and recommended referral to an administrative judge to determine whether his access to sensitive information should be granted, continued, denied, or revoked. (Hearing Exhibit (HE) 2) Specifically, the SOR set forth trustworthiness concerns arising under the financial considerations guideline.

On October 24, 2017, Applicant provided a response to the SOR, and he did not request a hearing. (HE 3) Department Counsel requested a hearing. On July 13, 2018, the Defense Office of Hearings and Appeals (DOHA) issued a notice setting the hearing for July 30, 2018. (HE 1) Applicant waived any issue relating to the timeliness of the notice of hearing. (Tr. 14-15) Applicant's hearing was held as scheduled using video teleconference. Department Counsel offered six exhibits; Applicant offered three exhibits; there were no objections; and all exhibits were admitted into evidence. (Transcript (Tr.) 16-23; GE 1-GE 6; Applicant Exhibit (AE) A-AE C) On August 6, 2018, DOHA received a transcript of the hearing.

Findings of Fact¹

Applicant's SOR response admitted the allegations in SOR ¶¶ 1.a through 1.f, and 1.h through 1.p. He also provided extenuating and mitigating information. Applicant made some admissions in his discussion of the debt, and those admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is 37-years-old, and he has been employed by a DOD contractor as a network specialist at a medical clinic from July 2017 to the present. (Tr. 6-7) In 2000, he graduated from high school. (Tr. 6) He has 126 college credits; however, he has not received a degree. (Tr. 6) He is majoring in network communication management. (Tr. 6) In 2001, he married, and in 2009, he divorced. (Tr. 8) Applicant's son is 18 years old. (Tr. 8) His monthly child support payment of \$200 is current. (Tr. 8) He served on active duty in the Army from 2004 to 2009, including service in Iraq and Afghanistan. (Tr. 27, 45) He left active duty as a sergeant (E-5); his military occupational specialty was network nodal systems operator; and he received an honorable discharge. (Tr. 45-46)

Financial Considerations

Applicant was unemployed from November 2009 to November 2011, from December 2012 to January 2013, from March 2013 to February 2014, from June 2014 to February 2015, and from February 2017 to July 2017. (Tr. 7, 23; GE 2) His first period of unemployment after leaving active duty was due largely to not looking for work as he was living on his savings. During his other periods of unemployment, his debts became delinquent.

The SOR listed eight non-student loan debts totaling \$14,147 as follows: ¶ 1.a is a debt placed for collection for \$1,215; ¶ 1.b is a charged-off debt for \$2,695; ¶ 1.c is a utility

¹ Some details were excluded to protect Applicant's right to privacy. Unless stated otherwise, the facts in the statement of facts are from Applicant's January 29, 2016 Questionnaire for National Security Positions or SF-86, Applicant's March 22, 2016 Office of Personnel Management personal subject interview, and FORM response. Items 4, 8, FORM response.

debt placed for collection for \$595; ¶ 1.d is a debt placed for collection for \$1,450; ¶ 1.e is a debt relating to repossession of a vehicle for \$7,237; ¶ 1.f is a debt placed for collection for \$786; ¶ 1.g is a charged-off debt for \$64; and ¶ 1.p is a debt placed for collection for \$105.

In Applicant's bankruptcy filing, his nonpriority unsecured debts, including his student loans, totaled \$75,067. (GE 5) He did not disclose any delinquent taxes. (GE 5)

The SOR listed eight student loans for college totaling \$34,640. From September 2015 to September 2017, when Applicant was employed, \$507 monthly was garnished from Applicant's pay for his student loan debt. (Tr. 31; AE A) After October 2017, he made five \$194 payments, one \$195 payment, one \$89 payment, and one \$237 payment to address his student loans. (Tr. 31; AE A) His current student loan balance is \$32,838. (Tr. 21-22, 28; AE A) He is awaiting a formal student loan payment plan from the creditor. (Tr. 22) He made payments on his student loans almost every month that he was employed and his bankruptcy was not pending.

Applicant's gross annual income is about \$69,000. (Tr. 37) Prior to his bankruptcy, Applicant paid two of the SOR debts. He paid the debt in SOR ¶ 1.g owed to a utility company for \$64 and the debt in SOR ¶ 1.p owed to an insurance company for \$105. (Tr. 34; SOR response) Applicant's bankruptcy attorney recommended that he seek a fresh financial start through bankruptcy. He received financial counseling during the bankruptcy process. (Tr. 39) In July 2018, all of his delinquent debts, except for his student loans, and car loan were resolved when they were discharged under Chapter 7 of the Bankruptcy Code. (Tr. 22; AE B; GE 5; GE 6)²

Applicant wants to return to college to complete his degree. (Tr. 29) He believes that his student loans must be in an established payment plan to enable him to obtain additional student loans to fund his college education. (Tr. 29) He has some Department of Veterans Affairs (VA) education benefits remaining that he can use to enroll in school. (Tr. 30) Once he has begun to attend college, he will be able to seek another deferral of his student loan payments until he completes his degree. (Tr. 30) He has maintained communications with his student loan creditor. (Tr. 33)

Applicant's supervisor has known Applicant for six months. (AE C) He described Applicant as "a huge asset" to mission accomplishment who is professional and diligent. He believes Applicant has learned from this financial experience and sincerely wants to take correction action to resolve his financial problems.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a [public trust position]." *Department of the Navy v. Egan*, 484 U.S. 518,

² I granted Department Counsel's motion to amend the statement of reasons to add an allegation in paragraph 1.q that Applicant filed for bankruptcy in March 2018, and his debts were discharged under Chapter 7 of the Bankruptcy Code in July 2018. (Tr. 40)

528 (1988). The Government's authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. See *Id.* at 527.

Positions formerly designated as ADP I and ADP II are classified as noncritical-sensitive positions and include those personnel "[w]ith access to automated systems that contain military active duty, guard, or reservists' personally identifiable information or information pertaining to Service members that is otherwise protected from disclosure by DOD 5400.11-R where such access has the potential to cause serious damage to the national security." DOD Manual 5200.02 ¶ 4.1a(3)(c).

When evaluating an applicant's suitability for a public trust position, an 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. An 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 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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to sensitive information. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's suitability for a public trust position. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her access to sensitive information]." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

The protection of national security and sensitive records is paramount. 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.”

Analysis

Financial Considerations

AG ¶ 18 articulates the trustworthiness concern for 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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel 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 includes two disqualifying conditions that could raise a trustworthiness concern and may be disqualifying in this case: “(a) inability to satisfy debts”; and “(c) a history of not meeting financial obligations.” The evidence of record establishes AG ¶¶ 19(a) and 19(c). Further inquiry about the applicability of mitigating conditions is required.

Five 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 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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's eligibility [for a public trust position], there is a strong presumption against the grant or maintenance of a [public trust position]. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising [trustworthiness] concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in [public trust position] decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Applicant's finances were adversely affected by his divorce in 2009 and five periods of unemployment in the previous 10 years. He was unemployed from November 2009 to November 2011, from December 2012 to January 2013, from March 2013 to February 2014, from June 2014 to February 2015, and from February 2017 to July 2017.

In ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009) the Appeal Board addressed a situation where an applicant was sporadically unemployed and lacked the ability to pay his creditors. The Appeal Board noted "it will be a long time at best before he has paid" all of his creditors. The applicant was living on unemployment compensation at the time of his hearing. The Appeal Board explained that such a circumstance was not necessarily a bar to having access to classified information stating:

However, the Board has previously noted that an applicant is not required to be debt-free nor to develop a plan for paying off all debts immediately or simultaneously. All that is required is that an applicant act responsibly given his [or her] circumstances and develop a reasonable plan for repayment, accompanied by "concomitant conduct," that is, actions which evidence a serious intent to effectuate the plan. See ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008).

ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009). The applicant in ISCR Case No. 08-06567 used his limited resources to (1) resolve some of his debts; (2) had a repayment plan for the remaining debts; and (3) took "reasonable actions to effectuate that plan." *Id.* The Appeal Board remanded the Administrative Judge's decision because it did not "articulate a satisfactory explanation for his conclusions," emphasizing the Administrative Judge did "not explain[] what he believes that applicant could or should have done under the circumstances that he has not already done to rectify his poor financial condition, or

why the approach taken by applicant was not ‘responsible’ in light of his limited circumstances.” *Id.*

AG ¶¶ 20(b) and 20(c) apply. Applicant financial situation was damaged by divorce and unemployment, which are circumstances beyond his control. Applicant paid two SOR debts, and he made several payments to address his student loans. Some payments were from garnishment of his salary, and some payments were made voluntarily after the garnishment ended. He has a plan for bringing his student loans to current status.

Applicant’s bankruptcy attorney recommended that he seek a fresh financial start through bankruptcy. Resolution of debts through bankruptcy is a legally authorized means for resolving delinquent debt. The U.S. Bankruptcy Court website³ states:

A fundamental goal of the federal bankruptcy laws enacted by Congress is to give debtors a financial “fresh start” from burdensome debts. The Supreme Court made this point about the purpose of the bankruptcy law in a 1934 decision: “[I]t gives to the honest but unfortunate debtor ... a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.” *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). This goal is accomplished through the bankruptcy discharge, which releases debtors from personal liability from specific debts and prohibits creditors from ever taking any action against the debtor to collect those debts.

In July 2018, the bankruptcy court discharged Applicant’s nonpriority unsecured debts under Chapter 7 of the Bankruptcy Code.⁴ As part of the bankruptcy process, he received financial counseling and generated a budget.

Based on Applicant’s track record of paying or resolving his debts, future new delinquent debt “is unlikely to recur and does not cast doubt on [Applicant’s] current reliability, trustworthiness, or good judgment,” and “there are clear indications that the problem is being resolved or is under control.” His payments to address some of his debts showed some good faith. He has sufficient income to keep his debts in current status and

³ U.S. Bankruptcy Court website, *Process - Bankruptcy Basics*, <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/process-bankruptcy-basics>.

⁴ There is may be some duplication of debts in Applicant’s bankruptcy schedules. In a bankruptcy filing, most debtors list potential creditors, even when the debt may have been resold or transferred to a different collection agent or creditor, to ensure notice, and reduce the risk of subsequent dismissal of the bankruptcy. If Applicant failed to list some nonpriority unsecured debts on his bankruptcy schedule, this failure to list such debts does not affect their discharge. Absent fraud, in a no-asset bankruptcy, all unsecured, nonpriority debts are discharged when the bankruptcy court grants a discharge, even when they are not listed on a bankruptcy schedule. See *Judd v. Wolfe*, 78 F.3d 110, 114 (3d Cir. 1996); *Francis v. Nat’l Revenue Service, Inc.*, 426 B.R. 398 (Bankr. S.D. FL 2010), but see *First Circuit Bucks Majority on Discharge of Unlisted Debt in No-Asset Case*, American Bankruptcy Institute, 28-9 ABIJ 58 (Nov. 2009). There is no requirement to re-open the bankruptcy to discharge the debt. *Collier on Bankruptcy*, Matthey Bender & Company, Inc., 2010, Chapter 4-523, ¶ 523(a)(3)(A). Some categories of priority obligations are listed on bankruptcy schedules, but in most cases are not discharged by bankruptcy, such as tax debts, student loan debts, and child support obligations.

to continue making progress paying his remaining debts. I am confident that Applicant will conscientiously endeavor to maintain his financial responsibility. His efforts are sufficient to mitigate financial considerations trustworthiness concerns.

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), "[t]he ultimate determination" of whether to grant a public trust position "must be an overall commonsense judgment based upon careful consideration" of the guidelines and the whole-person concept. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is 37-years-old, and he has been employed by a DOD contractor as a network specialist at a medical clinic from July 2017 to the present. He has 126 college credits; however, he has not received a degree. He is majoring in network communication management. In 2009, he divorced. His son is 18 years old, and his monthly child support payment of \$200 is current. He served on active duty in the Army from 2004 to 2009, including service in Iraq and Afghanistan. He left active duty as a sergeant, and he received an honorable discharge.

Applicant's supervisor has known Applicant for six months. He described Applicant as "a huge asset" to mission accomplishment who is professional and diligent. He believes Applicant has learned from this experience and wants to take correction action to resolve his financial problems.

Applicant had five periods of unemployment in the last 10 years. He paid two SOR debts, and he made payments to address his student loans. He has a plan to bring his student loan debt to current status. In July 2018, his non-priority, unsecured debts were discharged under Chapter 7 of the Bankruptcy Code. All of his debts except for his student loans are in current status. The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

. . . the concept of meaningful track record necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not

required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has . . . established a plan to resolve his financial problems and taken significant actions to implement that plan. The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.) There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations and quotation marks omitted). He understands what he needs to do to establish and maintain his financial responsibility. He took reasonable actions under his particular financial circumstances to address his delinquent debts. Applicant has established a "meaningful track record" of debt re-payment, and I am confident he will maintain his financial responsibility.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, DOD Manual 5200.02, and the AGs, to the facts and circumstances in the context of the whole person. I conclude that financial considerations trustworthiness concerns are mitigated. It is clearly consistent with the interests of national security to grant Applicant eligibility for public trust position.

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: FOR APPLICANT

Subparagraphs 1.a through 1.q: For Applicant

Conclusion

In light of all of the circumstances in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

MARK HARVEY
Administrative Judge