



**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. 17-00481

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

03/09/2018

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges one delinquent debt for \$62,648. That debt was resolved through a short sale in 2012. Financial considerations trustworthiness concerns are mitigated. Eligibility for access to sensitive information is granted.

Statement of the Case

On January 29, 2016, Applicant completed and signed an Electronic Questionnaire for National Security Positions (e-QIP) (SF-86). Item 4. On June 26, 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)*, which became effective on 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), which became effective "for all covered individuals" on or after 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 his access to sensitive information, and recommended referral to an administrative judge to determine

whether access to sensitive information should be granted, continued, denied, or revoked. Item 1. Specifically, the SOR set forth trustworthiness concerns arising under the financial considerations guideline. Item 1.

In July 14, 2017, Applicant provided a response to the SOR, and he did not request a hearing. Item 3. Department Counsel completed the File of Relevant Material (FORM), and on September 29, 2017, the FORM was provided to Applicant. On September 29, 2017, Applicant responded to the FORM. The nine items attached to the FORM and the response to the FORM were admitted into evidence without objection.

Findings of Fact¹

Applicant's SOR response denied the allegation in SOR ¶ 1.a. 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 41-years-old, and he has been employed by a DOD contractor as a mentor from April 2006 to the present. From September 2002 until present, he was also employed as a police lieutenant for a city. In 2008, he received a bachelor's degree. From August 1994 until July 2002, Applicant was in the Navy Reserve and Navy Inactive Reserve. He received an honorable discharge. In 2000, he married, and in 2008, he divorced. In 2010, he married, and in October 2012, he divorced. He has been cohabitating since June 2015. His children were born in 2001 and 2004.

Financial Considerations

Applicant traveled overseas for tourism as follows: Japan in January 2010; Barbados in October 2011; United Kingdom (U.K.) in March 2012 (his spouse is from the U.K.); Ireland in October 2013; Costa Rica in June 2014; and France in June 2015. Item 4.

Applicant's SOR alleges in ¶ 1.a that he has one charged-off debt for \$62,648. Applicant lived in the same residence from November 2002 to July 2011. Item 4. His home was encumbered with a first mortgage for \$228,000 and a home equity loan or second mortgage for \$62,648. In July 2011, Applicant moved, and he rented the home he formerly occupied. Applicant had an \$800 monthly negative cash flow on the rental property, and in March 2012, he separated from his spouse. The next month, he or his spouse filed for divorce. The divorce cost Applicant about \$50,000. Applicant had financial problems in 2012 because of the divorce, and he and his spouse needed to reduce expenses.

Applicant and his spouse initially tried to refinance their rental property; however, the creditors would not agree to refinance. An attorney advised Applicant and his spouse

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.

to stop making payments and to short sale the rental property. Applicant and his spouse complied with this advice. The first and second mortgages were current until the property entered the short-sale process. When the rental property was sold, the first mortgage was paid. Item 8 at 4-5. A printout shows in September 2012, Applicant's residence was sold for \$232,000, and the first mortgage was \$228,000. Item 9. The settlement sheet on the real estate transaction is not part of the record evidence. On July 16, 2012, the creditor for the second mortgage in SOR ¶ 1.a said "it is in its best interest to accept the offer of \$11,500 from the closing proceeds as settlement in full and agrees to release its lien" Item 3. Applicant believed that the creditor received \$11,500 from the settlement, and the debt was resolved. Item 8 at 6.

When Applicant learned the charged-off debt in SOR ¶ 1.a was on his credit report, he disputed negative information on his credit report. Item 3. On February 16, 2017, the creditor wrote Applicant that the debt dispute was received and "the information in dispute has been corrected on the account, and this change has been reported" to the three largest credit reporting companies. Item 3.

Applicant's September 29, 2017 Equifax credit report shows the debt was "paid for less than full balance, Paid charge off" and the "Actual Payment Amount" is shown as \$6,000. FORM Response. Applicant's most recent credit report is dated August 25, 2017, and it indicates the creditor in SOR ¶ 1.a has provided two loans to Applicant for \$17,931 and \$12,831 with both loans indicating paid and closed. Item 7. The debt in SOR ¶ 1.a is not shown in the most recent credit report of record. His most recent credit report shows multiple debts, which are all current. Item 7.

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, 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 three disqualifying conditions that could raise a trustworthiness 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 evidence of record establishes AG ¶¶ 19(a), 19(b), 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 divorce and the decline in real estate fair market values from 2009 to 2012. He had a negative cash flow on a rental property, and his attorney advised him to stop making payments on the two mortgages encumbering the rental property and to divest himself from the property through a short sale. The creditor for the second mortgage was amenable to a short sale, even though the creditor would only receive about 20 percent of the debt. Real estate in the state where the rental property was located declined drastically in market value around 2009. The property was sold through a short sale, and the first mortgage was paid. The second-mortgage creditor only received \$6,000 on a \$62,648 debt. In 2012, the creditor accepted the \$6,000 as payment of the debt and released a second-mortgage lien on the property. The debt is resolved. AG ¶ 20(a), 20(b), and 20(d) apply.

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 of his non-SOR debts showed good faith. He has sufficient income to keep his debts in current status and 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 41-years-old, and he has been employed by a DOD contractor as a mentor from April 2006 to the present. From September 2002 until January 2016, he was also employed as a police lieutenant for a city. In 2008, he received a bachelor's degree. From August 1994 until July 2002, Applicant was in the Navy Reserve and Navy Inactive Reserve. He received an honorable discharge. In 2010, he married, and in October 2012, he divorced. His children were born in 2001 and 2004.

In 2012, the debt in SOR ¶ 1.a was resolved through a short sale. Applicant's credit report does not reflect any balances past due on any debts. All of his debts 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

Subparagraph 1.a:

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