



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



In the matter of:

ADP Case No. 17-00510

Applicant for Public Trust Position

Appearances

For Government: Mary M. Foreman, Esq., Department Counsel

For Applicant: Patrick Cox, Personal Representative

02/05/2018

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the financial considerations trustworthiness concerns. Eligibility for access to sensitive information is granted.

Statement of the Case

On May 10, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guideline F, financial considerations. 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 DOD on September 1, 2006. On June 8, 2017, new AG were implemented and are effective for decisions issued after that date.¹

Applicant answered the SOR on August 1, 2017, and requested a hearing before an administrative judge. The case was assigned to me on October 25, 2017. The

¹ I considered the previous AG, effective September 1, 2006, as well as the new AG, effective June 8, 2017. My decision would be the same if the case was considered under the previous AG.

Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 20, 2017. I convened the hearing as scheduled on January 18, 2018. The Government offered exhibits (GE) 1 through 6, and they were admitted into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A through G, which were admitted into evidence without objection. The record was held open until February 1, 2018, to permit Applicant to provide additional documents, which he did. They are marked AE H through M, and were admitted without objection.² DOHA received the hearing transcript on January 26, 2018.³

Findings of Fact

Applicant admitted the SOR allegations in ¶¶ 1.a, 1.b, 1.g, and 1.h. He denied the remaining allegations and provided explanations. His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits, I make the following findings of fact.

Applicant is 40 years old. He earned his General Equivalency Diploma in 1999. He married in 2016. He and his wife have three children ages 21, 18 and 11 years old. He has been steadily employed for 18 years by federal contractors. His wife has worked for the past two months. His annual salary is approximately \$70,000 and his wife's monthly salary is approximately \$1,100.⁴

In 2011, Applicant became overwhelmed by his bills. His mortgage increased due to a balloon payment. He refinanced the mortgage, but the new interest rate was higher and unaffordable. He sought assistance from an attorney who recommended he file Chapter 13 bankruptcy, which he did in November 2011. He paid the attorney \$3,000. Applicant had the monthly payments automatically deducted from his pay beginning in December 2011. During a 14-month period, Applicant's employer changed four times. Each time the payroll process stopped and had to be restarted. Applicant made consistent payments that totaled \$45,259 until his bankruptcy was dismissed in October 10, 2013, presumably because the payroll deduction stopped.⁵

Applicant attempted to contact his attorney requesting a status of why the bankruptcy trustee was no longer deducting his Chapter 13 payments from his pay. Applicant had multiple conversations with the attorney and his assistant. An explanation was not provided. The attorney recommended refiling the Chapter 13 bankruptcy, which he did on October 29, 2013. Applicant paid the attorney \$3,100 to refile. Bankruptcy records show that Applicant paid \$13,637 to the trustee and \$10,365 was refunded.

² Hearing Exhibit I is a demonstrative exhibit. HE II is Department Counsel's email memorandum.

³ At the hearing, Department Counsel amended the SOR and correctly noted the case is an ADP vice an ISCR.

⁴ Tr. 18-24.

⁵ Tr. 25-28, 30-34; GE 2, 6; AE A, B, C, D, E, F, G.

This bankruptcy was dismissed in May 2014. Applicant testified that he made 30 payments into the plan.⁶

Applicant testified that when his attorney refiled the bankruptcy, he believed his payments were reinstated and everything was back on track. Then he received a check from the bankruptcy trustee for \$8,000. The same day his two vehicles were repossessed. Applicant contacted his attorney to get an explanation for the check he received. His attorney would not provide one and told him he could not help him and wished Applicant good luck with his life. Applicant contacted the bankruptcy trustee, and he was advised his bankruptcy was being dismissed, and the check was a refund that was not distributed to his creditors. Applicant cashed the check, gave it to the creditor of his repossessed vehicles. Applicant attempted to contact his attorney, but the attorney would not take his calls.⁷

The debts alleged in the SOR are supported by credit reports from June 2015 and January 2017, Applicant's admissions, and bankruptcy documents. The majority of the amount Applicant paid monthly in his bankruptcy payment plan was distributed to his mortgage and the debts in SOR ¶ 1.a (\$14,822) and ¶ 1.b (\$10,650), which are vehicle loans. There were some payments made to debts on the SOR, but the debts were not completely paid before the bankruptcy was dismissed. The debt in SOR ¶ 1.i (\$4,143) is with the same creditor as ¶¶ 1.a and 1.b and was included in the bankruptcy. Although Applicant paid the creditor to have his cars returned after they were repossessed, he was too far behind in payments. He then asked the creditor what his options were and was advised to turn the cars in, which he did. The cars were sold. He has communicated with the creditor about the delinquent debts and was advised that the total amount owed on the three debts is \$14,181. The creditor was unwilling to accept a monthly payment.⁸

Applicant settled the debt in SOR ¶ 1.c (\$630) and provided documentary proof.⁹ He provided proof that the debt in SOR ¶ 1.d (\$373) was paid in full in November 2015.¹⁰ The debt in SOR ¶ 1.i (\$130) is no longer in collection.¹¹ The debt in SOR ¶ 1.j (\$377) is paid.¹²

⁶ Tr. 35-42; GE 5.

⁷ Tr. 35-42.

⁸ Tr. 40-44, 51-57; GE 2, 3, 4, 5, 6; AE H.

⁹ AE J.

¹⁰ AE K.

¹¹ AE L.

¹² Tr. 46-51, 59; AE M.

Applicant has contacted his medical insurance provider regarding the debts in SOR ¶ 1.e (\$221) and ¶ 1.f (\$128) and is resolving these debts. He contacted the creditor in SOR ¶ 1.k (\$169) and was advised there is a zero balance on the account.¹³

Applicant participated in financial counseling as required to file bankruptcy. He also has educated himself through research online.¹⁴

Applicant testified that while payments were being deducted from his pay for his bankruptcy, he was not receiving any money. He was working odd jobs mowing lawns and repairing small engines. At the time of his hearing, he was on disability and receiving only 70% of his income. He anticipated being cleared to go back to work full time in the immediate future. Applicant indicated he intends to sell the vehicles he now has and use the money to pay these debts. He intends to have only one car. He is able to meet his monthly expenses. Applicant provided a budget that shows he has approximately \$900 in expendable income at the end of the month.¹⁵

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are to be used in determining an applicant's eligibility for a position of trust.

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 the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security."

Directive ¶ E3.1.14, states that the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states that 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."

¹³ Tr. 55-59; AE I.

¹⁴ Tr. 60-61.

¹⁵ Tr. 25, 46, 61, 64, 77; AE H.

The applicant has the ultimate burden of persuasion to obtain 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 safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline F: Financial Considerations

The trustworthiness concern relating to the guideline for financial considerations is set out in AG ¶ 18:

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. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

AG ¶ 19 provides conditions that could raise trustworthiness concerns. The following is potentially applicable:

- (a) inability to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant had delinquent debts that began accumulating in about 2011 that he was unable to resolve. He filed Chapter 13 bankruptcy twice and both were dismissed. There is sufficient evidence to support the application of the above disqualifying conditions.

The guideline also includes conditions that could mitigate trustworthiness concerns arising from financial difficulties. The following 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.

Applicant has delinquent debts that he is continuing to resolve and are ongoing. AG ¶ 20(a) does not apply. He experienced financial problems when his mortgage increased and he had difficulty paying his bills. This was not a circumstance beyond his control. However, Applicant acted responsibly by seeking guidance from an attorney. He filed Chapter 13 bankruptcy and participated in a payment plan where he paid approximately \$48,000. There is confusion as to why the plan was dismissed. It may have been because Applicant's automatic payroll deduction stopped when the contractor changed four times in a 14-month period. There is also confusion as to why his attorney would not communicate with him. Applicant did not ignore his debts and his pay was being sent to the bankruptcy trustee. He was working odd jobs to supplement his income. He provided proof he has resolved some of his delinquent debts, but several remain. He indicated his intent to resolve them and a plan for resolving them. He was on disability for four months and receiving 70% of his salary. He anticipated going back to work full time, which will also enhance his ability to pay the remaining debts. AG ¶ 20(b) partially applies.

Applicant participated in financial counseling as required when filing bankruptcy. He is also attempting to educate himself through online material. Although his finances

are not perfect there are clear indications that he is resolving his financial problems, and they are under control. AG ¶ 20(c) applies.

Applicant began addressing his delinquent debts through a Chapter 13 bankruptcy payment plan in 2011. He paid approximately \$48,000 toward his debts. He has paid the debts in SOR ¶¶ 1.c, 1.d, 1.j, and 1.l. The creditor in SOR ¶ 1.k confirmed there is a zero balance on the account. He is resolving the debts in SOR ¶¶ 1.e and 1.f. AG¶ 20(d) applies to these debts.

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(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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is 40 years old. He accumulated delinquent debts when his mortgage payments increased, and he had difficulty paying his other bills. Applicant attempted to resolve his debts through a Chapter 13 bankruptcy payment plan. He adhered to the plan and made \$48,000 worth of payments. It is unclear why the bankruptcy was dismissed, but it is likely due to his automatic payroll deductions stopping when the contractor changed four times. Applicant paid his attorney more than \$6,000. His attorney would not communicate with him after the second bankruptcy was dismissed. Applicant paid many of his debts, but is still resolving the largest ones. He received 70% of his pay for four months while on disability. He works other jobs to supplement his income.

A public trust clearance adjudication is not a debt collection procedure. It is a procedure designed to evaluate an applicant's judgment, reliability, and trustworthiness.

See ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010). An applicant is not required, as a matter of law, to establish resolution of every debt alleged in the SOR. An applicant need only establish a plan to resolve the financial problems and take significant actions to implement the plan. There is no requirement that an applicant make payments on all delinquent debts simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008).

Applicant took significant action to resolve his debts and this action is ongoing. He has paid some of his delinquent debts. Applicant did not ignore his financial responsibilities. He is not sophisticated in the intricacies of finances, but has been trying to learn. He has made an effort to put his finances in order. He understands the importance of resolving the remaining debts for the future of his job. Applicant has mitigated the reliability and trustworthiness concerns raised under Guideline F, 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, Guideline F:	FOR APPLICANT
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Subparagraphs 1.a-1.l	For Applicant
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Conclusion

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

Carol G. Ricciardello
Administrative Judge