



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



In the matter of:)	
)	
[Redacted])	ADP Case No. 17-01264
)	
Applicant for Public Trust Position)	

Appearances

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

03/07/2018

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves trustworthiness concerns raised under Guideline F (Financial Considerations). Eligibility for assignment to a public trust position is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) on February 10, 2016, seeking eligibility for a public trust position. On May 15, 2017, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), citing trustworthiness concerns under Guideline F. DOD acted under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation);¹ and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006. Security Executive Agent Directive 4 (SEAD 4) was issued on December 10, 2016, revising the 2006 adjudicative guidelines for all adjudicative

¹ On April 3, 2017, DOD Manual 5200.02, *Procedures for the DoD Personnel Security Program (PSP)*, (Manual) was published. It cancelled and incorporated the Regulation, but it did not include the provisions for ADP cases. ADP cases continue to be adjudicated in accordance with the Deputy Under Secretary of Defense's Memorandum for the Director, Defense Office of Hearings and Appeals, dated November 19, 2004.

decisions issued on or after June 8, 2017. The changes resulting from issuance of SEAD 4 did not affect my decision in this case.

Applicant answered the SOR on June 19, 2017, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on August 30, 2017, and the case was assigned to me on October 23, 2017. On November 13, 2017, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for December 7, 2017. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Applicant testified and presented the testimony of one witness, but he did not submit any documentary evidence. I kept the record open until January 12, 2018, to enable him to submit documentary evidence. He submitted Applicant's Exhibits (AX) A through E, which were admitted without objection. DOHA received the transcript (Tr.) on December 20, 2017.

Request for Continuance

Applicant requested that his hearing be continued until his attorney could be present. When I opened the hearing, no attorney had entered an appearance for Applicant. He stated that he had been paying a law firm \$800 per month for about three years to resolve his debts, and that the firm had advised him to seek a postponement to obtain more documentation. At my direction, Applicant and Department Counsel contacted Applicant's law firm, and a member of the firm advised Applicant that they are a debt-resolution law firm, that they do not appear at DOHA hearings, and they did not intend to appear in this case. Applicant testified that the law firm suggested that he obtain a military lawyer to represent him.² He testified that he also had a list of civilian lawyers but that he had not contacted any of them. I denied Applicant's request for a continuance. I noted on the record that Applicant had received the SOR in May 2017, responded to the SOR in June 2017, and was notified of the hearing date in mid-November 2017, and was still hunting for a lawyer to represent him on the day of the hearing. (Tr. 6-13.)

Findings of Fact

In Applicant's answer to the SOR, he admitted all the allegations. His admissions are incorporated in my findings of fact.

Applicant is a 61-year-old aircraft sheet metal mechanic employed by defense contractors since June 2010. He served on active duty in the U.S. Air Force from December 1969 to December 1973 and was honorably discharged. He was a federal civilian employee until 2009, when he retired. He was unemployed until he was hired for his current position. (Tr. 35.)

Applicant married in April 1978 and divorced in March 1993. He married his current spouse in August 1996. He has two adult children, one from each marriage. His daughter, the younger child, is a college student. His older child is self-supporting. (Tr. 34.)

² Applicant is not entitled to representation by military counsel. Legal assistance from military lawyers is limited to active duty and retired military personnel and their family members, and it usually does not extend to appearances in non-military courts or administrative tribunals.

The SOR alleges 12 delinquent debts totaling about \$65,000. All the debts are reflected in credit reports from February 2016 and March 2017. (GX 2; GX 3.)

Applicant testified that his financial problems began after a base closure in 1996, requiring him to find a job at another location. His wife was employed and they had a new baby, and so they lived apart and incurred the expenses of maintaining two households. They used credit cards for expenses, not realizing that the spending was becoming out of control. In mid-2011, he hired a law firm to consolidate and resolve his debts, and he paid the firm \$853 per month for three years. The firm handled nine debts, of which six are alleged in the SOR. The firm's status report reflects that the debts alleged in SOR ¶¶ 1.e and 1.k are barred by the statute of limitations. Four debts not alleged in the SOR are listed as settled. (AX B at 2.) The debts alleged in SOR ¶¶ 1.b and 1.d are for a delinquent credit card, and they appear to be included in the unsatisfied judgment in SOR ¶ 1.j. The law firm informed Applicant that they were unable to resolve the unsatisfied judgment. (AX A.) In January 2018, the firm refunded \$7,159 that was remaining in his escrow account. (AX C, D, and E.)

Applicant recently hired a credit-repair firm to challenge incorrect information on his credit reports. He did not submit any evidence of actions taken by the credit-repair firm. (Tr. 29-32.) Neither of the firms he hired provided any financial counseling. (Tr. 58.)

Applicant provided additional evidence regarding the status of the following debts alleged in the SOR:

SOR ¶ 1.a: mortgage loan for a time-share property, past due for \$1,737 and in foreclosure with a balance of \$7,383. Applicant testified that his wife persuaded him to purchase the time-share property and agreed to pay half of the expenses from her earnings, but she reneged on her promise. His debt-consolidation law firm did not handle this debt, and he has not taken any action to resolve it. (Tr. 36-38.) He testified that he received a settlement offer from this creditor about two years ago, but that he did not respond to it because he was busy and forgot about it. (Tr. 65-66.)

SOR ¶¶ 1.c, 1.f, and 1.h: collection accounts for \$12,395; \$1,241; and \$269. Applicant was unable to provide any information about the debt in SOR ¶ 1.c, except that his credit-repair firm was investigating it. (Tr. 41.) He testified that the debts in SOR ¶¶ 1.f and 1.h were resolved, but he provided no documentation to support his testimony. (Tr. 44-46.);

SOR ¶¶ 1.g, 1.i, and 1.l: medical debts for \$658; \$129, and \$232. Applicant's law firm did not handle these debts. He testified that they were not resolved, but that he intended to pay them. (Tr. 45-47.) He testified that he had not resolved them by the time of the hearing because he has been busy and forgot about them. (Tr. 49.)

Applicant testified that his annual salary from his current job is about \$50,000 or \$60,000, which amounts to net pay of about \$1,800 per pay period, and his civil service annuity is about \$2,800 per month after taxes. His wife is employed and earns about \$25,000 per year, making telephone calls for a debt collector. (Tr. 50-52.) He estimated

that his family's net monthly remainder is about \$400. (Tr. 57.) He prepared a personal financial statement when he first hired the debt-consolidation firm, but he has not updated it. (Tr. 60.)

Applicant's younger brother, who is also his pastor and an employee of a defense contractor, testified that Applicant is honest, reliable, diligent, hardworking, and dependable. He testified that Applicant is very devoted to his family, and that his wife was responsible for many of Applicant's delinquent debts. (Tr. 24-28.)

Policies

The Under Secretary of Defense's Memorandum of November 19, 2004, treats ADP positions as sensitive positions, and it entitles applicants for ADP positions to the procedural protections in the Directive before any final unfavorable access determination may be made. The standard set out in the Manual and the adjudicative guidelines for assignment to sensitive duties is that 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. Manual ¶ 7.1a(2); AG ¶ 2.b.

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. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information.

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 an evaluation of the whole person. The 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.

The protection of the national security is the paramount consideration. Under AG ¶ 2(b), "[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security." The Government must present substantial evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. 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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). An applicant has the ultimate burden of demonstrating that it is clearly consistent with national security to grant or continue eligibility for access to sensitive information.

Analysis

Guideline F, Financial Considerations

The trustworthiness concern under this guideline 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. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

This concern is broader than the possibility that a person might knowingly compromise sensitive information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting sensitive information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding sensitive information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

The evidence indicates that the delinquent debts alleged in SOR ¶¶ 1.b and 1.d are included in the judgment alleged in SOR ¶ 1.j. When the same conduct is alleged more than once in the SOR under the same guideline, the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 at 3 (App. Bd. Sep. 21, 2005) (same debt alleged twice). Accordingly, I have resolved SOR ¶¶ 1.b and 1.d for Applicant.

Applicant's admissions and the documentary evidence submitted at the hearing establish the following disqualifying conditions: AG ¶ 19(a) ("inability to satisfy debts"); AG ¶ 19(b) ("unwillingness to satisfy debts regardless of the ability to do so"); and AG ¶ 19(c) ("a history of not meeting financial obligations"). The following mitigating conditions are potentially applicable:

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(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; and

AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

None of the mitigating conditions are established. Applicant's delinquent debts are numerous, recent, and were not incurred under circumstances making them unlikely to recur. He provided no evidence of conditions beyond his control. He provided evidence that collection of two debts alleged in the SOR was barred by the statute of limitations, but reliance on a statute of limitations does not constitute a good-faith effort to resolve a debt. See ISCR Case No. 11-08274 (App. Bd. May 2, 2013). He testified that he had hired a credit-repair agency to challenge some of the debts reflecting in his credit reports, but he provided no evidence of a basis for challenging them and no evidence of any action to challenge them. He has not received financial counseling, and there are no "clear indications" that his financial problems are under control.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a sensitive position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a sensitive position by considering the totality of the applicant's conduct and all relevant circumstances and applying the adjudicative factors in AG ¶ 2(d).³

I have incorporated my comments under Guideline F in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the trustworthiness concerns raised by his delinquent debts.

Formal Findings

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant

³ The factors are: (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.

Subparagraph 1.d:

For Applicant

Subparagraphs 1.e-1.i:

Against Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for a public trust position is denied.

LeRoy F. Foreman
Administrative Judge