



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



In the matter of:

ADP Case No. 17-01530

Applicant for Public Trust Position

Appearances

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

For Applicant: Patrick Cox, Personal Representative

02/06/2018

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the financial considerations trustworthiness concerns. He refuted the personal conduct trustworthiness concerns raised. Eligibility for access to sensitive information is denied.

Statement of the Case

On June 16, 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, and Guideline E, personal conduct. 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 June 8, 2017.

Applicant answered the SOR on June 29, 2017, and requested a hearing before an administrative judge. The case was assigned to me on August 23, 2017. The 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 5, and they were admitted into evidence without objection. Applicant testified and offered Applicant Exhibit (AE) A, which was admitted without objection. DOHA received the hearing transcript on January 26, 2018.

Findings of Fact

Applicant admitted the SOR allegations in ¶¶ 1.a through 1.e, 1.g, 1.h, 1.i, 1.m, and 2.a. He denied the SOR allegations in ¶¶ 1.f, 1.j, 1.k, 1.l and 1.n. 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 42 years old. He graduated from high school in 1994. He married in 2004 and has children ages 16, 15 and 10 years old. He has worked for his present employer, a federal contractor, continuously since 2008 and has no periods of unemployment. Before then he worked from 2003 to 2008 for another contractor with no periods of unemployment. Applicant's wife began working the summer of 2017. She was unemployed for two years before starting her most recent job. Before then she worked as a day-care provider for about three years. Applicant estimated he earns about \$60,000 and his wife earns about \$20,000.¹

Applicant attributed his delinquent debts to a period in approximately January 2014 when he was unable to work due to knee surgery. The debts are supported by his admissions and credit reports from June 2015 and April 2017. He disclosed on his April 2015 security clearance application (SCA) that he had delinquent debts and he was "making arrangements with all creditors to make payments."² He further stated in his SCA the following:

Have not taken any action due to my spouse only working part time at this time. Unable to make payments at this time until she is employed full time. We are currently readjusting our finances, expenses in order to [fullfil] financial obligation to our creditors and the debt we owe. We will [pay off] the debt when we receive our tax refund in Jan 2015.³

Applicant testified he was on disability in 2014 and was only earning 70% of his salary. He went back to work full time in November 2014, earning his full pay. In September 2015, Applicant was interviewed by a government investigator. All of the delinquent debts alleged in the SOR except ¶ 1.j (\$138) were addressed during the interview. Applicant told the investigator that he was aware that he had several bad debts and unpaid collection accounts, but he was unaware of the extent or was unaware of the exact creditors or amounts owed. He indicated his wife handles the majority of the bills. He acknowledged the debts that he was confronted with by the investigator that are alleged in the SOR (except SOR ¶ 1.j). He told the investigator he

¹ Tr. 22-27; GE 1.

² Tr. 28-29; GE 1, 3, 4.

³ GE 1.

intended to obtain a credit report and contact creditors to make payment arrangements.⁴

Applicant told the government investigator that the debt in SOR ¶ 1.a (\$21,053) was for a voluntarily-repossessed vehicle. He was unable to make the payments. He testified he purchased the vehicle new in 2013 and, due to his knee surgery and reduced pay, he could not afford it. He attempted to negotiate a repayment plan, but the creditor wanted a lump sum and would not accept a monthly plan. He provided a document from the creditor that indicated it would accept a reduced amount of \$5,265. Applicant is unable to pay this amount.⁵ The debt is unresolved.

Applicant provided documents to show he paid the delinquent medical debt alleged in SOR ¶ 1.k (\$130) and the debt in ¶ 1.f (\$288) in June 2017.⁶ These debts are resolved.

The remaining debts in the SOR are unresolved. Applicant testified he is working on resolving them and is trying to come up with the money to pay them. He has not contacted the creditors. He stated he was going to pay the debts with overtime pay and by reducing expenses. He admitted he has been working overtime since June 2017, but did not use the money to pay the delinquent debts. Applicant stated he is current on his monthly expenses, including his mortgage. He does not want to go further in debt by missing payments on his current expenses. He does not have extra income to pay his delinquent debts. He owns two cars, each purchased new in 2016 and 2017. His car payments are \$594 and \$878 respectively. He has not participated in financial counseling.⁷

Applicant's April 2015 SCA required he disclose whether he had ever been charged with an offense involving alcohol or drugs. He responded "no." In his answer to the SOR, he admitted ¶ 2.a, which alleged he falsified material facts and deliberately failed to disclose he was arrested for driving under the influence of alcohol in 1998 and again in 2007. At his hearing, Applicant testified during direct examination that he failed to disclose his arrests because he thought he only had to if it was a felony, and he misunderstood the question.⁸

During Applicant's September 2015 interview with a government investigator, he did not disclose he had any alcohol-related arrests during the normal line of questioning. He did not provide information about his arrests until he was confronted with the information about his May 2007 DUI arrest when he replied "oh that's right." He indicated he had forgotten about the arrest and contended it was more than seven

⁴ Tr. 30, 36-37; GE 2.

⁵ Tr. 28-33; GE 1; AE A.

⁶ Tr. 33-36; Answer to SOR.

⁷ Tr. 37-45, 49-50, 54.

⁸ GE 1.

years old so he did not think he had to disclose it. At his hearing, he explained he remembered the investigator asked him about his 2007 arrest and he thought the charge had been dropped. He then disputed the accuracy of the summary of interview contained in GE 2. Therefore, under the circumstances, I will not consider this exhibit. Applicant testified that that he did not disclose it because he thought he only had to go back seven years. This was the reason he also did not disclose the 1998 DUI arrest. He admitted he was tired when he was interviewed, after having worked the graveyard shift. He stated he was confused, but did not have anything to hide.⁹

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." 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

⁹ Tr. 46-49, 56-61; GE 2, 5.

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;
- (b) unwillingness to satisfy debts regardless of the ability to do so; and
- (c) a history of not meeting financial obligations.

Applicant has numerous delinquent debts beginning in about 2014 that he is unwilling or unable to resolve. 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 numerous delinquent debts that he has been aware are a trustworthiness concern since he completed his SCA in April 2015. He indicated in his SCA that he would pay the delinquent debts with his income-tax refund. During his September 2015 background interview, he also indicated he would address the debts by obtaining a credit report and making payment arrangements. He paid two small debts after receiving the SOR (§§ 1.f and 1.k) in June 2017. He testified that he intended to use his overtime pay to address the debts, but admitted he has been working overtime since June 2017 and had not used the extra income to pay his debts. All but two of the debts alleged remain delinquent. His financial problems are ongoing and there is insufficient evidence to conclude future financial problems are unlikely to recur. AG § 20(a) does not apply.

Applicant attributed his financial problems to a period when he was only receiving 70% disability pay for a four-month period in 2014, and his wife was working part time. These were conditions beyond Applicant's control. For the full application of AG § 20(b) Applicant must have acted responsibly under the circumstances. Applicant's disability occurred in 2014. His wife is now working full time. He has been aware for more than two years that his delinquent debts are a trustworthiness concern. Despite providing assurances in his SCA and during his background interview that he was addressing the delinquent debts, he failed to provide sufficient evidence to show he has followed through on his promises. Although he testified he would use his overtime to pay his debts, he admitted he had not done so. Applicant has not acted responsibly in resolving his delinquent debts. AG § 20(b) partially applies.

There is insufficient evidence that Applicant has received financial counseling and there are clear indications that the problem is being resolved or is under control. Applicant paid two debts after he received the SOR, and they are resolved. (SOR §§ 1.f and 1.k). AG § 20(d) applies only to these debts.

Applicant denied certain debts in the SOR, but did not provide evidence of his reason for denial or disputing the debts. He did not provide documented proof to substantiate a dispute or evidence that he is resolving the dispute. AG ¶ 20(e) does not apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the trustworthiness concern for personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a trustworthiness concern and may be disqualifying. I find the following potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant testimony provided differing explanations for his failure to disclose his prior alcohol arrests. Although somewhat troubling, there is insufficient evidence to conclude he deliberately failed to disclose the required information. Applicant has refuted the allegation in SOR ¶ 2.a.

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 42 years old. He accumulated delinquent debts when his income was reduced for three to four months while on disability pay due to knee surgery. Despite being aware of the trustworthiness concerns regarding the debts and his repeated promises to address them, he has only paid two small debts. He has been earning his full pay since November 2014 and his wife is now working full time. He has been working overtime since June 2017, but has not addressed his remaining delinquent debts. Applicant failed to establish a reliable financial track record. He successfully refuted the personal conduct security concerns. Applicant failed to mitigate the Guideline F, financial considerations trustworthiness concerns.

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:	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraphs 1.g-1.j:	Against Applicant
Subparagraph 1.k:	For Applicant
Subparagraphs 1.l-1.n:	Against Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Carol G. Ricciardello
Administrative Judge