



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



In the matter of:)	
)	
[NAME REDACTED])	ADP Case No. 17-02032
)	
Applicant for Position of Trust)	

Appearances

For Government: Allison Marie, Esq., Department Counsel
For Applicant: *Pro se*

01/02/2018

Decision

MALONE, Matthew E., Administrative Judge:

Available information is sufficient to mitigate the trustworthiness concerns raised by Applicant’s financial problems. The delinquent debts for which he is responsible arose from circumstances beyond his control and do not reflect adversely on his judgment and reliability. His request for eligibility to occupy a position of trust is granted.

Statement of the Case

On July 29, 2016, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to obtain eligibility for an ADP I/II/III position for his job with a defense contractor. After reviewing the results of the ensuing background

investigation, DOD adjudicators were unable to determine that it is clearly consistent with the interests of national security to grant Applicant's request for a position of trust.¹

On June 27, 2017, DOD issued Applicant a Statement of Reasons (SOR) alleging facts raising trustworthiness concerns addressed through the adjudicative guideline (AG)² for financial considerations (Guideline F). Applicant timely responded to the SOR and requested a hearing.

I received the case on August 21, 2017, and scheduled the hearing for September 27, 2017. The parties appeared as scheduled. I admitted Government Exhibits (GX) 1 - 9.³ Applicant testified but did not present any documentary evidence. I received a transcript of the hearing (Tr.) on October 6, 2017.

Findings of Fact

Under Guideline F, the Government alleged that Applicant owed \$100,572 for three delinquent mortgage-related debts (SOR 1.a – 1.c). In a detailed response to the SOR (Answer), Applicant admitted, with explanations and supporting documents,⁴ each of the allegations. In addition to the facts established by Applicant's admissions, I make the following findings of fact.

Applicant is 36 years old and employed by a defense contractor in a position that requires eligibility for a position of trust. Applicant works as an information technology (IT) manager for a company that supports management of the health care system used by members of the military, and his duties include safeguarding personally identifiable information (PII) associated with the health care system's constituents. Applicant graduated from college with a degree in computer education systems. He also has completed extensive employer-sponsored training and post-graduate education equivalent to a master's degree in information systems management. Applicant has worked for that company since 2005, and currently supervises about 11 other employees. (Answer; GX 1; Tr. 37)

Applicant has an exemplary record of performance. His evaluations and letters from his supervisors extol his professionalism, expertise, and reliability. He has completed extensive training and qualifications for compliance with safeguarding

¹ Required by DOD Directive 5220.6, as amended (Directive).

² At the time they issued the SOR, DOD adjudicators applied the adjudicative guidelines implemented by the Department of Defense on September 1, 2006. On December 10, 2016, the Director of National Intelligence issued a new version of the adjudicative guidelines, to be effective for all adjudications on or after June 8, 2017. Publication of the DOD Manual 5200.02 did not affect the adjudicative guidelines applicable to this case. In this decision, I have considered and applied the new adjudicative guidelines. My decision in this case would have been the same under either version.

³ Tr. 22 – 35.

⁴ Tr. 10 – 12.

personal and health information, and his record of safeguarding sensitive information is unblemished. His personal and professional references are aware of the allegations that have raised trustworthiness concerns in this case. All without reservation recommended he continue in a position of trust. (Answer; GX 1; Tr. 39 – 40)

Applicant and his wife have been married since September 2010. They have three children, all under five years old. They bought their first house in April 2005. After selling that house, they bought their current primary residence in November 2011. Applicant also owns two other houses that are rental properties currently housing families displaced by a recent natural disaster in Applicant's state. Applicant has never been past due or delinquent on any mortgage related to these properties. (Answer; GX. 1; GX. 2; Tr. 37 – 38, 51)

In 2005, Applicant joined a real estate investment group under the tutelage of the real estate agent with whom he worked when Applicant bought his first primary residence. The group was organized as a limited liability corporation (LLC) and had 10 members, including Applicant. Members were required to invest about \$100 monthly toward an organizational goal of making significant down payments on investment real estate purchases. In 2006, Applicant and two other members of the LLC formed a second LLC to make other investments. Between 2006 and 2008, working with a local bank, both LLCs bought an undeveloped lot, a commercial building, and a residential condominium building. LLC members expected dividends from the rental revenues of the commercial building and the condominiums. All mortgages were for five years with an agreement with the bank⁵ to refinance them at the end of the term. The LLCs also planned to strike an agreement with a builder to develop the lot. (Answer; GX. 1; Tr. 40 – 42)

Before the refinancing and construction loans could take place, the national housing market collapsed. Concurrently, investor participation waned and available investment capital quickly evaporated as renters became scarce or unreliable. As these events transpired, the bank had required the LLCs to provide personal guarantors for the mortgages. Applicant and two other investors agreed to act in that capacity. One of the other guarantors was also both LLCs' registered agent with the state. Eventually, all three investment mortgages became delinquent and the responsibility for payments fell to the three personal guarantors. As it turned out, Applicant was the only guarantor who remained involved in the properties. One guarantor has not been heard from for several years. The other guarantor, who also was the LLCs' registered agent, moved to another state and went to law school. Because that person moved, correspondence addressed to the LLCs went undelivered and Applicant often did not receive timely notice of legal actions and debt collection efforts requiring his attention. (Answer; GX. 1; Tr. 42 – 46)

Eventually, all three properties went into foreclosure. Credit reports still attribute the debts remaining after resale of the properties to Applicant as delinquent joint

⁵ The same bank served as lender for all mortgage transactions at issue in this case.

accounts. From about 2011 until 2014, Applicant tried to manage the commercial building and the condominium through his own efforts and using his own money. Of the three personal guarantors, only one has been in contact with Applicant;⁶ however, only Applicant has made himself available to the lender and has tried to negotiate settlements of the debts at issue. The bank did not approve a proposed short sale of one of the properties before it foreclosed, and the bank officer with whom Applicant had been communicating no longer works for that bank. Applicant also offered a deed in lieu of foreclosure to no avail. He has tried as recently as mid-2017 to continue negotiations with the bank, but he now is referred to lawyers handling the matter. (Answer; GX. 1; Tr. 45, 55 – 57, 62 – 63)

Despite the financial difficulties presented to Applicant through his membership in the LLCs, his personal finances are sound. He has an excellent credit score, and he has not incurred any unpaid debts apart from the mortgages alleged in the SOR. Applicant owns his own home as well as two other rental properties. As already noted, he has never experienced any delays or defaults in meeting his personal financial obligations. A letter from Applicant's certified financial planner describes Applicant's financial health as excellent. Applicant adheres to a budget, has low personal debt, ample insurance, and significant retirement savings. Applicant has about \$1,700 remaining each month after meeting all of his regular expenses. (Answer; Tr. 46 – 47, 51, 60)

Applicant presented at hearing as credible, forthcoming, and knowledgeable regarding all aspects of his finances and the events underlying the issues in this case. In his e-QIP and during his background investigation, he disclosed all of his financial problems in detail. (GX. 1; GX. 2)

Policies

Eligibility for a position of public trust must be based on a determination that it is "clearly consistent with the interests of national security" to do so.⁷ All such adjudications must adhere to the procedural protections in the Directive before any adverse determination may be made. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁸ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors, commonly referred to as the "whole-person" concept, listed in the guidelines at AG ¶ 2(d).⁹ The presence or absence of a disqualifying or mitigating condition is not, by

⁶ That person provided a letter, included with Applicant's Answer, that corroborates Applicant's claims of what transpired.

⁷ Security Executive Agent Directive (SEAD) 4, Appendix A, Paragraph 1(d).

⁸ Directive, 6.3.

⁹ (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

itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of eligibility for a position of trust.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a position of trust for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government's case. Because no one is entitled to a position of trust, an applicant bears a heavy burden of persuasion. A person who has access to sensitive information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring applicants possess the requisite judgment, reliability, and trustworthiness of one who will protect sensitive information as his or her own. Any reasonable doubt about an applicant's suitability for access should be resolved in favor of the Government.

Analysis

Financial Considerations

The facts established by this record reasonably raise a trustworthiness concern about Applicant's finances that is addressed, in relevant part, at AG ¶ 18, as follows:

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.

More specifically, available information requires application of the disqualifying conditions at AG ¶¶ 19(a) (*inability to satisfy debts*) and 19(c) (*a history of not meeting financial obligations*). Applicant's financial problems have persisted over much of the

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.

past ten years, and they remain unresolved. By contrast, his debts did not arise from any misconduct or drastic lapses in judgment. In hindsight Applicant made a poor investment decision, but he did not do so recklessly. The enterprise involved a degree of risk distributed amongst the members of the LLCs. Unfortunately for Applicant, he was left holding the bag after his fellow investors unilaterally left the group and took their investment capital with them after the collapse of the national housing market. To his credit, Applicant tried to meet his obligations as a personal guarantor of three mortgages and he appears to have acted responsibly in trying to resolve the debts that remained after foreclosures.

Applicant's personal finances are sound, and he established that he manages his money prudently. He works with a certified financial planner and adheres to a monthly budget. His financial posture includes life insurance and savings that would help mitigate any future financial problems. Applicant also meets his obligations regarding two other rental properties he obtained by himself. All of the foregoing supports application of the following AG ¶ 20 mitigating conditions:

(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; and

(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.

Applicant was sincere in his efforts to resolve the mortgage debts attributed to him. The continued presence of unpaid debts is not, by itself, disqualifying. Financial problems present a two-fold inquiry. First, does the presence of unpaid debt or other unresolved financial burdens present a likelihood that Applicant would resort to illegal acts or other conduct that might compromise national interests? Here, that appears highly unlikely. Applicant is a solid employee with an excellent record of reliability and proper safeguarding of sensitive information. Those characteristics are well documented and did not change throughout the time Applicant has been trying to resolve his debts.

Second, did Applicant's financial problems arise from irresponsible decisions, poor judgment, or other factors that indicate he is unreliable or untrustworthy? I conclude they did not. Applicant made his 2005 investment decisions reasonably and with an eye toward distributed risk. The venture failed through factors Applicant could

not control. To say the least, the record as a whole establishes that Applicant will not make the same mistake again. His personal finances are sound and reflect his good judgment. On balance, available information is sufficient to mitigate the trustworthiness concerns raised by Applicant's financial problems.

I have evaluated the facts and have applied the appropriate adjudicative factors under Guideline F. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). Although Applicant is not debt-free, his prudent response to his financial problems and his overall reputation for integrity, good judgment, and reliability support a fair and commonsense conclusion in favor of Applicant.

Formal Findings

Formal findings 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 - 1.c:	For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the interests of national security for Applicant to occupy a position of trust. Applicant's request for public trust eligibility is granted.

MATTHEW E. MALONE
Administrative Judge