



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



In the matter of:)
)
) ADP Case No. 18-02217
)
Applicant for Public Trust Position)

Appearances

For Government: Eric Price, Esq., Department Counsel
For Applicant: Stephen M. Jewell, Esq.

01/06/2020

Decision

CERVI, Gregg A., Administrative Judge

This case involves trustworthiness concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). Eligibility for access to sensitive information is granted.

Statement of the Case

Applicant submitted a questionnaire for national security positions (SF-86) on May 30, 2017. Applicant is requesting a trustworthiness determination for access to sensitive information, also known as a “public trust” determination, to occupy an automated data processing (ADP) position. On December 5, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging trustworthiness concerns under Guidelines F and E. The DOD CAF acted under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective on June 8, 2017.

Applicant responded to the SOR on February 28, 2019, and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals issued a

notice of hearing on August 20, 2019, for a scheduled hearing on September 12, 2019. The hearing was convened as scheduled.

Government Exhibits (GE) 1 through 7 were admitted into evidence without objection. Applicant testified at the hearing and submitted Applicant's Exhibits (AE) A through T, contained in a tabbed binder, which were admitted into evidence without objection. The record was held open for Applicant to submit any documentary evidence in mitigation by September 30, 2019. He submitted several additional documents collectively marked as AE U, which were admitted into evidence without objection. DOHA received the hearing transcript on September 20, 2019.

Findings of Fact

Applicant is a 45-year-old systems engineer for a defense contractor, employed since 1997. He was laid off for three months in 2016, and four months in 2017. He previously held a DOD security clearance from 2007 to 2009. Applicant was awarded a bachelor's degree in 1997. He married in 2001 and has two children.

Applicant's spouse was laid off in November 2008 and remained unemployed for nine months. This resulted in a significant decrease in household income during the period. In 2011, Applicant's mother was diagnosed with dementia. He is her only child. She moved in with Applicant's family, and Applicant hired a private caregiver for her while he and his spouse were at work or at the children's events, costing about \$800 per month. He eventually was able to place his mother in a nursing home, and continues to pay \$1,800 per month to subsidize her costs since February 2019. In August 2017, Applicant's home was severely damaged by flooding during a hurricane. The damage was not covered by insurance, but the federal government assisted with partial repair costs. Applicant paid an additional \$30,000 for repairs.

The SOR alleges under Guideline F, that Applicant has 14 delinquent consumer and tax debts totaling about \$18,700 and federal income tax debts for tax years 2012 to 2016 totaling about \$24,300; and failing to file his 2012 to 2017 federal income tax returns when due. Additionally, the SOR alleges under Guideline E, that Applicant failed to report his federal income tax debts and failed to file his federal 2016 tax return, when he completed his SF-86 on May 30, 2017. Applicant generally admitted the SOR allegations with explanations and corrections, and denied intentionally falsifying his SF-86.

SOR ¶ 1.a is a delinquent auto loan for a vehicle to which Applicant had two engine replacements. Applicant allowed the vehicle to be voluntarily repossessed. The creditor charged off the debt in 2015. Applicant negotiated a settlement on the debt in February 2019, and paid the agreed amount in full. The debt is resolved.

SOR ¶ 1.b is a delinquent apartment rent debt from 2016. Applicant negotiated a payment schedule, beginning in February 2019. He has made consistent monthly payments since February 2019 per the agreement. This debt is being resolved.

SOR ¶ 1.c is a delinquent apartment debt from 2017. Applicant paid the debt in full in February 2019. This debt is resolved.

SOR ¶ 1.d is a small medical account. Applicant incorrectly believed the account was covered by insurance. He paid the account in full, and the debt is resolved.

SOR ¶ 1.e is a delinquent bank debt that became delinquent in 2016. Applicant negotiated a settlement in April 2019 and paid the settlement in full. This debt is resolved.

SOR ¶ 1.f is a phone company collection account. Applicant negotiated a monthly installment repayment plan in February 2019, and has made scheduled monthly payments since March 2019. This debt is being resolved.

SOR ¶ 1.g is a delinquent payday lender account. Applicant paid the account in full in February 2019. The debt is resolved.

SOR ¶¶ 1.h and 1.i are delinquent telephone utility and insurance company accounts that were paid in full in February and March 2019. These debts are resolved.

SOR ¶¶ 1.j – 1.n are federal income tax debts from tax years 2012 to 2016. Applicant was unable to completely pay taxes that were due as a result of the increased household expenses for caring for his mother. He established a repayment plan with the IRS beginning in 2013, but missed a payment in May 2017, causing the plan to be suspended. Once he restarted payments in June 2017, the plan was reinstated. His subsequent taxes owed were included in the plan, and Applicant has been compliant with the terms of the plan. A substantial refund owed to Applicant for his tax year 2017 filing was applied to the tax debt. These debts are being resolved.

SOR ¶ 1.o alleges Applicant failed to file his federal tax returns for 2012 to 2017 when due, however, Applicant showed evidence that the returns were filed on time. This allegation is resolved.

SOR ¶ 2.a alleges Applicant falsified his SF-86. Applicant did not report his federal tax debts on his SF-86 because he was in an approved repayment plan with the IRS and believed that the tax debts were no longer considered delinquent. Additionally, he provided evidence that his federal tax returns were submitted on time, as required.

Applicant's resolved debts no longer appear on his most recent credit report. Applicant and his spouse now have a combined annual household income of \$135,000, and he has over \$12,000 in retirement and savings accounts. They adhere to a strict budget, and his personal financial statement shows a substantial monthly net remainder. He has not had financial counseling, but through the assistance of his counsel, has ensured that all SOR debts have been resolved or are in the process of resolution.

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3. The standard that must be met 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.” Regulation ¶ C6.1.1.1. DOD contractor personnel are entitled to the procedural protections in the Directive before any final unfavorable access determination may be made. Regulation ¶ C8.2.1.

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. . . .

The relevant disqualifying conditions under AG ¶ 19 include:

- (a) inability to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant's admissions, testimony, and the documentary evidence in the record are sufficient to establish the disqualifying conditions AG ¶¶ 19(a), (c) and (f).

The following mitigating conditions under AG ¶ 20 are potentially relevant:

- (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
- (g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

Applicant incurred debts that were beyond his control, and he took sufficient steps to resolve the delinquent accounts. He suffered from various periods of reduced income from his and his spouse's periods of unemployment, and added expenses from recovering from a hurricane and caring for his mother. Once Applicant had sufficient resources, he addressed his delinquent accounts and resolved all of the SOR allegations. He has been working with the IRS on tax obligations since 2013, and is in compliance

with his tax repayment plan. He also filed his annual federal income tax returns on time, as required.

Applicant has taken responsible action to address his debts. Applicant has received advice from his attorney and has worked to correct his financial record. There are clear indications that his financial problems are resolved or being resolved, and his financial status is under control. I find that continued financial delinquencies are unlikely to recur and his financial status does not cast doubt on his current reliability, trustworthiness, or good judgment. Mitigating conditions in AG ¶¶ 20(a) - 20(d), and 20(g) apply.

Guideline E: Personal Conduct

The trustworthiness concern for personal conduct is set out in AG ¶ 15, as follows:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a concern and may be disqualifying. The following disqualifying condition is 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 national security eligibility or trustworthiness, or award fiduciary responsibilities.

When falsification allegations are controverted, as here, the Government has the burden of proving the allegations. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. (See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)) An applicant's level of education and business experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. (ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010))

Applicant did not report his federal tax debts on his SF-86 because he was in an approved repayment plan with the IRS and believed that the tax debts were no longer considered delinquent. Additionally, he provided evidence that his federal tax returns were submitted on time, as required. He denied intentionally falsifying his SF-86, and satisfactorily explained the circumstances. I find that based on Applicant's answer and testimony, his failure to report the SOR debts on his SF-86 was not intentional. He

provided plausible explanations for his omissions, and intentional falsification is not supported by the evidence. AG ¶ 16(a) is not applicable to SOR ¶ 2.a. The personal conduct security concern is concluded for Applicant.

Whole-Person Concept

Under AG ¶¶ 2(a), 2(c), and 2(d), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance 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).

I considered all of the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. I have incorporated my findings of fact and comments under Guidelines F and E, in my whole-person analysis. I believe Applicant adequately explained his financial situation, and despite the debts incurred as a result of the loss of household income, the costs of caring for his mother, and uninsured hurricane damage to his home, he took responsible action to resolve the delinquent debts.

Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a public trust position. For these reasons, I conclude Applicant has mitigated the financial considerations and personal conduct 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:	FOR APPLICANT
Subparagraphs 1.a – 1.o:	For Applicant
Paragraph 2. Guideline E:	FOR APPLICANT
Subparagraphs 2.a:	For Applicant

Conclusion

I conclude that 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.

Gregg A. Cervi
Administrative Judge