



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



In the matter of:)
)
) ADP Case No. 14-03462
)
)
Applicant for Public Trust Position)

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: Edgar P. Hanemann, Personal Representative

04/23/2015

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to sensitive information is granted.

Statement of the Case

Applicant completed and signed a Electronic Questionnaires for Investigations Processing (e-QIP) on February 26, 2013. The Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F, Financial Considerations on December 15, 2014. The action was taken 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*, dated January 1987, as amended (Regulation); and the *Adjudicative Guidelines For*

Determining Eligibility for Access to Classified Information (AG) implemented on September 1, 2006.

Applicant received the SOR, and he answered the SOR in writing on January 3, 2015. He requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on February 7, 2015, and I received the case assignment on February 23, 2015. DOHA issued a notice of hearing on March 4, 2015, and I convened the hearing as scheduled on March 25, 2015. The Government offered five exhibits (GE) 1 through 5, which were received, marked, and admitted into evidence without objection. Applicant testified. Applicant submitted six exhibits (AE) A through F, which were received, marked, and admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on April 2, 2015. I held the record open until April 15, 2015, for the submission of additional matters. Applicant timely submitted AE G through AE N, which were received, marked, and admitted without objection.¹ The record closed on April 15, 2015.

Findings of Fact

In his Answer to the SOR, Applicant admitted all the factual allegations in the SOR, with explanations. He also provided additional information to support his request for eligibility for a public trust position.

Applicant, who is 42 years old, works as customer service representative for a DOD contractor. He began his current position in January 2013. His most recent performance evaluation rated his performance at four out of a possible five.²

Applicant completed the 11th grade. From November 2009 until November 2010, Applicant attended a technical college where he received training to be a massage therapist. He received his state massage license in January 2011. He was unable to find work as a massage therapist. Applicant has never married. He currently lives with his parents.³

Applicant worked at a call center in customer service from May 2002 until October 2006, when the company closed. In October 2006, he began work as a floor walker at another call center located in another town several hundred miles from his previous job. This job ended in August 2009. Applicant was unemployed from August 2009 until June 2011, when he began a part-time position as a bouncer. He left his bouncer job for his current position. He also worked two weeks a year in campground security from June 2008 until 2013. He did not receive medical or other employee benefits from his part-time jobs. Applicant has not been disciplined at work. He returned

¹With his post-hearing submissions, Applicant provided duplicate copies of AE A and AE C.

²GE 1; AE M; Tr. 29.

³GE 1; Tr. 28-30, 32, 37.

to his present town of residence in November 2010, after completing his classes at the technical college.⁴

Applicant suffers from a skin disorder and sleep apnea, requiring ongoing medical care and daily medication. His medication costs him approximately \$109 a month, and the rental of his sleep apnea Continuous Positive Airway Pressure (CPAC) machine costs him \$50 a month. Over the last year, he has paid his physician almost \$1,000, with a recent payment of \$100 on February 14, 2015. As of that date, he had a remaining balance of \$250 on his bill. This medical bill is not on the SOR.⁵

Applicant earns \$2,210 in monthly gross income plus occasional overtime. His monthly deductions include \$446 for taxes, \$209 for pre-tax medical, dental, health savings, and retirement, and \$23 for employee giving and stock options. His monthly deductions total \$678. After his usual deductions, his net monthly income is \$1,533. In addition to his usual deductions, Applicant's pay has been garnished to pay two debts, which will be discussed *infra*. The total amount of his garnishments in 2014 amounted to \$4,443. His pay is currently being garnished for approximately \$452 a month. Leaving a net income of \$1,061. His other monthly expenses include \$300 in rent to his parents, \$200 for a car payment, \$159 for medicine and CPAC machine. \$50 for gasoline, \$50 for cell phone, and \$63 a month for car insurance.⁶ Applicant purchased a 2003 Toyota from his father for \$2,400 three months ago. His living expenses total \$822, leaving approximately \$260 for unanticipated expenses such as medical co-pays and for debt reduction. Applicant does not have credit cards. Every payday, he places \$150 on a prepaid, reloadable credit card, which he uses to pay his monthly expenses.⁷

Applicant fractured his right rotator cuff in the summer of 2009. He did not have health insurance or a full-time job at that time. The debts in SOR allegations 1.a (\$1,224), 1.c (\$340), 1.e (\$7,809), 1.f (\$160), 1.g (\$48), 1.h (\$400), and 1.i (\$2,577) relate to expenses incurred for treatment of his rotator cuff. These debts total \$12,558 and are discussed *infra*.⁸

The two medical bills in SOR allegations 1.c (\$340) and 1.d (\$298) are owned by the same collection agency. Applicant verified that he paid this agency \$340 on March 13, 2015. The agency provided him with a final statement of account which reflects that Applicant has a zero balance with this agency. He has resolved these two debts. The

⁴GE 1; Tr. 34-37.

⁵AE D; AE E; AE F; AE I; Tr. 24-26, 42.

⁶Applicant owns a motorcycle with no debt. He pays \$85 a year in insurance for the motorcycle.

⁷AE A; AE F; AE J; Tr. 37-44, 60-61.

⁸Response to SOR; Tr. 44-53.

June 2014 credit report indicates that Applicant paid a past-due medical bill of \$323. This bill is not listed on the SOR.⁹

The judgment in SOR allegation 1.e (\$7,809) is a compilation of multiple medical bills owned by one creditor. The creditor obtained a judgment against Applicant in May 2009 for \$8,870. Applicant's employer received a notice of garnishment around February 1, 2014, seeking to collect \$9,546. The judgment creditor sought 25% of Applicant's income to pay the debt. Applicant provided a copy of his December 19, 2014 earnings statement, showing that Applicant paid at least \$1,754 on this debt through garnishment. The collection agency filed a Motion to Revive its judgment against Applicant in January 2015 because the judgment would expire in May 2015. In its motion, the collection agency advised that \$5,367 remained to be paid on its judgment. The court approved the revival of the judgment on January 15, 2015. Applicant's employer filed a second notice of garnishment with his employer seeking to collect \$4,682. Applicant's pay is being garnished at the rate of \$236 a paycheck.¹⁰

The creditor for the \$2,577 debt in SOR allegation 1.i. also garnished Applicant's wages for payment of this debt in 2014. Applicant verified that he paid \$2,689 in a second garnishment in 2014. This debt is resolved. The remaining medical bills totaling \$1,832 have not been paid.¹¹

SOR allegation 1.b (\$980) concerns unpaid apartment rent. Applicant lived with his then girlfriend from January 2012 until February 2013, when he moved out of the apartment. He gave his then girlfriend sufficient money to pay the remaining rent due under the lease. She did not pay the rent. He disagrees that he owes this money, but he has not formally disputed the debt. This debt remains unpaid.¹²

The SOR alleges that Applicant's education (federal) loans totaling \$17,845 (1.j) have been sent for collection. In 2013, Applicant received a notice from the collection agency managing his federal education debt and paid the collection agent approximately \$2,000 in 2013. Applicant made an arrangement to make payments on his past-due loan. Applicant received a notice in January 2014, verifying he paid \$1,367 in total interest payments on his education loans in 2013. Applicant's federal education loans have been returned to the United States Department of Education as the loans are in good standing. His education loan is now in deferral status until November 2015. His monthly payment will be \$134 a month initially.¹³

⁹GE 2; GE 3; AE K; Tr. 48-52.

¹⁰GE 2 - GE 4; AE A; AE B; AE H; AE J; AE L; Tr. 53-54.

¹¹Response to SOR; AE A; Tr. 53-55.

¹²GE 3; GE 4; Tr. 29-30, 48.

¹³GE 5; AE C; AE G; Tr. 21, 23.

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” (See 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, based on all available information, 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.” (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

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 the factors listed in the adjudicative process. The administrative judge’s over-arching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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 access to [sensitive] information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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 protect or safeguard sensitive information. Such decisions entail a certain degree of legally

permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Section 7 of Executive Order (EO) 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

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

Failure or inability 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 [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise trustworthiness concerns. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Applicant accumulated delinquent debt and was unable to pay his obligations. The evidence is sufficient to raise these potentially disqualifying conditions.

The Financial Considerations guideline also includes examples of conditions that can mitigate trustworthiness concerns. I have considered mitigating factors AG ¶ 20(a) through ¶ 20(f), and the following are potentially applicable:

- (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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

- (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control; and

- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Most of Applicant's debt related to medical bills from his fractured rotator cuff and to education loans. His financial problems arose from the lack of medical insurance to pay his medical bills and unemployment or underemployment. Applicant did not receive health benefits from his employers, leaving him to pay high medical bills. From 2009 until January 2013, Applicant worked part-time or not at all. Applicant's debts arose from circumstances beyond his control. In 2013, after obtaining his first full-time job in more than three years, Applicant started the process to rehabilitate his education loans, which he completed. He acted responsibly towards his education loans. AG ¶ 20(b) is partially applicable.

Applicant has not provided evidence of financial counseling. However, he has resolved the medical debts in allegations 1.c (\$340), 1.d (\$298), and 1.i (\$2,577) and he is resolving the judgment in 1.e (\$7,809). The judgment and the debt in allegation 1.i have been or are being resolved through garnishment, which does not reflect a good faith effort to resolve debts. Applicant lives within monthly income. He does not have any credit cards and he has not incurred any additional debts outside of his education and medical bills. AG ¶ 20(c) applies. Applicant paid the \$340 debt in allegation 1.c voluntarily and in good faith. AG ¶ 20(d) applies to this debt only.

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 the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

“(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) 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. The decision to grant or deny a trustworthiness determination requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a trustworthiness concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a public trust position should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate trustworthiness concern.

In assessing whether an Applicant has established mitigation under Guideline F, the Appeal Board provided the following guidance in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008):

In evaluating Guideline F cases, the Board has previously noted that the concept of “meaningful track record” necessarily includes evidence of actual debt reduction through payment of debts.” See, e.g., ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 2007). However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. See, e.g., ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). All that is required is that an applicant demonstrate that he has “. . . established a plan to resolve his financial problems and taken significant actions to implement that plan.” See, e.g., ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). The Judge can reasonably consider the entirety of an applicant’s financial situation and his actions in evaluating the extent to which that applicant’s plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (“Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.”) There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

The evidence in support of granting a trustworthiness position to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. For more than three years, Applicant worked part time or not at all. For many years, he did not have medical insurance as his employers did not provide this benefit, and he lacked the income to purchase health insurance on his own. When he fractured his right rotator cuff, he did not have medical insurance and he did not have sufficient income from his employment to pay these bills. Two years ago, Applicant obtained full-time employment, his first since August 2009.

The evidence of record reflects that Applicant has a meaningful track record for resolving his debts since he obtained steady employment. He paid the required monthly amount needed to rehabilitate his education loans, which are now in deferment; he pays his current medical expenses; and he paid one past-due medical bill. He has been unable to pay additional medical bills because his wages have been garnished to pay his two largest past-due medical bills. The garnishment paid one debt and will resolve his largest medical bill. He is not required to pay all his debts at one time. Applicant is slowly resolving his debts. He does not live extravagantly nor he has incurred credit

card debt. While all his medical debts are not fully resolved, the remaining debts cannot be a source of improper pressure or duress. Of course, the issue is not simply whether all his debts are paid: it is whether his financial circumstances raise concerns about his fitness to hold a trustworthiness position. While some debts remain unpaid, they are insufficient to raise trustworthiness concerns. (See AG ¶ 2(a)(1).)

Overall, the record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a trustworthiness position. For all these reasons, I conclude Applicant mitigated the trustworthiness concerns arising from his finances under Guideline F.

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.i:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a position of trust. Eligibility for access to sensitive information is granted.

MARY E. HENRY
Administrative Judge