



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



In the matter of:)
)
) ADP Case No. 14-03357
)
)
Applicant for Public Trust Position)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

08/07/2015

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant’s eligibility to occupy a public trust position is granted.

Statement of the Case

Applicant completed and signed an Electronic Questionnaires for Investigations Processing for his Public Trust Position (e-QIP) on January 9, 2014. 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 November 14, 2014. The action was taken under DOD Regulation 5200.2-R. Personnel Security Program, dated January 1987, as amended and modified (regulation); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative*

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

Applicant acknowledged receipt of the SOR on November 24, 2014. He answered the SOR in writing on December 4, 2014, and 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 9, 2015, and I received the case assignment on March 2, 2015. DOHA issued a notice of hearing on April 16, 2015, and I convened the hearing as scheduled on May 12, 2015. The Government offered four exhibits (GE) 1 through 4, which were received, marked, and admitted into evidence without objection. Applicant testified. He did not submit any exhibits. DOHA received the transcript of the hearing (Tr.) on May 20, 2015. I held the record open until June 12, 2015, for the submission of additional matters. Applicant did not submit any documentation. The record closed on June 12, 2015.

Procedural Ruling

Motions

At the hearing, Department Counsel agreed that the debts identified in SOR allegations 1.b and 1.c were the same. Department Counsel moved to withdraw allegation 1.b as duplicative. Applicant did not object, and the motion was granted. SOR allegation 1.b is withdrawn from the record. (Tr. 24)

At the hearing, Department Counsel orally moved to amend the SOR to include an additional allegation of debt. Applicant did not object. The motion was granted, and the SOR was amended to add allegation 1.d under Guideline F. Essentially, the amendment alleges that Applicant is indebted on a home equity loan in the amount of \$71,829, which has been charged off by the lender-creditor.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a - 1.c of the SOR. Since Applicant did not object to the SOR amendment adding allegation 1.d, his failure to object is deemed an admission of the facts in allegation 1.d.

Applicant, who is 36 years old, works as an enrollment representative specialist for a DOD contractor. He began working for his employer in May 2008 and in his current position in May 2014. The record lacks any information on disciplinary action taken by his employer.¹

Applicant graduated from high school in 1997, and he has some college. He married in September 2006, and he divorced in November 2009. He and his former wife

¹GE 1; Tr. 25-26.

have a 15-year-old daughter and a 10-year-old son. Applicant currently lives with his girlfriend and her four children.²

Applicant earns \$18 an hour for a total gross monthly income of \$2,880. He pays \$988 a month in child support, which is withheld from his pay. His net monthly income is approximately \$1,200. His rent is \$1,300 a month, and his car payment is \$300 a month. He and his girlfriend combine their income to pay household expenses. Her monthly income is unknown. The total household expenses are unknown as Applicant did not provide a budget. He indicated at the hearing that they have just enough money each month to pay their customary expenses and that he has fallen behind in some bills because of his monthly child support payments, which are current.³

In May 2006, Applicant and his former wife purchased a home for approximately \$375,000. They did not use any of their money as a down payment. Applicant advised that they financed the home with a first mortgage (SOR ¶ 1.a) and a second mortgage (SOR ¶ 1.d). When Applicant and his wife separated, they were unable to continue the mortgage payments on the property. They moved out of the property, and the mortgage lender foreclosed on the property. Applicant advised that although he has never received any paper work from the mortgage lenders about the foreclosure sale or money owed, he is aware that someone is now living in the house.⁴

The three credit reports in the record show that in May 2006, Applicant and his former wife obtained a primary, conventional, real estate mortgage with lender A in the amount of \$290,700, and a second mortgage characterized as a home equity loan with lender B in the amount of \$72,650. The February 2015 and the May 2015 credit reports show that Applicant and his former wife defaulted on the second mortgage in July 2008 and the primary mortgage in September 2008. The three credit reports indicate that Lender A foreclosed on the property by December 2010 and each show a past-due amount and a balance. All three credit reports indicate that lender B charged off a debt of \$71,829, with two of the reports showing a charge-off date of February or October 2009. All three credit reports reflect a zero balance on this account.⁵

Applicant lives in a state that has an anti-deficiency statute to protect homeowners. The statute states as follows:

No deficiency judgment shall lie in any event after a sale of real property or an estate for years therein for failure of the purchaser to complete his or her contract for sale, or under a deed of trust or mortgage given to the vendor to secure payment of the balance of the purchase price of that real

²GE 1; Tr. 25, 35, 37.

³GE 2 - GE 4; Tr. 33-38, 40-41.

⁴Tr. 27-31.

⁵GE 2 - GE 4.

property or estate for years therein, or under a deed of trust on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling occupied, entirely, or in part, by the purchaser.

The provisions of this statute apply to monies used to purchase a home and a mortgage given at the time of conveyance of property to secure the unpaid balance of the purchase price. The titling of the second mortgage as a home equity loan does not change the fact that the money was used to purchase Applicant's home. The statute does not apply to property primarily purchased for rental and investment.

I take administrative notice of the generally known fact that at the time Applicant purchased his home, the mortgage lending industry routinely 100% financed home purchases with first and second mortgages. The second mortgages were often titled as home equity loans.

The three credit reports of record indicate that, except for the mortgages on his home and the one small credit card debt (SOR ¶ 1.c - \$313), Applicant regularly paid all his bills as required. He stated at the hearing that his monthly child support payments are making it difficult for him to pay all his bills and that he has fallen behind in some bills. He stated that he and his former wife would pay the \$313 debt. The record lacks any evidence of financial counseling.⁶

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." 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 national interests. 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.

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. In reaching

⁶GE 2 - GE 4; Tr. 31-32, 36.

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.

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 and his former wife defaulted on their mortgage loans and one small debt. They were unable to pay these obligations when required. 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; and

(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.

Applicant and his wife separated, a factor beyond his control. When their marriage ended, they were unable to afford their home, and the lenders foreclosed on their property. AG ¶ 20(b) is partially applicable because Applicant took no action on the mortgage debt after his separation and divorce.

Under the state anti-deficiency statute, Applicant does not owe any debt which may be remaining on the loans for his house because the mortgages are purchase money loans acquired by Applicant and his former wife at the time they purchased the property and gave the property as security for the payment of the loans. Applicant has resolved the major debts identified in the SOR under AG ¶ 20(c).

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 favorable trustworthiness determination 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. Applicant managed his income and paid his bills as shown by the credit reports. When he and his wife separated, they were unable to continued the mortgage payments on their house. The two unpaid mortgage loans are the only significant debts identified in the SOR. The mortgage lenders foreclosed on the property, a legal procedure under state law. The foreclosure process and the law eliminated any remaining unpaid monies owed on the property because the two loans on Applicant’s property are purchase money loans for the property.

Applicant acknowledged that he and his girlfriend have just enough money each month to pay their expenses. He pays almost \$1,000 a month in child support, which is 34% of his gross, not net, monthly income. His child support payments substantially reduce his available money for expenses. He will struggle to pay his bills without

additional income from overtime or a second job. He is not living extravagantly or luxuriously; rather, he is making sure his child support obligation is paid by having it deducted directly from his pay. In considering all the credit reports in the record, which are the only information showing Applicant's financial history, it is clear that Applicant has been responsible about his finances and his bills. The one unpaid bill for \$313 is insufficient to conclude that Applicant is not trustworthy. Thus, this debt 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 public trust position. While one debt remains unpaid, it is insufficient to raise trustworthiness concerns. Applicant is on notice that the Government has a concern about his finances. Should Applicant's finances spiral out of control in the future, he could lose his favorable trustworthiness determination. (See AG ¶ 2(a)(1).)

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a trustworthiness determination. 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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Withdrawn
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	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 public trust position. Eligibility for access to sensitive information is granted.

MARY E. HENRY
Administrative Judge