



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



In the matter of:

)
)
)
)
)
)

ADP Case No. 14-01305

Appearances

For Government: Robert J. Kilmartin, Esquire, Department Counsel

For Applicant: *Pro se*

10/27/2014

Decision

WHITE, David M., Administrative Judge:

Applicant filed for Chapter 13 bankruptcy in December 2013, resulting in a court-approved four-year wage earner’s plan. The court ordered his employer to submit the required monthly payments to the bankruptcy trustee via payroll deduction. Record evidence shows the plan is still in effect. Applicant mitigated any trustworthiness concerns raised under Guideline F, Financial Considerations. Eligibility for a public trust position is granted.

On January 24, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On May 14, 2014, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline F, Financial Considerations. (Item 1.) The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On May 30, 2014, Applicant answered the SOR in writing. (Item 3.) In a later email to DoD, he indicated that he elected to have the case decided on the written record in lieu of a hearing. (Item 9.) On July 9, 2014, Department Counsel prepared a File of Relevant Material (FORM), containing nine Items. The Defense Office of Hearings and Appeals (DOHA) mailed Applicant a complete copy of the FORM on July 16, 2014. Applicant received the FORM on August 1, 2014, and was provided 30 days from its receipt to file objections and submit additional information. He submitted no additional material in refutation, extenuation, or mitigation during that time; made no objection to consideration of any contents of the FORM; and did not request additional time to respond. On September 12, 2014, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me.

Findings of Fact

The SOR contains the single allegation that Applicant filed for bankruptcy under Chapter 13 in December 2013, and is on a four-year wage earner's plan approved by the Court. In his response to the SOR, Applicant admitted the truth of this allegation. (Item 3.)

Applicant is 40 years old and unmarried with no children. He lived with his parents until June 2003, when he moved into his present home that his parents also own in the same town. He graduated from high school in 1992, and earned an associate's degree from a technical college in 1996. He worked in various fast food and retail jobs before obtaining his current employment in early 2013. He continues to work a second, part-time job as a cashier in a mini-mart. (Item 3; Item 4; Item 6 at 24.)

Applicant initially went into debt while attending college. He paid down some of his debts when resources permitted, but encountered unexpected expenses and periods of unemployment that prevented resolving all of them. After beginning his current job he tried to resolve his outstanding debts with advice from a counselor and attorney. They advised him that his best option was to file for Chapter 13 bankruptcy relief. He did so in December 2013, and was participating in a four-year court-approved wage earner's plan as of the close of the record. (Item 1; Item 3; Item 5; Item 7.)

Applicant's bankruptcy petition reported \$10,787 in assets, \$41,648 in liabilities, \$2,062 in net monthly income, and \$1,684 in monthly expenses. On December 20, 2013, the bankruptcy court ordered that his primary employer submit payments of \$370 per month, through payroll deduction from Applicant's earnings, to his bankruptcy trustee for a period of 48 months to complete the wage earner's plan. (Item 5; Item 6.)

The record evidence supports the conclusion that Applicant's employer, a major health insurance company, has complied with the court order and made payments on his behalf. The most recent record credit report, dated March 6, 2014, shows that the Chapter 13 bankruptcy was filed and remained in effect. There is no evidence from which to infer or suspect that the court's order has not been followed, or that the plan has been dismissed for any reason. Applicant completed all financial counseling

programs required in support of his bankruptcy petition and qualification for Chapter 13 plan participation. (Item 6; Item 7.)

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 the DoD and 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 AGs. 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 AG ¶ 2(a), describing the adjudicative process. The administrative judge’s overarching 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 the applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

A person who applies for access to sensitive information seeks to enter 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 10865 provides that “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline F, Financial Considerations

The trustworthiness concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

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 classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 describes two conditions that could raise trustworthiness concerns and may be disqualifying in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant accumulated about \$41,000 in debt over the past decade or more, some of which became delinquent when he could not afford to pay it. This evidence raises both security concerns, thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline includes five conditions in AG ¶ 20 that could mitigate trustworthiness concerns arising from Applicant’s financial difficulties:

- (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, 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;

(d) the individual initiated 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's debts arose during periods when his income was insufficient to meet all of his financial obligations. For more than 18 months, he has held steady full-time employment, while also working a second part-time job. These positions provide him with sufficient income to meet all of his regular monthly expenses while paying \$370 per month into his court-approved Chapter 13 wage-earner's plan to resolve those debts. He chose this course of action, based on advice from his financial counselor and an attorney, as the best method to resolve his debts. Thus, his former inability to meet financial obligations is unlikely to recur and does not cast doubt on his current trustworthiness or good judgment. He has acted responsibly with respect to his financial problems, received and followed counseling for them, and is resolving them through compliance with a court-approved wage earner's plan. Applicant established full mitigation of formerly valid trustworthiness concerns under AG ¶¶ 20(a) through 20(d). He did not dispute the legitimacy of his debts, so AG ¶ 20(e) does not apply.

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(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) 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a trustworthiness determination 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 the facts and circumstances surrounding this case. Applicant is a 40-year-old employee of a health insurance company who is enjoying his first secure, full-time employment in many years. Once he obtained sufficient financial resources, he sought financial counseling and followed the resulting advice to resolve his debts through a Chapter 13 bankruptcy plan. His employer is ensuring compliance with his obligations under this plan through direct payments to the bankruptcy trustee from a payroll deduction. His current budget indicates solvency in the future, and his willingness to supplement his income through a second, part-time job demonstrates maturity, good judgment, and permanent behavioral change. Resolution of his debts through this court-approved plan minimizes the potential for pressure, coercion, or duress, and makes recurrence of financial problems unlikely.

Overall, the record evidence leaves me with no questions or doubts as to Applicant's present eligibility and suitability for a public trust position. For these reasons, I conclude Applicant met his burden to mitigate the trustworthiness concerns arising from his former financial problems.

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

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 ADP information is granted.

DAVID M. WHITE
Administrative Judge