

KEYWORD: Financial; Personal Conduct

DIGEST: Applicant's efforts to expand his financial base by buying into a purportedly profitable business in 2001 unfortunately resulted in financial difficulties arising from internal disputes about company direction and mismanagement. So long as he had a permanent job, or the remaining severance pay after being laid off from that job, he managed to survive financially. However, the money ran out, the partnership squabbles took their toll, and Applicant bailed out of the partnership burdened by substantial business-related financial delinquencies. Applicant's debts were discharged under Chapter 7 in March 2004. Questions and doubts as to his eligibility for occupying an Information Systems Position designated ADP-II have been satisfied. Eligibility is granted.

CASENO: 03-25748.h1

DATE: 05/25/2005

DATE: May 25, 2005

In re:

SSN: -----

Applicant for Trustworthiness Determination

ADP Case No. 03-25748

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's efforts to expand his financial base by buying into a purportedly profitable business in 2001 unfortunately resulted in financial difficulties arising from internal disputes about company direction and mismanagement. So long as he had a permanent job, or the remaining severance pay after being laid off from that job, he managed to survive financially. However, the money ran out, the partnership squabbles took their toll, and Applicant bailed out of the partnership burdened by substantial business-related financial delinquencies. Applicant's debts were discharged under Chapter 7 in March 2004. Questions and doubts as to his eligibility for occupying an Information Systems Position designated ADP-II have been satisfied. Eligibility is granted.

STATEMENT OF THE CASE

On June 3, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified; Department of Defense Regulation 5200.2-R., *Personnel Security Program*, dated January 1987, as amended and modified (the Regulation); Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended and modified (Directive); and a memorandum from the Deputy Under Secretary of Defense (Counterintelligence and Security), dated November 19, 2004, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's eligibility for occupying an Information Systems Position designated ADP-II to support a contract with the Department of Defense, and recommended referral to an Administrative Judge to determine whether such eligibility should be granted, continued, denied, or revoked.

In a sworn written response, dated July 1, 2004, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to me on October 15, 2004. A notice of hearing was issued that same date scheduling the hearing for November 17, 2004. The hearing was held as scheduled. During the hearing, two government

exhibits, and one Applicant exhibit, and the testimony of four Applicant witnesses (including the Applicant), were received. The transcript (Tr.) was received on November 29, 2004.

FINDINGS OF FACT

Applicant has denied all of the factual allegations pertaining to financial matters under Guideline F (subparagraphs 1.a. through 1.f.) and personal conduct under Guideline E (subparagraph 2.a.).

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Applicant is a 37-year-old employee of a defense contractor seeking to be granted eligibility for occupying an Information Systems Position designated ADP-II.

Applicant's finances were generally in good order until about 2001. While holding a permanent position as a product manager with his employer, in April 2001, he also became a partner in a custom home landscaping and construction business.⁽¹⁾ The enterprise had already commenced doing business before he joined it, and he was solicited by the founder to join the company as a partner and furnish an infusion of badly needed capital to purchase equipment and supplies.⁽²⁾ His partners had landscaping experience, but little money and poor credit, while Applicant had no such experience, but sufficient money and good credit.⁽³⁾ Applicant used his own personal credit and guarantees "to purchase everything that went into the business."⁽⁴⁾ Unfortunately, two of his partners were very irresponsible, one with money, and the other with the truth.⁽⁵⁾ The result was frequent overstocking of inventory and high restocking fees.⁽⁶⁾ In addition, the partnership was split by differing opinions as to company growth.⁽⁷⁾ In the end, the differences could not be resolved, and in about October 2002, after struggling with the situation for an extended period, Applicant bailed out of the partnership,⁽⁸⁾ and took the equipment he had purchased.⁽⁹⁾

Due to a company downsizing shortly after the September 11, 2001, terrorist attacks, Applicant was laid off by his permanent employer.⁽¹⁰⁾ He received a very generous severance package, including six months salary.⁽¹¹⁾ Some part-time computer consulting and the landscape business paperwork activities kept him busy, but after his severance ran out, he began actively searching for another permanent position.⁽¹²⁾ Eventually, in June 2003, he secured a full-time position with a federal contractor.⁽¹³⁾ In November 2004, he became the IT manager for another federal contractor.⁽¹⁴⁾

Applicant's financial difficulties generally commenced after his severance package benefits ran out and he found himself unable to remain current on the accounts he had opened pertaining to the landscaping enterprise.⁽¹⁵⁾ Aware that he could not continue making timely payments, Applicant initiated efforts to resolve his debts.⁽¹⁶⁾ He managed to sell some equipment,⁽¹⁷⁾ leased other equipment,⁽¹⁸⁾ returned some equipment, worked out a payment plan with one creditor,⁽¹⁹⁾ and, for \$2,000.00, obtained guidance of questionable accuracy, from a company providing "debt relief educational services."⁽²⁰⁾ Following that company's guidance, in August and September 2002, he signed letters to his remaining creditors disputing the various account balances.⁽²¹⁾ In 2003, two of the pieces of equipment that he had previously leased out were returned to him.⁽²²⁾

In November 2003, finding himself unable to again lease the equipment, and seeing no financial relief, Applicant filed a voluntary petition for bankruptcy under Chapter 7 of the bankruptcy code.⁽²³⁾ He listed total assets of \$289,020.00 (consisting of real property and personal property) and total liabilities of \$366,042.50 (consisting of secured claims and unsecured nonpriority claims).⁽²⁴⁾ Applicant's debts were discharged by the court on March 17, 2004.⁽²⁵⁾

The SOR identifies six delinquent accounts totaling approximately \$97,000.00. Those accounts, and their current status, are described below:

SOR ¶	TYPE DEBT	AMOUNT	CURRENT STATUS
1.a.	credit card used for the purchase of landscaping equipment ⁽²⁶⁾ - placed for collection	\$5,720.00 ⁽²⁷⁾	discharged in bankruptcy ⁽²⁸⁾
1.b.	credit card used primarily for the purchase of landscaping equipment and supplies ⁽²⁹⁾ - charged off	\$16,437.00 ⁽³⁰⁾	Discharged in bankruptcy ⁽³¹⁾
1.c.	credit card used primarily for the purchase of landscaping equipment and supplies ⁽³²⁾ - placed for collection	\$19,293.00 ⁽³³⁾	Discharged in bankruptcy ⁽³⁴⁾
1.d.	secured loan for the purchase of a commercial landscaping tractor ⁽³⁵⁾ - placed for collection	\$22,000.00 ⁽³⁶⁾	Discharged in bankruptcy ⁽³⁷⁾
1.e.	credit card used primarily for personal reasons as well as for the purchase of landscaping equipment and supplies ⁽³⁸⁾ - -charged off	\$20,278.00 ⁽³⁹⁾	Discharged in bankruptcy ⁽⁴⁰⁾
1.f.	same debt as that listed in ¶ 1.c. ⁽⁴¹⁾		

Aside from the debts attributed to the landscaping enterprise, since Applicant was able to obtain permanent employment, he has been able to live within his means.⁽⁴²⁾ By July 2003, even before his outstanding debts were discharged by bankruptcy, he ceased the use of credit cards and planned never to have them again.⁽⁴³⁾ Other than his mortgage and his car payment, Applicant no longer carries any debt.⁽⁴⁴⁾

In June 2003, Applicant completed his SF 85P, and in response to a finance-related inquiry: ("*Are you now over 180 days delinquent on any loan or financial obligation?*"), (45) responded "no." (46) He certified his response was true, complete, and accurate. It was obviously incorrect. Applicant denied intending to falsify his response and explained he had relied on the questionable interpretation of the law and legal advice furnished to him by the company providing "debt relief educational services." (47) Because of that interpretation, the fact some of the debts were in dispute, and other debts were being paid as a result of his leasing equipment to third-parties, (48) he was under the impression the debts were no longer delinquent. (49) It was not until he had obtained legal advice from his bankruptcy attorney that he first learned the earlier guidance he had received was not necessarily legally sound. (50)

Applicant's former supervisor, the chief information officer, and several colleagues at his former employer strongly support his application. According to them, he is professional, up-front, honest, and reliable.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability (as well as trustworthiness eligibility). In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information or eligibility for occupying an Information Systems Position (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information or eligibility for occupying an Information Systems Position (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline F - Financial Considerations: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

Personal Conduct - Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security or trustworthiness concern and may be disqualifying, as well as those which could mitigate security or trustworthiness concerns, pertaining to the adjudicative guidelines are set forth and discussed in the Conclusions section below.

Since the protection of the national security (and sensitive information) is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national security,"^(S1) or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. 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.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information or eligibility for occupying an Information Systems Position. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance or eligibility for occupying an Information Systems Position.

A person who seeks access to classified or sensitive information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information or eligibility for occupying an

Information Systems Position. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified or sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions (and by inference, trustworthiness 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." Security clearance and trustworthiness decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of the witness credibility, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

The government has established its case under Guideline F. Applicant's efforts to expand his financial base by buying into a purportedly profitable custom home landscaping and construction business in 2001 unfortunately resulted in financial difficulties arising from internal disputes about company direction and mismanagement. Applicant had no landscaping or construction experience, but sufficient money and good credit to merge with those who had the experience, but poor credit. So long as he had a permanent job, or the remaining severance pay after being laid off from that job, he managed to survive financially. However, at some point, the money ran out and the partnership squabbles took their toll. Applicant bailed out of the partnership but was burdened by substantial financial delinquencies associated with that partnership. Unable to make the necessary minimum payments for equipment and supplies, some accounts were charged off or placed for collection. His actions in failing to satisfy those outstanding financial obligations before 2004 gives rise to Financial Considerations Disqualifying Condition (FC DC) E2.A6.1.2.1. (*history of not meeting financial obligations*); and DC E2.A6.1.2.3. (*inability or unwillingness to satisfy debts*).

Applicant's financial situation and difficulties also bring this matter within Financial Considerations Mitigating Condition (FC MC) E2.A6.1.3.3. (*the conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)*), E2.A6.1.3.4. (*the person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control*), and FC MC E2.A6.1.3.6. (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*). As noted above, Applicant's finances were generally in good order until about 2001. His poor financial situation arose primarily from the "failed" landscaping and construction partnership

as well as the loss of his permanent job.

Applicant's previous efforts to resolve his past outstanding financial obligations, first by selling some equipment, then leasing other equipment, returning some equipment, and working out a payment plan with one creditor, are all seen as positive efforts to resolve his debts. His reliance on guidance of questionable accuracy, from a company providing "debt relief educational services, in retrospect, was unwise. It was, nevertheless, an effort to resolve his difficulties by obtaining counseling, at a cost of \$2,000.00. Finally, when faced with the reality of his financial situation, even after taking all the aforementioned steps to resolve his debts, Applicant took the ultimate step and had his debts discharged in bankruptcy. Under these circumstances, Applicant has, through evidence of extenuation and explanation, successfully mitigated or overcome the government's case. Accordingly, allegations 1.a. through 1.f. of the SOR are concluded in favor of Applicant.

The government has failed to establish its case under Guideline E. Applicant obviously furnished an incorrect answer to the SF 85P finance-related inquiry, but in doing so, he relied on the questionable interpretation of the law and legal advice furnished to him by the company providing "debt relief educational services." Because of that interpretation, the fact some of the debts were in dispute, and other debts were either being paid or resolved with his return of equipment, he was under the impression the debts were no longer delinquent. It was not until he had obtained legal advice from his bankruptcy attorney that he first learned the earlier guidance was not necessarily legally sound. Examination of his actions reveals conduct involving questionable judgment, but not necessarily untrustworthiness, unreliability, or unwillingness to comply with rules and regulations. Applicant's overall questionable personal conduct in this regard might otherwise fall within Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2. (*the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*).

However, considering his reliance on the questionable guidance, there are substantial doubts his actions were deliberate as envisioned in the PC DC. That reliance also raises the possible application of Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.4. (*omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided*). It is clear the company providing the advice was not in the strict sense of the word "authorized," but Applicant's innocent reliance on that company's advice was reasonable under the circumstances herein. Also, by being candid early in the investigation, another PC MC has been raised: E2.A5.1.3.5. (*the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*). Under these circumstances, Applicant has, through evidence of extenuation and explanation, successfully rebutted and overcome the government's case. Accordingly, allegation 2.a. of the SOR is concluded in favor of Applicant.

For the reasons stated, I conclude Applicant is eligible for to occupy an Information Systems Position designated ADP-II to support a contract with the Department of Defense.

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 THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: For the Applicant

Paragraph 2., Guideline E: FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's eligibility for occupying an Information Systems Position designated ADP-II.. Eligibility is granted.

Robert Robinson Gales
Chief Administrative Judge

1. Tr., at 29.
2. Tr., at 21.
3. Tr., at 23, 41-42.
4. Tr., at 23.
5. Tr., at 26.
6. Tr., at 27.
7. Tr., at 30.
8. Tr., at 30.
9. Government Exhibit 2 (Affidavit, dated July 31, 2003), at 5.
10. *Id.*, at 1.
11. Tr., at 31.
12. Tr., at 31.
13. Government Exhibit 1 (Public Trust Position Application (SP 85P), dated June 23, 2003), at 2.
14. Tr., at 18-19.
15. Tr., at 41-42.
16. Government Exhibit 2, *supra* note 9, at 5-6.
17. Tr., at 34.
18. Tr., at 34.
19. Government Exhibit 2, *supra* note 9, at 6.
20. Tr., at 37.
21. Tr., at 37-40, 43-44; Attachment E (Letters to Creditors), attached to Response to SOR, dated July 1, 2004.
22. Tr., at 34.
23. Attachment A (Bankruptcy File - Voluntary Petition, filed November 24, 2003), attached to Response to SOR, *supra* note 21.
24. Attachment A (Bankruptcy File - Summary of Schedules), *id.*

25. Attachment A (Bankruptcy File - Discharge of Debtor(s), dated March 17, 2004), *id.*
26. Tr., at 20.
27. It is unclear how the amount alleged in the SOR (\$5,933.00) was calculated, for there is no credit report, and the amount identified in the bankruptcy list of creditors holding unsecured nonpriority claims was only \$5,720.00. Attachment A (Bankruptcy File - Schedule F - Creditors Holding Unsecured Nonpriority Claims), attached to Response to SOR, *supra* note 21.
28. Tr., at 20.
29. Tr., at 20-21.
30. It is unclear how the amount alleged in the SOR (\$16,383.00) was calculated, for there is no credit report, and the amount identified in the bankruptcy list of creditors holding unsecured nonpriority claims was \$17,437.00. Attachment A (Bankruptcy File - Schedule F - Creditors Holding Unsecured Nonpriority Claims), *supra* note 21.
31. Response to SOR, *id.*, 2004, at 2.
32. Tr., at 22-23.
33. It is unclear how the amount alleged in the SOR (\$18,457.00) was calculated, for there is no credit report, and the amount identified in the bankruptcy list of creditors holding unsecured nonpriority claims was \$19,293.00. Attachment A (Bankruptcy File - Schedule F - Creditors Holding Unsecured Nonpriority Claims), *supra* note 21.
34. Response to SOR, *id.*, at 2; Tr., at 24.
35. Tr., at 24.
36. It is unclear how the amount alleged in the SOR (\$19,914.00) was calculated, for there is no credit report, and the amount identified in the bankruptcy list of creditors holding secured claims was \$22,000.00, including the value of the collateral. Attachment A (Bankruptcy File - Schedule D - Creditors Holding Secured Claims), *supra* note 21.
37. Response to SOR, *id.*, at 2; Tr., at 24.
38. Tr., at 24-25.
39. It is unclear how the amount alleged in the SOR (\$17,068.00) was calculated, for there is no credit report, and the amount identified in the bankruptcy list of creditors holding unsecured nonpriority claims was \$20,278.00. Attachment A (Bankruptcy File - Schedule F - Creditors Holding Unsecured Nonpriority Claims), *supra* note 21.
40. Response to SOR, *id.*, at 2.
41. Tr., at 25-26. The government has offered no evidence to rebut Applicant's contention and, based on the evidence, I accept it as fact.
42. Government Exhibit 2, *supra* note 9, at 6.
43. *Id.*
44. Tr., at 50.
45. Question 40.
46. Government Exhibit 1, *supra* note 13, at 5.

47. Tr., at 34-35, 52; Response to SOR, *supra* note 21, at 3-4.

48. Tr., at 35.

49. Tr., at 34.

50. Tr., at 44.

51. Exec. Or. 12,968, *Access to Classified Information*; as implemented by Department of Defense Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.)