

DATE: November 30, 2006

In re:

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SSN: -----

Applicant for Trustworthiness Determination

P Case No. 06-06337

DECISION OF ADMINISTRATIVE JUDGE

MARK W. HARVEY

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

William F. Savarino, Esq.

SYNOPSIS

Thirty-five year-old Applicant had six alleged debts listed in the statement of reasons (SOR). One debt was paid in 2000. His employer indicates he has a high degree of trustworthiness, and is an asset to the company. His employer paid the five remaining SOR debts, which amounted to \$10,466.50. Applicant agreed to repay his employer over the next 30 months using automatic allotments from his pay. His employer gave him a \$6,000.00 annual pay raise, which is more than sufficient to cover the monthly payments. He currently has no delinquent debts. He has mitigated concerns about financial considerations. Eligibility for an ADP I/II/III position is granted.

PROCEDURAL RULING

On October 19, 2006, Department Counsel made a motion to amend the Statement of Reasons (SOR), changing the reference from Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended to DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified.⁽¹⁾ Applicant did not object to the amendment. I granted Department Counsel's motion.

STATEMENT OF THE CASE

On August 2, 2004, Applicant applied for a public trust position and submitted a Questionnaire for Public Trust Positions (Standard Form (SF) 85P).⁽²⁾ On June 21, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a SOR to him, pursuant to the Directive and the Regulation.⁽³⁾ The SOR alleges security concerns under Guideline F (Financial Considerations). The SOR detailed reasons why DOHA recommends that Applicant's case be submitted to an administrative judge for a determination that Applicant is not eligible for occupying an ADP I/II/III position.

In a sworn, notarized answer, dated August 21, 2006, Applicant responded to the SOR allegations, and elected to have his case decided at a hearing.⁽⁴⁾ On September 19, 2006, the case was assigned to me. The hearing was held in

Arlington, Virginia on October 19, 2006 (R. 1, 3). DOHA received the transcript of the hearing on October 31, 2006.

FINDINGS OF FACT

As to the factual allegations under Guideline F, Applicant admitted that he was responsible for the six debts listed on the SOR. (5) His admissions are incorporated herein as findings of fact. His response to the SOR indicated the debt in SOR ¶ 1.a for \$96.00 was disputed, and then at the hearing he provided a receipt dated October 6, 2006, showing this debt was paid on May 30, 2000. The other five SOR debts became delinquent when his salary became insufficient to pay his debts due to the increase in the size of his family. After a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 35-years-old, and has been employed by the United States government or as a United States government contractor since March 1993. (6) From 1991 to 1992, he attended college, but did not receive a degree. (7) He has no prior military service. (8) He was married on February 4, 1996. (9) His children are ten, seven and three years of age, and his youngest child was born in 2003. (10) After his second child was born, his wife left her job and became a full-time homemaker (R. 23). In the late 1990s his debts began to become delinquent because his salary was only about \$30,000.00 per year (R. 23). In August 2004, he began to work for his current employer with annual pay of \$58,000.00 (R. 23-24). Once he began working for his current employer his debt load stabilized, and his car payments, utilities and credit card were kept current (R. 53-54). In 2005, his pay was \$65,000.00 and in 2006 it was \$71,000.00 per year (R. 24).

On February 23, 2005, Applicant provided a personal financial statement (PFS) to a security investigator. (11) In 2005, his gross salary was \$4,833.32 per month, his net salary was \$3,856.48 per month, and his expenses totaled \$2,660.00 per month. After making all payments, including rent (\$1,495.00), groceries (\$300.00), clothing (\$100.00), utilities (\$485.00), car expenses (\$160.00), and miscellaneous (\$120.00). After deducting all expenses \$596.79 per month remained. The PFS does not list any assets, and it shows a car loan of \$20,569.81 with a \$549.69 monthly payment, and an active credit card balance of \$270.00 with a monthly payment of \$50.00 per month.

In his February 28, 2005, statement to a security investigator, Applicant said he was unsure when the debt in SOR ¶ 1.c became delinquent, the debts in SOR ¶¶ 1.b and 1.d became delinquent in 2002, the debt in SOR ¶ 1.e became delinquent in 1996, and he did not indicate when the debt in SOR ¶ 1.f became delinquent. He promised to pay or resolve his debts in 2006, but he did not indicate he expected his employer to pay his debts. All of the SOR debts, except the debt in SOR ¶ 1.a are credit card or debit-type debts. The debt in SOR ¶ 1.a of \$96.16 was paid on May 30, 2000. (12) For the debt of \$1,025.00 in SOR ¶ 1.b, Applicant's current balance is \$1,025.92 and it was settled on September 12, 2006, for \$512.96. (13)

For the debt of \$5,519.00 in SOR ¶ 1.c, his current balance is \$5,905.61 and it was settled on September 12, 2006, for \$3,012.25. (14) The debt of \$10,898.00 in SOR ¶ 1.d, has a current balance of \$11,123.26 and was settled on September 12, 2006, for \$4,490.22. (15)

The debt of \$3,165.70 in SOR ¶ 1.e has a current balance is \$3,165.70 and was settled on September 12, 2006, for \$1,205.00. (16) For the debt of \$1,546.00 in SOR ¶ 1.f, Applicant's current balance is \$1,780.10 and it was settled on September 12, 2006, for \$1,246.07. (17)

In August 2006, Applicant received credit counseling and the credit company provided a step-by-step plan to resolve his debts. (18) He also paid for a college class concerning Personal Finance, provided a description of the class' content, and started the Personal Finance course the first week of October 2006, two weeks before his hearing. (19) He currently has just one credit card. It has a \$500.00 limit and a balance of \$183.00 (R. 43-44). He maintains a budget, and his payments are timely (R. 44-45). Over the years when his debts were delinquent, he periodically contacted his creditors and attempted to work out a settlement, but the creditors wanted large payments and he was unable to resolve his delinquent debts until his salary significantly increased (R. 58-59). He did not provide any documentation concerning these

contacts with his creditors.

Applicant's company contacted the creditors in SOR ¶¶ 1.b to 1.f, and determined these five debts currently totaled \$23,000.59, but could be settled in September 2006 for \$10,466.50. ⁽²⁰⁾ On September 12, 2006, Applicant signed an agreement with his employer. He agreed to pay his company \$174.45 per 2-week pay period for 30 months or \$4187.00 per year with payments automatically deducted from his pay. The company loan does not charge Applicant any interest.

His employer noted his outstanding work performance and that he an essential employee. ⁽²¹⁾ A senior vice president of Applicant's company (a retired Colonel with 30 years active service) spoke on his behalf at his hearing (R. 65-76).

His employer raised his pay in 2006 from \$65,000.00 to \$71,000.00 per year. The 2006 pay raise of \$6,000.00 is \$1,813.00 per year more than his 2006 debt payment to his company. In the event of an emergency his company is willing to provide additional assistance to help him and his family (R. 69-70).

POLICIES

In the evaluation of an Applicant's security suitability for a public trust position, an administrative judge must consider Appendix 8 of the Regulation, which sets forth brief introductory explanations for each guideline, and the adjudicative guidelines, which are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC).

These adjudicative guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the adjudicative process provision at Appendix 8 of the Regulation. An administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision.

To be eligible for a public trust position, an applicant must meet the security guidelines contained in the Regulation. "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." Regulation ¶ C6.1.1.1.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk." Regulation, Appendix 8. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision. Specifically, an administrative judge should consider the nine adjudicative process factors listed in the Regulation, Appendix 8, at 132: (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 guideline most pertinent to an evaluation of the facts of this case:

Financial Considerations - Guideline F: 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.

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

Since the protection of sensitive information is the paramount consideration, the final decision in each case is arrived at by applying the standard that eligibility for a public trust position is "clearly consistent with the interests 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.

In the decision-making process, facts must be established by "substantial evidence."⁽²²⁾ The government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with Regulation, Appendix 8, that it is not clearly consistent with national security to approve eligibility for a public trust position. Directive ¶ E3.1.14. If the government meets its initial burden, the Applicant then has the burden of persuasion, that is to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. These same burdens of proof apply to trustworthiness determinations for ADP positions.

A person who seeks eligibility for a public trust position 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 eligibility for a public trust position. Decisions include, by necessity, consideration of the possible risk an 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 classified or sensitive information. The scope of an administrative judge's decision is limited. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings.

CONCLUSIONS

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

Guideline F (Financial Considerations)

The government has met its initial burden under Guideline F. Applicant's failure to pay his debts is of concern, especially in light of his desire to have access to sensitive government information. Regulation, Appendix 8, clearly expresses the government's concern regarding financial considerations, stating, "an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." A person who fails or refuses to pay long-standing debts or is financially irresponsible may also be irresponsible or careless in his or her duty to protect sensitive information.

Applicant's actions in failing to satisfy his outstanding financial obligations give rise to Financial Considerations Disqualifying Condition (FC DC) 1, "a history of not meeting financial obligations," and FC DC 3, "inability or unwillingness to satisfy debts." The debt in SOR ¶ 1.a was paid on May 30, 2000, and there is no evidence that it was delinquent. The five debts listed in SOR ¶¶ 1.b to 1.f were delinquent for a substantial period of time and are discussed briefly below.

FC DCs 1 and 3 apply to his five failures to meet his financial obligations, and his admission that he was unable to pay his debts, which then became delinquent and remained delinquent for several years. The government produced substantial evidence of these two disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. The burden of disproving a mitigating condition never shifts to the government.⁽²³⁾

I considered Financial Considerations Mitigating Condition (FC MC) 1, "the behavior was not recent;" FC MC 2, "it was an isolated incident;" FC MC 3, "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;" FC MC 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 6, "the individual initiated a good-faith effort to repay

overdue creditors or otherwise resolve debts."

The Regulation does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. In September 12, 2006, his employer provided a debt consolidation loan, which resulted in payment of the debts listed in SOR ¶¶ 1.b to 1.f. Based on evaluation of the record evidence as a whole, ⁽²⁴⁾ I conclude FC MCs 1 and 2 do not apply because Applicant had multiple (five) delinquent SOR debts. Payment of the five debts so recently, well after he received the SOR, and shortly before his hearing is simply too recent to merit full application of FC MC 1.

FC MC 3 partially applies to all five SOR debts at issue because the debts became delinquent several years ago and were the result of the increase in the size of his family and his under employment (from 1999 to 2004). Underemployment and change in family circumstances are good examples of the unforeseen problems that trigger application of FC MC 3 as causes of financial problems that may be "largely beyond the person's control." I conclude that Applicant's statement about how his debts became delinquent is credible and sufficient to provide some credit under FC MC 3 in regard to his debts. Applicant, however, does not receive full credit for FC MC 3 because he waited until September 2006 to resolve or make progress on these five SOR debts. The impact of his underemployment is somewhat reduced by his steady growth in pay, especially after starting with his current employer in 2004. There is a paucity of evidence showing how he endeavored to pay or resolve his debts prior to September 2006. However, his recent resolution of his debts, warrants significant credit and I am confident that he is on the right track now towards correction of his financial problems.

FC MC 4 applies because there is sufficient evidence that he has had recent financial counseling, and there are clear indications (since September 2006) that the problem is being resolved or is under control.

FC MC 6 does not fully apply because there is insufficient information to establish that Applicant showed good faith prior to September 2006 in the resolution of his debts. ⁽²⁵⁾ He has not provided sufficient information about how he attempted to resolve or repay her debts from 1999 until September 2006. He does, however, merit partial credit for his recent efforts through a debt consolidation program to repay his creditors, which is a legal means for resolving these five debts. ⁽²⁶⁾ Reduction in his debts will substantially reduce his potential vulnerability to improper financial inducements.

"Whole Person" Analysis

In addition to the enumerated disqualifying and mitigating conditions, I have considered the general adjudicative guidelines related to the whole person concept under the Regulation, Appendix 8, at 132. As noted above, Applicant's lengthy history of failing to meet his financial obligations, and inability or unwillingness to satisfy his debts raise serious trustworthiness concerns. He is currently 35 years old, but was in his 20's when his delinquent debts first became a problem. He was sufficiently mature to be fully responsible for his conduct. His actions in generating or failing to resolve his five debts were knowledgeable and voluntary. His debt problems resulted from voluntary decisions to purchase items. However his inability to repay his debts resulted from his underemployment and the growth of his family. He made decisions to use his money for his spouse and children, rather than paying his five creditors. There is some evidence of rehabilitation, positive behavior changes, and improved circumstances as indicated by increased income, his arrangement in September 2006 for a debt consolidation loan, his receipt of financial counseling, and his payment of his creditors. The potential for pressure, coercion, exploitation, or duress is low-Applicant is current on his debts, and his income has increased substantially. These changes will result in a continuing trend of improved financial circumstances. Moreover, stability in his employment and debt load show self-discipline, and consciousness of his financial responsibilities. In sum, the likelihood of recurrent debt problems is low. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has mitigated the trustworthiness concerns pertaining to financial considerations.

Substantial evidence supports Applicant's trustworthiness eligibility and suitability. I take this position based on the law, my "careful consideration of the whole person factors" ⁽²⁷⁾ and supporting evidence, as well as my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities. For the reasons stated, I conclude Applicant is eligible for a public trust position.

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 to 1f: For 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 a public trust position. Eligibility for an ADP I/II/III position is granted.

Mark W. Harvey

Administrative Judge

1. Department Counsel's motion is at R. 8-9. A memorandum from the Deputy Under Secretary of Defense (Counterintelligence and Security) to Director, Defense Office of Hearings and Appeals (DOHA), dated November 19, 2004 states DOHA shall utilize provisions of the Directive to resolve contractor cases involving trustworthiness determinations. Accordingly, in this decision I will follow the procedural rules of the Directive but apply the adjudicative guidelines in the Regulation.

2. Item 1, Questionnaire for Public Trust Positions, Standard Form (SF) 85P, is dated August 2, 2004 on the first and last pages.

3. Item 8, Statement of Reasons (SOR), dated June 21, 2006. Item 11 is the SOR, which was amended on October 19, 2006. The SOR is the source for all the factual assertions in the remainder of this paragraph.

4. Item 9 (Applicant's response to SOR was notarized on August 21, 2006, and date stamped received at DOHA on August 24, 2006).

5. The source for all factual assertions in this paragraph is Item 9, *supra* note 4.

6. Item 1, *supra* note 2, at 1 (date of birth) and Item 1, question 6 at 2 (employment).

7. *Id.*, question 5, at 1.

8. *Id.*, question 11, at 3.

9. *Id.*, question 9, at 3. At his hearing Applicant said he was married in 1995 when he was 24 years old (R. 20).

10. R. 21 and Item 9, *supra* note 4, at 3.

11. Item 3 (Form 154, Personal Financial Statement (PFS), dated February 23, 2005). The remainder of this paragraph is derived from Applicant's PFS.

12. *See* Item C, letter from creditor, dated October 6, 2006, and R. 28, 31.

13. *See* Item P. The creditor provided a letter indicating the debt was paid. *See* Item D and R. 29, 33.

14. *See* Item P. The creditor provided a letter indicating the debt was paid. *See* Item E and R. 29, 34-35.

15. *See* Item P. The creditor provided a letter indicating the debt was paid. *See* Items G, H and R. 30, 35-36.

16. See Item P. The creditor provided a letter indicating the debt was paid. See Item F and R. 36-37.
17. See Item P. The creditor provided a letter indicating the debt was paid. See Item I and R. 30-31, 37-38.
18. R. 26, 56-57, 74; and Item A.
19. Item J and R. 39-41.
20. Item P, Employee Advance Agreement, September 12, 2006, and R. 49-51 are the sources for the facts in this paragraph.
21. Item N (letter from Applicant's company describing his work performance and pay increase, dated August 8, 2006).
22. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).
23. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).
24. See ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). When making a recency analysis for FC MC 1, all debts are considered as a whole.
25. The Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of Financial Considerations Mitigating Condition 6, an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of Financial Considerations Mitigating Condition 6.

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

26. See ISCR Case No. 04-07360 at 2 (App. Bd. Sept. 26, 2006) (stating partial credit was available under FCMC 6 for debts being resolved through garnishment).
27. See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).