



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



In the matter of:)
)
) ADP Case No. 07-12305
)
)
Applicant for Public Trust Position)

Appearances

For Government: Robert E. Coacher, Esq., Department Counsel
For Applicant: *Pro Se*

January 29, 2009

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated the Financial Considerations security concerns. Eligibility for access to sensitive information is denied.

On July 15, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F, Financial Considerations. 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); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on October 3, 2008 and requested a hearing before an administrative judge. The case was assigned to me on December 9, 2008. DOHA issued a Notice of Hearing on December 19, 2008, and the hearing was convened as scheduled on January 7, 2009. The Government offered Exhibits (GE) 1 through 4, which were received without objections. Applicant testified on his own behalf,

called one witness, and submitted Exhibits (AE) A through E, which were received without objections. I granted Applicant's request to keep the record open to submit additional information. Applicant submitted 13 pages of documents, which were marked AE F through K, and admitted without objections. Department Counsel's memo is marked Hearing Exhibit (HE) I. DOHA received the transcript of the hearing (Tr.) on January 26, 2009.

Procedural Rulings

I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived his right to 15 days notice.

Findings of Fact

Applicant is a 53-year-old employee of a defense contractor. He has an associate's degree. He has been married for more than 30 years and has one adult son.¹

The SOR lists 11 delinquent debts totaling about \$193,271. Applicant admitted to all the SOR allegations, except for SOR ¶ 1.a, which is a debt for \$125. He stated that this debt "was incorrectly reported to the credit bureau, but is such a small amount that no attempt was made to correct it." The debt is listed on the credit report of February 6, 2008.²

Applicant's financial difficulties started in about 2003. His company closed their office in his city and he was unemployed for about three months. He accepted a similar position with the same company in another city about 200 miles away. His wife was working in their home city on a research project necessary to complete her doctorate and was unable to relocate to the new city. They purchased a recreational vehicle for Applicant to live in his new city while his wife remained in their home. The cost of maintaining two households had an adverse impact on their finances. His wife also had numerous medical problems and she was unable to work. Applicant and his wife both had an elderly parent who became ill and passed away. They also had damage to their house from a natural disaster.³

Applicant's finances were further damaged by his wife's spending habits. Applicant stated that he is personally responsible for only about 5% of their debt. She was working on attaining a doctoral degree. She was told by professors and others that she would be capable of earning a very large salary once she had her doctorate and she spent money on the prospect of future income. She never obtained the doctorate

¹ Tr. at 25, 53; GE 1.

² Tr. at 30-31; Applicant's response to SOR; GE 4.

³ Tr. at 28, 32, 39-42, 46-47; Applicant's response to SOR; GE 2.

and never obtained the high paying job. She indicated that she has learned from this experience and will not make the same financial mistakes again.⁴

Applicant was questioned by an investigator from the Office of Personnel Management (OPM) on March 14, 2007, and fully discussed his finances. His finances were already in total disarray by that point. He indicated that he intended to resolve his delinquent debts either by a debt consolidation plan or by filing Chapter 13 bankruptcy.⁵

Applicant's son works for a car dealer. He was able to lease a 2008 luxury car for his mother at a rate of \$656 per month. She pays her son who makes the monthly payments. Applicant testified that this was done without his knowledge.⁶

Applicant filed a Chapter 13 bankruptcy in January 3, 2009. Under Schedule D – Creditors Holding Secured Claims, he listed the mortgage on his house, the loans for his car and recreational vehicle, and the leased car. Schedule F – Creditors Holding Unsecured Nonpriority Claims listed 24 creditors and debts totaling \$271,029. Schedule F includes all the debts in the SOR, except for the debts alleged in SOR ¶¶ 1.d and 1.f which total \$30,304. Applicant realized after the hearing that the debt alleged in SOR ¶ 1.d was not included in the schedule. He indicated he called his bankruptcy attorney about the omission and was waiting a response. He incorrectly stated that the debt alleged in SOR ¶ 1.f was included in Schedule F. His proposed plan called for 60 monthly payments of \$1,000 beginning in February 2009. Of the projected \$60,000 in payments, \$3,570 would go to the Trustee, \$2,085 to his bankruptcy attorney, \$46,836 to the loan for his recreational vehicle, and \$7,508 to his unsecured creditors. The plan has not been approved by the bankruptcy court. Applicant and his wife received counseling by internet and telephone pursuant to his bankruptcy.⁷

Applicant's supervisor testified that Applicant is honest, reliable, trustworthy, and that he has good work ethics and is a valuable member of their team.⁸

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

⁴ Tr. at 26-28, 37, 48-50, 54; Applicant's response to SOR; GE 2; AE H.

⁵ GE 2.

⁶ Tr. at 43-45; AE C.

⁷ Tr. at 52-56; AE A-E, I, J.

⁸ Tr. at 22-23.

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 common sense 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 as to obtaining 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).

Guideline F, Financial Considerations

The security 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 classified 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 security concerns under AG ¶ 19. Two are potentially applicable in this case:

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

Applicant accumulated a number of delinquent debts and was unable or unwilling to pay his obligations for a period of time. The evidence is sufficient to raise AG ¶¶ 19(a) and (c).

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20(a)-(e) are potentially applicable:

- (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 financial problems are extensive. He is still in the process of resolving his debts. AG ¶ 20(a) is not applicable at this time.

Applicant was laid off work and had to relocate to another city. His wife could not move because of her education. She had numerous medical problems and was unable to work. They both had parents who became very sick and passed away. Their home was damaged by a natural disaster. These are all conditions that were largely beyond his control. To be fully applicable, AG ¶ 20(b) also requires that the individual act responsibly under the circumstances. While these circumstances clearly hampered his financial situation, the circumstances are not fully accountable for the overwhelming debt accrued by Applicant and his wife. Applicant told the OPM investigator in March 2007, that he intended to resolve his delinquent debts either by a debt consolidation plan or by filing Chapter 13 bankruptcy. Since then a 2008 luxury car was leased on behalf of his wife. He has recently filed Chapter 13 bankruptcy. His proposed payment plan, which has not been approved by the court, calls for him to pay \$60,000 over five years. Only \$7,508 of that amount will be used to pay the \$271,029 listed as owed to his unsecured creditors. Two of the debts in the SOR totaling \$30,304 are not listed in the schedule. There is insufficient information for a finding that Applicant has acted responsibly under the circumstances. Applicant receives partial consideration under AG ¶ 20(b).

Applicant received financial counseling pursuant to his bankruptcy. He has submitted a Chapter 13 bankruptcy plan that has not been approved and he has not started on the repayment of the debts. The process is not sufficiently advanced at this time for a finding that there are clear indications that the problem is being resolved. AG ¶ 20(c) is partially applicable. His actions are not yet sufficient to qualify as a good-faith effort to repay overdue creditors or otherwise resolve debts.⁹ AG ¶ 20(d) is not applicable.

Applicant disputed owing the debt in SOR ¶ 1.a. The debt is listed on the credit report of February 6, 2008. Applicant did not provide documentation in support of the dispute. AG ¶ 20(e) is not applicable.

⁹ The Appeal 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)).

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 common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has an overwhelming amount of unsecured delinquent debt. Unforeseen events contributed to his financial problems, but clearly not to this extent. I considered his favorable work record, but he is still far too early in the bankruptcy process to alleviate concerns about his finances.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has not mitigated the trustworthiness concerns arising from his financial history.

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:	AGAINST APPLICANT
Subparagraphs 1.a-1.k:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Edward W. Loughran
Administrative Judge