



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



In the matter of:)	
)	
)	ADP Case No. 07-12874
SSN:)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: James B. Norman, Esq., Department Counsel
For Applicant: *Pro Se*

November 10, 2008

Decision

LAZZARO, Henry, Administrative Judge

On March 8, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing to Applicant its trustworthiness concerns.¹ The SOR alleges a security concern under Guideline F (financial considerations). Applicant submitted an undated response to the SOR, admitted all allegations and requested a hearing.

The case was assigned to me on July 28, 2008. A notice of hearing was issued on August 15, 2008, scheduling the hearing for September 25, 2008. The hearing was conducted as scheduled. The government submitted four documentary exhibits that were marked as Government Exhibits (GE) 1-4 and admitted into the record without objection. Applicant testified and submitted five documentary exhibits that were marked as Applicant's Exhibits (AE) 1-5 and admitted into the record without objection. The record

¹ This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive), DoD Regulation 5200.2-R, dated January 1987, as amended (Regulation), and the revised adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

was held open to provide Applicant the opportunity to submit additional documentary evidence in support of his case. One document was timely received, marked as AE 6 and admitted into the record without objection. Department Counsel's forwarding memorandum of AE 6 was marked as Appellate Exhibit (App. Ex.) I and is included as part of the record. The transcript was received on October 2, 2008.

Findings of Fact

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is 47 years old. He has been employed by a business performing work on behalf of the Government since November 2005. Applicant was previously employed in the private sector as a production control supervisor from February 1998 to July 1999; as a service delivery manager from July 1999 to April 2003; as a self-employed insurance salesman from July 2003 to March 2005; and as a sales clerk in a retail hardware store from July 2005 to November 2005. He was unemployed from March 2003 to July 2003, and from March 2005 to July 2005.

Applicant was married in May 1997. He separated from his wife in February 2006, due to her infidelity, and he obtained a divorce from her in April 2007. Applicant has two children from the marriage, ages ten and eight. Applicant had three step-children during the marriage who are currently 18, 17 and 14 years old.

Applicant's financial problems began when he lost his job in March 2003. He is a high school graduate who had managed to work himself into a position with that employer in which he was earning approximately \$90,000 annually. When the company was sold, Applicant was not retained because the new owners of the company decided the person holding Applicant's position was required to have a college degree. Following several months of unemployment during which Applicant sought other employment, he decided to start a business as an insurance salesman. That business endeavor was unsuccessful.

Applicant's wife was responsible for handling the family finances during the marriage. Shortly after he lost his job in 2003, Applicant discovered his wife was abusing credit cards and had accumulated debt that he was unable to service. In March 2005, having concluded the insurance business was not going to work, Applicant moved his family to a different state, where he worked for his father for several months until he took the job with a hardware store to obtain medical insurance coverage for his family.

When Applicant separated from his wife in 2006, he began paying her \$850 per month as support for her and their children. He reduced those payments to \$183 on the advice of his attorney and a mediator. When he appeared in court in April 2007, the combined child support and alimony he was ordered to pay was raised to \$950 and he was

ordered to pay a \$6,000 arrearage. Additionally, he was required to pay \$6,000 in attorney's fees. Applicant eventually cleared the arrearage charge by releasing his interest in a joint tax refund to his wife and turning over a vehicle to her. He is now current in his support payments. (Tr. p. 43)

The collection accounts alleged in subparagraphs 1.a and 1.h, totaling \$4,080, are business loans Applicant acquired while trying to start an insurance business. They remain unpaid. The collection and charge off accounts alleged in subparagraphs 1.b, 1.c, 1.d, 1.e, 1.i, and 1.l are credit card and cellular phones bills, totaling \$44,321, that Applicant's wife incurred before they were divorced. Applicant testified he and his wife were going to file a joint bankruptcy petition as part of the divorce to get rid of these debts but she eventually decided she did not want to file for bankruptcy protection. (Tr. pp. 36-37) These debts remain unpaid.

When Applicant lost his employment in 2003, he sold the house he had been living in and purchased a smaller home for his family. The collection account alleged in subparagraph 1.f, owed in the amount of \$3,431,² is for various items Applicant purchased to make repairs on the home he purchased in 2003. The \$102 collection account alleged in subparagraph 1.j is a cable television bill from Applicant's residence in the state from which he moved in 2005. These bills remain unpaid.

Applicant testified the debts listed in subparagraphs 1.g, owed in the amount of \$2,592, and 1.k, owed in the amount of \$1,287, are paid off automobile loans. In response to interrogatories (GE 4), Applicant submitted proof of satisfied debts to the creditors named in those subparagraphs. However, a comparison of the account number listed in GE 4 with the account numbers listed in AE 2 and AE 3 for the debt alleged in subparagraph 1.g discloses the debt alleged is actually a credit card debt that remains unpaid. The record does not contain sufficient evidence to determine the current status of the debt alleged in subparagraph 1.k.

In December 2001, Applicant purchased 6,425 shares of stock in a now defunct company at a total cost of \$5,255.92. (AE 5) Company executives were convicted of criminal offenses for their actions in defrauding investors and a lawsuit was filed on behalf of the investors. Applicant delayed seeking bankruptcy protection in the hope he would receive sufficient proceeds from the lawsuit to satisfy his delinquent creditors. The lawsuit was settled two weeks before the hearing in this case, with investors who were included in the settlement receiving on average \$6.90 per share. (Tr. p. 39) Appellant was not included in the investors who were to receive a portion of the settlement. (Tr. p. 39)

Applicant's credible testimony establishes he is currently living modestly and within his financial means. He completed a credit counseling program on September 3, 2008. (AE 4) With the assistance and advice of the credit counselors, he determined he lacks the financial assets to resolve his debts without seeking bankruptcy protection. He has now

² The SOR alleges the amount owed is \$3,341. The actual amount owed is listed in AE 2 as \$3,431.

retained an attorney to file a Chapter 7 bankruptcy petition on his behalf. The attorney received all the documentation required from Applicant to file a petition and anticipated having the petition filed by the end of October 2008. (AE 6) The attorney provided his legal opinion that Applicant would qualify for Chapter 7 bankruptcy protection. (AE 6)

POLICIES

Positions designated as ADP I and ADP II are classified as sensitive positions.³ The standard to 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.⁴ Trustworthiness adjudications apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management.⁵ Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination is made.⁶

An Administrative Judge must consider the disqualifying and mitigating conditions in the Adjudicative Guidelines when evaluating an Applicant's suitability for a public trust position. The Administrative Judge must also consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. The entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The protection of the national security is the paramount consideration, and any doubt concerning personnel being considered for access to sensitive information will be resolved in favor of national security. Decisions are made in terms of the national interest and are not determinations as to the loyalty of the applicant concerned.⁷

The Government is required to present evidence to establish controverted facts alleged in the SOR.⁸ The Applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by

³ Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

⁴ Regulation ¶ C6.1.1.1.

⁵ Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004.

⁶ Regulation ¶ C8.2.1.

⁷ Section 7 of Executive Order (EO) 10865.

⁸ Directive ¶ E3.1.14.

Department Counsel.⁹ The Applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

Analysis

Guideline F, Financial Considerations

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. . . . (Adjudicative Guideline [AG] 18)

Applicant has numerous delinquent accounts, totalling \$55,814, that have either been charged off or submitted for collection. Most, if not all of the alleged delinquent accounts remain unpaid. Disqualifying Conditions (DC) 19(a): *inability or unwillingness to satisfy debts*; and DC 19(c): *a history of not meeting financial obligations* apply.

Applicant's financial problems began with his unexpected loss of well-paying employment in 2003. They were greatly exacerbated by his wife's abuse of credit thereafter and the expenses he incurred in the resulting divorce. He quickly attempted to mitigate his financial problems by moving to a smaller house, starting an insurance business that failed, and then relocating to a different state where he was able to obtain immediate employment with his father. Mitigating Condition MC 20(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* applies.

Applicant acted reasonably in delaying seeking bankruptcy protection in the hope he would obtain a portion of a lawsuit settlement that would allow him to satisfy his delinquent creditors. He has completed a pre-bankruptcy filing credit counseling course, retained an attorney to file a Chapter 7 bankruptcy petition on his behalf, and supplied the legal opinion of that attorney that he will qualify for Chapter 7 protection. MC 20(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*; and 20(d): *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts* apply.

Applicant was living a financially responsible lifestyle when he unexpectedly lost his well-paying job solely because his new employer deemed his education insufficient for the position. He sold his house, used the proceeds to purchase a smaller home and live on until he could find new employment, and took reasonable steps to find replacement

⁹ Directive ¶ E3.1.15.

employment thereafter. He is now current in his support obligations and living within his financial means. (MC) 20(a): *the behavior happened . . . under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment applies.*

The objective of a trustworthiness determination is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to sensitive information. Indeed, the "whole person" concept recognizes we should view a person by the totality of his acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶¶ 6.3.1 through ¶¶6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has mitigated the financial considerations security concern. Although his substantial delinquent debts remain outstanding at the time of the issuance of this decision, I am satisfied based upon Applicant's appearance, demeanor, history, testimony, and the evidence he submitted that he will continued to pursue Chapter 7 bankruptcy protection and, based upon the legal opinion of his attorney, be successful in discharging his responsibility for all alleged debts in the very near future.

Applicant has overcome the case against him and satisfied his ultimate burden of persuasion. It is clearly consistent with the national security to grant Applicant access to sensitive information. Guideline F is decided for Applicant.

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-l: For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

Henry Lazzaro
Administrative Judge

