



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



In the matter of:)
)
-----) ADP Case No. 08-05286
SSN: -----)
)
Applicant for Public Trust Position)

Appearances

For Government: Richard A Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

June 29, 2009

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant submitted Questionnaires for Public Trust Position (SF 85P), dated August 2, 2007. On October 28, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns regarding Applicant arising under Guideline F and Guideline E. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), 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 Jan. 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 November 11, 2008, admitting all 13 allegations under Guideline F and denying the single allegation raised under Guideline E. He also requested a hearing before an Administrative Judge. DOHA received the request on January 2, 2009, and it was assigned to an Administrative Judge. A hearing was convened on February 5, 2009, at which Applicant requested a continuance for valid personal reasons. Without objection, the continuance was granted. The case was

transferred to me on March 4, 2009, for caseload considerations. Applicant and Department Counsel agreed on a hearing date of April 2, 2009. A notice of hearing was issued on March 16, 2009, to that effect. I convened the hearing as scheduled. The government offered Exhibits (Ex.) 1 through 4, which were received without objection. Applicant testified on his own behalf and submitted what has been accepted as Exhibits A through E without objection. I granted Applicant's request to keep the record open until April 17, 2009, to submit additional matters. On April 14, 2009, he submitted what has been accepted as Exhibits F-I without objection. DOHA received the transcript of the hearing (Tr.) on April 17, 2009. The record was then closed. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is granted.

Procedural and Evidentiary Rulings

Notice

At the hearing, it was unclear as to when Applicant received the Notice of Hearing. I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant effectively waived his right to 15 days notice.¹

Findings of Fact

Applicant is a 47-year-old male working for a defense contractor. He started working for his present employer in January 2007 in a temporary capacity, then became a full-time employee in January 2008. He has a high school diploma and completed two years of college. Married, he has two grown children and one 17-year-old child. In his Answer to the SOR, dated November 11, 2008, Applicant admitted all factual allegations raised in paragraph 1 regarding finances (¶¶ 1.a through 1.m). He denied the allegation set forth under paragraph 2 regarding personal conduct (¶ 2.a).

At age 18, after completing high school, Applicant joined the military. At age 24, he married his wife. At the time, she was having financial difficulties, so Applicant helped her manage her finances. This became a pattern, with her getting into debt and him helping her out. Applicant was honorably discharged in 1994 owing to a disability.

Applicant's wife's spending pattern became out of control in the early 2000s, by which time he could no longer stay current on both their obligations. Once, around 2002 or 2003, she purchased a new car to replace a 2000 model vehicle. He reluctantly signed as a cosigner on the purchase. Within a few days, he realized the purchase was a mistake. Applicant also concluded the car was unreliable. He tried to return it to the dealer. The dealer would not accept the car, however, and stated it belonged to the credit union that financed the purchase. Applicant left the car at the credit union, which later told him it belonged to Applicant and his wife. The most the credit union offered to do was auction the car, leaving the couple responsible for the difference.

¹ Tr. 8.

The following year, Applicant's wife's 2000 vehicle began having automotive problems. They bought her a 2002 car and Applicant assumed the payments on her troublesome 2000 vehicle. In 2005, she damaged the 2002 automobile in an accident. On her own initiative, after various attempts to have the car repaired, Applicant's wife bought a 2005 model vehicle. This left Applicant making payments on both the 2000 and 2002 vehicles.

The 2002 automobile was repossessed in 2005. The 2000 car was then totaled in an accident while driven by Applicant's son. In the interim, Applicant found it impossible to pay rent on an apartment in another region where he was going to school, make his house and car payments, and pay for insurance on all of the vehicles. His wife agreed to get insurance coverage for the cars, but only obtained coverage for herself and their son. Although financially responsible for the wrecked 2000 vehicle, the insurance company would not work with him because he was not one of the insured under his wife's policy. He never learned what became of the vehicle.²

At some point in 2005, Applicant was let go from his job at a mill. Unemployed, he went to college for a year in another state. When he returned home, he found work at an automobile restoration business. He was a valued employee, but was eventually laid off.³ In 2006, his wife left him and moved out of state with their teenage son. In the summer of 2007, he started working for his current employer as a temporary employee. A year later he was promoted to full-time permanent status.

At issue are 11 delinquent debts and 2 judgments, noted in the SOR as allegations ¶¶ 1.a through 1.m. They represent approximately \$51,000 of debt. Allegations ¶¶ 1.a and 1.b are duplicate entries representing the same debt.⁴ Allegations ¶¶ 1.e and 1.h are duplicate entries representing the same account.⁵ Allegations ¶¶ 1.f and 1.m are also duplicate entries representing the same account.⁶ Applicant does not recognize the telecommunications entity noted in ¶ 1.g and denies ever having had service with that company. He also denies knowledge of the entity noted in allegation ¶ 1.i.⁷ He is working on having these accounts formally disputed with his financial counselor.⁸ Allegation ¶ 1.k represents emergency medical care not

² Tr. 18.

³ Tr. 20.

⁴ Tr. 27, 32.

⁵ Tr. 32.

⁶ Tr. 30. *Note:* At Tr. 32, a typographical error in the transcript states allegation 1.f is a duplicate of "10." There is no "10" allegation.

⁷ Tr. 33-34.

⁸ Ex. F (Financial counseling letter, dated Apr. 7, 2009).

covered by the Veterans Administration, an issue he is currently working on with the hospital.⁹ Subtracting these duplicates and disputes, the amount at issue is about \$32,000.

Applicant has made some actual progress making payments on a judgment owed a credit union, noted in allegation 1.j (judgment for approximately \$1,471 entered about November 2005).¹⁰ Regarding allegations ¶¶ F and M, duplicate accounts, Applicant has negotiated a settlement of 50% of the \$365.82 balance now pending.¹¹

Applicant earns \$8.75 an hour, working 40 hours per week. He is paid every two weeks. His monthly net is about \$1,070 on a total compensation package worth approximately \$16,000 per year. When he can, Applicant sends money to his 17-year-old son, who lives with a disability. Applicant's personal needs are minimal and he lives a simple lifestyle. He is currently living within his income. He pays \$635 a month for a place to live and about \$175 a month for food. His utilities are approximately \$120 a month. He has no land line, internet, or cable, relying instead on a \$39.99 a month cell phone. He drives a 21-year-old car that is paid off. His auto insurance is paid and he spends about \$25 a week on gasoline. Applicant tithes at his church approximately \$350 a month.¹² He has received financial counseling and is considering getting help through a credit counseling service. His financial counselor cautions that having the Veterans Administration pay his medical balance and having duplicate accounts deleted from his credit report will "take some time."¹³

At work, Applicant is praised for his performance and maturity.¹⁴ His overall review rating is "Sometimes Exceeds Expectations," a ranking between "Meets Expectations" and "Consistently Exceeds Expectations."¹⁵ When documenting his honorable discharge from the military, it was noted that he had received several decorations, medals, and ribbons to his credit.¹⁶

⁹ Tr. 36-37; Ex. G (Medical query and receipt).

¹⁰ Tr. 25. Applicant made two \$25 monthly payments in 2007. He recently recommenced repayment on the account. Ex. H (Credit Union account posting).

¹¹ Ex. I (Telecommunications entity settlement offer).

¹² Tr. 52. "Every two weeks, I pay 150 for title [sic], \$5 for Sunday school and \$20 for – – \$20 per month for the building fund." A rough estimate for church and religious activities is \$175 per month.

¹³ Ex. F (Financial counseling letter, dated Apr. 7, 2009).

¹⁴ Ex. A (Performance review, dated Apr. 2009) at 2.

¹⁵ *Id.* at 1.

¹⁶ Ex. C (Certificate of discharge).

In executing his public trust questionnaires, Applicant answered “no” to a question asking whether he was over 180 day delinquent on any debts. It was not his intention to be dishonest.¹⁷ He was unclear about the question and unaware that he had existent debt.¹⁸ In his closing, Applicant noted: “The one thing that I’ve learned from the military service, be responsible, accept responsibility for your actions. And with that said, if the statement that I signed checking no [is incorrect], then I’m responsible for that. So I will accept responsibility however you decide, sir.”¹⁹ Prior to financial counseling, Applicant lacked sophistication with regard to finances.²⁰

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 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.

¹⁷ Tr. 55-56.

¹⁸ Tr. 56-59, noting, for example, that Applicant thought a charge-off meant a debt was “wiped out.”

¹⁹ Tr. 63.

²⁰ Tr. 60, noting the Government’s closing argument.

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 *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The trustworthiness 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 [sensitive] 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 trustworthiness concerns. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Applicant accumulated delinquent debt, mostly between 2002 and 2006. Thus far he has been unable to pay most of his delinquent obligations. The evidence is sufficient to raise these potentially disqualifying conditions.

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where “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." Applicant's financial worries arose between about 2002 and 2006, a period during which he testified he could no longer stay abreast of his now estranged wife's spending. As examples, he points to her automotive dealings. He also cites to personal emergency medical needs and to a child with physical special needs. With his wife and nearly 18-year-old son now physically in a distant state, and Applicant's medical care otherwise provided through the V.A., these circumstances are no longer existent. I find the behavior occurred under such unusual circumstances that it is unlikely to recur, and it does not raise concerns about his current reliability, trustworthiness, or good judgment. The evidence raises this potentially mitigating condition.

Under AG ¶ 20(b), it may be mitigating where "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." As noted above, some of the financial problems arose from his wife's expenditures, from medical necessity, and periods of unemployment. Throughout, Applicant continuously tried to keep his wife's spending under control, stay employed, and meet his obligations. He generally acted responsibly, trying to curb his wife's spending and resolve situations in which her automotive acquisitions exceeded their income. I find this potentially mitigating condition is a factor for consideration in this case.

Evidence that "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" is potentially mitigating under AG ¶ 20(c), given Applicant's recent financial counseling, initial efforts to dispute the multiple erroneous entries on his credit report, and obtain settlements. Similarly, AG ¶ 20(d) applies where the evidence shows "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." In addition to the aforementioned, Applicant has already received one settlement offer after his financial counseling, resumed repayment on one account, and has referred his medical bill to the V.A. for reconsideration. Although significant strides have not been made, he has shown a good faith effort in light of the minimal income his current employment provides. This mitigating condition applies in part.

Guideline E, Personal Conduct

The trustworthiness concern relating to the guideline for Personal Conduct is set out in AG ¶ 15: 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. Here, Applicant denied having any debts delinquent over 180 days on his SF-85P. Vague as to the meaning of the question, and unaware his past obligations were covered by the term "delinquent debt," he answered no to the applicable question. Applicant's own direct testimony and that elicited by Department Counsel demonstrate Applicant's lack of sophistication with regard to financial terminology. Given his credible testimony throughout the proceeding, there is no indication of falsity on his part. This guideline 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 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 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 all the facts and circumstances surrounding this case. Applicant is a straight-forward and direct man who openly takes full responsibility for his financial failures. His demeanor and credible testimony reflect his military experience. His testimony provides a direct link between his estranged wife's spending habits and financial commitments between 2002 and 2006 and much of his current delinquent debt. Despite his best efforts over the years to rehabilitate her financial situation, the efforts only served to worsen his own.

With his estranged wife now residing in a distant state supporting herself, and his youngest son on the verge of adulthood, Applicant is no longer acquiring debt, is living within his means, and is now free to focus on his own finances. He did not rush into bankruptcy, preferring instead to honor his obligations himself. He recognized that he lacked financial savvy and sought financial counseling. Applicant is now considering credit counseling, as well. While significant debt remains, he has made some important first steps in addressing his delinquent debt.

In terms of wages, Applicant's salary is relatively low. This is not unusual in trustworthiness determinations. To his credit, however, Applicant is noted for his professionalism, maturity, and productivity on the job. His appraisals demonstrate he is reliable, trustworthy, and able to protect sensitive information at work. These facts indicate he is a good candidate for his position, a position offering the financial stability and longevity needed to complete his financial rehabilitation. Now living safely and comfortably within his income, Applicant's military diligence and personal sense of honor should continue to inspire him to persist in the resolution of his delinquent debt and the deletion of errors on his credit report. The notion he would engage in illegal acts to generate income is antithetical to his core beliefs regarding personal responsibility, both expressed and demonstrated. Overall, the record evidence leaves me without questions or serious doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant mitigated the trustworthiness concerns arising from his financial considerations and personal conduct. Access is granted.

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
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	For Applicant
Subparagraph 1.j:	For Applicant
Subparagraph 1.k:	For Applicant
Subparagraph 1.l:	For Applicant
Subparagraph 1.m:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

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

ARTHUR E. MARSHALL, JR.
Administrative Judge