



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



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| In the matter of: |) | |
| |) | |
| -----,----- |) | ADP Case No. 08-08031 |
| SSN: ----- |) | |
| |) | |
| Applicant for Public Trust Position |) | |

Appearances

For Government: Paul M. DeLaney, Esquire, Department Counsel
For Applicant: *Pro se*

April 30, 2010

Decision

WHITE, David M., Administrative Judge:

Applicant admits owing more than \$39,400 in 22 delinquent debts amassed after his 2002 Chapter 7 bankruptcy discharge of almost \$60,000 in previous debt. He offered no evidence in mitigation of resulting security concerns. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to ADP I/II/III sensitive information is denied.

On April 9, 1993, the Composite Health Care Systems Program Office (CHCSPO), the Defense Office of Hearings and Appeals (DOHA), and the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASD C3I) entered into a memorandum of agreement for DOHA to provide trustworthiness determinations for contractor personnel employed in Sensitive Information Systems Positions (ADP I/II/III), as defined in DoD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation).

Applicant submitted his Questionnaire for Public Trust Positions (SF 85P), on December 19, 2007. On May 8, 2009, DOHA issued a Statement of Reasons (SOR) to Applicant 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); the Regulation (*supra*); and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense on September 1, 2006.

Applicant acknowledged receipt of the SOR on May 20, 2009.¹ He partially answered the SOR in writing on June 2, 2009, and completed his answer on September 3, 2009, requesting that his case be decided by an administrative judge on the written record without a hearing.² Department Counsel submitted the Government's written case on September 24, 2009. A complete copy of the file of relevant material (FORM)³ was provided to Applicant on September 8, 2009, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant signed the document acknowledging receipt of his copy of the FORM on October 8, 2009, and returned it to DOHA. He provided no further response to the FORM within the 30-day period he was given to do so, did not request additional time to respond, and made no objection to consideration of any evidence submitted by Department Counsel. The case was assigned to me on January 8, 2010.

Findings of Fact

Applicant is a 29-year-old employee of a defense contractor, where he started working in August 2007. His SF-85P reflects that he has been continuously employed since November 2000. He is married, with two children, ages 10 and 9.⁴

In his answer to the SOR, Applicant admitted all of the financial allegations in the SOR, with no explanation. The 22 SOR-listed delinquent debts total \$39,434, and their existence is corroborated by Applicant's credit reports in the FORM.⁵ Applicant's admissions are incorporated herein as findings of fact.

Applicant and his wife filed for Chapter 13 bankruptcy relief on December 13, 2000. This proceeding was dismissed on February 26, 2001, because they failed to appear at the meeting of creditors and failed to make the initial payment proposed under their plan.⁶ On March 25, 2002, they filed for Chapter 7 bankruptcy relief, listing \$59,684 in unsecured non-priority claims. These debts were discharged on July 5,

¹Item 3.

²Item 4.

³The government submitted 13 Items in support of the allegations.

⁴Item 5.

⁵Items 8, 9, 10.

⁶Item 12.

2002.⁷ All of the SOR-listed debts were incurred after that date. In 2007, a warrant was issued against Applicant for the offense of Passing Bad Check - Less than \$500. Applicant told the investigator from the Office of Personnel Management that he and his wife each earn about \$26,000 per year, but they are unable to keep up with their credit spending and periodically fall behind on rent and other debt payments. He said that “he and his wife seem to always buy whatever they want without considering the consequences.” Applicant has never met with a credit counselor.⁸

Applicant submitted no evidence documenting any effort to contact any of his current creditors concerning resolution of his delinquent debts. He submitted no evidence about the quality of his work, or about his character in general. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” (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.” (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. (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 overarching adjudicative goal is a fair, impartial, and commonsense 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

⁷Item 11.

⁸Items 6 and 7.

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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable [trustworthiness] decision.”

A person who applies for access to sensitive information seeks to enter 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 10865 provides that “[a]ny determination under this order adverse to an applicant shall be a determination 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 concerns relating to the Financial Considerations guideline are 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 more than \$39,400 in delinquent debts after his July 2002 Chapter 7 bankruptcy discharge of almost \$60,000 in earlier debt. He submitted no evidence of willingness or ability to satisfy any of these debts. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes 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 history of inability or unwillingness to pay his debts spans more than nine years, and continues to date. He provided no evidence this would not continue or recur, so this mitigating condition is not supported by the record.

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.” Applicant’s present financial problems arose during a period when he was continuously employed, and resulted from his admitted failure to conform his spending to his available means. He did not provide an explanation for his failure to make payments, or documentation demonstrating any attempt to resolve his substantial delinquent debt. He has not met his burden to establish that 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). Applicant offered no evidence to support application of this provision. Similarly, AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” The record is devoid of evidence of any effort at resolution of any SOR-alleged debt. Applicant’s 2002 Chapter 7 bankruptcy discharged almost \$60,000 in previous debt, but was followed by continued financial irresponsibility. This does not constitute a good-faith effort to resolve his debts. AG ¶ 20(e) pertains to documentation of a legitimate basis to dispute the debts in question. Applicant submitted no evidence to support application of this provision, and admitted owing all of the SOR-alleged debts.

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 relevant 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) the 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 pertinent facts and circumstances surrounding this case. Applicant is a mature individual who is accountable for his choices. He and his wife incurred more than \$39,400 in delinquent debts over the seven-year period following their Chapter 7 bankruptcy discharge by regularly spending more than they earned. Both Applicant and his wife are employed, but they regularly spend in excess of their income despite making more than \$50,000 per year. Applicant made no effective effort to arrange resolution of his outstanding debts, demonstrating neither rehabilitation nor permanent behavioral changes. The potential for pressure or duress from his creditors leading to exploitation or misuse of sensitive information remains substantial. His pattern of significant financial delinquency and absence of any effort to learn or implement effective budget management make continuation or recurrence of financial irresponsibility very likely.

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

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**

Subparagraph 1.a through 1.y **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.

DAVID M. WHITE
Administrative Judge