



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In re:)
)
-----) ADP Case No. 08-09018
SSN: -----)
)
Applicant for Public Trust Position)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro Se*

October 30, 2009

Decision

HOWE, Philip S., Administrative Judge:

Applicant (who changed his surname to his wife’s upon his marriage in 2009 and is not the name used in the SOR) (Tr. 3, 7) submitted his Questionnaire for Public Trust Position (SF 85P), on February 22, 2008. On April 22, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F (Financial Considerations) for Applicant. 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 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 April 27, 2009, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed

on June 11, 2009. I received the case assignment on June 11, 2009. DOHA issued a notice of hearing on July 9, 2009, and I convened the hearing as scheduled on July 30, 2009. The government offered Exhibits (Ex.) 1 through 8, which were received without objection. Applicant testified and wanted the opportunity to submit exhibits after the hearing. DOHA received the transcript of the hearing (Tr.) on August 7, 2009. I granted Applicant's request to keep the record open until August 13, 2009, to submit additional matters. On August 4, 2009, he submitted his Exhibits A to E without objection. The record closed on August 5, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

Findings of Fact

In his Answer to the SOR Applicant admitted the factual allegations in ¶¶ 1.a, 1.pp, 1.qq., and 1.rr of the SOR, with explanations. He denied the factual allegations in ¶¶ 1.b through 1.oo.of the SOR. He also provided additional information to support his request for eligibility for a public trust position.

Applicant is 28 years old. He works as a customer service representative for a defense contractor in the health care industry. He has been employed there for about one year. Prior to this employment, he worked for several companies in the hotel and food industries. Applicant has a high school degree, and is attempting to attend college to obtain a business degree. (Tr. 36, 63, 67, 83; Exhibit 1)

Applicant married his present wife on March 14, 2009. They are expecting a child in October 2009. Applicant's wife has a child from a prior relationship whom Applicant has adopted. Applicant also has a child from a prior relationship with another woman. He has joint custody of that child, and does not pay child support. Applicant was married from February 2006 to January 2007 to a third woman. She took his money and went to live with another man, so Applicant petitioned to have that marriage annulled. The petition was granted. Applicant's first wife wrote checks and took money from their accounts without telling Applicant. When Applicant wrote checks subsequent to those actions, there were insufficient funds in the checking account. Applicant was then charged with writing checks with insufficient funds. Applicant's present wife manages their money to make certain their current bills are paid on time each month. (Tr. 34-40, 61, 79-82; Exhibit 8)

Applicant filed Chapter 7 bankruptcy in April 2005 for debts he incurred from 2001 to 2005. His debts were discharged in bankruptcy in August 2005. His secured and unsecured debts in that bankruptcy totaled \$97,772. He could not pay those debts because he received a head injury on the job in 2001, and could only work part-time after that event. He based his spending habits on his income before his injury and later after his recovery. (Tr. 45, 51-56, 87-89, 92-94; Exhibits 6, 7, A, E)

Applicant filed a Chapter 13 bankruptcy on April 29, 2009, to pay \$126,800 in secured and unsecured delinquent debts he incurred from 2006 to the filing date. The filing fee for that type of bankruptcy is \$274, payable upon filing. Applicant agreed to

pay his attorney \$2,925, of which he paid \$1,425 prior to the petition filing. He owes his attorney \$1,500. The bankruptcy trustee's fee is not set forth in any exhibit. This fee must be paid from the monthly payments Applicant makes. The federal bankruptcy statute and rules require any petitioner such as Applicant is to complete "an instructional course in personal financial management in order to receive a discharge under Chapter 13," as stated in the Chapter 13 Introduction Letter Applicant submitted as Exhibit E. Applicant did not submit a copy of that certificate. The Chapter 13 plan petition dated April 29, 2009, and signed only by Applicant, lists his proposed payments to be \$75 monthly deducted automatically from his paycheck and sent to the bankruptcy trustee. The payment proposal would require Applicant to make 36 payments, for a total debt repayment amount of \$2,700 on a debt of \$126,800. This monthly payment amount and the total repayment amount are calculated on Applicant's assets and income to determine his ability to repay the debts listed in the bankruptcy, according to Applicant's testimony at the hearing. Applicant did not offer a copy of a Bankruptcy Court order confirming his proposed plan. No objections from the creditors were shown, if they existed. (Tr. 45, 51-56, 87-89, 92-94; Exhibits 6, 7, A, E)

The SOR lists 40 delinquent debts totaling \$45,000. All those debts are included in the Chapter 13 bankruptcy filing (subparagraphs 1.c to 1.oo). Applicant paid only the payday loan amount of \$989 by garnishment (subparagraph 1.b) and the restitution for the worthless check charge in 2006 (subparagraph 1.rr). Applicant paid \$2,324.47 for the check and \$609.21 to the court for costs. He also satisfied the one-year probation period he received as part of his sentence in that criminal action. The delinquent debts in both bankruptcies include credit card debts, car loans, cell telephone service bills, and store purchases.(Tr. 42, 59, 75, 86; Exhibits 2-6, A-E)

Applicant has a car his wife owns without any debt. They purchased a new car in 2009 for about \$16,000 with a loan secured by a \$20,000 certificate of deposit. This money came from his wife's inheritance (\$17,000) and \$3,000 Applicant contributed from money he did not spend from his federal and state education grants. Applicant has three credit cards, one used for furniture purchases, one card used for gas purchases, and the third card used for other purchases and to reestablish his credit after his first bankruptcy. The balances on those cards are paid monthly on time. Applicant's take-home pay is about \$2,000 monthly. Applicant's income over the past eight years has been between \$24,000 and \$30,000. Around 2001, Applicant made about \$60,000 from two jobs. From this income, he may have \$200 to \$500 in discretionary income each month. He pays \$300 to \$500 monthly for rent because he lives with his wife's family. (Tr. 57, 58, 62-70, 96-99; Exhibits 4, 5, B-D)

Applicant was charged in 2002 for issuing a worthless check, but the charge was dismissed because the bank made a mistake in processing a financial document and Applicant did not have a checking account at that time (subparagraph 1.pp). In May 2003, Applicant was charged with writing another worthless check. He pled guilty and was fined (subparagraph 1.qq.). Applicant's court record in his home state shows nine judgments against him totaling \$13,106. These judgments were not paid, and are included in Applicant's Chapter 13 bankruptcy. (Tr. 73-76; Exhibits 8-a to 8-m)

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 the 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 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 *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.

AG ¶ 19 describes nine conditions that could raise a trustworthiness concern and may be disqualifying. Of these conditions, four are applicable to Applicant’s situation.

- (a) inability or unwillingness to satisfy debts;
- (b) indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt;
- (c) a history of not meeting financial obligations; and
- (e) consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis.

Applicant’s actions demonstrate poor self-control and serious lack of financial judgment. His unpaid debts started in 2001 when he lost his job because of work-related injury, and his lack of any reasonable plan to repay them from his income or assets are of serious trustworthiness concern. He filed two types of personal bankruptcy petitions to eliminate his debts. He obtained a discharge order in his Chapter 7 bankruptcy in 2005. He started his Chapter 13 bankruptcy in 2009. It has not been concluded.

Under AG ¶ 19(a), Applicant has 40 delinquent debts totaling \$45,000 listed in the SOR. He repaid one debt by having his paycheck garnished. Applicant declared he does not have the money or income to repay these debts.

AG ¶ 19(b) applies because Applicant borrowed so much money he could not repay it from an income of \$24,000 annually. His first bankruptcy debts totaled \$97,772. His latest bankruptcy debts total \$126,800. The total of these two bankruptcy filings is \$224,572 spent in eight years by a man now 28 years old. Applicant spent money irresponsibly, and had no “good-faith” plan or possibility of repaying either set of debts, absent bankruptcy protection.

Similarly under AG ¶ 19(c), he has not repaid any of these excessive debts. He has an eight-year history of not making payments on these debts. The debts go back to 2001.

Applicant consistently spent beyond his means to repay the debt. His debt amount, his declared lack of funds to repay these debts, coupled with his high debt-to-income ratio, shows AG ¶ 19(e) is applicable.

His irresponsible attitude toward his delinquent debts is also shown in the various judgments and punitive actions entered against him for various financial transactions between 2001 and 2007. There is a pattern of money mismanagement shown in these situations which also support the application of these disqualifying conditions.

AG ¶ 20 provides six conditions that could mitigate security concerns arising under this guideline. Of these six conditions, three may apply to the Applicant’s situation:

(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.

Applicant’s financial problems were caused in some part by his job loss in 2001, which significantly reduced his income and ability to repay his debts. He spent money in that time based on his ability to repay it from his two incomes, but the loss of one job threw his debt repayment plans into an untenable position. His first wife’s spending habits added to some of his debt problems after 2006. That fact, coupled with his failure to coordinate their check-writing, caused the worthless check charges to be levied

against Applicant. He took action immediately to terminate that marriage because of the financial and personal issues his first wife caused. Yet none of these explanations or excuses can show Applicant acted responsibly under the circumstances by spending \$224,572 in eight years, a sum he never could repay with his lack of college education or jobs paying substantially higher salaries. Applicant spent, and spent borrowed money, with abandon and disdain for his legal and more obligations to repay it. AG ¶ 20(b) has no applicability.

Applicant is supposed to receive counseling on personal finances in accordance with the federal bankruptcy statute and rules. He cannot receive a discharge under Chapter 13 until he completes that counseling. Yet, Applicant, who has the burden of proof that a mitigating condition should apply to his case, did not submit any evidence of any counseling under the bankruptcy statute, nor under any consumer counseling program, or done on his own initiative. AG ¶ 20 (c) has no applicability.

Applicant initiated the 2005 Chapter 7 bankruptcy proceeding to eliminate his debts. It was the only legal method he had available to resolve the debts, because his income would never have allowed him to repay the debts. Then, in 2009, he started a Chapter 13 bankruptcy to repay in a small amount his latest accumulation of delinquent debts in the amount of \$126,800. The bankruptcy action is a legitimate procedure provided for in federal statutes to resolve debts, but in Applicant's situation it is not a "good-faith" effort. Applicant wantonly spent money he borrowed with no realistic possibility of repaying it. His bankruptcy documents for the Chapter 13 do not show the plan of \$75 monthly and a total payment of \$2,700 over three years has been approved by the bankruptcy judge. Furthermore, Applicant and his wife have \$20,000 in the bank which they pledged to buy a new car. This action is an example of how Applicant continues to spend money for his own advantage while not repaying his legitimate delinquent debts. AG ¶ 20(d) does not apply.

No mitigating conditions apply to Applicant's 13 judgments and criminal code offenses involving unpaid debts and the writing of worthless checks incurred between 2001 and 2007.

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) 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 facts and circumstances surrounding this case. Applicant was young and had only a high school degree when he started employment and earning an income. He was irresponsible in spending money he could never hope to repay from his average \$24,000 annual income. He took steps in 2005 and 2009 to file bankruptcy actions to resolve his debts. They were the only mechanisms available to him to satisfy the magnitude of his delinquent debts. However, the magnitude of \$224,572 in delinquent debt over eight years, with almost none of it repaid, shows serious and repeated misconduct. Applicant learned nothing from his experiences, especially his 2005 Chapter 7 bankruptcy. He just spends and spends, and does not repay substantial portions of his delinquent debts. He voluntarily spent all this borrowed money and showed no rehabilitation based on any time period. It is likely his spending habits will recur based on his history of spending borrowed money, as is shown by his recent car purchase. There is potential for pressure, coercion, exploitation, or duress resulting from the magnitude of his debts and the repeated spending pattern he exhibits.

Overall, the record evidence leaves me with questions or 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. I conclude the "whole-person" concept against 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:	AGAINST APPLICANT
Subparagraphs 1.a to 1.rr:	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.

PHILIP S. HOWE
Administrative Judge