



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



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| In the matter of: |) | |
| |) | |
| |) | ADP Case No. 08-09732 |
| SSN: |) | |
| |) | |
| Applicant for Public Trust Position |) | |

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro Se*

January 8, 2010

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has mitigated the Financial Considerations and Personal Conduct trustworthiness concerns. Eligibility for access to sensitive information is granted.

Statement of the Case

On May 19, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guidelines F and E, Financial Considerations and Personal Conduct. The action was taken under Executive Order (EO) 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 July 13, 2009. It was unclear from his response whether he wanted a hearing before an administrative judge or the case decided on the written record in lieu of a hearing. At his hearing, Applicant verified that

he wanted a hearing. The case was assigned to me on September 1, 2009. DOHA issued a notice of hearing on September 30, 2009, and the hearing was convened as scheduled on November 3, 2009. The government offered Exhibits (GE) 1 through 8, which were received without objection. A stipulation to the admissibility of GE 1 through 7 was marked Hearing Exhibit (HE) I. Applicant testified on his own behalf and submitted Exhibits (AE) A through C, which were received without objection. One witness testified. I granted Applicant's request to keep the record open to submit additional information. Applicant submitted AE D, which was admitted without objection. Department Counsel's memo is marked HE II. DOHA received the transcript of the hearing (Tr.) on November 12, 2009.

Findings of Fact

Applicant is a 59-year-old employee of a defense contractor. He has worked for his current employer since June 2008. He has a bachelor's degree and an associate's degree. He has been married for more than 25 years and has a 14-year-old child.¹

The SOR lists four delinquent debts totaling about \$36,749, and a mortgage that was in foreclosure with a balance of \$275,095. Applicant admitted that he owed all the delinquent debts but stated that he had filed bankruptcy.²

Applicant graduated from college with a bachelor's degree in 1972. He realized that further education in a scientific field would provide him with more opportunities, and he went back to school and earned an associate's degree in 1978. He was steadily employed as a computer programmer for many years and had no financial issues. He accepted a job in 1999, and he and his family moved to another state. He was laid-off from that job in June 2001, which started an extended period of unemployment and underemployment. He remained unemployed until he obtained a job in January 2002. Additional periods of unemployment included from November 2006 to February 2007, September to December 2007, and March to June 2008. Applicant took jobs at below the level of his education and experience, including delivering pizza. His current job is in data entry, which carries a much lesser salary than his previous positions as a computer programmer.³

Applicant was unable to maintain payments on his debts during his periods of unemployment and underemployment, and a number of debts became delinquent. He would contact the creditors and attempt to catch-up while he was working. He would then fall behind again when he became unemployed. He was sued by one creditor who obtained a judgment of about \$13,000 in April 2007. Applicant eventually lost his house to foreclosure. His wife lost her job in September 2009.⁴

¹ Tr. at 33-35; GE 1.

² Applicant's response to SOR.

³ Tr. at 23-29, 33-37; Applicant's response to SOR; GE 1.

⁴ Tr. at 27-28, 37-46, 70; Applicant's response to SOR; GE 2, 4.

Applicant believed his only recourse was to file bankruptcy. He was unable to pay a bankruptcy attorney for a period. He found a legal document preparation company that does not provide legal representation but provides assistance in the preparation of court documents. He paid the company \$600 for their services and filed a Chapter 7 bankruptcy in July 2009. Under Schedule F – Creditors Holding Unsecured Nonpriority Claims he listed 14 creditors and debts totaling \$71,745. There were no secured or priority debts listed under the relevant schedules. The court has not yet approved the bankruptcy. Applicant received counseling pursuant to his bankruptcy. Applicant and his wife have adjusted to him making a smaller salary. They have a simple lifestyle and will be able to pay their current debts once the bankruptcy court discharges their debts.⁵

Applicant submitted a Public Trust Position Application (SF 85P) on June 4, 2008. He answered “No” to Questions 19 and 20, which asked “In the last 7 years, have you, or a company over which you exercised some control, filed for bankruptcy, been declared bankrupt, been subject to a tax lien, or had a legal judgement rendered against you for a debt?” and “Are you now over 180 days delinquent on any loan or financial obligation? (Include loans or obligations funded or guaranteed by the Federal Government.)” Applicant fully discussed his finances and delinquent debts when he was interviewed for his background investigation in August 2008. He responded truthfully to DOHA interrogatories in December 2008 and March 2009. He was open and candid about his finances at his hearing. Applicant denied intending to mislead the government about his finances. He credibly testified that he did not know the one debt was reduced to a judgment. Because he was continuously attempting to catch-up with his delinquent debts when he was working, it was unclear in his mind if he had ever been 180 days delinquent on his debts.⁶ After considering all the evidence, I find that Applicant did not intentionally falsify his SF 85P.

Applicant submitted numerous character letters. He is praised by all for his complete honesty, integrity, and trustworthiness.⁷

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

⁵ Tr. at 29-31, 50-51, 57; GE 3; AE C, D.

⁶ Tr. at 52-54, 58-66; GE 1-4.

⁷ AE A.

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 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 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).

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. 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. The evidence is sufficient to raise AG ¶¶ 19(a) and 19(c).

Four Financial Considerations mitigating conditions under AG ¶ 20(a) 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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant filed Chapter 7 bankruptcy, but the court has not yet granted the discharge of his debts. AG ¶ 20(a) is not applicable at this time.

Applicant had stable employment as a computer programmer and was financially sound for many years. In 1999, he accepted a new job, and his family relocated to another state. His finances remained in order until he was laid-off from that job in 2001. That started an extensive period of unemployment and underemployment from which he has still not completely recovered. Those are conditions that were largely beyond his control. To be fully applicable, AG ¶ 20(b) also requires that the individual act responsibly under the circumstances. Applicant fell behind on his debts when he was unemployed and then attempted to catch-up when he obtained a job. The debts

became too much to handle and he took his only recourse, which was bankruptcy. He received financial counseling pursuant to his bankruptcy. His debts have not yet been discharged, but the bankruptcy is sufficiently advanced that there are clear indications that the problem is being resolved. Applicant receives partial consideration under AG ¶¶ 20(b) and 20(c). His actions do not qualify as a good-faith effort to repay overdue creditors or otherwise resolve debts.⁸ AG ¶ 20(d) is not applicable.

Guideline E, Personal Conduct

The trustworthiness concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect [sensitive] information. Of special interest is any failure to provide truthful and candid answers during the [public trust position] process or any other failure to cooperate with the [public trust position] process.

AG ¶ 16 describes conditions that could raise a trustworthiness concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant submitted inaccurate information on his SF 85P, but as discussed above, it was not an intentional falsification. AG ¶ 16(a) is not applicable.

⁸ 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. Jun. 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) 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. I have incorporated my comments under Guidelines F and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. Applicant is 59 years old. He had a successful career as a computer programmer for many years and he was financially stable. An extended period of unemployment and underemployment devastated his finances. He fell behind on his payments and then attempted to catch-up when he obtained a job. He became overwhelmed and took his only recourse, which was bankruptcy. His debts have not yet been discharged, but I am convinced that Applicant is on the right track. He has adjusted his lifestyle to a lower income. Additional financial problems are unlikely. As discussed above, relying on bankruptcy does not constitute a good-faith effort to repay overdue creditors or otherwise resolve debts. However, Applicant exhausted all other resources before resorting to this legal avenue. He attempted to pay his debts and accepted a menial job before he finally accepted bankruptcy as a means to start over. If the debts are discharged, the risk of him having to engage in illegal acts to generate funds and his potential vulnerability to financial inducements are greatly reduced or eliminated. Applicant's finances are not perfect. But the issue is not whether Applicant has unpaid debts; the issue is whether his debts make him an unacceptable risk. I find they do not.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has mitigated the Financial Considerations and Personal Conduct trustworthiness concerns.

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-1.e: For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraphs 2.a-2.b: For Applicant

Conclusion

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

Edward W. Loughran
Administrative Judge