



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



In the matter of:)	
)	
-----)	ADP Case No. 08-11619
SSN: -----)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Gregg Cervi, Esquire, Department Counsel
For Applicant: *Pro Se*

September 25, 2009

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted a Questionnaire for Public Trust Position (SF-85P), dated March 28, 2007. On May 5, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns regarding Applicant arising under Guideline F (Financial Considerations). 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 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.

On June 1, 2009, Applicant answered the SOR. He requested a hearing before an Administrative Judge. DOHA received the request and assigned the case to me on July 2, 2009. Applicant and Department Counsel agreed to an August 25, 2009, hearing date. On July 27, 2009, a Notice of Hearing was issued scheduling the hearing for that date. The hearing was convened as scheduled. Department Counsel submitted four

exhibits (GE) 1-4, without objection. Applicant introduced five exhibits at the hearing, marked (AE) A-E, without objection. He testified on his own behalf. I held the record open until August 27, 2009, for additional documents. Applicant submitted a packet which was marked AE F and admitted into the record without objection. The transcript (Tr.) was received on September 1, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for a public trust position is granted.

Findings of Fact

Applicant is a 59-year-old man working for a defense contractor. He graduated from high school, and he enlisted in the U.S. Army after his second year of college. Applicant served on active duty from 1970 until 1973. He was unemployed for several months after his active duty. He served in the U.S. Army National Guard (active reserve) from November 1974 until June 2000. In 1990, Applicant received a commission (Tr. 53). He retired from the U.S. Army in 2000 after 30 years of service. He held a top secret clearance in the Army without any security violations (Tr. 83).

He is married and has three adult children from two previous marriages. Applicant had a difficult transition from military to civilian work. While he was in the military, Applicant had excellent credit. He did not work for several months, which impacted his finances. He opened his own business in 2000 (AE) E. He had business expenses and marketing costs that he paid for by using a credit card. He had no real income from the business in 2000 or 2001 (Tr. 32). His social security account statement confirms this assertion. The business failed in 2003 (AE) E. Applicant lost a great deal of money. His earnings in 2003 were \$856. Applicant worked as a sales representative when the business failed. He worked on commission and did not receive very much money. The paychecks would fluctuate. Applicant had part-time work in 2004-2005. He has worked for his current employer since September 2005, earning less than \$30,000 a year (Tr. 66).

Applicant's mother died in 2006 (Tr. 68). The family home, valued at approximately \$500,000, is for sale (AE) C. Applicant's share of the inheritance from the home will be approximately \$67,000 (Tr. 72). The house was under contract in 2008, but the sale did not go through (AE) D. Given the current economic climate this is understandable. The home will sell and Applicant plans to use the money to finish paying his delinquent debts. He presented credibly on this issue and had documentation from his lawyer concerning the property.

Applicant has paid as many small debts as possible since 2005 when he became employed on a full time basis (Tr. 77). He contacted other creditors and they would not cooperate with him on settlements. His recent credit report notes several accounts that are "paid as agreed". He did not want to file for bankruptcy as a solution.

At issue are the following debts totaling approximately \$31,000, as noted in the May 5, 2009 SOR allegations ¶¶ 1.a through 1.e.

1.a – **VEHICLE** (\$23,009) – UNPAID – Applicant admits this account represents a voluntary repossession that occurred in 2004 because he could no longer maintain the monthly payment. He contacted the dealership and learned the balance is now \$17,000. His intent is to settle this account as soon as he is able (Tr. 20). He believes he will make a settlement offer and liquidate the debt for less than \$17,000.

1.b – **Credit Card** (\$5,747) – SETTLED – Applicant denied this account because he settled it for \$2,269. He has been making monthly payments. He will make his last payment of \$383 in August 2009 (AE) B).

1.c – **Credit Card** (\$2,006) – UNPAID – Applicant admits this allegation. This is a account that was opened in 2002. Applicant used this account when he was self-employed (Tr. 58).

1.d – **Credit Debt** (\$5,061) – UNPAID – Applicant admitted this allegation.

1.e. – **DEBT** (\$6,940) SETTLED.-- Applicant denied this account because he has been in repayment status for 18 months (AE) A. He made an initial payment of \$2,500. His monthly payments are \$301.78. He defaulted in 2000 due to his unemployment. His balance is approximately \$5,432 (Tr. 41).

Applicant's net monthly income from his employment is approximately \$1,634. His veteran's disability pension is \$1,429 a month. After expenses and debt repayment, Applicant has approximately \$356 net remainder. His wife is currently employed. He will receive a military pension next year at the age of 60 (Tr. 38). He has a 401(k) worth approximately \$7,000. He is current on his monthly bills.

Applicant works within his church community. He accepts positions of leadership and is creative. He is a proven asset in the community. Applicant is a very responsible member of the church. He exemplifies a man of integrity and character (AE) G. Applicant serves on the church finance team. He is generous with his time and mentors disadvantaged church members. His deacon recommends him highly (AE) G.

Applicant is rated as an exceptional employee. He is articulate and very thorough in his work. He is a problem solver and a team player. He is a loyal associate who is very trustworthy (AE) F. Applicant is extremely knowledgeable and well versed on policy and procedure.

Applicant's supervisor describes him as meticulous, professional, and committed to the mission. He received an award for his outstanding contribution to the company in 2009. His performance consistently exceeds expectations. Applicant received recognition as a team leader for his leadership skills in 2007, 2008 and 2009 (AE) F.

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 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.

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 over a period of time after his retirement from the military. He admitted the delinquent accounts alleged in the SOR. The evidence is sufficient to raise these disqualifying conditions.

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying conditions 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.[@] Most of Applicant’s debts became delinquent around the time of his 2001 transition to the civilian world. He had no real income in 2001 or 2002. His business failed in 2003. He no longer has the business and has no intent to have another one. While he has some lingering debt, his efforts to repay and his current status on monthly bills does not cast doubt on his reliability, trustworthiness, or judgment. Consequently, this mitigating condition applies.

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.[@] Inasmuch as the majority of debts at issue became delinquent during Applicant’s transition from military life to civilian or shortly thereafter, this mitigating condition applies and is a factor for consideration. Applicant’s business failed in 2003. He paid the bills that he could showing a good-faith effort to honor his obligations. He has a track record of paying his bills, albeit at a slower pace than he would like. He has not shirked his responsibility. Given his low income, he has acted reasonably in paying the accounts that he could

manage. His family home will sell and his demeanor and presentation were credible concerning this issue.

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 has paid many small bills since 2005, when he started to earn a steady, but low income. He contacted creditors and tried to negotiate settlements. He is paying on two of the debts listed in the SOR. One is now paid. He provided documentation at the hearing to substantiate his claims. He has paid almost 40% of his delinquent debt. Therefore, AG & 20(d), the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts applies.

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.

The evidence in support of granting a position of public trust to applicant under the whole person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is an honorable man who served his country for 30 years. He had a top secret clearance during his military career without incident. He is an excellent employee who has garnered many commendations. He accepts responsibility for his financial situation. His transition from military to civilian life was difficult. He experienced low paying jobs and a failed business venture. He did not ignore his debts. Most significantly, he has taken affirmative action to pay or resolve most of the delinquent debts that had initially raised concerns. His plan to use the proceeds from his family home was delayed due to the economic downturn. Of course, the issue is not simply whether all his debts are paid—it is whether his financial circumstances raise concerns about his fitness to hold a public

trust position. While some debts remain unpaid, they are insufficient to raise concern about a trustworthiness determination.

Overall, the record evidence does not leave me with questions or doubts with regard to Applicant's financial condition. As noted above, 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." Consequently, I conclude Applicant met his burden and mitigated the trustworthiness concerns arising from his finances. 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

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.

NOREEN A LYNCH
Administrative Judge