



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



In the matter of: )  
 )  
----- ) ADP Case No. 08-11666  
SSN: ----- )  
 )  
Applicant for Public Trust Position )

**Appearances**

For Government: Melvin Howry, Esquire, Department Counsel  
For Applicant: *Pro se*

May 28, 2010

**Decision**

WESLEY, Roger C., Administrative Judge:

**Statement of Case**

On October 9, 2009, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that eligibility for occupying an ADP I/II/III position is clearly consistent with the national interest, and recommended referral to an administrative judge to determine whether a trustworthiness determination should be granted, continued, denied or revoked.

On November 19, 2004, the Undersecretary of defense (Intelligence) issued a Memorandum signed by the Deputy Undersecretary of Defense (Counterintelligence and Security), authorizing DOHA to provide due process in contractor cases for ADP, ADP-II and ADP-III positions, exclusively under the provisions of DoD Directive 5220.6. This case is adjudicated under the Guidelines set forth in that Directive, as it was sent to the Applicant.

Applicant responded to the SOR on November 24, 2009, and requested a hearing. The case was assigned to me on March 2, 2010, and was scheduled for hearing on April 1, 2010. A hearing was held as scheduled, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's eligibility for occupying a public trust position. At hearing, the Government's case consisted of nine exhibits, which were admitted as exhibits 1 through 9. Applicant relied on two witnesses (including himself) and five exhibits, which were admitted as exhibits A through E. The transcript (Tr.) was received on April 8, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility to occupy a public trust position is granted.

### **Procedural Rulings and Evidentiary Issues**

Before the close of the hearing, Applicant requested leave to supplement the record with documentation of his permanent loan approval regarding his residence, his assumed mortgage obligations covered in subparagraphs 1.m and 1.o of the SOR, and the judgment covered in subparagraph 1.a of the SOR. For good cause shown, Applicant was granted 14 days to supplement the record. The Government was granted two days to respond. Within the time permitted, Applicant supplemented the record with copies of his judgment covered in subparagraph 1.a, first and second mortgage approvals covered by subparagraphs 1.m and 1.o, and furnished a payment schedule from the first trust holder covered in subparagraph 1.i. Applicant's post-hearing exhibits were admitted as exhibits F through L and considered.

### **Summary of Pleadings**

Under Guideline F, Applicant is alleged to have (a) accumulated 13 debts exceeding \$154,000 and (b) had a personal judgment taken against him December 2006 in the amount of \$2,167. Under Guideline E, Applicant is alleged to have falsified his public trust application (SF-85P), executed in July 2007 by denying any adverse judgment taken against him.

In his answer to the SOR, Applicant admitted each of the listed debts without any explanations. He denied any intentional falsification of his application for a public trust position (SF-85P) and attributed his omission to a misunderstanding of the nature of the judgment covered by subparagraph 1.a.

### **Findings of Fact**

Applicant is a 47-year-old contract bid specialist for a defense contractor who seeks a trustworthiness determination. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Applicant married in June 2005. He has four children, ages 20, 16, 9, and 4, three of whom reside with him. See Ex. 1; Tr. 53. All but his last child are from other marriages of his wife and himself. Tr. 53, 56-57.

### **Applicant's finances**

Applicant and his wife purchased their first home in January 2005 and financed their purchase with a \$137,000 first mortgage with creditor 1.n. See Exs. 6 and 7. In April 2006, they purchased a second home and financed this purchase with a \$363,985 first mortgage on the property from creditor 1.m. See Exs. 6 and 7; Tr. 84. Sometime in the summer of 2006, they signed a rental agreement with a single mother with four children to lease their first home for \$1,167 a month. See Exs. F and H; Tr. 59. Before the prospective renter could move in, Applicant and his wife changed their mind and told the renter not to move into their property. The renter defied the instruction and moved into the home. Exs. F and G. Applicant and his wife followed with a 30-day notice to quit the premises. Court records document that the renter vacated the premises.

In March 2008, Applicant and his wife obtained a home equity loan on their second home from creditor 1.m in the amount of \$91,000. See Exs. 5, 6, and 7; Tr. 100-01. They secured the loan with a second trust deed. Tr. 101.

At the time they purchased their second home, Applicant was making about \$80,000 a year from his construction job. His wife earned \$40,000 a year from her work with a non-profit organization. Tr. 58, 60-61.

Applicant and his wife encountered financial difficulties in 2006 and 2007 after both lost their jobs. See Ex. C; Tr. 57-61. Applicant's loss of work was due to a weakening economy in his community. Tr. 106. His wife contracted a West Nile virus in the summer of 2006 that debilitated her and forced her to take indefinite leave from her job. See ex. B ; Tr. 51-52. With their limited income from his wife's disability income and his own part-time jobs, they were unable to keep paying their bills and defaulted on most of them. Tr. 47.

Realizing they could not keep up with their debts, Applicant and his wife explored petitioning for bankruptcy in July 2007. See Ex. A; Tr. 62, 96-97. Records show that creditor 1.n assigned its \$364,000 first mortgage to creditor 1.o in March 2007. See Ex. 9; Tr. 85. However, creditor 1.n retained its second mortgage on Applicant's property. Ex. 9. By August 2007, Applicant and his wife had fallen behind on their creditor 1.o first mortgage and faced potential foreclosure. See Ex. K.

When Applicant and his wife could not address their mortgage delinquency with creditor 1.o, the latter initiated non-judicial foreclosure proceedings against the borrowers in February 2008 and completed the foreclosure several months later. See Exs. 9 and A; Tr. 84. They continued to pay on their rental property for a number of months before falling behind in their payments to creditor 1.n as well.

In December 2009, Applicant and his wife petitioned for Chapter 7 bankruptcy relief. Records document their receiving the required financial counseling before filing their petition. Ex. A. In their joint petition, they scheduled \$191,687 in secured claims and \$98,588 in unsecured debts. See Ex. A. Petitioners included the charged off second mortgage of creditor 1.m in their unsecured schedule, which they reported as a deficiency on their foreclosed second home. See ex. A; Tr. 87-89. Even though creditor 1.m had previously charged off this debt following creditor 1.o's foreclosure of its first mortgage interest, it retained a potential deficiency claim for its sold-out junior lien.

In their Chapter 7 unsecured claims schedule, Applicant and his wife also included a judgment claim of creditor 1.a in the amount of \$2,167. See ex. A; Tr. 72. The judgment is linked to the rental dispute Applicant and his wife had with their tenant of their first home. Applicant characterizes the claim as a small claims judgment in the claimant's favor without any mention of a set-off.

Applicant and his wife document their Chapter 7 discharge in March 2010. Ex. A. Except for any potential deficiency claims from creditor 1.o, all of the debts listed in the SOR were scheduled in Applicant's Chapter 7 petition. As a caution against any deficiency claims that either creditor 1.m or other medical creditors who were not scheduled in their initial Chapter 7 petition might wish to pursue (Tr. 63-72), Applicant and his wife filed an amended bankruptcy petition on the date of their discharge. Virtually all of these medical claims were included in Applicant's initial bankruptcy petition and were discharged. See Ex. A; Tr. 67-79.

After the renter vacated their first home, Applicant and his wife sued in small claims court for retention of the tenant's \$1,000 security deposit, a month's rent, and additional cleaning costs. See Exs. 3, F, and H; Tr. 59. The renter, in turn, counterclaimed against Applicant and his wife for damages associated with repairs she made to the property during her short tenure. Exs. 3, F, and H; Tr. 117.

In its initial judgment, the court hearing the respective claims of the parties ruled that the renter owed Applicant and his wife the \$1,000 rental deposit, the first month's rent of \$1,167, and cleaning costs of \$747, for a total award of \$2,914. In turn, the court awarded the renter \$2,167 on her counterclaim. This initial judgment allocation made Applicant and his wife net judgment holders in the amount of \$747. See Exs. F through I.

At Applicant's request, the court hearing his rental dispute reconsidered its December 2006 judgment and entered an amended judgment in April 2007. See Exs. H and I. In its amended judgment, the court substituted respective off-setting judgments and deleted the net payment language in the initial December 2006 judgment. See Exs. F through I. The net effect of the court's revision leaves the final result unchanged. Off-setting judgments were entered that left Applicant and his wife with a net \$747 award entitlement from the renter.

Between them, Applicant and his wife earn collectively about \$86,000 a year. Ex. A; Tr. 109. They estimate they have a \$793 monthly remainder that can vary some from month to month. Tr. 113. With their current income, they have been able to maintain possession of their second home.

Creditor 1.n never tried to foreclose on their second home, and Applicant and his wife continue to negotiate a remodeling agreement that would, if agreed to by the mortgage holder, reduce their monthly mortgage payments. See Ex. L; Tr. 88-89. Applicant is confident that he and his wife will be able to renegotiate their mortgage terms to meet their budget needs. Tr. 90-92. He is encouraged, too, by his obtaining his contractor's license in March 2010 and is currently enrolled in the contractor's state license service. See Ex. C. With his contractor's license, he hopes to attract contracting projects that will enhance his income.

### **Applicant's SF-85P omissions**

Asked to complete an SF-85P application for a public trust position in July 2007, Applicant failed to list his creditor 1.a judgment when responding to question 19. Applicant attributed his omission to confusion over whether he was required to list a judgment that was reported in his bankruptcy petition and was subject to a net setoff in his favor. Tr. 118-31. Applicant assures that he did not intend to omit any outstanding judgment from his questionnaire. Tr. 120. He admitted to omitting his renter's judgment on her cross-claim in the belief that his judgment created a net collectible judgment in his favor.

When first interviewed by an investigator from the Office of Personnel Management (OPM) in August 2008, Applicant explained the rent-related judgments and the circumstances surrounding them to the investigator without any prompting. See Ex. 3; Tr. 120-31. There is nothing in the OPM summary to indicate that Applicant was shown copies of the judgments before he volunteered information about them.

Applicant's explanations for his judgment omission are entirely plausible and corroborated by the documented off-setting judgments. It was never his intent to falsify his application or acknowledge any kind of deliberate falsification of his SF-85P when responding to the SOR. Applicant's explanations are credible and are accepted.

### **Endorsements**

Applicant is well-regarded by his supervisors and coworkers. His direct supervisor for the past 13 months described Applicant as a "hard-working, dedicated, loyal, and experienced" construction professional. See ex. E. He credited Applicant with being reliable and trustworthy and an outstanding asset to his employer.

Applicant's assistant facility manager described Applicant as a highly motivated and valuable member of their staff and a very reliable resource. See Ex. E. Applicant is

praised as well by members of the Defense Department who work with him and his coworkers.

## **Policies**

The AGs list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a trustworthiness concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a determination of eligibility to hold a public trust position should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

## **Financial Considerations**

*The Concern:* 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 classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts. AG ¶ 18

## **Personal Conduct**

*The Concern:* Conduct involving questionable judgment, untrustworthiness, unreliability, 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 classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. AG ¶ 15.

## **Burden of Proof**

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's eligibility to hold a public trust position maybe made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility to hold a public trust position depends, in large part, on the relevance and materiality of that evidence. *See Kungys v. United States*, 485 U.S. 759, 792-800 (1988). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to hold or maintain a public trust position. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused sensitive information before it can deny or revoke an applicant's eligibility to hold a public trust position. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard sensitive information entrusted to him. Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her trustworthiness through evidence of refutation, extenuation, or mitigation.

## **Analysis**

Applicant is a conscientious and well-regarded contract bid specialist for a defense contractor who accumulated numerous debts during periods of his unemployment and his wife's medically-related layoffs in the 2007 time frame. With the limited resources available to him and his family, he encountered considerable difficulty in keeping up with his accumulated debts. Applicant has since petitioned for Chapter 7 bankruptcy, received his discharge, and is presently awaiting court-approval of his amendment. Applicant's finances and his omission of a small judgment (subject to offset) in his completed SF-85P raise initial security concerns.

## **Applicant's finances**

Trustworthiness concerns are raised under the financial considerations guideline of the Adjudicative Guidelines where the individual applicant is so financially overextended that he or she is at risk of having to engage in illegal acts to generate funds. Applicant's accumulation of delinquent debts, which heretofore he has not been in a position to address, warrant the application of two of the disqualifying conditions (DC) of the Adjudicative Guidelines for financial considerations: DC ¶ 19(a), "inability or unwillingness to satisfy debts," and DC ¶ 19(c) "a history of not meeting financial obligations."

Extenuating circumstances are associated with Applicant's debts covered in his discharged 2010 bankruptcy. Applicant and his wife both experienced prolonged job losses and could not keep up with their mortgages and personal debts. MC ¶ 20(b) of the financial considerations guideline, "the conditions that resulted in the behavior 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, applies to Applicant's situation.

Because of the limited income available to Applicant and his wife following their loss of steady employment, they could not find any way to address their individual debts and petitioned for Chapter 7 bankruptcy relief. All of Applicant's listed debts (including the off-set judgment that ensued from his dispute with his renter) were scheduled and discharged. Applicant has no known outstanding debts at this time.

Based on Applicant's shown extenuating circumstances and demonstrated good-faith efforts to resolve his debts through preliminary financial counseling and Chapter 7 bankruptcy relief, two additional mitigating conditions under the financial considerations guideline are applicable to Applicant's situation: MC ¶ 20(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," and MC ¶ 20(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."

While Applicant is credited with making initial efforts to address his debts before electing to file for Chapter 7 bankruptcy relief, his efforts are not enough to warrant the application of MC ¶ 20(d) of the guideline. The Appeal Board has never equated bankruptcy discharge with good-faith efforts to repay creditors, and has never precluded considerations of negative trust considerations from an applicant's overall financial history just because the applicant has exercised his right to seek a discharge of debts in bankruptcy. See ISCR Case No. 01-27082 at 3 (App. Bd. Aug. 5, 2003).

Holding a favorable trustworthiness determination involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor. Financial stability in a person cleared to access information covered by privacy



rights is required precisely to inspire trust and confidence in the holder of the trustworthiness determination. Applicant meets these high fiduciary requirements.

Both the applicable mitigating conditions of the financial guideline and whole-person assessment of Applicant's financial problems and special circumstances as a struggling provider who experienced lengthy periods of unemployment conduce to dispel concerns about his reliability and trustworthiness. Taking into account all of the extenuating facts and circumstances surrounding Applicant's debt accumulations, the limited resources he has had to address them with, and the counseling and professional bankruptcy services he has enlisted to address his debts, he mitigates trustworthiness concerns related to his debts. Favorable conclusions warrant with respect to the allegations covered by the financial considerations guideline.

### **Personal Conduct issues associated with Appellant's SF-85P**

Security concerns over Applicant's judgment, reliability and trustworthiness are also raised initially under the personal conduct guideline, as the result of his omission of his renter's judgment on her cross-claim in December 2006. Applicant attributed his omission to confusion over the status of the judgment. Applicant's explanations are well corroborated by the documented off-setting judgments he provided. Once his former tenant's judgment on her cross-claim is off-set by Applicant's affirmative judgment for his security deposit, rent, and clean-up charges, Applicant retains a net enforceable judgment of \$747. Under this set of circumstances, Applicant's claims of having no known enforceable judgment against him are plausible ones.

Based on Applicant's accepted explanations the judgment at issue, MC ¶ 17(f), "the information was unsubstantiated or from a source of questionable reliability," is fully applicable to Applicant's situation. Applicant's omission of the renter's judgment on her cross-claim is absorbed by Applicant's own judgment against his renter and deprives his omission of any material significance.

Overall, Applicant's omission explanations are persuasive enough to warrant conclusions the falsification allegations relative to his SF-85P omission of his neutralized renter's judgment on her cross-claim are unsubstantiated. Considering all of the evidence produced in this record, favorable conclusions warrant with respect to the Guideline E allegations that Applicant knowingly and wilfully omitted a judgment taken by his renter in the SF-85P he executed in July 2007.

In reaching my decision, I have considered the evidence as a whole, including each of the E2(a) factors enumerated in the Adjudicative Guidelines of the Directive.

### **Formal Findings**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE F: (FINANCIAL CONSIDERATIONS): FOR APPLICANT

Sub-paras. 1.a through 1.o: FOR APPLICANT

GUIDELINE E (PERSONAL CONDUCT): FOR APPLICANT

Sub-para. 2.a: FOR APPLICANT

### **Conclusions**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's eligibility for a public trust position. Eligibility for an ADP I/II/III position is granted.

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Roger C. Wesley  
Administrative Judge