



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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-----) ADP Case No. 09-07749
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)
Applicant for Public Trust Position)

Appearances

For Government: Pamela C. Benson, Esquire, Department Counsel
For Applicant: *Pro se*

August 31, 2011

Decision

HOWE, Philip S., Administrative Judge:

Applicant submitted his Questionnaires for Public Trust Position (SF 85P), on January 12, 2009. On June 24, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) for Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a determination of trustworthiness, suitability, and eligibility for the Applicant to hold a Sensitive Systems Position (ADP-I/II/III). 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 Jan. 1987, as amended (Regulation), and the adjudicative guidelines (AG) effective after September 1, 2006.

Applicant acknowledged receipt of the SOR on June 28, 2010. He answered the SOR in writing on August 13, 2010. He did not request a hearing before an

Administrative Judge. DOHA converted the case to a hearing case on September 2, 2010. Department Counsel was prepared to proceed on November 4, 2010, and I received the case assignment on November 15, 2010.

DOHA issued a notice of hearing on November 30, 2010, setting a hearing for December 13, 2010. That hearing was cancelled when a blizzard intervened and prevented travel by the parties. A second notice of hearing was sent on January 27, 2011, and I convened the hearing as scheduled on February 23, 2011.

The government offered Exhibits (Ex.) 1 through 6, which were received without objection. Applicant testified and submitted Exhibits A through LL, with objections to several exhibits. I reserved ruling on those exhibits pending the receipt of all additional exhibits from Applicant. (Tr. 73)DOHA received the transcript of the hearing (Tr.) on March 8, 2011. I granted Applicant's request to keep the record open until March 16, 2011, to submit additional matters. On April 26, 2011, he submitted Exhibits MM to AAA, without objection. I overruled the objections to any of the original exhibits and admitted them into the record. The record closed on April 27, 2011. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to sensitive information is granted.

Procedural and Evidentiary Rulings

Motion to Amend SOR

Department Counsel moved to amend the SOR in Paragraph 2 by changing the reference in the last line thereof to Paragraphs 1.b. and 1.n., and substituting for those references the correct citations to Paragraphs 1.a. and 1.b. (Tr. 7.) Applicant had no objection to the amendments and I granted the motion. (Tr. 8)

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a, to 1.h, 1.l to 1.r, 1.t, 1.w, 1.x, 1.z, 1.aa, and 1.dd of the SOR, with explanations. He denied the remaining factual allegations in ¶ 1, ending with ¶ 1.cc of the SOR. Applicant denied the allegations in Paragraph 2 of the SOR pertaining to personal conduct. He also provided additional information to support his request for eligibility for a public trust position.

Applicant is 46 years old, married and has four children. His children are aged 20 to 12 years old. The youngest child is adopted from Romania in 2000. Applicant has a college degree and has been employed by his current defense contractor company since January 2009 earning about \$110,000 annually. Applicant's wife worked from 2004 to 2007 earning about \$20,000 annually. She paid the family debts and managed the finances. In 2007 she quit her job to care for her aging and ill parents, in addition to maintaining the family household. (Tr. 11, 20, 21, 36, 42, 49, 80-88; Exhibit 1)

Applicant has 30 delinquent debts listed in the SOR totaling \$89,703. These debts include his first house mortgage that became delinquent in 2007, federal and state income tax deficiencies from the 2001 to 2004 tax years for which tax liens were filed against Applicant, hospital and medical debts that Applicant assumed the insurance company paid, and three credit card debts. Applicant paid seven hospital bills on December 10, 2010, with cash and obtained receipts. He has a payment agreement with the Internal Revenue Service (IRS) to allow them to seize his federal and state income tax refunds and for him to pay \$500 monthly until the remaining balance of taxes owed of \$5,299.03 is paid this year. Applicant already paid nearly \$30,000 in back taxes to the IRS. He is current on his present tax obligations. The state tax lien was released in March 2008 and he is current on those obligations. All tax reports were filed, but payments in 2001 to 2004 were deficient. Applicant renegotiated his first mortgage and will sign the documents with the bank soon. Twenty eight of the thirty debts were resolved by negotiations, payments, withdrawals by the creditor because of past payments not recorded on their records, or installment payment agreements. Applicant's Exhibit AAA is a chart setting forth each debt in the SOR and his actions regarding each. I added a column listing the specific exhibits showing the status of each debt. (Tr. 18-77, 89, 90-94; Exhibits 3-6, E to AAA)

There are two debts that Applicant has not resolved by April 15, 2011, which are the \$605 debt in Paragraph 1.i and the insurance debt for \$152 in Paragraph 1.y. Applicant disputes both debts because the first debt, a medical account, has no creditor listed whom he could contact to discuss payments and the second debt is not owed by him because he had auto insurance with another company in 2003 when this debt allegedly originated. Applicant submitted proof of that other insurance in 2003. Applicant disputed both these debts on the computer with the credit reporting agencies. (Tr. 29-31, 64; Exhibits 2-6, P, EE, LL, YY, AAA)

Applicant spent about \$120,000 in 1999 and 2000 supporting his wife's trips to Romania every three or four weeks for about a year to maintain contact with the female child they were adopting. Applicant explained that the Immigration and Naturalization Service (INS) wanted a second home study done on his family and ability to support the adoptive child. The Romanian authorities approved the adoption but required monthly contact between the child and the adoptive parents to maintain its approval of the adoption. Applicant and his wife paid these expenses while INS completed the second study. In 2000 the adoption was completed. The child is now 12 year old. This large expense coupled with Applicant changing his job in 2007 adversely affected his ability to maintain payments on all his debts, according to his testimony. (Tr. 19- 21, 42)

Applicant denied falsifying his SF-85P in answering Question 22(a) by denying he had tax liens filed against him in the past seven years, as alleged in Paragraph 2.a of the SOR. Applicant also had 23 delinquent debts incurred from 2003 to 2008 that he denied were more than 180 days delinquent in answering Question 22(b), but this alleged falsification was not listed in the SOR. Applicant stated he had not researched his credit reports for several years and relied on his wife to pay all bills and debts. Applicant claimed he did not know the tax liens were filed against him because he had

an installment payment agreement with the IRS. He also denied knowing a state tax lien was filed against him before 2008. Applicant admitted he knew he owed back taxes. (Tr. 19, 88-90)

Applicant took a financial planning course at his church. He prepared a family budget as a result of completing that course. Applicant has only one credit card. (Tr. 40, 77, 78; Exhibit D)

Applicant submitted three character statements from his co-workers and the owner of his employer. All three statements show Applicant is a professional developer who is trustworthy and reliable. (Exhibits A to C)

Applicant made a logical and credible presentation of his efforts to resolve his debts. He convincingly showed he was not knowledgeable about his delinquent debts because he relied on his wife to pay the family's financial obligations. She was distracted by her care-giving to her ill and elderly parents and her normal family obligations. Applicant stated he is now working with his wife as a team to rid the family of all debt except the mortgage by the end of 2011. Applicant was persuasive in his explanations about how he was detached from his obligations to assist in managing the family finances. He now uses a cash-only system to control the family finances. (Tr. 77, 92, 99)

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 over-arching adjudicative goal is a fair, impartial and common sense 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 *a/so* 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 30 delinquent debts totaling \$89,703 from 2001 to 2010. These debts included unpaid state and federal income taxes, medical debts for treatments rendered to family members, and three credit card debts. Applicant filed his tax returns but did not pay enough money at the filing time to satisfy the tax debt. The debts also included unpaid first mortgage payments from 2007 to 2010. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of 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 financial worries arose in 2001. He accumulated delinquent debt due to his lack of attention to his debts, paying about \$120,000 to support his wife’s efforts to adopt a child from Romania, and not coordinating with his wife on the regular progress of paying their household debts. The behavior continued until late 2010 and was regular in occurrence. The evidence does not raise this potentially mitigating condition.

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.” As noted above, the financial problems arose from his inattention to his financial responsibilities and the expenditure of a large sum of money on a foreign adoption. None of the conditions that resulted in 30 delinquent debts were beyond Applicant’s control. He did not act responsibly under the circumstances. I find this potentially mitigating condition is not 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). Similarly, AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Applicant received counseling at his church by taking a financial and debt management course. He resolved all the delinquent debts, except two small debts he is researching further, either by payment, settlement, or negotiation with his mortgage holder. Applicant earns \$110,000 annually and is financially able to pay his debts. He is financially sound and prepared for future contingencies. His debt problem is under control and being resolved. Applicant declared he and his wife intend to pay all his debts except the mortgage balance by the end of 2011. I conclude these potentially mitigating conditions apply.

Applicant has a reasonable basis to contest two delinquent debts on the SOR list. The insurance debt and the \$605 medical debt are disputed because Applicant never had insurance with the company trying to collect from him and the creditor is not disclosed in the medical debt. Applicant had medical insurance at all times and that contract should have paid any such claims. Applicant disputed these debts and is doing further research with the goal of resolving them. AG ¶ 20(e) applies.

Affluence was not raised as an issue by the SOR or the evidence at the hearing. AG ¶ 20(f) does not apply.

An applicant is not required to be debt-free or to develop a plan for paying off all debts immediately or simultaneously. All that is required is that an applicant act responsibly given his or her circumstances. An Applicant should develop a reasonable plan for repayment, accompanied by actions indicating a serious intent to effectuate his or her debt resolution plan. This Applicant has effectuated those plans and actions.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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 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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes seven conditions that could raise a security concern and may be disqualifying. One disqualifying condition applies to Applicant:

(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 did not disclose his state and federal tax liens on his SF-85P completed in January 12, 2009. Nor did he disclose his delinquent debts on his SF-85P. However, the SOR did not allege falsification on his debts in answer to Question 22(b) on the SF-85P. Only the tax lien falsification was alleged in the SOR. Responding to that allegation, Applicant explained he was paying the IRS and state the back taxes owed and never knew any liens were filed. He never received notice of the liens nor did he check at the local government office where such liens are filed. His naiveté is believable. He undertook a program to pay his tax debts and it was ongoing for some years. The state tax lien was released in March 2008 showing those taxes were being paid. Applicant should have received notice of the release, but there was no evidence from him at the hearing on that issue. Therefore, there was no deliberate falsification.

AG ¶ 17 provides seven conditions that could mitigate security concerns. None of them apply to the facts in this case because there was no deliberate falsification.

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) 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 forgot his financial responsibilities to his creditors over a nine-year period because he was spending a large sum in 1999 and 2000 to adopt a foreign-born child and changing his job in 2007, both actions caused a serious disruption to his ability to pay his debts. His wife, who managed the family finances, was distracted when she undertook to care for her ill and aging parents in 2007. Applicant did not assume the duties of paying the medical debts

and other obligations in a timely manner. In 2010 Applicant became aware of the delinquent debts when the government investigator questioned him and he then received the SOR in June 2010. Applicant is now committed to resolving his debts, as he should do as an adult with a responsible job and a good income. Applicant took the financial management course at his church to assist him in better managing his money. There is little likelihood of a repeat of such actions based on Applicant's actions since June 2010 and his statements. There is no potential for pressure, coercion, exploitation, or duress because Applicant has taken action to resolve his debts and there are records of his debts with the credit reporting agencies and creditors that would preclude anyone from using his debts as a basis for illicit pressures.

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 mitigated the trustworthiness concerns arising from his Financial Considerations and Personal Conduct. I conclude the "whole-person" concept for 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:	FOR APPLICANT
Subparagraph 1.a to 1.dd:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	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.

PHILIP S. HOWE
Administrative Judge