



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ADP Case: 10-02116
)
)
Applicant for Public Trust Position)

For Government: Paul DeLaney, Esquire, Department Counsel
For Applicant: *Pro se*

February 9, 2010

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the record evidence as a whole, eligibility for access to sensitive information is denied.

On June 24, 2009, Applicant submitted a Questionnaires for Public Trust Positions (SF 85P). On August 17, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline F (Financial Considerations). 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); and the adjudicative guidelines effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on September 8, 2010, and requested a hearing before an administrative judge. On October 12, 2010, DOHA assigned the case to me. On November 10, 2010, DOHA issued a Notice of Hearing, setting the case for

December 2, 2010. The case was heard as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 6 into evidence without objection. Applicant testified and called three witnesses. He offered five exhibits marked as Applicant Exhibits (AE) A through F that were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on December 13, 2010.

Findings of Fact

In his Answer, Applicant admitted all allegations contained in ¶¶ 1.a. through 1.n of the SOR, except the allegation listed in ¶1.f. Those admissions are incorporated herein.

Applicant is 53 years old and married. He has a 26-year-old daughter from a previous relationship, and has three children, ages 16, 17, and 18, from his marriage. He has one step-child, age 26, who has three children, ages 4, 7, and 10. His stepdaughter and her children live with him. He has a bachelor's degree in mathematics and computer science. In February 1999, he started a business that closed in March 2002. He was unemployed from May 2004 to June 2005, and January 2006 to November 2006. In between those periods of time, he was underemployed. He was employed as a consultant for a private company in another state from December 2006 until July 2007. Since July 2007, he has worked as a software engineer for a federal contractor. (GE 3 at 5; Tr. 37-38.)

In 1995, Applicant filed a Chapter 7 bankruptcy, as a result of a 1992 automobile accident in which his son was killed. (Tr. 41.) He had incurred approximately \$10,000 in medical bills, \$20,000 in damages to a commercial truck, and \$17,000 for damages to his vehicle all of which his insurance did not cover. (Tr. 42.)

In December 2009, Applicant was interviewed by a government investigator about his delinquent debts. He stated he was unable to pay many of the individual debts because of periods of unemployment, underemployment, and insufficient money. In response to a question about a mortgage foreclosure listed on his credit report, he stated that he did not believe he owed any money because his mortgage insurance should have covered the debt. He intended to pay his debts in the future and stated that his current finances were stable. (GE 3.) He later noted that in late 2007, his wife experienced a medical emergency that resulted in about \$1,500 of unanticipated bills not covered by insurance. (Tr. 39.)

In May 2010, Applicant responded to a set of Interrogatories regarding specific delinquent debts. He submitted a copy of his budget, documents from the Internal Revenue Service (IRS), and letters he sent in January 2010 to specific creditors requesting information about his accounts. (GE 3.) According to his monthly budget, his net family income is \$5,980 and expenses are \$3,580. Included in his deductions is a child support payment of about \$200 per month for an arrearages debt of \$21,000 owed to the mother of his oldest child. (Tr. 76, 78.) He also pays \$1,633 on his debts, which includes seven credit cards, two car loans, and an IRS debt of \$22,900. At the time he

submitted his budget he had about \$773 remaining at the end of the month. (GE 2 at 8.) Now, he has about \$73 remaining because rent and other expenses have increased in the past several months. (Tr. 58.)

In addition to the debts listed on the SOR, Applicant has an outstanding state tax lien of \$5,776 filed in 2004 for tax years 1999 and 2002. He has contacted the state, but has been unable to establish a payment plan he can afford. (Tr. 65-66.) In September 2010, he completed payments on a \$10,697 federal tax lien for unemployment taxes for years 1999 and 2001.¹ (AE D.)

Based on credit bureau reports (CBR) dated July 2009 and June 2010, the SOR alleged that Applicant accumulated 13 delinquent debts (SOR ¶¶ 1.b through 1.n) between 2003 and 2009 that total \$126,955. The status of each listed debt is as follows:

1. (¶ 1.b) A state tax lien for \$1,699, filed in 2009 for tax year 2007 remains unresolved. (Tr. 43.)
2. (¶ 1.c) A medical bill incurred in August 2006 for \$140 remains unresolved. (Tr. 46.)
3. (¶ 1.d) A medical bill incurred in June 2008 for \$283 remains unresolved. (GE 4; Tr. 47.)
4. (¶ 1.e) A medical bill incurred in August 2007 for \$173 remains unresolved. (GE 4; Tr. 48.)
5. (¶ 1.f) A medical bill for \$174 is paid. (AE E.)
6. (¶ 1.g) The \$8,579 balance on an automobile repossession remains unresolved. After Applicant purchased the car, he was unable to make payments because of his unemployment. He believes the balance is now \$10,979. (Tr. 51.)
7. (¶ 1.h) The \$103,089 mortgage judgment remains unresolved. Applicant asserted that he spoke to the mortgage company who told him the loan was paid. (Tr. 52.) He did not provide documentation to confirm its payment or resolution.
8. (¶ 1.i) The \$11,894 credit card debt remains unresolved. The last time he used the card was in 2003 while unemployed. (Tr. 53.)

¹Because these liens were not alleged as a trustworthiness concerns, they will not be considered for purposes of establishing a potential disqualifying condition, but may be considered in the Whole-Person Analysis.

9. (¶ 1.j) Applicant does not know the creditor for the \$329 debt. He sent the creditor a letter in January 2010, but has not received any follow-up communication. (Tr. 54.)
10. (¶ 1.k) The \$228 medical debt remains unresolved because he does not have enough money to pay it. (Tr. 55.)
11. (¶ 1.l) The \$140 medical debt remains unresolved because he does not have enough money to pay it. (*Id.*)
12. (¶ 1.m) The \$127 medical debt remains unresolved because he does not have enough money to pay it. (*Id.*)
13. (¶ 1.n) The \$100 medical debt remains unresolved because he does not have enough money to pay it. (*Id.*)

Applicant called three coworkers to testify in support of his request for a position of trust. They are aware of his financial problems. All of them consider Applicant an honest and trustworthy person. His supervisor ranked him in the “Vital 70% of performers” in his 2009 Evaluation Performance. (AE B.)

Applicant was candid about his financial situation. He acknowledged that he has made some bad decisions over the years and has encountered some unfortunate situations. He intends to “make restitution on all of [his] debt” but cannot do so now. (Tr. 78.)

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 adjudicative guidelines (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 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.”

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel and has the ultimate burden of persuasion 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 classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified 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 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.”

Analysis

Guideline F, Financial Considerations

The security 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 classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 describes two conditions that could raise a security concern and may be disqualifying in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant has a history of inability or unwillingness to satisfy debts that began in 1995 with a bankruptcy, and subsequently recurred in 2003 when delinquent debts began accumulating. The evidence is sufficient to raise these disqualifying conditions.

After the Government produced substantial evidence of those potential disqualifying conditions, the burden shifted to Applicant to produce evidence to rebut and prove mitigation. AG ¶ 20 provides conditions that could potentially mitigate the above security concerns:

- (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;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; and
- (f) the affluence resulted from a legal source of income.

AG ¶ 20(a) does not mitigate the trustworthiness concerns because Applicant has financial delinquencies that are recent, current, and involve numerous creditors. AG ¶ 20(b) fully applies to the allegation contained in SOR ¶ 1.a. In 1995 (approximately fifteen years ago), he filed a Chapter 7 bankruptcy as a result of a tragic automobile accident and as a method to legally resolve the debts that resulted. Said mitigating condition has limited application to the remaining allegations. Applicant testified that

from approximately 2003 to 2009, he accumulated delinquent debts that he was unable to pay because of periods of unemployment and underemployment up to 2007, when he obtained his current position. Those were circumstances beyond his control. However, he did not produce any evidence that he attempted to resolve or contact many of the creditors until January 2010, despite being on notice that these debts were a trustworthiness concern. Hence, he did not demonstrate that he acted responsibly while his debts were accruing. Applicant has not obtained credit counseling and the evidence does not indicate that his financial problems are under control, as required for the application of AG ¶ 20(c). Similarly, the evidence does not support the application of AG ¶ 20(d). He paid one debt, but has not made a good-faith effort to pay or resolve any of the 12 other delinquent debts, including small medical bills. There is no evidence to support the application of AG ¶ 20(e) and AG ¶ 20(f).

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). They include the following:

- (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 position of trust must include 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 facts and circumstances surrounding this case. Applicant is a mature, educated, and well-spoken man, who has a history of financial troubles, some of which he admitted are the result of poor financial decisions, including unpaid taxes. He acknowledged his responsibility to pay his debts, but cannot because he does not earn enough money. In December 2009, he learned of the government's trustworthiness concerns, and in particular a large judgment related to a foreclosure that he claimed he did not owe. In August 2010, he received the SOR that listed the \$103,000 unpaid mortgage as an allegation. Despite being on notice for a year regarding that debt, he did not produce documentation to corroborate his assertion that the matter is resolved.

While Applicant provided information that he recently paid off a \$10,000 federal lien for the tax years of 1999 and 2001, he did not present sufficient evidence of financial rehabilitation or a track record of managing his obligations that outweighs the last seven years of delinquent debts. Although his colleagues uniformly asserted that he is trustworthy, his financial record exhibits a pattern of poor judgment and lack of reliability. He should consider seeking professional advice to assist in the resolution of his numerous financial problems and the establishment of a family budget to avoid additional debts.

Overall, the record evidence creates sufficient doubt as to Applicant's eligibility and suitability for a position of trust. For all these reasons, I conclude Applicant did not mitigate the trustworthiness concerns arising under financial considerations.

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
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b through 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraphs 1.g through 1.n:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a public trust position. Eligibility for access to ADPI/II/III sensitive information is denied.

SHARI DAM
Administrative Judge