



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ADP Case No. 10-02536
)
)
Applicant for ADP Determination)

Appearances

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

May 16, 2011

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Public Trust Positions Application (Standard Form 85-P) dated September 1, 2009. (Government Exhibit 1.) On August 25, 2010, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended), and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed the 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 access to sensitive information for the Applicant and recommended referral to an Administrative Judge to determine Applicant's eligibility for a position of trust.

The Applicant responded to the SOR on September 13, 2010, and he requested a hearing before a DOHA Administrative Judge. This case was assigned to this Administrative Judge on January 4, 2011. A notice of hearing was issued on January 13, 2011, scheduling the hearing for February 16, 2011. The Government presented nine exhibits, referred to Government Exhibits 1 to 9, which were admitted without objection. The Applicant presented five exhibits, referred to as Applicant's Exhibits A

and E, which were admitted without objection. He also testified on his own behalf. The official transcript (Tr.) was received on February 25, 2011. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for a position of trust is granted.

FINDINGS OF FACT

The following Findings of Fact are based on the Applicant's Answer to the SOR, the testimony and the exhibits. The Applicant is 54 years old and married with three adult children. He is a high school graduate. He is employed by a defense contractor as a Material Handler/Packer and is seeking to obtain a favorable trustworthiness determination in connection with his employment.

The Government opposes the Applicant's request for a trustworthiness determination, on the basis of allegations set forth in the Statement of Reasons (SOR). After a complete and thorough review of the evidence in the record, and upon due consideration of the same, the following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline F - Financial Considerations) The Government alleges that the Applicant is ineligible for a trustworthiness determination because he is financially overextended and at risk to engage in illegal acts to generate funds.

The Applicant denies each of the delinquent debts set forth in the SOR under this guideline that total over \$76,000.00. (See, Applicant's Answer to SOR.) Credit Reports of the Applicant dated September 19, 2009; June 17, 2010; and December 12, 2010, collectively reflect that at one time each of the delinquent debts set forth in the SOR were owing. (Government Exhibits 6, 7 and 8.) Presently, all but one of the debts have been discharged in bankruptcy.

The Applicant has had three employers his entire life. He served honorably in the United States Marine Corps for six years from 1975 to 1981, from the age of seventeen until he was twenty-three. In 1974, he started working at a grocery store as a bagger, and over a thirty-six year period he held numerous positions of great trust and handled large amounts of money. He worked his way up to co-manager of the store and retired in 2010. He is currently working for a defense contractor. Up to this point, he had excellent credit and always demonstrated responsibility, reliability and trustworthiness.

About three years ago, due to the recession, the Applicant's household income took a drastic drop. His wife's income was reduced by 50%, his income was reduced by 15%, and the value of his residence fell 50%. He was receiving less overtime than he had been, and his wife, who was working part-time, had her hours cut in half. So instead of receiving \$900.00 weekly, he received \$550.00 a week. His wife, who had been receiving almost \$700.00 weekly, was now receiving \$350.00 weekly. (Tr. p. 43.) The Applicant tried to pay his bills, but for the most part he was paying late. The

Applicant became indebted to creditors in the following amounts: in the amount of \$6,385.00; in the amount of \$2,431.00; in the amount of \$3,446.0; in the amount of \$204.00; in the amount of \$5,490.90; in the amount of \$692.00; in the amount of \$4,392.00; in the amount of \$100.00; and in the amount of \$55,624.00 (for a second mortgage on the Applicant's house). Realizing that he needed professional help to resolve the problem, the Applicant retained an attorney. Although it was not something he wanted to do, based upon his drastically reduced income his attorney advised him that his best option was to file for bankruptcy. On June 3, 2010, the Applicant filed for Chapter 7 and listed each of his delinquent debts set forth in the SOR, except 1(i), the second mortgage on the Applicant's house. Each of the delinquent debts set forth in the SOR, except 1(i), were discharged in bankruptcy on August 2, 2010. (See Applicant's Answer to SOR and Tr. p. 48.) The Applicant also completed his debtor education course and received a Certificate of Financial Counseling. (Applicant's Exhibit D.)

The Applicant can no longer afford the house that he has lived in for the past twelve years. The mortgage loan adjusted and the payments are now too high. The Applicant tried to modify his loan, but was unsuccessful. The house is in the process of being short sold. The bank has agreed to accept the offer by the purchasers and the short sale process is well underway. (Applicant's Exhibit E.)

The Applicant understands the importance of being fiscally responsible. He has now adjusted his lifestyle to his reduced income and is living within his means. He understands that he must never overspend. He believes that he can now handle his finances in a timely fashion and without difficulties. He is working to repair his credit.

Applicant's bank statements for the period from October 20, 2010, to November 17, 2010, indicates that after paying his monthly expenses, he has a monthly balance of \$1,287.58 left at the end of the month. (Tr. p. 33 and Applicant's Exhibit B.)

Paragraph 2 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for a trustworthiness determination because he intentionally falsified material aspects of his personal background during the security clearance process.

The Applicant completed a Public Trust Position Application dated September 1, 2009. (Government Exhibit 1.) Question 22 of the application asked the Applicant, "Are you now over 180 days delinquent on any loan or financial obligation. Include loans or obligations funded or guaranteed by the Federal Government." The Applicant answered, "NO." (Government Exhibit 1.) The Applicant failed to disclose those debts set forth in the SOR listed in 1(b) through 1(i) of the SOR.

The Applicant explained that he never intended to mislead the Government when he answered this question on the application. He stated, "It was a matter of haste. I filled out the paper real quick and I - - honestly , I had a cocky attitude. And I go, I got this job and, you know, I signed it - - you know, cause like - - even when they

interviewed me, I told the boss - - they go, you know, what do you know, what do you think about - - you know, what words can you tell us? I go, anybody that hires me is lucky because I have a lot to bring to the board. And I told 'em that." The Applicant did not pay as much attention to the form as he should have and he made an error. He has learned that it can never happen again. (Tr. pp. 57-58.)

Letters of recommendation from the Applicant's current supervisor, past supervisor from his previous employer, and other professional associates attest to his strong work ethic and integrity, professionalism, reliability, diligence and honesty. The Applicant is described as a "valuable asset to the company." He is recommended for a position of trust. (Applicant's Exhibit A.)

POLICIES

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See Regulation ¶¶C3.1.2.1.1.7 and C3.1.2.1.2.2.) "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 ¶ ED3.1.15, 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 failed 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).

Enclosure 2 of the Directive sets forth adjudication policies divided into “Disqualifying Factors” and “Mitigating Factors.” The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline F (Financial Considerations)

18. 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.

Conditions that could raise a security concern:

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

Conditions that could mitigate security concerns:

20(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 circumstance;

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

Guideline E (Personal Conduct)

15. *The Concern.* 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.

Condition that could raise a security concern:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature, extent, and seriousness of the conduct;
- b. The circumstances surrounding the conduct, to include knowledgeable participation;
- c. The frequency and recency of the conduct;
- d. The individual's age and maturity at the time of the conduct;
- e. The extent to which participation is voluntary;
- f. The presence or absence of rehabilitation and other permanent behavioral changes;
- g. The motivation for the conduct;
- h. The potential for pressure, coercion, exploitation or duress; and

- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is “clearly consistent with the national interest” to grant an Applicant’s request for access to sensitive information.

The DoD Directive states, “The adjudicative process is an examination of a sufficient period of a person’s life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination.” The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, “Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned.”

CONCLUSIONS

In the defense industry, a position of trust is granted to only those civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for such access may be involved in instances of financial irresponsibility or dishonesty which demonstrates poor judgment or unreliability.

It is the Government’s responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant’s conduct and the eligibility for a trustworthiness determination. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government’s case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a favorable trustworthiness determination and access to sensitive information.

In this case the Government has met its initial burden of proving that the Applicant has been financially irresponsible (Guideline F). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his trustworthiness eligibility.

Due to the recession, and through no fault of his own, the Applicant's household income was substantially reduced. He did not have enough money to pay the bills he had previously accumulated. To resolve his debts, he hired an attorney who recommended bankruptcy. He filed bankruptcy and discharged his debts. His house that he can no longer afford, is in the process of being short sold. Although his situation is unfortunate, he has done everything humanly possible to show that he is responsible, trustworthy and reliable. At this point, he is for the most part debt free and he plans to stay that way. He is working to rebuild his credit.

There is sufficient evidence of financial rehabilitation at this time. Under Guideline F (Financial Considerations), Disqualifying Conditions 19(a) *inability or unwillingness to satisfy debts*, and 19(c) *a history of not meeting financial obligations* apply. However, Mitigating Conditions 20(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 circumstance* and, 20(d) *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts* also apply. The Applicant has indeed made a good faith effort to repay his overdue creditors or otherwise resolve his debts. Accordingly, I find for the Applicant under Guideline F (Financial Considerations).

Under Guideline E, the Applicant did not deliberately conceal material information from the Government on his application in response to questions about his delinquent debts. He was careless in answering the questions, but not deceitful. He was not trying to conceal his delinquent indebtedness, he simply did not spend sufficient time to answer the questions as carefully as he should have. He now realizes the importance associated with the application and indicates that it will never happen again. Accordingly, I find for the Applicant under Guideline E (Personal Conduct.)

I have also considered the "whole-person concept" in evaluating the Applicant's eligibility for access to classified information. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, support a whole-person assessment of good judgement, trustworthiness, reliability, candor, a willingness to comply with rules and regulations, or other characteristics indicating that the person may properly safeguard classified information.

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. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: For the Applicant.

Subpara. 1.a.: For the Applicant.

Subpara. 1.b.: For the Applicant.

Subpara. 1.c.: For the Applicant.

Subpara. 1.d.: For the Applicant.

Subpara. 1.e.: For the Applicant.

Subpara. 1.f.: For the Applicant.

Subpara. 1.g.: For the Applicant.

Subpara. 1.h.: For the Applicant.

Subpara. 1.i.: For the Applicant.

Paragraph 2: For the Applicant.

Subpara. 2.a.: For the Applicant.

DECISION

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

Darlene Lokey Anderson
Administrative Judge