



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



In the matter of:)	
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)	ADP Case No. 10-03114
)	
Applicant for Public Trust Position)	

Appearances

For Government: Pamela C. Benson, Esquire, Department Counsel
For Applicant: Scott Ashelman, Esquire

02/27/2012

Decision

HOWE, Philip S., Administrative Judge:

Applicant submitted his Questionnaires for Public Trust Position (SF 85P), on December 9, 2009. On March 1, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F (Financial Considerations) for Applicant. 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); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation), and the revised adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on March 18, 2011. He answered the SOR in writing on March 23, 2011, and requested a hearing before an Administrative Judge. DOHA received the request on April 19, 2011. Department Counsel was prepared to proceed on May 31, 2011. The case was assigned to another

administrative judge who scheduled the hearing for July 27, 2011, after a Notice of Hearing dated June 28, 2011, was issued. Applicant retained an attorney before the hearing, who requested a continuance, which was granted. The case was transferred to me on October 24, 2011,. DOHA issued the second Notice of Hearing on October 27, 2011, and I convened the hearing as scheduled on November 17, 2011. The government offered Exhibits (Ex.) 1 through 6, which were received without objection. Applicant testified and submitted Exhibits A through K. The Government objected to Exhibits J and K, but I overruled the objection and admitted those exhibits into the record (Tr. 113). DOHA received the transcript of the hearing (Tr.) on November 30, 2011. I granted Applicant's request to keep the record open until December 1, 2011, to submit additional matters. On that date, he submitted Exhibits L to O, without objection. The record closed on December 1, 2011. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to sensitive information is granted.

Findings of Fact

In his Answer to the SOR Applicant admitted the factual allegations in the SOR, with explanations. He also provided additional information to support his request for eligibility for a public trust position.

Applicant is 34 years old, married, and has a step-son. He has a college degree in physics and works for a defense contractor. Applicant worked for his first defense contractor employer from October 2000 to March 2006, earning \$56,000 annually, until he was laid-off work. He started his second job in April 2006 and worked for that defense contractor until October 2009 earning \$64,000 annually. He was again laid-off work until January 2010 when he started his present job and now earns \$75,000 annually. (Tr. 19, 36, 47-52; Exhibit 1)

Applicant purchased a home in 2005 for \$135,000. He underestimated the cost of owning a home, especially after a storm caused a tree to topple into his house, his water heater and flooring near the storm damage had to be replaced, and then he paid \$9,000 for a new geothermal heat pump. He used credit cards to pay for these purchases and repairs. His monthly mortgage payment is \$1,235.82. Applicant is the sole wage earner in his family. (Tr. 26, 27, 36, 38; Exhibits 2-6, A, B, I)

Applicant owns two cars. His car is a 2000 model which has had several expensive repairs made to it in the past four years. His wife drives another car on which they owe \$4,465. His wife's car cost \$23,000 when new. (Tr. 39, 101)

Applicant has two delinquent debts listed in the SOR. The first debt is owed to a bank on a credit card in the amount of \$34,621. The second debt is owed to a department store in his credit card in the amount of \$9,082. The total debt listed is \$43,703.

The first debt occurred after Applicant opened that account in 2006, charged \$14,000 on it, opened another bank's credit card with a lower interest rate, and then

transferred the balance from the first card to the second card. He then tried to pay the second card's balance from his income. Meanwhile, he charged another \$14,000 on the first card. Applicant opened a third credit card account from the bank that issued him the second credit card. He transferred the new balance from the first card to the third card. He attempted to pay his monthly payments on all three cards. Applicant continued to use the first card and incurred another \$34,000 in debt on it because he used it to purchase food, clothing, and other items while he tried to pay the second and third credit card balances. Meanwhile he used the department store credit card for the heat pump that cost \$9,000. Applicant made payments on that account as regularly as he could. The second and third accounts he attempted to negotiate to a settlement with the bank issuer. He succeeded in arriving at a settlement of 15% of the balance. He used all the \$14,000 from his Section 401(k) retirement account to pay the two credit cards and closed them in August 2009. Applicant also attempted to settle the first credit card account. However, the bank wanted 50% of the balance, and would have taken 30% but Applicant did not have that amount of money available after paying the other two credit cards. (Tr. 21-88, 96; Exhibits 2-6, A-O)

Applicant pays the collector for the first credit card \$100 monthly until he can save a significant amount of money with which to negotiate a settlement. He has paid this amount since August 2011. The balance owed is now \$33,921. (Tr. 21-26, 30-32; Exhibits 2-6, C-F, M)

Applicant submitted copies of the department store account bills showing that since November 2009 he has made payments on that debt. The current debt owed is \$7,485.52 as of November 2011. (Tr. 33-36, 76-78, 99; Exhibits G, H, O)

Applicant paid his state and federal income taxes, including property taxes. (Exhibits J-L, N)

Applicant consulted with a financial counselor before he made his settlement offers to his creditors. He thinks he has control of his finances at the present time. Applicant also considers that he will keep his finances in order if he remains vigilant about them. He does not have a savings account at the present time. He does not have any other credit cards, using a checking account debit card or cash for his current purchases. (Tr. 40, 84, 85, 106)

Applicant was sincere about his efforts to control his finances and expenditures. He was contrite about his past financial mistakes. Applicant was credible in his documented efforts to pay his delinquent debts.

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 (AG ¶ 2 (a)). 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 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 \$43,703 of delinquent debt as listed in the SOR and was unable to pay in total these two obligations since 2007. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

AG ¶ 20 provides six conditions that could mitigate security concerns. Two conditions might apply:

(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; and

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

Applicant has not received any current financial counseling, but did when he started his plan to resolve the second and third credit card debts. He was successful in getting a significant reduction in his debt on those two credit cards and being able to resolve them totally. His income was then directed toward the remaining original credit card debt and his department store account. His financial problems are being resolved and are under control through Applicant's regular monthly payments. Applicant earns a substantial income with which to afford these payments. AG ¶ 20(c) applies.

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

resolved two earlier significant delinquent debts, either by payment or settlement, which consumed his only savings. He makes regular payments on the remaining bank credit card which is currently delinquent. He has reduced the department store credit card account by more than \$2,000 through regular payments. I conclude this mitigating condition 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) 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's financial difficulties started in 2006 when he purchased his house and had to make significant improvements and repairs to it. His fiscal management suffered from a flaw, which was attempting to transfer balances from one credit card to another to reduce his interest costs and enable him to resolve those amounts of debt. However, Applicant became caught in a cycle of debt. He has now stopped that problem through the negotiated settlements on his accounts. Applicant learned his lesson and made changes in his financial practices. He used all his retirement savings to accomplish part of his financial reform plan. The potential for duress, coercion, exploitation, or pressure is slight based on his efforts to date. There is insignificant likelihood Applicant will engage in such dangerous behavior in the future because his experiences have educated him as to the proper course of financial conduct.

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. 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:	For Applicant
Subparagraph 1.b:	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

