



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



In the matter of:)
)
) ADP Case No. 10-03497
)
Applicant for Public Trust Position)

Appearances

For Government: William O'Neil, Esq., Department Counsel
For Applicant: *Pro se*

April 13, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant recently resolved most of the debts alleged in the SOR. Notwithstanding, he made questionable financial decisions while he still had delinquent debts and child support obligations. He should have been more diligent addressing his legal obligations and providing financial support for all his children. His behavior shows lack of judgment and an unwillingness to abide by rules and regulations, all of which raise questions about his reliability, trustworthiness, and ability to protect classified information. Eligibility to occupy an automated data processing (ADP) I/II/III position is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on February 26, 2009. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA)

were unable to make a preliminary affirmative finding¹ that it is clearly consistent with national security to grant Applicant eligibility to occupy an ADP position.

On August 25, 2010, DOHA issued Applicant a Statement of Reasons (SOR), which specified the basis for its decision. Specifically, trustworthiness concerns were raised under Guideline F (Financial Considerations) of the adjudicative guidelines (AG).²

Applicant answered the SOR on September 24, 2010, and requested a hearing before an administrative judge. The case was assigned to me on October 21, 2010, to determine whether Applicant's eligibility for an ADP position should be granted or denied. DOHA issued a notice of hearing on October 29, 2010, convening a hearing on November 17, 2010. At the hearing, the Government offered exhibits (GE) 1 through 7. Applicant testified and presented exhibits (AE) 1 through 10. AE 10 was submitted post-hearing. All exhibits from both parties were admitted without objection. DOHA received the hearing transcript (Tr.) on November 29, 2010.

Findings of Fact

Applicant admitted all the SOR factual allegations (¶¶ 1.a through 1.i), with explanations. His admissions are incorporated as findings of fact. After a thorough review of the evidence of record, including Applicant's answer to the SOR, his answers to DOHA interrogatories, and his testimony, I make the following additional findings of fact.

Applicant is a 40-year-old senior systems engineer working for a defense contractor. He attended college on and off through the years and accumulated around 40 credit hours, but he has not completed a degree. He served in the U.S. Navy from August 1988 until October 2001. He performed as an electronics technician, and he achieved the rank of petty officer second class, pay grade E-5. His service was characterized as honorable. While in the Navy, Applicant received access to classified information at the top secret level. When he left the service, he started working for government contractors and his access to classified information has continued to present. There is no information to show that he has ever compromised or caused others to compromise classified information.

Applicant married his wife in 1989, and they separated in 1992. He has two children of this marriage, ages 18 and 14. Additionally, Applicant has four more children all from different mothers, ages 22, 16, 12, and 3. According to his testimony, four of the

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised; and DoD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation).

² Adjudication of this case is controlled by the AGs implemented by the DOD on September 1, 2006.

children are the beneficiaries of the court-ordered child support alleged in SOR ¶¶ 1.f and 1.g. The three-year-old child's mother is in the process of filing for court-ordered child support.

In his February 2009 e-QIP, Applicant disclosed he was having financial difficulties. The subsequent background investigation disclosed the nine delinquent debts alleged in the SOR, totaling approximately \$49,000. Applicant's documentary evidence shows he settled the debt alleged in SOR ¶ 1.a in October 2009. Following his settlement agreement, he made intermittent monthly payments of \$100. Whenever he missed payments, he made them up later, and he is current on this account. He settled and paid the following SOR debts in September 2010: SOR ¶¶ 1.b, 1.c, 1.d, and 1.i. He established a payment arrangement for the debt alleged in SOR ¶ 1.e in September 2010. He paid SOR ¶ 1.h in June 2010.

Concerning the two delinquent court-ordered child support obligations alleged in SOR ¶¶ 1.f (\$9,000) and 1.g (\$18,000), Applicant claimed that SOR ¶ 1.g included the debt alleged in SOR ¶ 1.f. He failed, however, to present documentary evidence to support his claim. Two different states are garnishing Applicant's wages to cover his delinquent child support obligations for two children living in state A and state B is recovering for the two other children living in that state.

State A registered the order of child support in July 2009, requiring Applicant to pay \$663 monthly. This child support order was apparently filed on behalf the two children born from his marriage, ages 18 and 14. By November 2009, Applicant had arrearages totaling approximately \$11,000, presumably for financial support provided to the children by state A. In November 2009, State B informed Applicant that he had arrearages totaling approximately \$9,000, and that his two child support obligations totaled \$530 monthly. This child support obligation apparently was filed on behalf of the children ages 16 and 14. As mentioned above, both states are currently garnishing Applicant's pay to cover his child support obligations. The three-year-old child's mother is in the process of filing for court-ordered child support. Applicant testified he no longer has to provide child support for his oldest son, age 22, who is living in state C. Applicant did not remember whether he was in arrears on his 22-year-old's child support.

Applicant testified he was employed from August 2001 until March 2007, self-employed from March 2007 until August 2007, and employed from August 2007 until October 2008.³ He was fired from his job in October 2008, apparently for not doing his job, or for not following orders. Applicant denied that his job performance was ever bad. He claimed he always received the highest ratings. He blamed his termination on the contractor's economic situation, its losing the federal contract, and his being involved in an accident. He was unemployed for six months, from October 2008 until March 2009.

³ Applicant's employment chronology testimony is not consistent with the information provided in his e-QIP. In his February 2009 e-QIP he indicated he had had two periods of unemployment since August 2001. The first from June to August 2008, and the second October 2008 to the date he filed his e-QIP.

Applicant has been employed with two government contractors from March 2009 to present. With the first contractor he was making approximately \$101,000 yearly. He started working for his current employer in February 2010. His yearly salary is approximately \$113,000. Based on his testimony, he has approximately \$3,000 of monthly net remainder. He has not made any mortgage or rent payments since June 2008. Applicant testified he has approximately \$800 in his checking account and no savings. He failed to explain where he has been expending his disposable income.

Applicant attributed his financial problems to his six-month period of unemployment in 2008-2009, his failed attempt to establish an information technology consulting company, and the increased expenses resulting from the child support court orders filed against him. He averred that when he lost his job he notified his creditors of his predicament, but the debts went into collection. He again notified his creditors after he was hired in March 2009, and started to negotiate settlement agreements and to pay his debts. He averred he could not pay the debts any sooner because he had difficulty identifying the proper creditors.

In 2002, Applicant bought a home. He became delinquent on his mortgage in 2008, the loan was foreclosed, and the house was sold in 2010. He has not made any mortgage payments or paid rent, since June 2008. Notwithstanding, he is still living in the home and requested a loan modification. The bank has not acted on his loan modification request. He believes it is not likely the loan modification will go through because of his high income level. He does not know whether he will acquire any financial liability resulting from the foreclosure and sale of his property.

Applicant testified he received financial counseling through a couple of credit counseling firms. He consulted with the credit counseling firms when he was trying to avoid losing his home. Ultimately, he elected to negotiate and establish payment arrangements with his creditors by himself. Applicant had a car repossessed in the 1990s, but he testified he paid that debt. In 2003, he took a \$23,000 car loan to purchase a 2000 Acura. In 2004, he paid \$30,000 cash for a new Infinity. This car was totaled in an accident, and the insurance paid him \$26,000. He claimed he used the \$26,000 to pay some bills. He also took a vacation trip to Las Vegas, Nevada in July 2010.

Applicant expressed remorse for his financial problems, and indicated he is stressed over his situation. He admitted he made several financial mistakes such as trying to establish his own information technology consulting company and taking a signature loan (apparently for \$10,000) in October 2008, to remodel part of his home to use it for his business. Notwithstanding, he attributed his financial problems primarily to his six-month period of unemployment. Applicant testified he has learned his lesson, and does not want to be unemployed again.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The government’s authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. See *Id.* at 527.

Positions designated as ADP I/II/III are classified as “sensitive positions.” 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.” Regulation ¶ C6.1.1.1. 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, an 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 an evaluation of the whole person. An administrative judge’s controlling adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to sensitive information. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the

criteria listed therein and an applicant's security and trustworthiness suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance [or trustworthiness] determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

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."

Analysis

Guideline F, Financial Considerations

Under Guideline F, the trustworthiness concern is that 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 ¶ 18.

The SOR alleges and the evidence established that Applicant had nine delinquent debts, totaling near \$49,000. His debts became delinquent after he was fired from his job in 2008, and he was unemployed for six months. He paid five of his debts around September 2010. He negotiated or established payment plans for the other four creditors. AG ¶ 19(a): "inability or unwillingness to satisfy debts" and AG ¶ 19(c): "a history of not meeting financial obligations," apply.

AG ¶ 20 lists six conditions that could mitigate the financial considerations trustworthiness 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.

Applicant is not debt free, but he has taken significant actions to resolve his delinquent debts. He receives substantial credit for resolving seven of his SOR debts. He receives partial credit concerning his two child support payments because the states are garnishing his pay to cover his child support obligations. Furthermore, he failed to present documentary evidence establishing he has a track record of providing financial support to all his children.

Applicant's period of unemployment cannot be fully considered as a circumstance beyond his control because he was fired from his job, but his unemployment period contributed to his inability to pay his debts. His long-term separation from his wife also could be considered as a circumstance beyond his control; however, it is not clear how his separation has affected his ability to satisfy his financial obligations.

Applicant made financial mistakes in the acquisition of his debts and in his failed business venture. He made significant progress in the resolution of his debts and it appears that his financial problem is being resolved or is under control. He also received some financial counseling. AG ¶¶ 20(b), (c), and (d) apply in part, but do not fully mitigate the financial considerations concerns.

Considering Applicant's military experience, and his years working for government contractors, and his familiarity with the security clearance process, he should have been more diligent in his efforts to resolve his delinquent financial obligations, particularly in assuming responsibility for and staying current on his child support obligations. On balance, and considering the evidence as a whole, Applicant's failure to provide support for his children still cast doubt on his current reliability, trustworthiness, and judgment. He does not understand his responsibilities and what will be required of him to be eligible for an ADP position.

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):

(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.

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. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant honorably served in the Navy for approximately 14 years. He continued to serve the United States working for government contractors. He has held access to classified information at the top secret level for many years. There is no evidence of any misconduct or security violations. He paid or resolved most of the debts alleged in the SOR. These factors show responsibility and some mitigation.

Applicant made some questionable financial decisions, such as the purchase of a \$30,000 car, taking a signature loan to remodel his home in October 2008, and taking a vacation to Las Vegas in July 2010, while he still had unresolved delinquent debts and child support obligations. He should have been more diligent addressing his delinquent financial obligations. Particularly, he should have assumed responsibility for and stayed current on all his child support obligations. I do not believe Applicant is aware of what is required of him to be eligible for an ADP position. On balance, I find Applicant's favorable information insufficient to mitigate the financial considerations concerns.

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
Subparagraphs 1.a-1.e, 1.h & 1.i:	For Applicant

Subparagraphs 1.f & 1.g:

Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with national security to grant or continue Applicant's eligibility to occupy an ADP I/II/III position. Applicant's eligibility to occupy an ADP I/II/III position is denied.

JUAN J. RIVERA
Administrative Judge