



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



In the matter of:)	
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-----)	ADP Case No. 10-06257
)	
)	
Applicant for Public Trust Position)	

Appearances

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

August 9, 2011

Decision

HOWE, Philip S., Administrative Judge:

Applicant submitted his Questionnaires for Public Trust Position (SF 85P) on December 6, 2009. On December 9, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F (Financial Considerations) 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 within the Department of Defense after September 1, 2006.

On April 9, 1993, the Composite Health Care Systems Program Office (CHCSPO), the Defense Office of Hearings and Appeals (DOHA), and the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASD C3I) entered into a memorandum of agreement for DOHA to provide trustworthiness

determinations for contractor personnel employed in Information Systems Positions as defined in DoD Regulation 5200.2-R, Personnel Security Program (Regulation), dated January of 1987.

Applicant acknowledged receipt of the SOR on December 16, 2010. He answered the SOR in writing on January 6, 2011, and requested a hearing before an Administrative Judge. DOHA received the request on January 10, 2011. Department Counsel was prepared to proceed on January 26, 2011, and I received the case assignment on February 2, 2011. DOHA issued a notice of hearing on February 2, 2011, and I convened the hearing as scheduled on February 23, 2011. The government offered Exhibits (Ex.) 1 through 5, which were received without objection. Applicant testified and did not submit any exhibits. He requested until March 16, 2011, to submit two documents and I granted his request. Applicant never sent any documents. DOHA received the transcript of the hearing (Tr.) on March 6, 2011. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

Findings of Fact

In his Answer to the SOR, Applicant admitted all the factual allegations. He did not provide any additional information to support his request for eligibility for a public trust position beyond his denials.

Applicant is 39 years old. He is unmarried. Applicant works for a defense contractor in the health care business. He earns \$32,000 annually. His monthly expenses are \$1,380 and his income is \$1,400. (Tr. 11-13, 19; Exhibit 1)

Applicant has delinquent debts dating from 2006. There are 12 delinquent debts listed in the SOR totaling \$27,801.06. None of them have been repaid or are being resolved through installment payment agreements. Applicant stated he obtained credit cards about four years ago and made many purchases that he could not pay for later. Applicant claimed he rehabilitated his student loans two years ago, but they fell into default again. He also claimed he was paying \$120 monthly on his student loans after a down payment of \$300, but he never submitted any documentary proof of any payments. Applicant also admitted he had not filed state and federal income tax returns for the past five years because he knew the federal government would take any refunds to pay down his student loan balance. (Tr. 13-35; Exhibits 1-5)

Applicant was unemployed for 45 days in 2007 and for six months from July 2008 to January 2009. Applicant did not submit any documents or other evidence to show his periods of unemployment adversely affected his ability to repay his debts. (Tr. 16-18; Exhibit 2)

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 overarching 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." 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 significant delinquent debts and was unable to pay any of them during the last five years. AG ¶19(e) states “consistent spending beyond one’s means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis” may raise security concerns. Applicant has a high debt-to-income ratio and long-standing delinquent debt. Finally, AG ¶19(g) provides that a condition against clearance is, “failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of same.” This disqualifying condition applies because Applicant admitted he failed to file his income tax returns for the past five years. 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 about 2006. He accumulated delinquent debt due to his spending habits.

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.” Applicant spent money he had no possibility of repaying. The debts have remained unpaid for five years. This mitigating condition does not apply.

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 has had no financial counseling. He has not started a repayment program for any debt, so there is no good-faith effort to resolve his debts. Applicant has no legal basis to dispute his debts. There is no affluence shown by the evidence. Therefore, AG ¶19 (c) to (f) do not apply.

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 was 34 years old when he started accumulating debts he could not repay. He made a conscious decision not to file his income tax returns for the past five years because any refund would be taken to pay his student loans, thereby avoiding the repayment of that debt. His conduct of not repaying his debts is current, ongoing, and frequent. There is no rehabilitation shown. Applicant will continue his past conduct of ignoring his debts and not filing his tax returns. Because of the magnitude of the debts and Applicant’s decision not to repay them or file his tax returns, there is potential for pressure, coercion, exploitation, or duress.

Overall, the record evidence leaves me with questions or doubts as to Applicant’s eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant did not mitigate the trustworthiness concerns arising from his financial considerations. I conclude the “whole-person” concept against 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: AGAINST APPLICANT

Subparagraphs 1.a to 1.l: Against Applicant

Conclusion

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

PHILIP S. HOWE
Administrative Judge