



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



In the matter of:)
)
) ADP Case No. 12-11754
)
)
Applicant for Public Trust Position)

Appearances

For Government: Jeff Nagel, Department Counsel
For Applicant: Catie E. Young, Attorney At Law, Griffith, Young & Lass

October 20, 2016

10/20/2016

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

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 (ASDC3I) 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 submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on December 5, 2011. (Government Exhibit 1.) On June 27, 2015, the Department of Defense (DoD), issued an SOR detailing the trustworthiness concerns under Guidelines B and F regarding 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); and the adjudicative guidelines (AG), effective within the Department of Defense after September 1, 2006.

Applicant responded to the SOR on August 10, 2015, and requested an administrative hearing before a DOHA administrative judge. This case was assigned to the undersigned Administrative Judge on February 5, 2016. A notice of hearing was issued on March 22, 2016, and the hearing was scheduled for April 26, 2016. At the hearing the Government presented seven exhibits, referred to as Government Exhibits 1 through 7, which were admitted without objection. The Applicant presented sixteen exhibits, referred to as Applicant's Exhibits A through P, which were admitted without objection. Applicant also testified on his own behalf. The record remained open until close of business on May 9, 2016 to allow Applicant to submit additional documentary evidence. Applicant submitted supplementary Exhibits R through W, which were admitted without objection. The official transcript (Tr.) was received on May 5, 2016. Based upon a review of the pleadings and exhibits, eligibility for a public trust position is granted.

REQUEST FOR ADMINISTRATIVE NOTICE

Department Counsel requested that I take administrative notice of certain facts concerning the current political condition in Egypt. (Tr. p 16, and Government Exhibit 2.) Applicant had no objection. (Tr. p. 16.) The request and the attached documents were admitted into evidence and included in the record. The facts administratively noticed are set out in the Findings of Fact, below.

FINDINGS OF FACT

Applicant is 50 years old and divorced. He has a Master's degree in Mathematics. He is employed with a defense contractor as a Software Engineer and is seeking to obtain access to sensitive information in connection with this employment.

The Government opposes Applicant's request for access to sensitive information on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline B - Foreign Influence). The Government alleges in this paragraph that the Applicant is ineligible for access because he has foreign contacts that could create the potential for foreign influence, which could result in the compromise of classified information.

Applicant was born and raised in Egypt. He watched television growing up and was exposed to the American culture. He lived in a small westernized suburb in Egypt. He belonged to a sports club with lots of expatriates. He was drawn to the American lifestyle, culture, and freedoms. In 1991, he came to the United States to attend college. Financial aid was not available to him, and so he returned to Egypt. He finished his undergraduate degree in Egypt, and then permanently relocated to the United States in 1997. He attended graduate school in the United States. In 2004, he

became a naturalized United States citizen, and received a United States passport. (Applicant's Exhibit A.) He renounced his Egyptian citizenship in 2007. (Tr. p. 47.)

Applicant's mother and one brother are citizens and residents of Egypt. His mother has always been a housewife, and has no affiliation with the Egyptian government. In 2014, she came to visit the Applicant in the United States, and is supportive of his United States citizenship. (Tr. p. 52.) His brother is a banker, who is married with children. Applicant has minimal contact with him. Applicant has another brother who is a citizen of Egypt, but who resides in Kuwait. He has lived there since 1987, and is employed by the Kuwaiti Department of Education. Applicant may talk to this brother once a year. This brother is also married with children. Applicant's most recent physical contact with this brother was in 2005. Applicant's father passed away in 2007. Applicant has sent money to his mother in the past, but she is financially supported by her husband's pension. Applicant speaks with his mother by telephone about every two months, or once a month if she is sick. (Tr. p. 51.) They discuss her health, and trivial things such as that. His family in Egypt has no knowledge of his work or even what a public trust position is. (Tr. p. 52.)

Applicant states that since permanently moving to the United States in 1997, he has visited Egypt three or four times. He states that he does not feel safe in Egypt. He notes that just crossing the street is unsafe. He also gets sick with traveler's diarrhea every time he travels there, as the water is contaminated. (Tr. p. 50.) He has not travelled to Egypt since his father passed away in 2008. He has no plans to return to Egypt, unless he is told that his mother is dying, and that would be his last time. He does not feel a tie or attachment to his family in Egypt. He notes that Egypt is a totally different culture and his family in Egypt do not understand the American culture.

Applicant credibly testified that he has established deep, longstanding roots in the United States, and considers himself to be an American. He has friends and bank accounts in the United States. (Tr. pp. 58-59 and Applicant's Exhibit K.) He also has a step-daughter here that he still communicates with. (Tr. p. 60.) He has created a life here. He states that he is loyal to the United States, and that he has no loyalty to Egypt. (Tr. p. 61.)

Applicant testified that he also understands the reporting requirements when holding a position of trust. In the event that he is targeted or approached by any foreign entity, he will report that interaction to his company security officer. Likewise, he knows that any foreign travel of any sort must be reported to his company. (Tr. p. 51.)

Paragraph 2 (Guideline F - Financial Considerations) The Government alleges that Applicant is ineligible for a public trust position because he is financially overextended and at risk of having to engage in illegal acts to generate funds.

There are fourteen delinquent debts, totaling in excess of \$12,000, set forth in the SOR. Applicant's credit reports dated December 23, 2011; December 2, 2014; October 16, 2015; and April 23, 2016, which include information from all three credit

reporting agencies, reflect that Applicant was at one time indebted to each of the creditors listed in the SOR. (Government Exhibits 4, 5, 6, and 7.)

Applicant explained that he was married in 1998, and divorced in 2009. During the course of his marriage he incurred substantial debt. He paid for most things and his wife did not contribute. (Tr. p. 62.) She took early deductions out of her 401(k) and was penalized. When he divorced, he accepted the responsibility of paying most of the debt from the marriage, including the majority of the credit cards and tax debt. To further complicate matters, Applicant married another woman in late 2010. She insisted in filing taxes separately, and Applicant was hit with substantial tax liability. He discovered that this woman had lied to him, and he annulled the marriage in April 2011. (Applicant's Exhibit J.)

Applicant filed for Chapter 13 bankruptcy in December 8, 2008, but it was dismissed when he missed three mandatory payments. (Applicant's Exhibit B.) In January 2013, Applicant re-filed for Chapter 13 bankruptcy. His plan was approved by the court, and he has been following the payment plan since February 1, 2013. He pays \$300 per pay period according to this payment plan. This time, each payment is automatically deducted from his payroll. Applicant has also taken a credit counseling course, required as part of the bankruptcy. (Applicant's Exhibit G.) He is projected to complete the bankruptcy payment plan sometime in 2018. (Applicant's Exhibits C, D, E and F.)

All of the debts listed in the SOR, except allegations 2.(d), and 2.(h) have been included in the Chapter 13 bankruptcy. Allegations 2.e. through 2.p. are listed in the Chapter 13 bankruptcy.

2.c., Applicant issued a check in the amount of \$894, which was returned for insufficient funds and was placed for collection in 2011. Applicant has contacted the creditor and paid off the debt. (Applicant's Exhibit H.)

2.d. A delinquent medical debt owed to a creditor in the amount of approximately \$374. Applicant has contacted the creditor and paid off the debt. (Tr. p. 84 and Applicant's Exhibit I.)

2.e. A delinquent debt owed to a creditor on an account that was charged off in the approximate amount of \$241. This debt was included in the Chapter 13 bankruptcy filed in 2013.

2.f. A delinquent state tax lien entered against him in 2010 in the approximate amount of \$1,744. This debt was included in the Chapter 13 bankruptcy filed in 2013.

2.g. A delinquent debt owed to a creditor that was placed for collection in the approximate amount of \$303. This debt was included in the Chapter 13 bankruptcy filed in 2013.

2.h. A delinquent debt owed to a creditor that was placed for collection in the approximate amount of \$285. Applicant has set up a payment plan with the creditor that he is following to resolve the debt.

2.i. A delinquent debt owed to a creditor that was placed for collection in the approximate amount of \$611. This debt was included in the Chapter 13 bankruptcy filed in 2013.

2.j. A delinquent debt owed to a creditor that was placed for collection in the approximate amount of \$1,031. This debt was included in the Chapter 13 bankruptcy filed in 2013.

2.k. A delinquent debt owed to a creditor that was placed for collection in the approximate amount of \$207. This debt was included in the Chapter 13 bankruptcy filed in 2013.

2.l. A delinquent debt owed to a creditor that was placed for collection in the approximate amount of \$457. This debt was included in the Chapter 13 bankruptcy filed in 2013.

2.m. A delinquent debt owed to a creditor that was placed for collection in the approximate amount of \$547. This debt was included in the Chapter 13 bankruptcy filed in 2013.

2.n. A delinquent debt owed to a creditor in that was placed for collection in the approximate amount of \$75. This debt was included in the Chapter 13 bankruptcy filed in 2013.

2.o. A delinquent debt owed to a landlord in the approximate amount of \$900 for unpaid rent. This debt was included in the Chapter 13 bankruptcy filed in 2013.

2.p. Delinquent federal taxes in the amount of approximately \$6,000 for tax years 2006 and 2008. This debt was included in the Chapter 13 bankruptcy filed in 2013.

In January 2016, Applicant underwent an invasive second surgery for sleep apnea, a condition he has been suffering from for sometime. (Applicant's Exhibit L.) The standard treatment did not work for him. He was unable to perform at work, unable to focus on paying his bills, and had to go on temporary disability for about six months in 2012. He is currently recuperating from surgery. He is now single, and no longer sleep deprived. He is focused on getting his debts resolved and living a more financially responsible life.

Applicant's personal financial statement indicates that his gross monthly income is \$5,000. (Applicant's Exhibit P.) He has no difficulty paying his regular monthly expenses. He is currently on leave from work, but plans to return in one to three

months, when he is completely healed. At that time his take home will increase to \$5,700 monthly. Applicant has a car payment and minimal expenses. He has not acquired any new debt. He now lives much more frugally.

In 2014 and 2015, Applicant received performance recognition awards for his significant contributions to achieving the companies objectives. (Applicant's Exhibit N.)

Letters from the Applicant's former supervisor, project manager, and his aunt indicate that Applicant is considered to be highly trustworthy and responsible. His financial problems have not seemed to affect his work or professional ethics. He is a hard working team member who goes the extra mile to complete the customer's objectives and is well respected by all who know him. He is consistently praised for his performance, reliability, and valuable contributions, and is considered to be an asset to the company. (Applicant's Exhibit M.)

POLICIES

Positions designated as ADP I, II, or III 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 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." 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).)

Guideline B (Foreign Influence)

6. *The Concern.* Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

Condition that could raise a security concern:

7.(a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion.

Conditions that could mitigate a security concern:

8.(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose

between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

8.(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and

8.(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

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

Conditions that could raise a security concern:

19.(a) inability or unwillingness to satisfy debts; and

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 circumstances; and

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

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 and surrounding circumstances;

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 [sensitive] 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.

CONCLUSION

In the defense industry, the security of classified industrial secrets is entrusted to 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 clearance may be involved in instances of foreign influence and financial irresponsibility, 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 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 or her a public trust position.

In this case the Government has met its initial burden of proving that the Applicant may be subject to foreign influence (Guideline B), and 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 and circumstances, I conclude there is a nexus or connection with his eligibility for access to sensitive information.

Applicant's foreign contacts do not pose a security risk to the United States. The evidence convincingly shows that the Applicant is a loyal, naturalized United States citizen. He has deep, longstanding roots in the United States, and in more ways than one he has expressed his love for this country. He has bank accounts here and has created his life here. His contacts with his family in Egypt are minimal. He does not relate to his family there, nor does he enjoy visiting.

Under Guideline B, Foreign Influence, Disqualifying Condition 7.(a) *contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion* applies. Mitigating Conditions 8.(a) *the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.*; 8.(b) *there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest*; and 8.(c) *contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation* are also applicable. Accordingly, I find for the Applicant under Guideline B, Foreign Influence.

Regarding his finances, the evidence shows that Applicant's two unsuccessful marriages, a divorce, an annulment, poor financial management, and excessive spending, contributed to his excessive indebtedness. Also involved in this situation is the fact that Applicant has had difficulties from sleep apnea, and has been struggling to find a cure. He believes that his ability to focus on paying his bills was seriously interrupted by sleep deprivation. For many years, Applicant was financially irresponsible for reasons mentioned above. In 2013, he filed bankruptcy, set up a

payment plan, and has been following it since then. He plans to continue with this payment plan until he has paid off all of his delinquent debt.

He also understands the financial responsibilities involved in holding a position of trust. He must always live within his means and budget his lifestyle accordingly. There is sufficient evidence in the record to show that Applicant can live within his means. There is evidence in the record to show that he has formally received credit counseling. He has gotten rid of the bad marriages, addressed his medical problems, and is working to resolve his indebtedness. He has been on the right track for the past three years. It is evident that his finances are now under control.

Under the particular circumstances of this case, Applicant has met his burden of proving that he is eligible for a public trust position. It appears that he does have a concrete understanding of his financial responsibilities. He has sufficiently addressed his delinquent debts in the SOR. Thus, it can be said that he has made a good-faith effort to resolve his past-due indebtedness. He has shown that he is or has been reasonably, responsibly, or prudently addressing his financial situation. Considering all of the evidence, Applicant has introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case.

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. 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 circumstances*; and 20.(d) *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts* are applicable. From the evidence in the record, Applicant has acted responsibly under the circumstances. He has tackled his delinquent debts and his health problems. Accordingly, I find for the Applicant under Guideline F (Financial Considerations).

I have also considered the "whole-person concept" in evaluating Applicant's eligibility for access to sensitive information, including the favourable letters from his former supervisor and project manager. Under the particular facts of this case, the totality of the conduct set forth above, when viewed under all of the guidelines as a whole, support a whole-person assessment of good judgement, trustworthiness, reliability, candor, a willingness to comply with rules and regulations, and/or other characteristics indicating that the person may properly safeguard sensitive and protected information.

I have considered all of the evidence presented. It clearly mitigates the negative effects that his foreign influence and financial indebtedness can have on his ability to safeguard sensitive and protected information. On balance, it is concluded that Applicant has overcome the Government's case opposing his request for a public trust position. Accordingly, the evidence supports a finding for Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the SOR.

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.

Paragraph 2: For the Applicant.
Subpara. 2.a. For the Applicant.
Subpara. 2.b. For the Applicant.
Subpara. 2.c. For the Applicant.
Subpara. 2.d. For the Applicant.
Subpara. 2.e. For the Applicant.
Subpara. 2.f. For the Applicant.
Subpara. 2.g. For the Applicant.
Subpara. 2.h. For the Applicant.
Subpara. 2.i. For the Applicant.
Subpara. 2.j. For the Applicant.
Subpara. 2.k. For the Applicant.
Subpara. 2.l. For the Applicant.
Subpara. 2.m. For the Applicant.
Subpara. 2.n. For the Applicant.
Subpara. 2.o. For the Applicant.
Subpara. 2.p. For the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a public trust position for the Applicant.

Darlene Lokey Anderson
Administrative Judge