



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



In the matter of:)
)
) ADP Case No. 15-02500
)
)
Applicant for Public Trust Position)

Appearances

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

October 18, 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 20, 2012. (Government Exhibit 1.) On December 4, 2015, the Department of Defense (DoD), issued an SOR detailing the trustworthiness concerns under Guideline 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 January 11, 2016, and requested an administrative hearing before a DOHA administrative judge. This case was assigned to the undersigned Administrative Judge on March 15, 2016. A notice of hearing was issued on March 22, 2016, and the hearing was scheduled for April 25, 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 fourteen exhibits, referred to as Applicant's Exhibits A through N, which were admitted without objection. Applicant also testified on his own behalf. The record remained open until close of business on May 16, 2016, to allow the Applicant to submit additional documentary evidence. He submitted supplemental Exhibits O through W. Department Counsel objected to Applicant's Exhibit W, contending that it does not apply to the vehicle alleged in SOR allegation 1.b. The evidence is ambiguous. I am not convinced that it applies to the vehicle in question, or to another vehicle not discussed. However, the document will be admitted, but given little weight. Applicant's supplemental Exhibits O through W were admitted into evidence. The official transcript (Tr.) was received on May 4, 2016. Based upon a review of the pleadings and exhibits, eligibility for a public trust position is granted.

FINDINGS OF FACT

Applicant is 40 years old and married a second time. He has two children from his first marriage. He holds a Bachelor's degree. He is employed with a defense contractor as a Database Administrator, 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 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 six delinquent debts, totaling in excess of \$22,000, set forth in the SOR. Applicant admitted allegation 1.a., and denied the remaining allegations under this guideline. (Applicant's Answer to SOR.) Applicant's credit reports dated January 9, 2013; March 3, 2015; November 30, 2015; and March 7, 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 3, 4, 5, and 6.)

Applicant served in the United States Marine Corps from 1993 to 1997, when he was honorably discharged. During his military service he held a security clearance without incident. He received a number of awards and commendations during his

military service to include the Navy Achievement Medal, the National Defense Service Medal, the Good Conduct Medal, and various unit awards.

In 2003 or 2004, Applicant and his wife separated. By 2008, their divorce was finalized. Following the divorce, Applicant was required to take on more financial responsibility, including child support payments, moving expenses, the cost of another household, as well as some of his wife's expenses. He could no longer afford the lifestyle he once had. His finances fell in a hole, and since then, he had been digging himself out.

The following debts became delinquent and owing:

2.a., a delinquent debt owed to a creditor in the amount of \$912 with a balance due of \$9,411. This was for the purchase of a motorcycle in 2008. He made the payments of \$321 for about a year before the account went delinquent. (Tr. p. 33.) Applicant allowed the motorcycle to be voluntarily repossessed. He does not believe he owes the entire \$9,000, and he is disputing the amount owed. He has no intentions of paying the debt. Applicant is unwilling to set up a payment plan. The creditor is demanding a settlement amount of \$6,166.19. (Applicant's Exhibit O.)

2.b., a delinquent debt that was charged off in the amount of \$2,444. Applicant believes that the creditor has confused the debt with a lease that his wife had for a vehicle. Applicant admits however, that he owed \$2,444, and he contends that he paid the debt. (Tr. p. 39.) Applicant submitted a copy of the letter confirming the account is now at a zero balance. (Applicant's Exhibits P and W.)

2.c., a delinquent debt owed to a creditor in the amount of \$169. Applicant states that he paid the debt off through the collection agency sometime between May and July 2014. Applicant provided a copy of his bank statement that verifies the payment was made. (Applicant's Exhibit Q and Tr. p. 41.)

2.d., a delinquent debt owed to a credit union in the amount of \$10,293. Applicant explained that after he separated from his wife she was a signer on his credit card, and she had the limits increased without his knowledge. Applicant states that he disputes the debt because he never approved the credit increase. Applicant provided an affidavit from his ex-wife wherein she indicates that she requested the credit increase without informing the Applicant, and the credit union did not inform him. (Applicant's Exhibit R.) Applicant states that he paid the \$2,500 that he actually borrowed, and he has no intentions of paying his wife's fraudulent debt. (Tr. p. 45.)

2.e., a delinquent credit card debt owed to a creditor that was placed for collection in the approximate amount of \$3,003. Applicant claims that he paid this debt off in May or July 2014. (Tr. p. 46.)

2.f. a delinquent debt owed to a creditor in the approximate amount of \$1,330. Applicant states that the debt was paid. (Applicant's Exhibit S and Tr. p. 48.) He

provided a copy of the receipt from the creditor showing his payment. There were other delinquent debts besides those listed in the SOR that Applicant paid off between May and July 2016. Applicant states that since 2014, he has really pushed hard to put his finances in order. He has reduced his expenses and focused on paying his bills. His net monthly income is about \$8,960. (Tr. p. 51.) His wife earns about \$85,000 annually. His regular monthly expenses include a mortgage payment of \$2,600, and regular monthly expenses of \$2,030. Applicant is able to comfortably meet his regular monthly expenses and put a significant amount away in savings. He now has investments including stocks and bonds of \$10,000.

Applicant presented copies of his Certificates of Completion for the Air Traffic Controller Basic course dated March 15, 2015; and the Marine Air Traffic Control and Landing System Operator Course dated March 22, 2015. (Applicant's Exhibits T and U.)

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 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;

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

20.(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.

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 personally identifiable information 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 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 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 eligibility for access to sensitive information.

The evidence shows that when Applicant divorced, he incurred expenses that he felt he had to pay, while others he allowed to fall delinquent. He made child support payments and paid for necessities, while the things he did not need fell delinquent. Since 2014, he has been working to resolve his delinquent indebtedness and improve his credit rating. He has also learned the importance of paying attention to one's credit report to avoid fraudulent reporting. In this case, Applicant has acted reasonably and responsibly. He has paid off all but one of his debts. He still owes about \$6,600 on the motorcycle, and I trust that he will manage a way of resolving the debt in full or convincing the creditor to accept payments to do so. However, in this case, sufficient mitigation has been shown and his conduct demonstrates a pattern of reliability and good judgment. Furthermore, there is sufficient evidence in the record to show that Applicant can live within his means. Although there is no evidence in the record to show that he has formally received credit counseling, he has shown on his own that by buckling down and reducing his expenses, he can set a budget and learn to live within it. 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*; 20.(d) *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*; and 20.(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* are also applicable. From the evidence in the record, Applicant has acted responsibly under the circumstances. Applicant has seriously changed his spending habits and reduced his overhead. He has addressed his debts and is continuing to resolve them. 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 classified information. 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 does mitigate the negative effects of his financial indebtedness, and the effects that it 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 Paragraph 1 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.
Subpara.	1.c.	For the Applicant.
Subpara.	1.d.	For the Applicant.
Subpara.	1.e.	For the Applicant.
Subpara.	1.f.	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