



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



In the matter of:)
)
) ADP Case No. 15-07679
)
Applicant for Public Trust Position)

Appearances

For Government: Carroll Connelley, Esq., Department Counsel
For Applicant: *Pro se*

07/19/2017

Decision

GARCIA, Candace Le'i, Administrative Judge:

The Government failed to establish any foreign influence trustworthiness concern regarding Applicant's father, sister, and sons in the Netherlands, as well as any foreign preference trustworthiness concerns. Applicant has mitigated the foreign influence trustworthiness concern raised by his friend in the Netherlands who works for the Dutch government. Eligibility for access to sensitive information is granted.

Statement of the Case

On June 23, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guideline B, foreign influence, and Guideline C, foreign preference. The action was taken under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review*

Program (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG).¹

Applicant answered the SOR on July 11, 2016, and elected to have the case decided on the written record in lieu of a hearing. The Government's written case was submitted on September 21, 2016. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the trustworthiness concerns. He received the FORM on September 29, 2016. He responded by letter dated October 11, 2016, which I have marked as Applicant's Exhibit (AE) A. The case was assigned to me on June 1, 2017. The Government's documents identified as Items 1 through 4 and AE A are admitted in evidence without objection.

SOR Amendment

In his response to the SOR concerning ¶ 1.a, Applicant clarified that his two sons are citizens and residents of the Netherlands, as he does not have a daughter. I hereby *sua sponte* amend SOR ¶ 1.a, pursuant to ¶ E3.1.17 of the Directive, so that it reads: "Your father, sister, and two sons are citizens and residents of the Netherlands."²

Findings of Fact

Applicant admitted all of the SOR allegations.³

Applicant is 58 years old. He is married to a native-born U.S. citizen and was previously married to a citizen of the Netherlands from 1983 to 1990. He has three adult stepchildren who are native-born U.S. citizens residing in the United States, and two adult children from his prior marriage who are citizens and residents of the Netherlands. He has worked for his current employer since December 2013.⁴

Applicant was born in the Netherlands. He obtained a high school diploma in 1981 and attended college between 2004 and 2007 in the Netherlands. He performed compulsory military service with the Dutch military from 1979 until his honorable discharge in 1993. He worked for the Dutch defense department between 1992 and 1999 and the Dutch tax authority between 2002 and 2007, entitling him to receive

¹ I decided this case using the AG implemented by DOD on June 8, 2017. However, I also considered this case under the previous AG implemented on September 1, 2006, and my conclusions are the same using either set of AG.

² Items 1-2.

³ Items 1-2.

⁴ Items 1-2.

taxable Dutch social security and retirement benefits of \$1,250 monthly in 2026, at age 67. He is eligible to retire in the United States in 2025, at age 66.⁵

Applicant immigrated to the United States in November 2007. He was naturalized as a U.S. citizen in July 2012, and obtained a U.S. passport in September 2012. He renewed his Dutch passport in November 2013, so that he could maintain his Dutch citizenship and entitlements to Dutch social security and retirement benefits. His Dutch passport is scheduled to expire in November 2018.⁶

When Applicant's spouse lived in the Netherlands with Applicant, she worked and became medically disabled before their move to the United States in 2007. She has since received \$2,000 in taxable, monthly disability benefits from the Netherlands, and is entitled to continue receiving this benefit until 2020. In 2020, she is also entitled to receive \$300 monthly in taxable, Dutch social security and retirement benefits.⁷

Applicant's father, sister, and two sons are citizens and residents of the Netherlands. His father is 85 years old and works for a university. His sister is 56 years old and works for a non-governmental organization. His sons are ages 33 and 31; one is self-employed and the other works for a non-governmental company. Applicant maintains telephonic and electronic contact with his father quarterly and with his sister monthly. He maintains monthly electronic contact with his sons. As of February 2015, Applicant had visited his family in the Netherlands in 2008, 2009, and 2010.⁸

Applicant's one friend, who is a citizen and resident of the Netherlands, works for the Dutch tax office. He is 59 years old. In July 2015, Applicant indicated that he maintained electronic and social media contact with his friend three times yearly. As of June 2016, Applicant maintained electronic contact with his friend once or twice yearly.⁹

Applicant previously owned property in the Netherlands from 2005 to 2007, but sold this property at a loss when he moved to the United States. As of February 2015, Applicant was renting his apartment. He previously owned property in the United States from 2007 to 2013.¹⁰

⁵ Items 1-2.

⁶ Items 1-4.

⁷ Items 1-4.

⁸ Items 1-4.

⁹ Items 1-4.

¹⁰ Item 2.

Policies

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(a), 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.

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 to obtain 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 safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline B, Foreign Influence

AG ¶ 6 expresses the trustworthiness concern pertaining to foreign influence:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a [trustworthiness] concern if they result in divided allegiance. They may also be a [trustworthiness] concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

AG ¶ 7 describes conditions that could raise a trustworthiness concern and may be disqualifying. I considered the following relevant:

- (a) contact, regardless of method, 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; and
- (b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology.

Applicant's father, sister, and two sons are citizens and residents of the Netherlands. His father works for a university, his sister works for a non-governmental organization, one son is self-employed, and the other son works for a non-governmental company. The Government did not present any evidence of a heightened risk with the Netherlands, and the record does not establish that these family members have any ties to the Dutch government or military that might present a heightened risk. These familial connections do not pose a conflict of interest. I find SOR ¶ 1.a in Applicant's favor.

Applicant's one friend, who is a citizen and resident of the Netherlands, works for the Dutch tax authority. AG ¶¶ 7(a) and 7(b) are established by his position in the Dutch government.

I have considered all of the mitigating conditions under AG ¶ 8 and considered the following relevant:

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

As of June 2016, Applicant maintained only electronic contact with his friend once or twice yearly. AG ¶¶ 8(a) and 8(c) apply.

Guideline C, Foreign Preference

AG ¶ 9 expresses the trustworthiness concern pertaining to foreign preference:

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may provide information or make decisions that are harmful to the interests of the United States. Foreign involvement raises concerns about an individual's judgment, reliability, and trustworthiness when it is in conflict with U.S. national interests or when the individual acts to conceal it. *By itself*; the fact that a U.S. citizen is also a citizen of another country is not disqualifying without an objective showing of such conflict or attempt at concealment. The same is true for a U.S. citizen's exercise of any right or privilege of foreign citizenship and any action to acquire or obtain recognition of a foreign citizenship.

AG ¶ 10 describes the following conditions that could raise a trustworthiness concern and may be disqualifying:

- (a) applying for and/or acquiring citizenship in any other country;
- (b) failure to report, or fully disclose when required, to an appropriate security official, the possession of a passport or identity card issued by any country other than the United States;
- (c) failure to use a U.S. passport when entering or exiting the U.S.;
- (d) participation in foreign activities, including but not limited to:
 - (1) assuming or attempting to assume any type of employment, position, or political office in a foreign government or military organization; and
 - (2) otherwise acting to serve the interests of a foreign person, group, organization, or government in any way that conflicts with U.S. national security interests;
- (e) using foreign citizenship to protect financial or business interests in another country in violation of U.S. law; and
- (f) an act of expatriation from the United States such as declaration of intent to renounce U.S. citizenship, whether through words or actions.

None of the disqualifying conditions are established by Applicant's spouse's receipt of disability benefits from the Dutch government, Applicant's future entitlement of receiving Dutch social security and retirement benefits, or Applicant's possession of a Dutch passport. I find SOR ¶¶ 2.a, 2.b, and 2.c in Applicant's favor.

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(d):

(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.

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.

Overall, the record evidence leaves me without questions and doubts about Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude that the Government failed to establish any foreign influence trustworthiness concern regarding Applicant's father, sister, and sons in the Netherlands, as well as any foreign preference trustworthiness concerns. Applicant has mitigated the foreign influence trustworthiness concern raised by his friend in the Netherlands who works for the Dutch government.

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 B:	FOR APPLICANT
Subparagraphs 1.a – 1.b:	For Applicant
Paragraph 2, Guideline C:	FOR APPLICANT
Subparagraphs 2.a – 2.c:	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.

Candace Le'i Garcia
Administrative Judge