



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 14-04814

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

09/02/2015

Decision

Harvey, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges he maintains his Canadian citizenship to protect his financial interests in Canada. Applicant’s Canadian citizenship does not provide a financial benefit to him. Applicant lives in the United States, votes in U.S. elections, and intends to retire in the United States. He offered to renounce his Canadian citizenship. Foreign preference trustworthiness concerns are mitigated. Eligibility for a public trust position is granted.

Statement of the Case

On October 4, 2013, Applicant signed an Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (GE 1) On March 28, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, and modified; DOD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleges trustworthiness concerns under Guideline C (foreign influence). (HE 2) The SOR detailed reasons why the DOD CAF was unable to find that it is clearly

consistent with national security to grant or continue Applicant's eligibility to occupy a public trust position, which entails access to sensitive information. (HE 2) The DOD CAF recommended referral to an administrative judge to determine whether such access to sensitive information should be granted, continued, denied, or revoked. (HE 2)

On April 16, 2015, Applicant responded to the SOR allegations and requested a hearing. (HE 3) On July 1, 2015, Department Counsel was prepared to proceed. On July 28, 2015, DOHA assigned the case to me. On August 6, 2015, DOHA issued a notice of the hearing, setting the hearing for August 25, 2015. (HE 1) The hearing was held as scheduled. Department Counsel offered four exhibits into evidence, and Applicant offered one exhibit into evidence. (Tr. 15-16; 46-47; GE 1-4; AE A) All exhibits were admitted into evidence without objection. (Tr. 16, 47; GE 1-4; AE A) I received the transcript of the hearing on August 31, 2015.

Findings of Fact¹

In his Answer to the SOR, Applicant admitted the SOR allegation and provided mitigating information. (HE 3) His admissions are accepted as findings of fact.

Applicant is a 69-year-old computer-technical consultant, who has been working with medical records for the same U.S. Government contractor for almost 20 years.² (Tr. 5, 7-8, 17; AE 1) He was born in Canada, and he attended school through college in Canada. (Tr. 17) He has never served in the U.S. or Canadian militaries. (Tr. 5-6) In 1975, he married, and in 1985, he divorced. (Tr. 6) In 1986, he married his spouse. His oldest daughter is 25, and his twins are 15. (Tr. 8-9) In 1965, he graduated from high school. (Tr. 7) In 1970, he received a bachelor of arts in mathematics and economics, and in 1971, he received a bachelor of education. There is no evidence of reportable criminal offenses, alcohol or drug abuse, or violations of Applicant's employment rules.

Connections to Canada

Applicant lived in Canada from 1946 to 1989. In 2004, his spouse and children returned to Canada from the United States and have lived in Canada since 2004. (Tr. 18, 21) Applicant visits them three days a week, and the other four days he stays in the United States. (Tr. 25) Applicant's children receive the same Canadian education and medical benefits as other Canadian citizens and residents. (Tr. 35-37)

Applicant has an expectation that he will receive monthly payments of about \$500 from the Canadian Pension Plan, which is similar to Social Security.³ (HE 3) He

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

²Unless stated otherwise, the facts in this paragraph are from Applicant's October 4, 2013 Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (GE 1)

³See Government of Canada website, "Lived or Living Outside Canada - Pensions and Benefits," http://www.servicecanada.gc.ca/eng/services/pensions/international/index.shtml?utm_source=v

has a Canadian Registered Retirement Savings Plan (RRSP), which is similar to a U.S. IRA plan. (HE 3)⁴ He ended his contributions to the RRSP when he left Canada in 1989. (Tr. 24) In 1989, his RRSP was valued at less than \$100,000. (Tr. 27) The current value of his RRSP is about \$400,000. He plans to move his RRSP funds to the United States; however, he is unsure whether there will be a penalty when the fund is transferred to the United States. (Tr. 24, 27-29) He will have to pay Canadian taxes on the funds when they are withdrawn from the RRSP account. (Tr. 29-31) See note 4, *supra*.

In 1989, Applicant purchased farm land in Canada. (Tr. 20-21) In 2006, Applicant and his spouse built a home on the farm land. (Tr. 21) The farmland and home in Canada are valued at about \$900,000. (Tr. 23; HE 3)

Connections to the United States

In 1989, Applicant entered the United States, and he became a naturalized U.S. citizen in 1999. (Tr. 17-18) Applicant's spouse is a naturalized U.S. citizen, and their children were born in the United States and U.S. citizens. (Tr. 32, 35; GE 1)

Applicant prefers the United States over any other country. (Tr. 22) He votes in U.S. elections, and he has not voted in a Canadian election since 1999. (Tr. 35) He has not received Canadian medical benefits after 1999, and he has not held a Canadian passport after 1999. (Tr. 37, 39) He is eligible for U.S. Medicare, which he believes is an excellent medical benefit and probably better than Canadian medical care. (Tr. 45-46) His U.S. Social Security benefit is greater than his Canadian Pension Plan benefit. (Tr. 45-46) He is not aware of any benefit he is receiving or will receive from Canada based on his Canadian citizenship. (Tr. 37-39) His pay is deposited into a U.S. bank account. (Tr. 33-34)

Applicant is an honest and trustworthy person, who has had access to sensitive U.S. corporate financial information for many years. (Tr. 41-42) He loves the United States and plans to purchase property in the United States and to retire in the United States. (Tr. 22, 45-46) He does not currently own any property in the United States. (Tr. 23) If necessary to retain his public trust position, he was willing to renounce his Canadian citizenship. (Tr. 40)

Character Evidence

Applicant's manager has worked with Applicant since 1998. (AE A) He states that Applicant "is a conscientious, honest, and loyal employee, and a hard worker." (AE A)

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⁴See Government of Canada website, "Canada Revenue Agency" Registered Retirement Savings Plan (RRSP), <http://www.cra-arc.gc.ca/tx/ndvds/tpcs/rrsp-reer/rrsps-eng.html>.

Applicant provides high-quality work, and he is honest and has integrity. (AE A) He enthusiastically supports approval of Applicant for a public trust position. (AE A)

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, “no one has a ‘right’ to a [public trust position].” *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 and ADP II 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 overarching 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 suitability for a public trust position. 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. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her access to sensitive information]." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). 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 and sensitive records is of 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." 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."

Analysis

Foreign Preference

AG ¶ 9 describes the foreign preference trustworthiness concern stating, "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 be prone to provide information or make decisions that are harmful to the interests of the United States."

AG ¶ 10 describes one condition with seven subparts that could raise a trustworthiness concern and may be disqualifying in Applicant's case. AG ¶ 10(a) provides:

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to:

- (1) possession of a current foreign passport;
- (2) military service or a willingness to bear arms for a foreign country;
- (3) accepting educational, medical, retirement, social welfare, or other such benefits from a foreign country;
- (4) residence in a foreign country to meet citizenship requirements;

(5) using foreign citizenship to protect financial or business interests in another country;

(6) seeking or holding political office in a foreign country; and

(7) voting in a foreign election.

The scope of AG ¶ 10 is not limited to the specifically enumerated disqualifying conditions and includes coverage by the Canadian health plan, even though he may not have received benefits from the plan; participation in the Canadian equivalent of the U.S. Social Security and Medicare plans; voting in Canadian elections, receipt of Canadian education benefits, and payment of Canadian income taxes. AG ¶ 10(a) applies.

Department Counsel correctly noted that foreign preference concerns can arise and be disqualifying even in cases involving close allies of the United States. See ISCR Case No. 12-04023 at 3-4 (App. Bd. Apr. 24, 2015) (holding “Applicant’s extensive contacts within Canada, along with his dual citizenship and exercise of various prerogatives of Canadian citizenship,”⁵ warranted denial of his security clearance); ISCR Case No. 08-05869 at 5-7 (App. Bd. July 24, 2009) (reversing the grant of a security clearance and stating a U.S. citizen’s decision to move to Australia and serve in the Australian army showed “strong evidence of a profound, deeply personal commitment to the interests and welfare of that country.”).

Applicant’s spouse and children are residents and citizens of Canada, and they have received medical and education benefits from Canada. Applicant has indirectly benefited from their Canadian citizenship and residency because when Canada provides benefits to them, Applicant does not have to pay for those benefits. Consideration of the applicability of mitigating conditions is required.

AG ¶ 11 provides six conditions that could mitigate trustworthiness concerns in this case:

(a) dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(b) the individual has expressed a willingness to renounce dual citizenship;

(c) exercise of the rights, privileges, or obligations of foreign citizenship occurred before the individual became a U.S. citizen or when the individual was a minor;

⁵The applicant in ISCR Case No. 12-04023 elected to live in Canada, and that “[a]pplicant’s health insurance is provided by a Canadian province; he participates in a Canadian pension plan and social insurance plan; he pays Canadian taxes, votes in Canadian elections, and has a Canadian driver’s license. He and his partner plan to live in Canada at least another five years.” *Id.* at 2.

(d) use of a foreign passport is approved by the cognizant security authority;

(e) the passport has been destroyed, surrendered to the cognizant security authority, or otherwise invalidated; and

(f) the vote in a foreign election was encouraged by the United States Government.

AG ¶ 11(c) applies in part. Applicant voted in Canadian elections and received Canadian medical and education benefits before he moved to the United States and became a U.S. citizen in 1999. Applicant has not personally received benefits from Canada based on his Canadian citizenship since he became a U.S. citizen. The SOR does not cite receipt of Canadian benefits or voting in Canadian elections or residing in Canada as raising a trustworthiness concern.

AG ¶ 11(b) applies. There is no evidence that Applicant has received any benefit based on his Canadian citizenship in relation to his expectation that he will receive monthly payments of about \$500 from the Canadian Pension Plan, his ownership of a Canadian RRSP account, and his interest in family-owned Canadian farmland. Applicant was unaware of any benefit that he will receive in the future based on his Canadian citizenship.

Applicant offered to renounce his Canadian citizenship. He stated he has a strong preference for the United States over Canada; his primary residence has been in the United States since 1989; and he plans to retire in the United States.

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) 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 have incorporated my comments

under Guideline C in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a 69-year-old computer-technical consultant, who has been working with medical records for the same U.S. Government contractor for almost 20 years. He was born in Canada, and he attended school through college in Canada. He has never served in the U.S. or Canadian militaries. His spouse and three children are dual citizens of the United States and Canada, and they have lived in Canada since 2004. In 1970, he received a bachelor of arts in mathematics and economics, and in 1971, he received a bachelor of education. There is no evidence of reportable criminal offenses, alcohol or drug abuse, or violations of Applicant's employment rules. He is sufficiently mature to understand and comply with his public trust responsibilities. There is every indication that he is loyal to the United States, the DOD, and his employer.

Applicant has not personally received benefits from Canada based on his Canadian citizenship since he became a U.S. citizen, and he does not know of any benefit that he will receive in the future based on his Canadian citizenship. Applicant is an honest and trustworthy person, who has had access to sensitive U.S. corporate financial information for many years. Applicant's manager has worked with Applicant for 17 years and describes Applicant as conscientious, honest, loyal, diligent, and he enthusiastically supports approval of Applicant for a public trust position. There is no evidence that Applicant has ever violated the trust of his employer. He loves the United States and plans to purchase property in the United States and to retire in the United States. If necessary to retain his public trust position, he was willing to renounce his Canadian citizenship.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude foreign preference concerns are mitigated. Eligibility for a public trust position is granted.

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 C: FOR APPLICANT

Subparagraph 1.a: 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.

Mark Harvey
Administrative Judge