



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



In the matter of:)
)
) ADP Case No. 06-12429
)
)
Applicant for Public Trust Position)

Appearances

For Government: Emilio Jaksetic, Esq., Department Counsel
For Applicant: *Pro Se*

June 19, 2008

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant failed to mitigate the concerns raised by his criminal conduct. Eligibility for access to sensitive information is denied.

On December 21, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the trustworthiness concerns under Guideline J, Criminal Conduct and Guideline E, Personal Conduct. 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); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on January 29, 2008, and requested a hearing before an Administrative Judge. The case was assigned to me on April 2, 2008. DOHA issued a Notice of Hearing on April 15, 2008. I convened the hearing as

scheduled on May 28, 2008. DOHA received the transcript of the hearing (Tr.) on June 5, 2008.

Procedural and Evidentiary Rulings

Motion to Amend SOR

Department Counsel made an oral motion to amend SOR ¶ 1.a by changing the date in the allegation from “2004” to “2005.” Applicant did not object to the motion and it was granted.

Evidence

The Government offered Exhibits (GE) 1 through 8. Applicant did not object to any of the documents except the part of GE 2 which referenced Applicant’s nonjudicial punishment (NJP) received while in the U.S. Marine Corps in 1994. He objected to the admission of the NJP based upon relevance and the age of the NJP. Department Counsel argued that Applicant’s entire military record was relevant and that it would rebut the favorable character evidence that Applicant planned to present. I withheld ruling on the objection until after Applicant presented his case. GE 1 through 8 were admitted except for the part of GE 2 which referenced Applicant’s 1994 NJP.

Applicant testified on his own behalf, and submitted Exhibits (AE) A through G. Department Counsel objected to the admission of AE D, a security clearance application, on the basis that it was unsigned. The objection was overruled. Department Counsel objected to AE E, extracts from the record of trial of Applicant’s Special Court-Martial, on the basis of completeness. Applicant stated that he had a complete copy of the record of trial, but that he did not have it with him. I informed Applicant that I would hold the record open and ask him to submit a complete copy of the record of trial. Applicant withdrew his offer of AE E. AE A through D, F, and G were admitted. Applicant’s exhibits reference his entire military record. I overruled Applicant’s objection to GE 2 and it was admitted in its entirety.

I held the record open until June 11, 2008, for Applicant to submit additional matters. I requested that Applicant submit a copy of the record of trial of his Special Court-Martial. Applicant submitted a one page memo (AE H), four pages of e-mail traffic (AE I), a computer diskette (AE J), and the record of trial of his Special Court-Martial (AE K). The exhibits were received without objection. Department Counsel’s memo is Hearing Exhibit (HE) I. The record closed on June 11, 2008.

Findings of Fact

Applicant is a 33-year-old employee of a defense contractor. He is married with two children, ages seven and three. He has an associate’s degree. Applicant served in the United States Marine Corps from 1997 through 2005, and was discharged as a Corporal (E-4) with a General (Under Honorable Conditions) Discharge.¹

¹ Tr. at 44-45, 57, 62-64; GE 1, 2.

Applicant's Marine Corps career, but for nonjudicial punishment for a minor offense in 1994, was commendatory until about 2003. He received numerous awards, decorations, and accolades and his fitness reports were excellent. He was promoted to Staff Sergeant (E-6) and was selected for promotion to Gunnery Sergeant (E-7). Applicant began to have an inappropriate sexual relationship with a female subordinate in about 2003. The female Lance Corporal (E-3) eventually reported Applicant and stated he assaulted her. A Military Protection Order (MPO) was issued by Applicant's Commanding Officer on October 9, 2003, directing him to have no contact with the female Lance Corporal. The order was effective until November 7, 2003. A second MPO was issued on November 13, 2003, to be in effect until cancelled by the Commanding Officer or higher authority. Applicant repeatedly violated the orders.²

Applicant was interviewed for his security clearance investigation by a Special Agent of the Defense Investigative Service (DIS) on January 29, 2004. He denied engaging in a sexual relationship with the female subordinate and that he assaulted her. He admitted he "had feelings" for her. He also admitted that he spoke with her in person and left a voice mail message for her after the MPO was issued. He stated he was attempting to get her to tell "the truth" that they did not have sexual relations.³

Applicant was interviewed again by a DIS Special Agent on April 4, 2004. He admitted that he was charged with assault, adultery, and violation of an MPO, and was going to a Special Court-Martial. The DIS agent questioned him about allegations that he contacted the Lance Corporal telephonically 20 to 30 times and had in-person contact on two additional occasions. He admitted he contacted her on "multiple occasions." He stated he "didn't tell [DIS] this on 29 Jan 04, [because he] did not believe it relevant." He also admitted that he had an additional in-person contact with her.⁴ He wrote in his statement:

Yes, the other aforesaid contacts were in violation of the MPOs. However, looking back on it, I have much more at stake, i.e. my career and family. I considered my career & family more important than the MPOs. Also I've been taught to meet problems head on.⁵

Applicant was charged at a Special Court-Martial in February 2005, with violating a general order; failure to obey a Military Protection Order; two specifications of assault; adultery; and wrongfully impeding an investigation, under the Uniform Code of Military Justice. He pled not guilty to all charges. He was found guilty of violating a general order and adultery and not guilty of the remaining charges. He was sentenced to perform hard labor for two months; to forfeit \$200 pay per month for two months; and to be reduced to the pay grade of E-4.⁶

² Tr. at 45-50, 67-68; GE 2-4; AE K.

³ GE 5.

⁴ GE 6.

⁵ *Id.*

⁶ GE 2; AE K.

Applicant completed a Security Clearance Application (SF-86) on September 16, 2005. He listed his court-martial conviction under Question 25, "**Your Police Record – Military Court.**" He provided further details under Question 43, "**General Remarks.**"⁷

Applicant submitted a Public Trust Application (SF-85P), certified as true on September 21, 2005. Question 16 asked, "**Your Police Record** In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s)? (leave out traffic fines of less than \$150." Applicant answered "Yes," and listed a speeding offense in May 2003. He did not list his court-martial conviction.⁸

Applicant denied the falsification allegation in the SOR. He stated he already provided the requested information via the SF-86 and did not understand the specific question in the SF-85P.⁹ After considering all the evidence, I find there is insufficient evidence for a finding that Applicant intentionally falsified his Public Trust Application as alleged in the SOR.

Applicant denied engaging in a sexual relationship with the female subordinate in statements given on January 29, 2004 and April 9, 2004. He stated in a background interview on June 6, 2007, that he and the subordinate had developed a "buddy" type relationship. He was asked by Interrogatories to authenticate the report of investigation (ROI) of the interview of June 6, 2007. He made several changes to the ROI and further stated on October 15, 2007, "I would only like to add that the verdict given was based on no solid proof and only questionable testimony from a perjuring and disgraceful witness." In his response to the SOR, Applicant denied the criminal activity and stated the offenses show "an isolated incident of lack of judgment, if the accusations were true." At his hearing, Applicant adamantly denied having any kind of intimate contact or sexual relations with the subordinate.¹⁰ After reviewing all the evidence, including the record of trial of his court-martial, I find Applicant did commit adultery by having sexual intercourse with his subordinate. I further find that Applicant was untruthful when he denied committing the conduct.

Applicant is very highly regarded by his current employer. He is described as a valued and reliable associate and a man of integrity with high ethical and moral standards. His performance appraisals were very positive. He was recommended for a security clearance and an ADP position.¹¹

⁷ GE 8; AE D.

⁸ GE 1.

⁹ Applicant's response to SOR.

¹⁰ Tr. at 50, 73; Applicant's response to SOR; GE 5, 6, 8.

¹¹ AE A-C, F, G, K.

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 over-arching adjudicative goal is a fair, impartial and common sense 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).

Analysis

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant omitted information from his Public Trust Application; however, he had already provided the information through a different questionnaire six days earlier. There is insufficient evidence to find that it was a deliberate omission. AG ¶ 16(a) is not applicable. SOR ¶ 2.a is concluded for Applicant.

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.

AG ¶ 30 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

(a) a single serious crime or multiple lesser offenses; and

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was convicted at a Special Court-Martial of adultery and violating a general order by fraternizing with a subordinate. He denied committing adultery but admitted to conduct that would amount to fraternization and violations of a Military Protection Order. This raises both of the above disqualifying conditions. Applicant did not intentionally falsify his Public Trust Application. SOR ¶ 1.b is concluded for Applicant.

Four Criminal Conduct Mitigating Conditions under AG ¶¶ 32(a)-(d) are potentially applicable:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

The conduct that formed the basis of Applicant's Special Court-Martial occurred in 2003. There is no evidence that Applicant was pressured or coerced into committing his criminal acts. His denials that he had a sexual relationship with his subordinate constitute some evidence that he did not commit the offense of adultery. However, I did not find his denials credible. Applicant provided false, incomplete, and misleading information about his involvement with his female subordinate in statements on January 29, 2004 and April 9, 2004; in a background interview on June 6, 2007; in his response to Interrogatories on June 6, 2007; in his response to the SOR on January 29, 2008; and in his hearing testimony on May 28, 2008. While there is some evidence of rehabilitation, I cannot find successful rehabilitation without complete candor. I am also unable to find that Applicant's criminal conduct is unlikely to recur and does not cast doubt on his current reliability, trustworthiness, and good judgment. No mitigating condition is completely applicable.

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 common sense 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 committed criminal offenses which ultimately cost him his military career. He has been untruthful about his criminal acts throughout this process, including providing false testimony at his hearing. He has a favorable work record and served honorably for most of his career in the Marine Corps. Despite the positive evidence, Applicant's actions raise serious concerns about his judgment, reliability, and trustworthiness.

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 has not mitigated the trustworthiness concerns arising from his criminal conduct.

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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For 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.

Edward W. Loughran
Administrative Judge