

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant failed to mitigate security concerns about his arrest record and his deliberate falsification of his Application for a Position of Trust (SF 85P). Eligibility for an ADP I/II/III position is denied.

CASENO: 06-13052.h1

DATE: 05/03/2007

DATE: May 3, 2007

In re:	)	
	)	
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SSN: -----	)	ADP Case No. 06-13052
	)	
Applicant for ADP I/II/III Position	)	
	)	

**DECISION OF ADMINISTRATIVE JUDGE  
MATTHEW E. MALONE**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer Goldstein, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant failed to mitigate security concerns about his arrest record and his deliberate falsification of his Application for a Position of Trust (SF 85P). Eligibility for an ADP I/II/III position is denied.

## STATEMENT OF THE CASE

On October 31, 2003, Applicant submitted a Public Trust Position Application (SF 85P). After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding<sup>1</sup> that it is clearly consistent with the national interest to grant Applicant a position of trust. On July 18, 2006, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise trustworthiness concerns addressed in the Directive under Guideline E (personal conduct) and Guideline J (criminal conduct).

Applicant timely responded to the SOR, and requested a hearing. The case was assigned to a DOHA administrative judge on October 13, 2006. A hearing originally scheduled for November 20, 2006, was cancelled when the case was transferred to me on November 17, 2006, due to caseload considerations. I convened a hearing on January 8, 2007.<sup>2</sup> The government submitted eight exhibits (Gx. 1- 10) that were admitted into evidence without objection. Applicant testified and introduced one exhibit (Ax. A), which was admitted without objection. DOHA received the transcript (Tr.) on January 17, 2007.

## FINDINGS OF FACT

The government alleged in SOR ¶ 1 that Applicant was arrested in December 1992 and charged with statutory sexual seduction, but pleaded guilty to a lesser charge of contributing to the delinquency of a minor, for which he spent four days in jail (SOR ¶ 1.a); that in April 1997, he was charged with corporal injury to spouse and battery, and after pleading guilty he was sentenced to 40 hours community service, fined, and ordered to complete a 32-session domestic violence program (SOR ¶ 1.b); that in November 1998, he was charged with two counts of aggravated battery (SOR ¶ 1.c); that in May 1999, he was charged with violating his probation for the charge listed in SOR ¶ 1.a, was found guilty and sentenced to three years of probation (SOR ¶ 1.d); that in April 2003 he was charged with battery of his spouse and probation violation (SOR ¶ 1.e); and that he violated 18 U.S.C. § 1001 by deliberately falsifying his SF 85P in October 2003 (SOR ¶ 1.f). In response, Applicant admitted with explanation the allegations in SOR ¶¶ 1.a, 1.b, and 1.c. He denied the allegations in SOR ¶¶ 1.d, 1.e, and 1.f.

Under SOR ¶ 2, the government alleged Applicant deliberately falsified his response to question 16 of his SF 85P (arrests, charges, and/or convictions for any offense in the past seven years) by omitting the arrests alleged in SOR ¶¶ 1.b, 1.c, 1.d, and 1.e (SOR ¶ 2.a). Claiming he was told he only had to disclose arrests in the preceding five years, Applicant denied intentionally falsifying his answers to the SF 85P.

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<sup>1</sup> Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

<sup>2</sup> On January 3, 2007, Applicant requested a continuance. I determined, after speaking with the parties that day via telephone conference call, that Applicant failed to show good cause for a continuance, and I denied his motion. See also, Tr., 12 - 13.

His admissions are incorporated herein as facts. After a thorough review of the transcript and exhibits, I make the following additional findings of relevant fact:

Applicant is 32 years old and has worked since February 2001 as a network design engineer for a health care and medical insurance company contracted to manage medical insurance claims and information for TriCare, the Department of Defense (DoD) medical insurance system for military personnel and their families. He has been married to his current wife since June 2003. A previous marriage began in 1992. They separated in 1993, and a divorce was finalized in 1997. Applicant and his first wife had one child. He has adopted his current wife's child, and he has a third child by a different woman whom he never married.<sup>3</sup>

Applicant served in the U.S. Marines from September 1993 until July 1997. He was initially trained as a scout sniper, but was later trained to work on information networks. He attended college briefly following high school, but finished his business degree while in the Marines.<sup>4</sup> He has been employed continuously as a network engineer since he left the military with a general discharge under honorable conditions.<sup>5</sup>

In December 1992, when Applicant was 18 years old, he dated and had consensual sex with a girl he thought was at least 18 years old. In fact, she was only 16 years old. When her mother learned of their relationship, she filed charges that led to Applicant's arrest for statutory sexual seduction. He pleaded guilty to a lesser charge of contributing to the delinquency of a minor, and was sentenced to 90 days in jail, of which all but four days was suspended.<sup>6</sup>

While still in the Marine Corps, Applicant was at a party at his sister's house on April 5, 1997. When a fight broke out, Applicant, who had been drinking, stepped in and fought with his sister's husband. One result of the fight was that he struck his wife, which he claimed was accidental. Another result was that he was charged with corporal injury to spouse and battery. He was convicted of the latter charge, fined, ordered to perform 40 hours of community service. Applicant was also ordered to complete a 32-hour domestic violence program and placed on three years probation.<sup>7</sup>

Applicant failed to pay the entire fine on time, and did not complete all of his community service. The court issued a bench warrant for his arrest. In May 1999, after being pulled over for speeding, he was arrested and spent more than three weeks in jail before appearing in court. The court considered his jail time and commuted the unfinished service and unpaid fine.<sup>8</sup>

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<sup>3</sup> Tr., 40 - 42, 70.

<sup>4</sup> Tr., 40.

<sup>5</sup> Applicant was allowed to leave the military a year early due to overmanning in his skill set.

<sup>6</sup> Answer to SOR; Gx. 2; Gx. 4; Gx. 6.

<sup>7</sup> Answer to SOR; Gx. 2; Gx. 4; Tr., 34 - 35, 56.

<sup>8</sup> Answer to SOR; Gx. 2; Tr., 57.

In April 2000, Applicant was detained by police who thought he looked suspicious as he walked home from a bar after having “a few too many drinks.” A records check revealed the same bench warrant for failing to pay his fine, and he was arrested. Applicant testified this event is “a funny story” he tells his friends.<sup>9</sup>

Applicant was also arrested in November 1998 and charged with two counts of aggravated battery after he was involved in a bar fight. Applicant acknowledged he was involved in such a fight, but asserts he did not start it and that the charges were dropped after he spent a night in jail. There is no other information available about the disposition of these charges.<sup>10</sup>

On October 31, 2003, Applicant submitted a Public Trust Position Application (SF 85P). In response to question 16 (arrests, charges, and/or convictions for any offense in the past seven years), Applicant answered “no,” thereby omitting any arrests since October 1997. Applicant claims he was told only to list such information only if it occurred in the preceding five years, or since October 1998. He further asserted that, because he did not consider the 1999 or 2000 arrests for failing to complete the sentence from his 1997 conviction to be new charges, he did not think he had to list it.<sup>11</sup>

Applicant enjoys a good reputation at work. Colleagues who have known him for most or all of the time he has worked in his current job regard him as accomplished in his work, a good family man, and willing to help others at work and in the community.<sup>12</sup>

### **POLICIES AND BURDEN OF PROOF**

The Directive sets forth adjudicative guidelines<sup>13</sup> to be considered in evaluating an applicant’s suitability for access to sensitive information.<sup>14</sup> Each trustworthiness determination must reflect consideration of both disqualifying conditions (DC) and mitigating conditions (MC) under

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<sup>9</sup> Tr., 36.

<sup>10</sup> Answer to SOR; Tr., 35, 52 - 53.

<sup>11</sup> Answer to SOR; Tr., 37 - 38.

<sup>12</sup> Ax. A.

<sup>13</sup> Directive, Enclosure 2.

<sup>14</sup> Department Counsel moved to amend the SOR to show that a memorandum from Carol A. Haave, Deputy Under Secretary of Defense for Counterintelligence and Security to DOHA Director, *Adjudication of Trustworthiness Cases* (Nov. 19, 2004), directed that adjudication of trustworthiness cases for ADP I, II, and III positions be resolved using the provisions of the Directive rather than, as originally drafted, DoD Regulation 5200.2-R, *DoD Personnel Security Program*, as amended (Regulation). Applicant did not object and I granted the motion. (Tr., 11) Positions designated as ADP I or ADP II are classified as sensitive positions in section AP10.2.1 of the Regulation. ADP III positions are nonsensitive positions. (Regulation, AP10.2.3.1) By virtue of the aforementioned memorandum, however, even though they are nonsensitive positions, ADP III cases are treated in the same way and adjudicated under the same guidelines and procedures as ADP I and II cases. The adjudicative guidelines in the Directive cases are virtually identical to those in the Regulation.

each adjudicative issue applicable to the facts and circumstances of each case.<sup>15</sup> Each determination must also reflect a fair and impartial common sense consideration of all available relevant and material information,<sup>16</sup> and it must reflect the adjudication process outlined in the Directive at Section E2.2.1.<sup>17</sup> The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to sensitive information. Having reviewed the information presented by the parties, I conclude Guideline J (criminal conduct) and Guideline E (personal conduct) must be considered in this case.

\_\_\_\_\_ Under the Regulation, trustworthiness determinations are intended solely to resolve whether it is clearly consistent with the interests of national security for an applicant to receive or continue to have access to sensitive information.<sup>18</sup> The government bears the initial burden of producing admissible information on which it based the preliminary decision against the applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, the burden then shifts to the applicant to refute, extenuate or mitigate the government's case. As with security clearances, no one has a "right" to such access.<sup>19</sup> Thus, an applicant bears a heavy burden of persuasion. Access to sensitive information is a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect sensitive information pertaining to the national interests as his or her own. The "clearly consistent with the interests of national security" standard compels

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<sup>15</sup> Also, Appendix 8 of the Regulation sets forth the adjudicative policy, as well as the disqualifying conditions and mitigating conditions associated with each guideline. DoD contractor personnel are afforded the adjudication procedures contained in the Directive. (Regulation, C8.2.1)

<sup>16</sup> Directive, 6.3.

<sup>17</sup> "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. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:

- E2.2.1.1. The nature, extent, and seriousness of the conduct;
- E2.2.1.2. The circumstances surrounding the conduct, to include knowledgeable participation;
- E2.2.1.3. The frequency and recency of the conduct;
- E2.2.1.4. The individual's age and maturity at the time of the conduct;
- E2.2.1.5. The voluntariness of participation;
- E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes;
- E2.2.1.7. The motivation for the conduct;
- E2.2.1.8. The potential for pressure, coercion, exploitation, or duress; and
- E2.2.1.9. The likelihood of continuation or recurrence;"

<sup>18</sup> Regulation, C6.1.1.1 ("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.")

<sup>19</sup> See *Egan*, 484 U.S. at 528, 531.

resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.<sup>20</sup>

## CONCLUSIONS

**Criminal Conduct.** Applicant's arrests and false statements to the government raise trustworthiness concerns addressed in the Directive under Guideline J. Specifically, a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.<sup>21</sup> A person who is willing to disregard the law and risk fines or incarceration may also be willing to disregard rules and regulations governing the protection of sensitive information. The criminal activity at issue may consist of a single serious crime or multiple lesser offenses.

Here, the government has reasonable doubts about Applicant's suitability for access to sensitive information because available information shows he has been arrested at least five times since 1992. He was convicted of contributing to the delinquency of a minor in 1993 (SOR ¶ 1.a), and of battery and spousal injury in 1997 (SOR ¶ 1.b). While on probation, he was held overnight in jail after a fight in 1998 (SOR ¶ 1.c). In 1999 (SOR ¶ 1.d) and 2000 (SOR ¶ 1.e), he was arrested on bench warrants issued for failing to comply with the terms of his sentence in 1997.

Available information also shows he deliberately made false statements to the government through his response to SF 85P question 16 in October 2003 (SOR ¶ 1.f). Applicant denied intentionally falsifying his answer because he was told to list only offenses within the preceding five years. Further, he claimed he did not believe he had to list either his 1999 arrest or his 2000 arrest because both related back to his original conviction in 1997. I accept his claim he was told to list events from the preceding five years; however, I do not accept his explanation of why he omitted his 1999 and 2000 arrests. On both occasions, he was held in jail and had to appear in court. He has not provided an explanation of his omission of the 1998 arrest for aggravated battery, for which he spent the night in jail before the charges were dropped.

By the plain language of question 16, Applicant was to list arrests, as well as convictions, and there is no qualifying language about the basis of the arrest. It is against federal criminal law and punishable by fines and/or imprisonment to knowingly and wilfully make a false statement or representation to any agency of the U.S. government concerning a matter within its jurisdiction.<sup>22</sup> Applicant, a college graduate and, by all appearances an intelligent person, signed his SF 85P directly below an advisement to that effect, thereby demonstrating he was aware of the consequences of his false statements. All of the foregoing requires consideration of Guideline J DC 1 and DC 2.<sup>23</sup>

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<sup>20</sup> See *Egan*; Directive, E2.2.2.

<sup>21</sup> Directive, E2.A10.1.1.

<sup>22</sup> Title 18 U.S.C. § 1001.

<sup>23</sup> Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged; and E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

By contrast, were it not for Applicant's deliberate falsification of his SF 85P, the record would require consideration of Guideline J MC 1.<sup>24</sup> His arrests and other conduct occurred nearly six years ago, and there appear to have been several recent positive changes in his lifestyle. However, his violation of 18 U.S.C. § 1001 is recent. In light of Applicant's work record, I have also considered MC 6.<sup>25</sup> But the value of this mitigator is attenuated by his deliberate false statement to the government. His criminal conduct is recent, it is not isolated, and his deliberate false statement to the government directly undermines any argument that he is rehabilitated. In sum, there is insufficient information available to overcome the government's concerns about his criminal conduct. I conclude Guideline J against the Applicant.

**Personal Conduct.** Under Guideline E, a security concern may arise if it is shown an applicant has exhibited questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct may indicate the person may not properly safeguard classified information.<sup>26</sup> The government questioned Applicant's trustworthiness by alleging he deliberately falsified material facts on his SF 85P by omitting his arrests in 1998, 1999, and 2000 in response to question 16 (SOR ¶ 2.a). Based on the discussion of this allegation, above, within the context of criminal conduct, I conclude from all available information about his SF 85P that he intended to minimize the scope of his criminal conduct. Guideline E DC 2<sup>27</sup> must be considered.

I have also considered Guideline E MC 4<sup>28</sup> in that Applicant was told to go back only five years. However, this does not explain his omission of events less than five years old. Nor did Applicant promptly correct his omissions as nearly eight months passed before he was interviewed by government investigators, and there is nothing in the record showing he tried to correct his omissions before then. Based on all of the foregoing, I conclude Guideline E against the Applicant.

**Whole Person.** In evaluating Applicant's case, I have also considered the adjudicative process factors collectively referred to as the "whole person" concept.<sup>29</sup> Applicant is a smart, hard-working person. His friends and co-workers speak highly of him and he is, by all accounts, very good at his job. However, the recommendations he provided carry diminished weight in that none of their remarks demonstrate any firsthand knowledge of the adverse information in Applicant's background. A fair and commonsense assessment<sup>30</sup> of the entire record before me shows the government properly expressed reasonable doubts about Applicant's suitability to hold a sensitive position. The SOR was

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<sup>24</sup> Directive, E2.A10.1.3.1. The criminal behavior was not recent.

<sup>25</sup> Directive, E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

<sup>26</sup> Directive, E2.A5.1.1.

<sup>27</sup> Directive, E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material 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;

<sup>28</sup> Directive, E2.A5.1.3.4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided.

<sup>29</sup> See note 20, supra.

<sup>30</sup> Directive, E2.2.3.

based on sufficient, reliable information about Applicant's criminal conduct, and his deliberate falsification of his SF 85P. Such issues bear directly on an applicant's ability and willingness to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its sensitive information.

**FORMAL FINDINGS**

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline J (Criminal Conduct):	AGAINST THE APPLICANT
Subparagraph 1.a:	Against the Applicant
Subparagraph 1.b:	Against the Applicant
Subparagraph 1.c:	Against the Applicant
Subparagraph 1.d:	Against the Applicant
Subparagraph 1.e:	Against the Applicant
Subparagraph 1.f:	Against the Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST THE APPLICANT
Subparagraph 2.a:	Against the Applicant

**DECISION**

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's request for eligibility for assignment to a sensitive position. Eligibility is denied.

Matthew E. Malone  
Administrative Judge