

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant is a 36-year-old employee of a defense contractor, who deliberately falsified his Questionnaire for Public Trust Positions (SF 85P) in January 2002, a violation of federal criminal law. He omitted a 1996 arrest in response to Question 16 on the form. He did not mitigate the concerns under the Personal Conduct Guideline and the Criminal Conduct Guideline. Eligibility for an ADP I/II/III position is denied.

CASENO: 04-11978.h1

DATE: 04/14/2006

DATE: April 14, 2006

In Re:

SSN: -----

Applicant for Trustworthiness Determination

ADP Case No. 04-11978

DECISION OF ADMINISTRATIVE JUDGE

NOREEN A. LYNCH

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 36-year-old employee of a defense contractor, who deliberately falsified his Questionnaire for Public Trust Positions (SF 85P) in January 2002, a violation of federal criminal law. He omitted a 1996 arrest in response to Question 16 on the form. He did not mitigate the concerns under the Personal Conduct Guideline and the Criminal Conduct Guideline. Eligibility for an ADP I/II/III position is denied.

STATEMENT OF THE CASE

On January 16, 2002, Applicant submitted an application for a position of public trust. On August 12, 2005, the Defense Office of Hearings and Appeals (DOHA), under Department of Defense Regulation 5200.2-R, *Personnel Security Program*, (Jan. 1987), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, (Directive), issued a Statement of Reasons (SOR) to Applicant. ⁽¹⁾ The SOR detailed reasons why DOHA could not make a determination that it is clearly consistent with the national interest to grant Applicant's request for a determination of trustworthiness because of security concerns arising under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct.)

On September 7, 2005, Applicant submitted a notarized response to the factual allegations set forth in the SOR, and elected to have the case decided on the record in lieu of a hearing. Department Counsel submitted the government's written case on November 7, 2005. Applicant received a complete file of relevant material (FORM) on October 14, 2005, and was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the government's case. ⁽²⁾ Applicant submitted a written response to the FORM on December 12, 2005. This case was assigned to me on January 6, 2006.

FINDINGS OF FACT

Applicant admitted the allegations in subparagraphs 2.a., and 2.b. of the SOR.⁽³⁾ Those admissions are incorporated as findings of fact. He did not respond to the remaining allegations in the SOR.⁽⁴⁾ After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a 36-year-old employee of a defense contractor.⁽⁵⁾ After leaving school, Applicant worked in various positions. He submitted an application for a position of trust in connection with his employment in January 2002.⁽⁶⁾

On January 1992, police arrested Applicant for carrying a concealed weapon through the security checkpoint at an airport. He originally packed the .22 caliber revolver in his checked baggage, but due to lateness, the bag was returned as a carry-on piece. He claimed he told the skycap and one security guard the gun was in his bag. He was detained at the airport, and the weapon was kept. He was arrested and charged with carrying a weapon in a public place, and carrying a concealed weapon. He pled guilty to the amended charge of Failure to Appear, and was sentenced to three years probation, fined \$122.00, and ordered to destroy the weapon.⁽⁷⁾

In 1996, Applicant was arrested for Driving While Under the Influence of Alcohol (DWI) and driving with a blood-alcohol level of .08% or higher. He pleaded guilty to the second charge and was sentenced to three days local confinement and fined \$1,415.00. Charge one was dismissed.⁽⁸⁾

In 1996, Applicant was arrested on a bench warrant and charged with Conspiracy to Commit a Crime, Possession and sale of Marijuana. He pled no contest, and the court sentenced him to 120 days in jail, with 30 days credit for time already served, five years supervised probation, fined \$168.00, and required to participate in a drug rehabilitation program. He completed probation successfully.⁽⁹⁾

On January 16, 2002, Applicant signed an application for a public trust position (SF-85P). He did not disclose his complete arrest record in response to question 16.⁽¹⁰⁾ He answered "yes" to the following question:

Question 16. Your Police Record

In the last 7 years, have you been arrested for, Charged with, or convicted of any offenses (s)? Leave out traffic fines of less than \$150.00.

He then listed his arrest for the DWI in 1996, but omitted the 1996 arrest for conspiracy to commit a crime, Possession and sale of marijuana. Because his 1992 arrest was more than seven years old he was not required to list it under Question 16.

Applicant acknowledged his three arrests in his June 2003 affidavit, his 2005 answer to the SOR, and his December 2005 statement in response to the FORM. He did not provide any explanation or extenuating circumstances concerning this omission. However, in his 2005 letter, Applicant did not object to the materials in the FORM and specifically stated he did not deny any of the charges presented in the FORM against him.

Applicant also explained in his affidavit, dated June 25, 2003, he did not believe he is vulnerable to any blackmail or coercion because his arrest record is a public record. [\(11\)](#)

In his 2005 response to the FORM, although Applicant did not specifically address the issue of falsification of the SF 85P, he made a general admission to all charges. He explained he takes full responsibility for the criminal charges. [\(12\)](#)

Applicant is now a customer care representative. While working for his current employer, he has performed his duties quite well. He earned recognition in his two years of service. His supervisor rating indicated "exceeds or meets standards." [\(13\)](#)

POLICIES

The President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to information." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). In Executive Order 12968, *Access to Classified Information*, § 3.1(b) (August 4, 1995), the President provided that eligibility for access to classified information shall be granted only to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness to abide by regulations governing the use, handling, and protection of classified information.

To be eligible for assignment to sensitive duties, an applicant must meet the security guidelines contained in DoD

5200.2-R. "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." DoD 5200.2-R, ¶ C6.1.1.1. Appendix 8 of the Regulation sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." DoD 5200.2-R, Appendix 8. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider the following factors: (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. *Id.*

DoD contractor personnel are afforded the right to the procedures contained in DoD Directive 5200.6 before any final unfavorable access determination may be made. DoD 5200.2-R, ¶ C8.2.1. Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. Directive, ¶ E3.1.14. Thereafter, the applicant is responsible for presenting evidence 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 security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2.

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. Exec. Ord. 10865, § 7. It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Personal Conduct - Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Criminal Conduct - Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegation set forth in the SOR:

Personal Conduct

Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. Personal Conduct is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information.

The government established its case under Guideline E as to allegation 1.a. Applicant's answer to Question 16 omitted material facts from his SF 85P. When Applicant completed his security application form in 2002, he answered "yes" to Question 16 on his application, but disclosed only one arrest. Applicant acknowledges his three arrests in a 2003 affidavit and his 2005 response to the FORM. The government must establish that Applicant's omission, concealment or falsification in regards to his omission on the SF 85P was deliberate. When a falsification allegation is denied, the government has the burden of proving it. Proof of omission standing alone does not establish or prove an applicant's intent or state of mind when the omission occurred.

Applicant intentionally omitted the second arrest on his SF 85P due to the serious nature of the charge. It does not seem credible that he would forget the five-year probation or time spent in jail for that charge, but remember the less serious DWI. In his 2005 statement he specifically stated he did not deny any charges or object to any materials in the FORM. Although he did not respond to the SOR allegation concerning the omission, it is considered a denial. I do not find he carried his burden to persuade me he merely overlooked the second arrest. Personal Conduct Disqualifying Condition (PC DC) 2 (*the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire . . . to determine security clearance eligibility or trustworthiness*) applies in this case. I conclude Applicant falsified material facts on a Public Trust Position Application (SF 85P). I find against Applicant as to allegation 1.a.

He breached a trust that exists between employer and employee. His actions are pertinent to a determination of his

overall judgment, trustworthiness, and reliability, therefore, Personal Conduct Mitigating Condition (PC MC) 1 does not apply. Applicant disclosed his three arrests on the 2003 affidavit and his 2005 answer to the SOR, but not before being confronted with the facts. (PC MC) 2 (*the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*) and PC MC 3 (*the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*) do not apply. None of the remaining mitigating conditions apply.

Criminal Conduct

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. Willingness to abide by rules is essential for one who is granted access to sensitive information.

The government established its case as to allegations 2.a. 2.b. and 2.c. under Guideline J. Applicant's arrests in 1992 and 1996 are conduct clearly falling under Criminal Conduct Disqualifying Condition (CC DC) 1 (*any conduct, regardless of whether the person was formally charged*), and CC DC 2 (*a single serious crime or multiple lesser offenses*).

The arrests were in 1992 and in 1996. Applicant's record does not include any criminal activity after that date. Because he had no other convictions or recorded criminal activity over a ten-year period, Criminal Conduct Mitigating Condition (CC MC) 1 (*the behavior was not recent*) applies.

Applicant had a pattern of criminal activity with his three arrests over the years. CC MC 2 (*the crime was an isolated incident*) does not apply.

Since the arrests in 1992 and 1996, Applicant has remained gainfully employed and responsible. He was 25 years old at the time of the last arrest. Since that time he gained the respect of various employers and colleagues. He completed his probation successfully and paid his fines. CC MC 5 (*there is clear evidence of successful rehabilitation*) applies.

As to allegation 2.d., I conclude he did not mitigate the allegation, for the same reasons discussed in the Personal Conduct section. Applicant deliberately omitted relevant information in Question 16 on his Public Trust Application form. This intentional falsification constitutes a felony under the law (18 U.S.C. Section 1001).

Finally, I considered the whole person concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I balanced all the factual circumstances and applied them to the adjudicative criteria established in the Regulation in light of the whole person concept. Despite a ten year period with no criminal activity, Applicant's deliberate omission of material information on his SF 85P is not mitigated. I conclude it is not clearly consistent with the national interest to grant a trustworthiness determination to Applicant. Accordingly, criminal conduct under Guideline J is concluded against Applicant.

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 E (Personal Conduct) AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Paragraph 2. Guideline J (Criminal Conduct) Against Applicant

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For Applicant

Subparagraph 2.d: Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly not consistent with national interest to grant Applicant's request for a determination of trustworthiness and eligibility for assignment to sensitive duties. Eligibility is denied.

Noreen A. Lynch

Administrative Judge

1. In ADP trustworthiness determinations, I am required to follow the procedural rules of the Directive but the substantive guidelines from the Regulation.
2. The government submitted seven items in support of its contentions.
3. Item 3 (Applicant's Answer to SOR, dated September 7, 2005) at 1-2.
4. Since Applicant has not responded to the other allegations, I will treat his non-response as a denial of 1.a., 2.c., and 2.d.
5. Item 2 (Transmittal Letter Receipt, dated August 12, 2005) at 1.
6. Item 5 (Application for Public Trust Positions (SF 85P), dated January 16, 2002) at 1-5.
7. Item 4 (Federal Bureau of Investigation Report, dated January 12, 1992) at 1.

8. Item 6 (Federal Bureau of Investigation Report, dated January, 1992) at 2.

9. *Id.* at 3.

10. Item 5, *supra* note 6, at 2.

11. *Id.*

12. Applicant's Response to FORM, .

13. Applicant's Certificates, included in file.