

KEYWORD: Criminal Conduct, Personal Conduct, Financial Considerations

DIGEST: Applicant, while working as a bookkeeper for an employer in the mid-1990's, embezzled company funds, using them for among other things, a pleasure cruise and a trip to Disneyland. In April 1995, she was arrested and charged with theft. Later, she pleaded no contest, but evaded punishment for seven years by failing to appear for the sentencing hearing. After finally being apprehended by the police in 2002, she was convicted and ordered to pay \$12,645 in restitution of which she continues to owe approximately \$10,000. Applicant failed to disclose this conviction, as required on her application for a public trust position. Eligibility for occupying an Information Systems Position designated ADP-II is denied.

CASE NO: 05-08820.h1

DATE: 05/31/2006

DATE: May 31, 2006

In re:

SSN: -----

Applicant for Trustworthiness Determination

ADP Case No. 05-08820

DECISION OF ADMINISTRATIVE JUDGE

MARC E. CURRY

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, while working as a bookkeeper for an employer in the mid-1990's, embezzled company funds, using them for among other things, a pleasure cruise and a trip to Disneyland. In April 1995, she was arrested and charged with theft. Later, she pleaded no contest, but evaded punishment for seven years by failing to appear for the sentencing hearing. After finally being apprehended by the police in 2002, she was convicted and ordered to pay \$12,645 in restitution of which she continues to owe approximately \$10,000. Applicant failed to disclose this conviction, as required on her application for a public trust position. Eligibility for occupying an Information Systems Position designated ADP-II is denied.

STATEMENT OF THE CASE

On November 21, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified; Department of Defense Regulation 5200.2-R., *Personnel Security Program*, dated January 1987, as amended and modified (the Regulation); Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended and modified (Directive); a memorandum from the Deputy Under Secretary of Defense (Counterintelligence and Security, *Adjudication of Trustworthiness Cases*, dated November 19, 2004); and a memorandum from the Deputy Director for Personnel Security, Office of the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence, dated August 4, 1999.

The SOR detailed reasons under Guideline J (criminal considerations), Guideline E (personal conduct considerations), and Guideline F (financial considerations) why DOHA could not make a preliminary affirmative finding under the Directive that it was clearly consistent with the national interest to grant or continue Applicant's eligibility for occupying an Information Systems Position, designated ADP-II, to support a contract with the Department of Defense, and recommended a referral to an administrative judge to determine whether such eligibility should be granted, continued, denied, or revoked. Applicant answered the SOR on December 16, 2005, and requested a hearing.

The case was assigned to me on January 30, 2006. A notice of hearing was issued on February 13, 2006 scheduling the hearing for March 14, 2006. The hearing was held as scheduled. During the hearing, four government exhibits, three Applicant exhibits, and Applicant's testimony were received. DOHA received the transcript (Tr.) on March 23, 2006.

FINDINGS OF FACT

Applicant admitted all of the criminal conduct allegations. These admissions are incorporated herein as findings of fact. She denied all of the personal conduct allegations, and did not respond to the financial considerations allegation. After a thorough review and consideration of the evidence in the record, I make the following findings of fact:

Applicant is a 48-year-old woman who has been married twice. She has three children, two of whom are adults. She adopted her youngest child in 2003. She earned a college degree in 1984, and has been working for her current employer in a DoD contract position that requires access to sensitive information since August 2004. Her supervisor characterizes her as "an outstanding worker who is always dependable, and proactive."⁽¹⁾ She earned a promotion within six months of being hired.

Applicant has a history of criminal activity. On April 3, 1995, she was charged with nine counts of unlawful issuance of checks. Subsequently, she was found guilty of three of the charges, and ordered to pay \$767 in restitution and fines. At or about this time, she was also using her employer's corporate checks and credit cards for personal use. Her employer discovered this fraud after she quit, and reported it to the police. Shortly thereafter, on April 30, 1995, she was charged with felony theft. She pleaded no contest, but failed to appear for the sentencing, evading prosecution for nearly seven years until May 2002 when the police discovered the outstanding warrant pursuant to a routine traffic stop. She was then arrested, sentenced to 30 days in jail, and one year of supervised probation. Also, she was ordered to pay approximately \$14,000 in restitution.⁽²⁾ She knew at the time she pleaded no contest in April 1995 that her impending sentence was going to include a requirement to pay restitution.⁽³⁾

Contrary to the allegation listed in subparagraph 2.a., her employer did not fire her when the fraud was discovered. She had already quit the job by that time. Therefore, I find in her favor with respect to subparagraph 2.a.

In February 1996, Applicant was charged with unlawful issuance of a check. She was found guilty in September 1997, sentenced to 365 days incarceration, suspended, fined \$100, and ordered to pay approximately \$270 restitution.

Applicant paid the restitution resulting from the April 1995 and September 1997 misdemeanor bad check charges. She has, for the most part, been unable to consistently pay the restitution resulting from the May 2002 conviction. By December 2004, the amount owed had increased to approximately \$15,600. Since February 2005, she has been making monthly \$50 payments toward its satisfaction.⁽⁴⁾ Currently, she owes approximately \$10,000.⁽⁵⁾

Throughout the course of the investigatory process, Applicant misrepresented the details of her wrongdoing with respect to the 1995 felony theft charge. In her signed, sworn statement executed in September 2004, she stated that she wrote two or three checks drawn from her employer's account, and that her husband at the time, a drug abuser, had abused the company credit cards.⁽⁶⁾ She elaborated further in her answer to the SOR, stating that she wrote "2 or 3 company checks to [herself] to pay rent & to buy groceries for [her] children."⁽⁷⁾ On cross-examination at the hearing, however, she admitted writing 34 checks drawn from her employer's account, and using the company credit cards herself for, among other things, a leisure cruise and airline tickets for a trip to Disneyland.⁽⁸⁾

In her April 2004 SF 85P, Applicant failed to disclose her 2002 arrest and subsequent sentencing for felony theft, and her 1997 conviction for issuing a bad check, in response to Question 16: (*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.)*).⁽⁹⁾ She testified that she believed she did not have to list them because the charges occurred more than seven years before she completed the SF 85P.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability (as well as trustworthiness eligibility). In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information or eligibility for occupying an Information Systems Position (Disqualifying Conditions), and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information or eligibility for occupying an Information Systems Position (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in

making a meaningful decision. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future.

The following adjudicative guidelines are raised:

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

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

Guideline F - Financial Considerations: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

Conditions pertaining to these adjudicative guidelines that could raise a security or trustworthiness concern and may be disqualifying, as well as those which could mitigate security or trustworthiness concerns, are set forth and discussed in the conclusions below.

Since the protection of national security (and sensitive information) is the paramount consideration, the final decision in each case must be reached by applying the standard that the determination of an applicant's eligibility for occupying an Information Systems Position is "clearly consistent with the interests of national security," or "clearly consistent with the national interest."⁽¹⁰⁾ For the purposes herein, despite the different language in each, I have concluded both standards are the same. 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.

The government is responsible for presenting witnesses and other evidence to establish facts in the SOR that have been controverted. The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by the government, and has the ultimate burden of persuasion as to

obtaining a favorable trustworthiness determination.

A person who seeks access to classified or sensitive information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship 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 or eligibility for occupying an Information Systems Position. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified or sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information.

Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions (and by inference, trustworthiness 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." Security clearance and trustworthiness decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Criminal Conduct

Applicant was convicted twice for writing bad checks and once for felony theft. Additionally, her failure to list the 1997 and 2002 convictions on her SF 85P raises the issue of whether she violated Title 18, United States Code, Section 1001. (11) After considering her explanation for omitting the convictions from the SF 85P in light of the plain language of Question 16, the circumstances surrounding the 2002 conviction, and the lack of credibility demonstrated throughout the trustworthiness adjudication process, I conclude Applicant's omissions were intentional.

These falsifications, in conjunction with the bad check and felony theft convictions generate trustworthiness concerns under Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*), and CC DC E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*). Applying the whole person concept, favorable evidence exists that indicates Applicant's past criminality is no longer a trustworthiness concern. She completed probation related to the 2002 conviction, and performs her job duties exceptionally. However, this favorable evidence is greatly outweighed by the negative trustworthiness implications generated by skipping the sentencing hearing after pleading guilty to felony theft in 1995, attempting to conceal her criminal history from the trustworthiness adjudication process in 2004, and her attempted deception at the hearing.

Under these circumstances, none of the mitigating conditions apply. Applicant failed to mitigate her past criminal conduct.

Personal Conduct

In addition to constituting a felony under 18 U.S.C. §1001, Applicant's failure to disclose the convictions of 1997 and 2002 generate trustworthiness concerns under Personal Conduct Disqualifying Condition (PC DC) 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*), PC DC E2.A5.1.2.4. (*Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*), and PC DC E2.A5.1.2.5. (*A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*). I conclude she has not mitigated the Personal Conduct trustworthiness concerns for the same reasons set forth in the Criminal Conduct section, above.

Financial Considerations

Applicant stole approximately \$12,600 from her employer, pleaded guilty, and failed to appear for sentencing, knowing that the sentencing order was going to include a provision that she pay restitution. Upon being sentenced in 2002, she was unable to make steady, monthly restitution payments until February 2005. Financial Considerations Disqualifying Conditions (FC DC) E2.A6.1.2.1. (*A history of not meeting financial obligations*), FC DC E2.A6.1.2.2. (*Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust*), and FC DC E2.A6.1.2.3. (*Inability or unwillingness to satisfy debts*), apply.

Although Applicant's consistent restitution payments constitute a step in the right direction, they are woefully inadequate to mitigate the Guideline F trustworthiness concerns. She accrued the debt through theft, and avoided sentencing for seven years knowing the sentencing order was going to include a provision that she pay restitution. Ten years later, she still owes approximately \$10,000. None of the mitigating conditions apply. I conclude Applicant has not mitigated the Guideline F trustworthiness concerns.

FORMAL FINDINGS

I conclude Applicant is not eligible to occupy an Information Systems Position. 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 THE APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Paragraph 2., Guideline E.: AGAINST THE APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: Against Applicant

Paragraph 3., Guideline F.: AGAINST THE APPLICANT

Subparagraph 3.a.: Against Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for occupying an Information Systems Position designated ADP-II. Eligibility is denied.

Marc E. Curry

Administrative Judge

1. Exhibit A (Supervisor's Reference Letter, dated December 13, 2005)
2. Answer to the SOR, dated December 16, 2005, at 1.
3. *Id.* at 2.
4. Tr. at 18.
5. Tr. at 28.
6. Exhibit 2 (Signed, Sworn Statement, dated September 16, 2004) at 3.
7. *See* note 3, *supra*.
8. Tr. 33-36.
9. Exhibit 1 (Public Trust Position Application, executed April 21, 2004) at 5.
10. The Directive, as amended by Change 4, dated April 20, 1999, alternately uses the terms "clearly consistent with the national interest" (Sec. 2.3.; Sec. 2.5.3.; Sec. 3.2; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), "clearly consistent with the interests of national security" (Enclosure 2, Sec. E2.2.3.), and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.).
11. Under 18 U.S.C. §1001, intentionally falsifying, concealing or covering up a material fact is a federal crime punishable by up to five years in prison.