

DATE: October 31, 2006

In re:

SSN: -----

Applicant for ADP Position

P Case No. 05-11172

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant pleaded guilty to misdemeanor embezzlement in 1994. Since October 2000, he has accumulated seven delinquent debts totaling about \$10,385. He falsified a security clearance application (SF 86) by failing to disclose a felony arrest and delinquent debts. He has not mitigated the trustworthiness concerns based on financial considerations, personal conduct, and criminal conduct. Eligibility is denied.

STATEMENT OF THE CASE

Applicant filed his SF 86 on August 12, 2004. On April 4, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified; and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleged security concerns raised under Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct). Applicant answered the SOR in writing on May 9, 2006, and he elected to have the case decided on the written record in lieu of a hearing.

On June 19, 2006, Applicant's security manager informed DOHA that Applicant did not require access to classified information but needed ADP III computer access. Department Counsel submitted the Government's written case on July 24, 2006, and he included in his submission a motion to amend the caption and first paragraph of the SOR to redesignate the case as an application for an ADP position and to cite Department of Defense Regulation 5200.2-R, *Personnel Security Program* (Jan. 1987), as amended and modified (Regulation), as an additional basis for the action. A complete copy of the file of relevant material (FORM) and Department Counsel's motion to amend was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on August 1, 2006, but did not respond. The case was assigned to me on September 25, 2006.

PROCEDURAL RULING

Department Counsel's motion to amend the caption and first paragraph of the SOR to redesignate the case as an application for an ADP position and to cite the Regulation as an additional basis for the action is hereby granted.

FINDINGS OF FACT

Applicant is a 53-year-old employee of a federal contractor. He has worked for his current employer since August 2002. He served in the U.S. Air Force from September 1971 to September 1991, retiring as a technical sergeant (E-6). After his retirement, he did not find steady employment until some time in 1994. He does not have a security clearance or eligibility for sensitive positions.

In June 1994, Applicant was working as an assistant manager of a retail store, and he was charged with felony embezzlement. According to Applicant, the charges arose after he removed some damaged merchandise from a trash dumpster and took it home, intending to repair it and keep it. Although he denied intending to do anything wrong, he appeared in court represented by counsel, pleaded guilty to misdemeanor embezzlement, and was fined \$199.50, including court costs. He admitted his conviction of misdemeanor embezzlement in his answer to SOR ¶ 1.a.

On his SF 86, Applicant answered "no" to question 21, asking if he had ever been charged with or convicted of a felony; question 34, asking if his wages had been garnished for any reason in the last seven years; question 38, asking if he had been more than 180 days delinquent on any debts in the last seven years; and question 39, asking if he was currently more than 90 days delinquent on any debt.

Applicant's credit reports dated December 15, 2005 (FORM Item 7), and March 15, 2006 (FORM Item 6), reflected two debts for \$563 and \$76 that were placed for collection in October 2000 (SOR ¶¶ 1.b and 1.c); a debt to the military exchange system for \$4,757 that was charged off as a bad debt in December 2000 (SOR ¶ 1.d); three debts totaling \$4,462 that were placed for collection in 2003 (SOR ¶¶ 1.e, 1.f, and 1.g); and a \$527 debt that was placed for collection in May 2005 (SOR ¶ 1.g).

In a statement to a security investigator on March 22, 2005, Applicant attributed his financial problems to periods of unemployment (FORM Item 5 at 6, 7, 8, 9). However, his SF 86 reflects continuous employment from 1994 to the present (FORM Item 4 at 1-2). He told the security investigator he intended to contact a financial counselor to resolve his debts. (FORM Item 5 at 11-12).

In his answer to the SOR, Applicant stated that the debts alleged in SOR ¶¶ 1.b, 1.d, 1.e, and 1.f. would be paid in accordance with installment agreements. He stated the debt in SOR ¶ 1.e would be paid in full in May 2006. He admitted the debts in SOR ¶¶ g and 1.h, but he did not comment on his plans to resolve them.

In a personal financial statement dated March 22, 2005, Applicant reported a net monthly household income of \$6,120, expenses of \$1,145, debt payments of \$2,050, and a remainder of \$2,925 (FORM Item 5 at 13). In his answer to the SOR, he stated his monthly remainder would be used to carry out his installment payment plans for the debts in SOR ¶¶ 1.b, 1.c, 1.d, 1.e, and 1.f. However, after receiving the FORM, Applicant did not submit any documentary evidence of payments on the delinquent debts.

In his answer to the SOR, Applicant explained that he answered "no" to question 21 on the SF 86 because he was convicted only of a misdemeanor. He admitted his retirement pay was garnished but denied any of his wages were garnished. He admitted falsification of the two questions about delinquent debts. He denied having a "history of criminal activity," pointing out he has only one misdemeanor conviction that was disposed of by a fine.

POLICIES

The adjudicative guidelines set out in the Regulation are used to make ADP trustworthiness determinations. 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. Regulation ¶ C8.2.1.

Positions designated as ADP I and ADP II are classified as "sensitive positions." Regulation AP10.2.1. and AP10.2.2. ADP III positions are nonsensitive positions. Regulation AP10.2.3.1.

By memorandum dated November 19, 2004, the Deputy Under Secretary of Defense for Counterintelligence and Security directed DOHA to resolve all contractor cases submitted for trustworthiness determinations, including ADP I, II, and III, under with the Directive. Thus, ADP III cases are treated in the same way and adjudicated under the same guidelines and procedures as ADP I and II, even though they are nonsensitive positions.

"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. Appendix 8 of the Regulation sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) 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." Regulation Appendix 8. Each eligibility determination must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Regulation.

In security clearance cases, the government must initially present substantial 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. "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). 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. These same burdens of proof apply to trustworthiness determinations for ADP positions.

CONCLUSIONS

Guideline F (Financial Considerations)

Under this guideline, "[a]n individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." Regulation Appendix 8 at 144. Two disqualifying conditions (DC) under this guideline could raise a trustworthiness concern and may be disqualifying in this case. DC 1 applies where an applicant has a history of not meeting financial obligations. *Id.* Applicant's financial history and his admissions are sufficient to raise DC 1.

"Deceptive or illegal financial practices such as embezzlement [or] employee theft" also may be disqualifying (DC 2). *Id.* Applicant's statement to a security investigator suggested that the conduct on which the embezzlement charge was based was no more than an innocent mistake. However, he appeared in court and, with the assistance of counsel, pleaded guilty to misdemeanor embezzlement.

If Applicant had been convicted of a felony, he would be estopped from asserting his innocence. He is not estopped, however, from challenging his misdemeanor conviction and asserting that his alleged embezzlement was an honest mistake, as he did during his interview with a security investigator. *See* ISCR Case No. 01-08410 (App. Bd. May 8, 2002), 2002 WL 32114539. Nevertheless, for reasons not clear from the record, he chose to plead guilty and to not challenge his conviction in his answer to the SOR or by responding to the FORM. Thus, I resolve the conflict between his statement to the security investigator and his guilty plea by concluding that he was in fact guilty of embezzlement. Accordingly, DC 2 is raised.

DC 3 applies where an applicant has exhibited inability or unwillingness to satisfy debts. *Id.* Applicant denied being unable to pay his debts and asserted he had established payment plans for several debts, but he produced no documentary evidence that any payments had been made. Thus, I conclude DC 3 also is raised.

Since the government produced substantial evidence to establish DC 1, DC 2, and DC 3, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

A security concern based on financial problems can be mitigated by showing the delinquent debts were not recent (MC 1) or were isolated incidents (MC 2). Regulation Appendix 8 at 144. Applicant has multiple delinquent debts that are not resolved. I conclude MC 1 and MC 2 are not established.

Security concerns arising from financial problems can be mitigated by showing they are the result of conditions "largely beyond the person's control" (MC 3). *Id.* Although Applicant asserted in his statement to a security investigator that his inability to pay his debts was caused by periods of unemployment, his assertion is undermined by his SF 86, which reflects continuous employment since 1994. I conclude MC 3 is not established.

A mitigating condition (MC 4) applies when an applicant "has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control." *Id.* In his statement to the security investigator, Applicant stated he intended to seek financial counseling. In his answer to the SOR, he asserted that payment plans had been established for several debts. However, he has resented no evidence that any payments have been made. MC 4 is not established because there is no evidence the problem is being resolved.

A security concern arising from financial problems can be mitigated by showing a good-faith effort to resolve debts (MC 6). *Id.* The concept of good faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Because there is no evidence that payments have been made on the debts, MC 6 is not established.

Guideline E (Personal Conduct)

In security clearance cases, "[c]onduct 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." Regulation Appendix 8 at 142. The same considerations apply to trustworthiness determinations. A disqualifying condition (DC 2) under this guideline may be established by "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." *Id.*

Applicant responded to SOR ¶¶ 2.a and 2.b by saying "I admit," but he then offered explanations inconsistent with intentional falsification. With respect to SOR ¶ 2.a, pertaining to felony charges or convictions, Applicant explained that his felony charge "ended up being Misdemeanor" [sic], and he was "answering to that effect." With respect to SOR ¶ 2.b, pertaining to garnishments, he admitted his retired pay was garnished but not his wages. I have construed his responses as admitting that he answered "no" to each question but denying that he intentionally gave false answers.

Applicant is a mature, educated adult who served in the Air Force for 20 years and retired as a mid-level noncommissioned officer. He also had ten years of work experience in civilian life before he executed his SF 86. Question 21 asks, in plain language, whether an applicant has "ever been charged with or convicted of any felony offense." He indicated in his statement to the security investigator and his answer to the SOR that he knew he had been charged with a felony. His careful parsing of the question pertaining to garnishments, distinguishing between garnishment of his retired pay and garnishment of his wages, indicates he read the questions carefully. I am satisfied, based on all the circumstantial evidence, that Applicant intentionally answered "no" to the question 21, knowing his answer was false.

With respect to question 34, pertaining to garnishments, Applicant's answer was reasonable and his explanation for his answer was plausible. Pensions and retirement annuities are not usually referred to as "wages." I resolve SOR ¶ 2.b in his favor.

Applicant admitted falsely answering questions 38 and 39, pertaining to delinquent debts, and he offered no explanation.

Based on his false answers to questions 21, 38, and 39, I conclude DC 2 is raised.

Two mitigating conditions (MC) are relevant to this case. MC 2 applies when the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. *Id.* at 143. MC 3 applies when the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts. *Id.* Neither condition is established. Applicant's falsifications were recent, pertaining to his current application for a trustworthiness determination, and he did not provide correct information until he was interviewed by a security investigator in March 2005.

Guideline J (Criminal Conduct)

"A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness." Regulation Appendix 8 at 150. A disqualifying condition (DC 1) may be based on "any conduct, regardless of whether the person was formally charged." *Id.* "[A] single serious crime or multiple lesser offenses" may also be disqualifying (DC 2). *Id.*

It is a felony, punishable by a fine or imprisonment for not more than five years, or both, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the government of the United States. 18 U.S.C. § 1001. Trustworthiness determinations are within the jurisdiction of the executive branch of the government of the United States. A deliberately false answer on a SF 86 is a serious crime within the meaning of Guideline J. Applicant's false answers on his SF 86 and his embezzlement conviction raise DC 1 and DC 2.

A security concern based on criminal conduct may be mitigated by showing the criminal behavior was not recent (MC 1) *Id.* MC 1 is not established because Applicant falsified the SF 86 that initiated his current trustworthiness determination.

MC 2 may apply if criminal conduct was "an isolated incident." *Id.* Applicant has been twice involved in criminal conduct involving dishonesty; but his embezzlement conviction was in 1994 and was preceded by 20 years of honorable service in the U.S. Air Force, and his falsification of the SF 86 occurred ten years later. I conclude the substantial temporal break between these two offenses is sufficient to establish that each was "isolated" within the meaning of MC 2.

"Whole Person" Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered the following in my "whole person" analysis: (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 applicant'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. *See* Regulation Appendix 8 at 132.

Applicant's falsification of his SF 86 is serious misconduct. His delinquent debts are numerous, extend over a substantial time period, and are not yet resolved. He appears to have sufficient income to pay off his debts over time, and he has promised to do so; but he has presented no evidence that he carried out his promises. The seriousness of his embezzlement is difficult to assess, because he appears to have recanted his early explanation of an innocent mistake but has offered no other explanation. In light of the ambiguity of the record and the passage of time since his embezzlement conviction, I have given his conviction of embezzlement little weight in my decision. He is a mature adult with significant military and civilian experience, but unless he changes his financial behavior, continued financial problems are likely. His delinquent debts make him vulnerable to pressure, coercion, exploitation, or duress.

After weighing the disqualifying and mitigating conditions under Guidelines F, E, and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the trustworthiness concerns based on based on financial considerations, personal conduct, and criminal conduct. Accordingly, I conclude he has not carried his

burden of showing that it is clearly consistent with the interests of national security to grant him eligibility for assignment to a sensitive position or an ADP III position.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline F (Financial): AGAINST APPLICANT

Subparagraphs 1.a-1.i: Against Applicant

Paragraph 2. Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: Against Applicant

Subparagraph 2.d: Against Applicant

Paragraph 3. Guideline J: AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for assignment to sensitive duties or an ADP III position. Eligibility is denied.

LeRoy F. Foreman

Administrative Judge