



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



In the matter of:)
)
-----) ADP Case No. 07-05703
SSN: -----)
)
Applicant for Public Trust Position)

Appearances

For Government: Tom Coale, Esquire, Department Counsel
For Applicant: Pro Se

May 8, 2008

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Questionnaire for Public Trust Position (SF 85P), on November 7, 2006. On January 3, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guidelines F and E for Applicant. 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 Jan. 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 requested a hearing before an Administrative Judge. I received the case assignment on April 2, 2008. DOHA issued a notice of hearing on April 4, 2008, and I convened the hearing as scheduled on April 23, 2008. The government offered Exhibits (GE) 1 through 7, which were received without objection. Applicant testified in his own behalf and submitted Exhibits (AE) A through L. DOHA received the transcript

of the hearing on May 1, 2008. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

.Findings of Fact

In his Answer to the SOR, dated February 27, 2008, Applicant admitted the factual allegations in ¶¶ 1.a, 1.c-1.f, 1.h, 1.k-1.q, and 2.a, with explanation. He denied the factual allegations in ¶¶ 1.b, 1.g, 1.i, and neither admitted nor denied 1.j of the SOR. He also provided additional information to support his request for eligibility for a public trust position.

Applicant is a 40-year old employee of a defense contractor. He graduated from high school in 1986 and continues to take college courses. He is single and has no children. Since January 2003, Applicant has worked in a position for a federal contractor. He submitted a Questionnaire for Public Trust Position, on November 7, 2006 (GE 1).

In 1987, shortly after high school, Applicant was charged with forgery. He admits that he signed a check that was mistakenly delivered to his address. He deposited the check in his bank account. He does not recall other details but he admits he was convicted and placed on probation. He made restitution (Tr. 91 and (GE 7)

Again in 1989, Applicant was convicted of forgery and theft by taking. He and some friends found checks and signed them. In addition, he ordered a piece of computer hardware and did not pay for it or return it to the company (Tr. 93). Applicant was incarcerated from May 1990 until October 1990. He explained that his home life was not good. He stated that his family was physically and emotionally abusive to him and he rebelled by acting out (Tr. 33).

In 1992, Applicant was convicted of writing bad checks. He was placed on probation for six months. Again, in 1993, he was convicted of bad checks and theft by deception (GE 7). He recalled he "came across some checks" and cashed them. He does not recall his sentence or how much time he served, but he received probation for five years (Tr. 96-98). During this probation period, Applicant worked for a church and he received counseling. His record also indicated that he violated his probation in 1995 for a traffic incident. He does not agree that this was an actual violation of probation but he agreed he was taken to jail until his probation officer was notified of the situation (Tr. 100).

From 1996 until 2003, prior to his employment with federal contractors, Applicant worked as a consultant and as a technology officer in different companies. The only period of unemployment that Applicant reported was approximately nine months from early 2006 until late 2006 (Tr. 69). The majority of his debts precede that time period. During cross-examination, Applicant admitted that during the 2006 period of unemployment several of his checks were returned for insufficient funds, but it was not his intention to have his checks bounce.

The SOR alleges 13 delinquent debts totaling approximately \$20,000. Applicant admits to approximately \$15,000 in delinquent debt. At the hearing, Applicant asserted that some debts were disputed with the credit reporters. He did not provide them with any documentation but stated the debts were not his (Tr. 88). According to Applicant, his documents are in storage in another state and he has not had an opportunity to retrieve them (Tr. 21). He stated that some records were destroyed (Tr. 66). In some instances the debts have been removed from his 2008 credit report (AE J). He is still disputing some that have already been investigated and are still on his credit report. Despite his admissions to debts in the SOR, at the hearing he explained that he was still disputing many of them and is waiting for the creditors to verify the amount due (Tr. 61). He is also trying to negotiate with three creditors so that he does not pay interest and fees. His answers to questions in his September 2007 interrogatories differ from answers he provided in an interview in January 2007 (GE 5 and GE 6).

The current status of the accounts in the SOR is as follows:

SOR ¶	Type of Account/ Amount	Status
1.a	\$226 Credit card	Disputed
1.b	\$133 Phone collection	Disputed/Removed
1.c	\$1,845 Collection	Removed
1.d	\$2,498 Credit card	Admits/Unpaid
1.e	\$707 Credit card	Removed
1.f	\$222 Collection (returned check)	Removed
1.g	\$275 Dental	Disputed
1.h	\$206 Collection (returned check)	Disputed
1.i	\$6,807 Credit card	Admits/Unpaid
1.j	\$259 Medical	Disputed
1.k	\$1,442 Credit card	Admits/Unpaid
1.l	\$5,236 Credit card	Admits/Unpaid
1.m	\$1,465 Credit card	Disputed

Applicant stated that he would make arrangements to pay and he is willing to resolve the debts if he and the companies can agree to an amount. He contests certain interest and fees that have been included (Tr. 82). Applicant provided no documentation of payment or payment plan for any of the debts. At the hearing, he was clear that he would honor his debts when an amicable payment arrangement was reached (Tr. 111). He added that he has not paid some of the larger bills because he is

concerned that he may face unemployment if he does not obtain a favorable trustworthiness determination (Tr. 113).

When Applicant signed his Standard Form SF 85P, Questionnaire for Public Trust Position on November 2006, he answered “no” to question 20 concerning his financial record - 180 day delinquencies.

Applicant explained that he thought he checked “yes” for that question. He states that it was just a clerical error. He is adamant that he did not falsify his application or lie. He further noted that he did not realize until the investigation that he had checked “no”. He was in a hurry to complete the application and did not check it. Applicant stated that he was forthright in his interview with the Government and never denied that he was in debt. He was rushed to complete the form but he also stated that it took him four hours to complete. He regrets the error and acknowledges that when he signed the document, he did not reread it.

Applicant has a net monthly income of \$5000. After monthly expenses, he has a net remainder of \$2,590 (GE 6). He also has some savings and a retirement account.

In January 2007, Applicant was interviewed by investigators as part of the application process. He maintains that he was fully cooperative with the investigator in answering questions about his debts and repeated that he did not hide anything from the investigator (Tr. 104). He disputed many accounts and stated he had no intention of paying some of them. At that time he also explained that he would not pay accounts until the debts could be verified by the creditor or collection agency. However, he also promised to set up payment plans on some of them. He originally told the investigators that he had no knowledge of some of the accounts. However, at the hearing Applicant admitted that prior to 1997, he knew he had debts (he just had not checked his credit reports).¹ He also added that he had not received notices for some of the debts, but then stated that he moved frequently and that might be the reason that he had not received notices from some of the creditors.

Applicant’s current employer states that Applicant is in “excellent standing” with the company (AE A). His employee performance appraisals for 2007 reflect that he has successfully demonstrated the core tenets of his job. In addition, he received a promotion in April 2008 for exceptional dedication and work performance to clients and technical managers. One of his colleagues, a retired Navy Officer, praises Applicant for his integrity, dedication and commitment to the team and Government clients. He rates him as a valued member of the team. He recommends Applicant for a position of trustworthiness. (AE B).

Applicant has not disclosed everything about his background with his current employer. He states that it is in his past when he was immature and is not indicative of his behavior today. He apologizes and regrets the occurrences. He also argued that since he does not handle classified information, he does not think it important to

¹Applicant stated he now has access to his credit reports and has a fraud alert on them.

discuss everything with his employer due to his emotional maturity and growth that has taken place (Tr. 99).

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©, 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 *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The trustworthiness concern relating to the guideline for Financial Considerations is set out in AG & 18:

Failure or inability to live within one-s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual-s reliability, trustworthiness and ability to protect [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise trustworthiness concerns. Under AG & 19(a), an inability or unwillingness to satisfy debts[@] is potentially disqualifying. Similarly under AG & 19(c), Aa history of not meeting financial obligations[@] may raise security concerns. Applicant accumulated delinquent debt on numerous accounts charged off or placed in collection beginning in 1999. He admits to \$15,000 of delinquent debt that is not resolved. Moreover, under AG ¶ 19(d), “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” may raise concerns. Applicant’s forgery, bad checks and theft by deception ad admitted fall under this disqualifying condition. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where Athe behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual-s current reliability, trustworthiness, or good judgment.[@] Applicant has a long history of financial difficulty and the debts are ongoing to the present. Applicant’s incidents of forgery and theft by deception are in the distant past but they are not mitigated due to his recent falsification and his recent returned checks. He did not present any evidence to persuade me that it is unlikely to recur, nor

that it does not raise concerns about his current reliability, trustworthiness, or good judgment. The evidence does not raise this potentially mitigating condition.

Under AG & 20(b), it may be mitigating where the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances.⁶ As noted above, Applicant listed one period of unemployment in his application. However, he did not elaborate on it, nor did he explain what, if any, impact it had on his ability to pay his debts. He presented no evidence to show that he acted responsibly in identifying and resolving these debts. I find this potentially mitigating condition is not a factor for consideration in this case.

Evidence that the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control⁶ is potentially mitigating under AG & 20(c). Similarly, AG & 20(d) applies where the evidence shows the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.⁶ Applicant did not present any information concerning financial counseling. He has not resolved his delinquent debts, either by payment or settlement. Since Applicant was on notice about the Government's concern regarding his financial difficulties and his debts, he has spent time disputing them. AG ¶ 20(e) applies where the evidence shows "the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue." Applicant put the burden on the credit reporters to verify the debts. This does not show financial responsibility or a record of payment. The fact that some debts have been removed from his latest credit bureau report does not mean that he did not owe the debt. Applicant was also firm that he will repay certain accounts if he can be assured that certain fees would be removed. I conclude these potentially mitigating conditions do not apply.

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.

The guideline notes several conditions that could raise security concerns. Under 16(a), "deliberate omission, concealment, or falsification of relevant facts from any personnel 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” is potentially disqualifying.

In this case, Applicant offered explanations for his not listing the overdue debts on his public trust questionnaire. However, the explanations are inconsistent and not reasonable. He admitted to knowing that he had significant debt. He said he was rushed to complete the application. He then stated that he spent almost four hours on the application. This leaves me with the conclusion that he deliberately omitted them in the hopes that they would not be discovered. I find that he intentionally omitted relevant information from his application in 2006.

I have considered the mitigating condition in AG ¶ 17(a) “the individual made prompt, good faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” Applicant did not do so until he was questioned by the investigators in 2007. None of the other mitigating conditions apply.

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 has been employed with his current employer since 2006. He has some years of experience with a federal contractor. His current employer recommends him. However, his employer is not fully aware of Applicant’s situation. Applicant expresses regret for his actions and poor judgment. However, he has not provided any mitigating information concerning his financial problems nor his plan to resolve them. Despite the fact that he has managed to have some accounts removed from his latest credit report, he has not met his burden of proof in this case. Granted, his forgery incidents are in the distant past; however, he has recently had checks bounce for insufficient funds. His recent behavior does not outweigh the long history of financial irresponsibility. Moreover, he falsified his trustworthiness application as recently as 2006.

Overall, the record evidence leaves me with questions and 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 under the financial considerations and personal conduct guidelines.

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 F: AGAINST APPLICANT

Subparagraph 1.a-1.q: Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Noreen A. LYNCH
Administrative Judge