



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



In the matter of:

ADP Case No. 07-07434

Applicant for Public Trust Position

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: James Alan Perkins, Personal Representative

September 12, 2008

Decision

RIVERA, Juan J., Administrative Judge:

Applicant mitigated the trustworthiness concerns arising from his financial considerations. He failed to mitigate personal conduct concerns arising from his falsification of his public trust position application. Eligibility for a public trust position and access to sensitive information is denied.

Statement of the Case

Applicant submitted his Public Trust Position Application (SF85P) (GE 4) on October 10, 2006.¹ On March 17, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the Government's security concerns under Guideline F (Financial Considerations), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct).²

¹ Applicant submitted an Application for Federal Employment (SF 171) on Jan. 2, 1990 (GE 1); a Questionnaire for Sensitive Positions (SF 86) on May 15, 1990 (GE 2), a Security Clearance Application in June 2004 (AE 7), and an Electronic Questionnaires for Investigations Processing (e-QIP) on Jun. 23, 2008 (GE 5). The falsification allegation concerns only Applicant's October 2006 SF85P.

Applicant answered the SOR on May 8, 2008, and requested a hearing before an Administrative Judge. The case was assigned to me on June 10, 2008. DOHA issued a Notice of Hearing on June 16, 2008. I convened the hearing as scheduled on July 9, 2008. The Government offered exhibits (GE) 1 through 9, which were received without objection (Tr. 32). Applicant testified on his own behalf, presented one witness, and submitted exhibits (AE) 1 through 7, which were received without objection (Tr. 23, 35). DOHA received the transcript of the hearing (Tr.) on July 18, 2008.

Procedural Issues

The Government withdrew the allegations in SOR ¶¶ 1.c - 1.f; ¶ 2; and ¶¶ 3.b and 3.c (Tr. 17-19).³ I did not address these allegations.

Findings of Fact

In his Answer to the SOR, Applicant admitted SOR ¶¶ 1.a and 1.b with explanations. He denied the allegation in SOR ¶ 3.a. His admissions are incorporated herein as findings of fact. After a thorough review of the record evidence, including Applicant's demeanor, I make the following additional findings of fact.

Applicant is a 37-year-old senior acquisitions analyst employed by a Government contractor. While in high school, Applicant worked as a summer intern for a Government agency and received access to classified information at the top secret level (Tr. 41). He attended college from 1991 to 1996, and received two Bachelor's degrees with concentrations in finance and international business (Tr. 5). He married his wife in 1996 and divorced her in 2002. He has a 12-year-old-daughter from this marriage. He shares legal custody of his daughter with his ex-wife (Tr. 82).

After college, he worked from 1996 to 2000 as a financial analyst for a U.S. Government agency in a position of trust (Tr. 78). Thereafter, he worked as pricing analyst for one year, and then worked numerous jobs as bartender, server, and in the Information Technology field (GE 5). In 2005, he started working as a contract specialist for a Government contractor. Since June 2006, he has been working for his current employer, another Government contractor, in a position of trust. Applicant has been working in a position of trust for the last four years (Tr. 7).

Applicant's references included two directors and four senior military officers (AE 1-6). Five of them have known him and observed his performance and character for at

² 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.

³ See Appellate Exhibit 2, Government's Notice, dated June 3, 2008.

least two years. One colonel has known Applicant since 1996, and supervised him for approximately seven years. Applicant is considered a hard-working and intelligent employee, and an honest man who takes his job seriously. All of his references lauded his organization skills, efficiency, competence, and communication skills. In their opinion, Applicant always displays the highest degree of integrity and impeccable work ethic. In their opinion, he is trustworthy and displays sound judgment. All of his references recommended him for a position of trust.

Applicant's background investigation addressed his financial situation and included the review of his April 2007 response to DOHA interrogatories (GE 9), two credit bureau reports (CBRs) from 2006 (GE 7), and 2007 (GE 8), a 1999 Federal tax lien, and his 2006 public trust application. The SOR alleges that Applicant filed for bankruptcy protection in 2000, and that he had a Federal tax lien imposed as a result of a money judgment granted against him in a civil law suit brought by the U.S. Government. The SOR also alleges Applicant falsified his public trust application by deliberately failing to disclose his bankruptcy and tax lien.

Applicant's father worked over 20 years for a Government agency as a budget analyst in charge of a large budget program.⁴ Around 1989-1990, while Applicant was in high school, his father set up a ghost company and named Applicant's mother, Applicant, and his siblings as officers of the corporation. From 1991 to 1996, Applicant's father made false claims and statements to his agency and his ghost company received over 6 million dollars in illegal/unauthorized payments.⁵

The U.S. Government brought a civil law suit against Applicant's father, the ghost company and all family members involved with the ghost company. The United States alleged Applicant's family spent and dissipated the monies falsely obtained and, when they learned their misappropriation had been discovered, they destroyed evidence and secreted assets to impede the Government's recovery and prosecution efforts. Applicant and his family denied the allegations. When questioned about the ghost company activities and the sources of their income, they asserted their right against self-incrimination.

In May 1999, a Court granted summary judgment against Applicant for \$5,530,805. In October 1999, the U.S. Government filed a tax lien against Applicant based on the judgment and started garnishing his wages. Applicant filed for bankruptcy protection in August 2000 and was discharged of his debts in December 2000. In April 2001, Applicant entered into a settlement agreement with the U.S. Government which required Applicant to sell his home and any and all property of value to reimburse the Government (Tr. 43). After a settlement was reached, the garnishment of his wages stopped and the tax lien was removed. However, the settlement will not be concluded

⁴ His father suffers from muscular dystrophy. He is bound to a wheel chair, and requires the use of a respirator and colostomy bag (Tr. 40).

⁵ GE 9 is the source of the facts in the next three paragraphs, unless otherwise stated.

until Applicant's father dies and his estate, insurance proceeds, and Applicant's grandfather's estate trust are surrendered to the U.S. Government.

Applicant explained that the civil judgment, wage garnishments, tax lien, attorney fees, and his wife's filing for divorce and leaving him with the household expenses forced him to file for bankruptcy protection (Tr. 38).

In June 2004, Applicant submitted a Security Clearance Application (AE 7), in which he disclosed his 2000 bankruptcy filing;⁶ that his wages had been garnished in 2000 by the U.S. Department of Justice; and that he had an unpaid judgment resulting from the civil law suit brought against him by the Government. In his answer to question 36, he denied that in the last seven years he had a lien placed against him. He explained this answer as an honest mistake.

In October 2006, Applicant submitted a Public Trust Position Application (GE 4). In response to question 19 (asking whether he, or a company over which he exercised some control, filed for bankruptcy, . . . was subject to a tax lien, or had a judgment rendered against him for a debt), he answered "No," and deliberately failed to disclose the 1999 judgment obtained by the Government, the tax lien placed against him, and his 2000 bankruptcy filing and discharge.

Applicant strongly denied he ever intended to misrepresent the facts or lie in his public trust application. He claimed he disclosed all the missing information to a Government investigator during an interview conducted after he submitted his public trust application (Tr. 45). He also noted he had disclosed all the missing information in his 2004 Security Clearance Application (AE 7).

Applicant offered several explanations for his failure to disclose the required information, i.e., he mixed up the dates (Tr. 44, 61); he made an honest mistake and "lumped" the date of the judgment (May 1999) with the bankruptcy (filed August 2000) and, he believed the bankruptcy and tax lien were seven years old and, as such, not subject to disclosure (Tr. 65-66); he believed the garnishments and the tax lien were "water under the bridge" and he did not have to disclose them because he had reached a settlement agreement with the Government and the garnishment of wages was stopped and the tax lien was removed (Tr. 62, 67). He stated: ". . . I was trying to figure out if I could finally put all this stuff behind me. I mean, it was such a long time ago. Everything was finalized. It's all, and it's all water under the bridge . . . And if I had waited another nine months, this would have been seven years ago (Tr. 67-68)."

Applicant vehemently asserted he had no knowledge and never suspected his father was defrauding the U.S. Government. Applicant benefited from the proceeds of his father's fraud because his father gave him the down payment for his home, paid for his college education, he used the ghost company's cars, and was paid a salary (Tr. 58).

⁶ At his hearing, Applicant clarified he mistakenly wrote the wrong date in his 2008 e-QIP (Tr. 47). He filed for bankruptcy protection once in August 2000.

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.”⁷ “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.”⁸ 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.⁹

When evaluating an Applicant’s suitability for a public trust position, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant’s eligibility for access to classified information.

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 controlling adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), 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 classified information will be resolved in favor of national security.”¹⁰ 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,

⁷ See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

⁸ See Regulation ¶ C6.1.1.1.

⁹ See Regulation ¶ C8.2.1.

¹⁰ See *Department of the Army v. Egan*, 484 U.S. 518, 528, 531 (1988).

or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified 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 classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 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 *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

Under Guideline F, the trustworthiness concern is that an Applicant’s

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 classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. AG ¶ 18.

AG ¶ 19 lists nine conditions that could raise security concerns and may be disqualifying:

- (a) inability or unwillingness to satisfy debts;
- (b) indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt.
- (c) a history of not meeting financial obligations;
- (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;

- (e) consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis;
- (f) financial problems that are linked to drug abuse, alcoholism, gambling problems, or other issues of security concern;
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same;
- (h) unexplained affluence, as shown by a lifestyle or standard of living, increase in net worth, or money transfers that cannot be explained by subject's known legal sources of income; and
- (i) compulsive or addictive gambling as indicated by an unsuccessful attempt to stop gambling, "chasing losses" (i.e. increasing the bets or returning another day in an effort to get even), concealment of gambling losses, borrowing money to fund gambling or pay gambling debts, family conflict or other problems caused by gambling.

Applicant was an officer of a ghost company created by his father which defrauded the Government by deceptive and illegal financial practices. He was 20 years old when his father started defrauding the Government in 1991, and 25 years old when the fraud was discovered in 1996. Applicant, his parents, and sibling benefited from this fraud. He had a \$5,530,805 judgment filed against him in May 1999, which is still outstanding. Although he entered into a settlement agreement with the Government, the settlement will not be final for an unknown number of years. His bankruptcy filing resulted from the expenses associated with his attorney fees, his wage garnishments, tax lien, the surrendering of all his valuables to the Government, and the expenses associated with his divorce. AG ¶ 19(a) (inability or unwillingness to satisfy debts) and 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), apply in this case.

AG ¶ 20 lists six conditions that could mitigate the financial considerations security concerns. After considering all the mitigating conditions (MC), and the record evidence as a whole, I conclude the following mitigating condition applies.

- (a) the 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's father defrauded the Government from 1991 to 1996. Applicant's implication in his father's illegal actions and his benefiting from them also stopped in 1996. There is no evidence showing Applicant knowingly participated in his father fraudulent scheme. His financial problems and resulting bankruptcy filing were the result of his father's actions and not Applicant's. Under the circumstances, I find his questionable behavior to be remote and unlikely to recur. His current CBRs do not show questionable financial behavior. Guideline F is decided for Applicant.

Guideline E, Personal Conduct

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. AG ¶ 15.

The record evidence established Applicant deliberately failed to disclose relevant information in his answers to question 19 of his public trust application. Numerous factors weighed in my analysis to reach that conclusion, including: Applicant's age, his level of education, his employment history, his familiarity working with the Government and the security clearance system, the magnitude and seriousness of the fraud committed by his father and the resulting legal actions Applicant faced, and his demeanor and testimony.

Applicant knew or should have known the importance of accurate completion of his public trust position application, and nevertheless failed to provide information that was material to making an informed trustworthiness determination. Disqualifying Conditions (DC) 16(a): *deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . .*, and DC 16(e): *personal conduct or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress . . .*, apply.

I specifically considered all Guideline E Mitigating Conditions and conclude that none apply. Applicant's falsification is recent, and his favorable information is not sufficient to fully apply any of the mitigating conditions. I specifically considered that Applicant had previously disclosed the omitted information in his June 2004 Security Clearance Application. He knew from past experience that he was required to disclose the information in his public trust application. Notwithstanding, he knowingly decided to omit the required information because he "was trying to put all that stuff behind [him]." Considering the legal ordeal Applicant faced from 1996 to 2001, his education, and job experience, I find it difficult to believe that he could have made an honest mistake. Furthermore, he failed to establish that he disclosed the omitted information to the Government investigator prior to him being confronted with the falsification. Guideline E is decided against Applicant.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance 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) the 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 security clearance 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 successfully worked in positions of trust for defense contractors for approximately nine years. He is a hard-working and intelligent employee. He is considered a man of integrity, trustworthy, and of sound judgment. All of his references recommended him for a position of trust. He is a dedicated father who takes care of his daughter.

Overall, the record evidence fails to convince me of Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant failed to mitigate the trustworthiness concerns arising from his personal conduct.

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:	FOR APPLICANT
Subparagraphs 1.a & 1.b:	For Applicant
Subparagraphs 1.c – 1.f:	Withdrawn
Paragraph 2, Guideline J:	WITHDRAWN
Subparagraph 2.a:	Withdrawn
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b & 1.c:	Withdrawn

Conclusion

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

JUAN J. RIVERA
Administrative Judge