



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



In the matter of:)
)
) ADP Case No. 07-12398
)
)
Applicant for Public Trust Position)

Appearances

For Government: Francisco Menedez, Esquire, Department Counsel
For Applicant: *Pro Se*

September 17, 2008

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the government’s trustworthiness concerns under Guideline J, Criminal Conduct. Applicant’s eligibility for access to sensitive information is denied.

On May 7, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline J for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), 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 answered the SOR in writing on July 3, 2008, and requested a hearing before an Administrative Judge. I was assigned the case on August 7, 2008. DOHA issued a notice of hearing on August 11, 2008, and I convened the hearing as scheduled on September 3, 2008. The government offered Exhibits (GE) 1 through 4,

which were admitted without objection and offered GE 5 and 6 in rebuttal, which were also admitted without objection. Applicant testified on his own behalf and did not offer any exhibits. DOHA received the transcript of the hearing (Tr.) on September 11, 2008.

Findings of Fact

In his Answer to the SOR Applicant admitted all of the factual allegations in SOR ¶¶ 1.a, 1.b, and 1.c of the SOR, with an explanation that certain charges in 1.a had been dismissed on appeal.

Applicant is 52 years old and works as a consultant on government contracts for a federal contractor. Applicant married in 1977 and divorced in 2004. He remarried in 2005. He has two grown children. Applicant enlisted in the U.S. Navy in 1976 and attained the rank of first class petty officer (E-6) before being accepted into a commissioning program through the medical service corps with a specialty in procurement. He was commissioned as a naval officer in May 1984. Applicant holds both a bachelor's and master's degree.

In 1977, Applicant went to nonjudicial punishment for shoplifting from the Navy Exchange. He was found guilty and punished.¹

In May 1989, Applicant was stationed in the Republic of the Philippines. He was a Lieutenant (O-3) at the time and his family accompanied him. While stationed there he had two adulterous relationships, each lasting approximately one year. He began a third adulterous relationship in 1992 with Woman C. He transferred from the Philippines in May 1993. All three of the women Applicant had relationship with were Philippine nationals. When Applicant transferred from the Philippines to North Carolina, Woman C applied for and was granted a visitor's visa to the U.S. Applicant continued his relationship with her. He paid for her airfare to come to the U.S. in 1993. She moved to the same area where Applicant was stationed. She lived with friends while in the U.S. and obtained a job.² Applicant stated he gave her money every now and then. He was stationed in North Carolina from 1993-1996.³

In February 1996, Applicant and his family were transferred to California. Woman C moved to Texas, but continued her relationship with Applicant by meeting him for vacations in New Orleans. Woman C's visa expired and she remained in the U.S. illegally. Applicant was aware that she was in the U.S. illegally. In Woman's C's written statement she admitted she found it difficult to get a job or have a normal life. She wanted to get her green card which would allow her to remain in the U.S. legally and travel back to the Philippines to see her family. While living in Texas she told Applicant

¹ Tr. 28-29.

² It is unclear how she could obtain a job when she was in the U.S. on a visitor's visa and without a green card.

³ Tr. 29-35.

she had met somebody that was a U.S. citizen who could help her with her immigration problems and that she was dating him and might marry him.⁴

During this period of time, Applicant was the financial management officer for a Naval Hospital. He had been promoted to Lieutenant Commander (O-4). He stated that while on a "smoke break" he asked Seaman J if he would be willing to marry his girlfriend. This seaman did not work directly for Applicant, but did work in the hospital. Applicant specifically targeted Seaman J, because like Applicant, he was a Filipino. Seaman J's statement reflected that he met Applicant while he was working in the human resource department and told him he came into the Navy to go to college. After he had known Applicant for about a month, Seaman J's statement said Applicant called him one afternoon and asked him to come to his office after work to discuss something. Seaman J agreed and went to his office. They spoke in the work area outside Applicant's office. It was after hours and no other workers were present. Applicant told Seaman J that he needed his help and asked him if he wanted to make some money for college. Applicant explained he had a girlfriend from the Philippines that needed help staying in the U.S. so she could help her family in the Philippines. Applicant advised Seaman J that he could make extra money on the side by marrying her and he would be entitled to married housing allowance and when he became a U.S. citizen he could petition to grant her U.S. citizenship status.⁵ Applicant asked Seaman J to do this for him. Seaman J told Applicant that he did not think it was a good idea, but Applicant asked him to think about doing it. About a month later, Applicant contacted Seaman J again in his office and asked him if he had been thinking about the offer. Seaman J again told him that he had a bad feeling about it and Applicant told him that he should trust Applicant. In about March 1996, Seaman J told Applicant that he would help him.⁶

Applicant told Woman C that he knew a Navy man who would be willing to marry her to help with her immigration problems. In early 1996, Woman C flew to California and Applicant met her at the airport. He took her to stay with a family he knew.

In approximately April 1996, after Seaman J agreed to help, Applicant contacted him and told him he had set a date for Seaman J to marry his girlfriend. Applicant picked him up at the barracks and drove to an automatic teller machine. Applicant retrieved some money. They then drove to the Officers' Club and picked up Applicant's girlfriend. The three of them went to the court house and they filled out the paper work for a marriage license. Applicant gave Seaman J the money for the license. After receiving the license, Applicant then drove them to a wedding chapel and Seaman J

⁴ Tr. 36-43, 53- 54; GE 5 and 6.

⁵ Apparently SN J was not a U.S. citizen.

⁶ Tr. 18, 35-46, 55-57, GE 5 and 6. I did not find Applicant's testimony credible when he testified that the seaman never expressed any hesitation and he only asked him one time to participate in the scheme. This is contrary to Seaman J's written statement.

married Woman C. The three then left and Applicant returned Seaman J to his barracks and Woman C to the Officers' Club.⁷

Approximately a week after Seaman J and Woman C married, Applicant contacted Seaman J and told him that Woman C was coming to the hospital to get her military dependents identification card and to start the paperwork for the married housing allowance. Seaman J met her and she signed the necessary paperwork presenting the marriage license. This was the last time Seaman J saw Woman C, his wife. Neither intended the other to be an actual marital partner.

In September 1996, Applicant again contacted Seaman J and told him that he wanted him to come to his office to talk to him. Seaman J went to Applicant's office after work and Applicant told him that Woman C was coming to live near the base and Applicant wanted Seaman J to sign paperwork for an apartment because that would make it look as though she and Seaman J were living together. Seaman J agree to do this and several days later he went to Applicant's office after work and Applicant drove him to the apartment and he signed the paperwork.

In early December 1996, Applicant again contacted Seaman J and told him he needed \$250 for the apartment rent and Seaman J gave him a check for that amount drawn on his personal account. This was the only money he paid. Later Applicant called him and told him that he was going to put Woman C on Seaman J's Navy Federal Credit Union (NFCU) account, so Seaman J gave him the account number. The next day an employee of NFCU contacted Seaman J's father and advised him that Woman C had attempted to put herself on Seaman J's account.⁸ Seaman J's father asked him about it and he told him the whole story.⁹

Seaman J also stated in his written statement that Applicant had asked him on several occasions how his citizenship application was progressing, because he wanted Seaman J to apply for citizenship for Woman C's as soon as he could.¹⁰ Applicant stated he could not remember if he asked Seaman J to petition for his wife to become a U.S. citizen after he did. He stated: "It's possible, but I don't remember."¹¹

⁷ Tr. 72; GE 5 and 6. Applicant stated he could not remember if he was the witness at the wedding, or that he drove the couple to get married, or that he paid for the marriage license, or that he helped Woman C get her military dependents identification card, or that he had Seaman J sign the apartment lease. He stated he is not denying that he did those things, he just could not remember. I did not find Applicant's testimony credible.

⁸ Seaman J's NFCU's account was through his father. When NFCU contacted Seaman J's father he was unaware that he had gotten married.

⁹ Tr. 58-61, 74. Applicant's testimony was contrary to Seaman J's statement. Applicant denied attempting to put Woman C on Seaman J's Navy Federal Credit Union account. I did not find his testimony credible.

¹⁰ GE 5.

¹¹ Tr. 70-72. Applicant stated he could not remember the exact details of some of the issues. Although he did not deny that he could have said certain things, he stated he could not recall.

Applicant testified that he was aware of Woman C's illegal immigration status. He admitted he was attempting to have her remain in the country illegally. His relationship with her lasted until 1997 when his affair and the scheme were discovered.¹² He last had contact with her in 1998. He admitted he was not the one to come forward, but the offenses were found out when Seaman J's father reported the offense. Applicant was charged with (1) conspiracy to make and present a false claim against the government (2) sodomy; (3) making and presenting a fraudulent claim against the government; and (4) conduct unbecoming an officer. Applicant pled guilty to the offenses at a court-martial. He was sentenced to a Dismissal, confinement for six months, a fine of \$5,000, and a reprimand. On appeal charges (1) and (3) were considered multiplicitous with the course of conduct in charge (4) and were dismissed. The court found the sentence was still appropriate.¹³ Applicant admitted that he did conspire to defraud the government.¹⁴

Applicant admitted he was investigated in about 1993 for fraudulent use of a government credit card. No other evidence was provided to show any offense was committed by Applicant.

Applicant had a security clearance at the time of the offenses. He knew adultery was an offense and was aware of his girlfriend's immigration status and he was attempting to thwart the immigration laws.¹⁵ Applicant testified he is a changed man and no longer a womanizer. Applicant testified he could not remember many of the specifics of the acts that he committed as provided in the written statements by Woman C and Seaman J. He did not deny his conduct. He is remorseful for his actions. He believes he paid for his actions and was disgraced. He has worked in the private sector since serving his sentence. He provided character letters from supervisors who knew of his past and consider him trustworthy, loyal and competent. He is considered a trusted advisor with unparalleled work ethic who is dedicated and eager to accept responsibilities, accountability and stewardship of Government funding actions.¹⁶

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

¹² Tr. 62-64.

¹³ GE 4.

¹⁴ Tr. 59-60

¹⁵ Tr. 64.

¹⁶ Tr. 20; GE 3.

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(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 [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

Criminal Conduct

Paragraph 30 of the adjudicative guidelines sets out the trustworthiness concern relating to criminal conduct: “Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.”

I have considered all of the criminal conduct disqualifying conditions and especially considered AG ¶ 31(a) (“a single serious crime or multiple lesser offenses”); (b) (“discharge or dismissal from the Armed Force’s under dishonorable conditions”); and (c) (“an allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted”). Applicant conspired and perpetrated a fraud on the government to thwart immigration laws. He had adulterous relationships while a married man while serving as an officer in the Navy. He solicited an enlisted person to commit a fraud on the government through a sham marriage. Applicant was court-martialed, went to jail and was dismissed from the Navy. I find all of the above disqualifying conditions apply under these facts.

I have also considered the criminal conduct mitigating conditions and especially considered AG 32 ¶ (a) (“so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment”) and (d) (“there is evidence of successful rehabilitation, including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement”). It has been 11 years since Applicant completed his sentence. He has a good job and is a valued employee who is trusted. He is remorseful for his actions and stated he is no longer a womanizer. Both of the above 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 commonsense 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 was an officer in the Navy, married, holding a security clearance, and in a position of trust. He preyed on and targeted a young sailor because he was a Filipino and needed money. He arranged a sham marriage so his girlfriend, who was in the U.S. illegally, could remain. He disregarded the seriousness of the U.S. immigration laws, he abused his position of trust as an officer and husband, and through his actions he defrauded the government. Applicant's actions were not a one time occurrence. To the contrary his exploits expanded over six years and did not stop until he was eventually caught. He took many steps to advance his own personal agenda, including buying the marriage license and taking Seaman J and Woman C to the chapel to be married. He then took her to get her military dependents identification card, to sign an apartment lease and then attempted to place her on Seaman J's bank account. During Applicant's continuing course of misconduct he held a security clearance and was in a position of trust as an officer and the financial officer for a naval hospital. He is remorse for all he lost due to his actions and the disgrace he brought to himself and his family. It has been many years since the conduct occurred. I have considered all of the issues in mitigation and conclude that they do not outweigh the gravity of Applicant's conduct. He abused his position of trust for his personal pleasure; he willingly sacrificed his honor and the trust he was given as a naval officer; he repeatedly violated his marital vows with several women over many years; it was at his suggestion that a sham marriage occurred and he continued to perpetuate the criminal activity involved in it. He took action to have an illegal immigrant gain access to benefits afforded to military dependents. He had Seaman J sign for an apartment lease and Applicant attempted to have his girlfriend be made a joint owner of a bank account. He was the moving force behind all of this criminal conduct. Although he is a model employee and a significant period of time has past, it does not outweigh his continuing course of misconduct and the years he spent violating those who trusted him. 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 failed to mitigate the trustworthiness concerns arising from his criminal 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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	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.

Carol G. Ricciardello
Administrative Judge