



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ADP Case No. 08-08759
)
Applicant for Public Trust Position)

Appearances

For Government: Candace Le'i Garcia, Esq., Department Counsel
For Applicant: *Pro se*

March 21, 2011

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate Guidelines F (financial considerations) and E (personal conduct) security concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

Applicant submitted a Public Trust Position Application (SF-85P) on January 29, 2008. On April 29, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines F (financial considerations) and E (personal conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG), effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant received the SOR on May 4, 2010. He answered the SOR in writing on May 20, 2011, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on July 12, 2010, and I was assigned the case on July 16, 2010.

DOHA issued a notice of hearing on July 22, 2010, scheduling the case for August 17, 2010. The hearing was held as scheduled. The Government offered Government Exhibits (GE) 1 through 14, which were received without objection. Applicant did not offer any exhibits, but did testify on his own behalf. I held the record open until August 27, 2010 to afford him the opportunity to submit additional evidence. Applicant timely submitted Applicant Exhibits (AE) A through C, which were received without objection. DOHA received the hearing transcript (Tr.) on August 25, 2010.

Findings of Fact

Applicant admitted all of the SOR allegations. His admissions are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

Applicant is a 28-year-old customer service representative, who has been employed by a defense contractor since May 2005. He seeks to retain access to sensitive information in conjunction with a public trust position, which is a condition of his continued employment. (GE 1, Tr. 16-17, 19.)

Applicant graduated from high school in May 2000. He attended three colleges for about two years after high school and is unsure how many college credit hours he has earned. He is unmarried and has no dependents. (GE 1, Tr. 17-19.)

Financial Considerations

Applicant has a history of financial problems that began as early as 2002. At some point in 2002, he was fired by his then employer, was out of work for “three or four months,” and was then rehired by the employer who fired him. While he was unemployed, his car was repossessed when he was unable to make his car payments. (SOR ¶ 1f (charged off account for \$10,213).) (Tr. 21-22.) In 2004, he purchased a second car and later returned it to the creditor as a “voluntary” repossession because he lost his license (SOR ¶ 2a9 (past-due account for \$3,497).) (Tr. 22-25.) Applicant lost his license for failure to pay numerous outstanding traffic-related tickets.

In 2002, when he was not working, he attended school and, in order to pay bills and pay for school, he began withdrawing money from bank accounts with no funds available. (Tr. 28.) By 2005, Applicant had acquired a number of debts and looked into debt consolidation. In November 2008, he filed Chapter 7 bankruptcy listing \$54,171 in unsecured debt. In March 2009, he was awarded a discharge. (SOR ¶ 1a) (GE 10, Tr. 29-30.)

The SOR alleges five debts approximating \$39,000. (Tr. 10.) Three of the debts alleged in the SOR were included in Applicant's March 2009 discharge. Those discharged debts are: (1) SOR ¶ 1d – collection account for \$898 originally owed to a local court and assigned to a collection agency; (2) SOR ¶ 1e – collection account for \$250 originally owed to a local check cashing company and assigned to collection agency; and (3) SOR ¶ 1f – charged-off account for balance owed of \$10,213 to an automobile financing company after his vehicle was repossessed.

The two remaining unresolved SOR debts owed and not discharged are: (1) SOR ¶ 1b - past-due account for \$8,000 owed to a local court for traffic tickets, and (2) SOR ¶ 1c – federal tax lien filed in November 2008 in favor of the Internal Revenue Service (IRS) in the amount \$20,408 in taxes, penalties, and interest. Applicant attached a payment schedule from a local court reflecting that he owed \$617. (SOR Response.) Applicant explained that this amount was “part of the \$8,000 that I owe.” (Tr. 32.) The payment schedule requires Applicant to pay \$165 per month; however, he testified that he can only pay \$50 per month. He indicated at his hearing that he could provide proof of payment. (Tr. 33-34.) Applicant did not submit any proof of payment for his \$617 payment schedule or documentation that he was making any progress towards paying his \$8,000 debt to the local court. Applicant does not currently have a driver's license, and it is his understanding that he will not get his license back until he pays the \$8,000 in fines.

Applicant began accruing tickets when he was 16 and did not pay his fines because he “didn't think it would be an issue.” (Tr. 34-35.) In 2002, he was arrested on an outstanding warrant for failure to pay his traffic tickets. He claims that he did not know that he owed traffic-related fines until he was arrested. His state department of motor vehicles revoked his driver's license in 2003 for failure to pay outstanding traffic fines. Since his license was revoked, Applicant has been cited at least two times for driving-related offenses, the most recent offense being in 2009. (AE 13, Tr. 35-37.) Applicant testified that he has not driven since then and takes the bus as his primary means of transportation. (Tr. 37.)

The IRS lien for \$20,408 stemmed from Applicant's federal tax liabilities for years 2006, 2007, and 2008. One month after his SOR was issued, the IRS began garnishing Applicant's pay at the rate of \$100 per pay period. According to the May 2010 IRS garnishment letter, the amount they are attempting to collect from the Applicant is \$9,239.32. However, Applicant's credit reports reflect an IRS lien for \$20,408 filed in November 2008. Applicant was unable to explain this discrepancy. (SOR Response, GE 4, GE 5, GE 6, AE B. Tr. 37-39.) Applicant stated that he did not file correct federal income tax returns because, “I was dumb, being young.” (Tr. 39.) He received notices from the IRS that he owed them money and disregarded them until May 2010 claiming he did not have the money to pay his taxes. (Tr. 39-40.)

During cross-examination, Applicant revealed that he fraudulently claimed he was the father of children not his when filing his income taxes. (Tr. 40-41.) Applicant further revealed that he had the same issues with his state income taxes; however, the state has not pursued him until recently. (Tr. 42-43.) Applicant's August 2010 pay stub

reflects bimonthly gross pay of \$1,426.80. His net pay after deductions \$877.32. (AE B, Tr. 43.) His net monthly pay averages \$1,755. Applicant does not have a budget *per se*, and pays bills “that are important to [him].” He acknowledged that his methodology is not financially responsible. (Tr. 48-49.) Applicant has no savings and claims his one credit card account is current. (Tr. 49-50.) Additionally, Applicant owes \$33,157 in deferred student loans that were due in October 2010. He hoped to get another deferment based on financial hardship because he is unable to repay his student loans. (GE 5, Tr. 50-52.)

Applicant attributes his financial difficulties to an undetermined period of unemployment in 2002, discussed *supra*, and a period of unemployment from May 2003 to December 2003. (GE 1, Tr. 25-26.) He also mentioned that he provided occasional financial assistance to his mother. During cross-examination, Applicant was asked if he intended to make a budget for himself and he responded, “I want to.” (Tr. 49.) He later indicated that he intended on making a budget. (Tr. 52.) Applicant did not submit a budget in any of his post-hearing exhibits. I note that Applicant completed mandatory credit counseling in February 2008 in conjunction with his filing Chapter 7 bankruptcy. (GE 10.) However, there is no evidence that his financial situation is resolved or under control.

Personal Conduct

When Applicant completed his Public Trust Position Application (SF-85P) in January 2008, he failed to list any loans or financial obligations that were 180 days delinquent. Specifically, he failed to list delinquent debt itemized in his Chapter 7 bankruptcy filed in November 2008. The SOR identified nine separate debts that Applicant failed to list that were included in his bankruptcy. Applicant certified by his signature when completing his SF-85P that the information he provided was true, complete, and correct to the best of his knowledge and belief and made in good faith. He further acknowledged that a knowing and willful false statement on his SF-85P can be punished by fine or imprisonment or both.

Applicant admitted that he did not list any of his debts on his SF-85P claiming that he did not think he had to list those debts. He explained that he was in the process of filing for bankruptcy. He stated that he had previously submitted an SF-85P and the information was lost. When Applicant had submitted an SF-85P in May 2004, he also did not list any loans or financial obligations that were 180 days delinquent. He denied that he was trying to avoid disclosure of his debts to the Government when completing his SF-85P reiterating that, “I just didn’t think it was needed for my job.” (GE 14, Tr. 53-57.)

Character Evidence

Post-hearing, Applicant submitted one reference letter and a letter that he wrote on his own behalf. The reference letter was from his immediate supervisor. His supervisor noted that she has worked with the Applicant for the last four years. She

provided favorable comments about the Applicant and noted that he would be missed if his clearance was not granted. (AE C.)

Among the topics discussed in Applicant's letter, he admitted "to withholding information, but this was not an intentional thing." He claimed he provided what he "could remember at the time or what I thought would suffice." He stated he is attempting to pay off his outstanding debts, but did not submit any documentation that he was making payments to the state for his outstanding traffic tickets. He requested a favorable decision regarding his application for a public trust position. (AE A.)

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 overarching 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 *also* 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), “a history of not meeting financial obligations” may raise security concerns. Applicant accumulated five debts approximating \$39,000 and filed Chapter 7 bankruptcy in November 2008. His indebtedness began as early as 2002 and has been ongoing. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

Five financial considerations mitigating conditions under AG ¶¶ 20 are potentially applicable:

(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;

(b) 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;

(c) 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 control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) 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's conduct does not warrant application of AG ¶ 20(a) because there is more than one delinquent debt and his financial problems are not isolated. Therefore, his debt is "a continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)).

Under AG ¶ 20(b), Applicant receives partial credit because his unemployment in 2002 and 2003 was largely beyond his control. However, to receive full credit under this mitigating condition, Applicant has to demonstrate that he acted responsibly under the circumstances. I note that his most recent unemployment occurred five years before he filed Chapter 7 bankruptcy and seven years before his SOR was issued. Applicant had a significant period of time to evaluate his financial situation and make adjustments in the five-plus years since his last unemployment. There is no evidence that Applicant remained in contact with his creditors or tried to make minimum payments during this time.¹ Under these facts, I am unable to apply full credit under this mitigating condition.

AG ¶ 20(c) is partially applicable. Although Applicant participated in the mandatory credit counseling required when he filed Chapter 7 bankruptcy in 2008, it is clear that his financial situation is not resolved or is under control. Likewise, there is not sufficient evidence in the record to establish full mitigation under AG ¶ 20(d).² Despite

¹ "Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

² The Appeal Board has previously explained what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

having being employed full-time since May 2005, there is no evidence that Applicant has made much of an effort to repay his overdue creditors. He did not provide proof that he was making payments on his \$8,000 traffic-related debt to his state and he recently started making \$100 payments per pay period to the IRS through garnishment. AG ¶ 20(e) is not applicable because Applicant does not dispute the validity of the debts alleged.

Personal Conduct

Under Guideline E, the concern is that 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.)

AG ¶ 16 describes one condition that could raise a security concern and may be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant 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.

The SOR alleges that Applicant deliberately provided false information or omitted required information on his January 2008 SF-85P. Applicant's explanation that he did not think such information was needed for his job is insufficient to overcome his obligations to tell the complete truth during the security clearance vetting process. Nor is he excused from providing required financial information because he was contemplating filing bankruptcy.³ The Government established through the evidence presented the disqualifying condition in AG ¶¶ 16(a).

In order to qualify for application of [the "good-faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that 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.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option in order to claim the benefit of [the "good-faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

³ Deliberate and materially false answers on a security clearance application violate 18 U.S.C. § 1001. The Supreme Court defined "materiality" in *United States v. Gaudin*, 515 U.S. 506, 512 (1995): as a statement having a "natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed." See also *United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004).

Six personal conduct mitigation conditions under AG ¶ 17 are potentially applicable:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and
- (f) the information was unsubstantiated or from a source of questionable reliability.

A statement is false when it is made deliberately -- knowingly and willfully. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported. Here, Applicant knew of financial problems and chose not to disclose them. He certified his answers to be true and correct. Had Applicant's information been relied upon without verification, he may well have successfully vetted for a public trust position. Regardless of the reason Applicant chose not to be forthcoming, the process does not allow for applicants to pick and choose which answers they will answer correctly. When applicants lie on their public trust position applications, they seriously undermine the process as Applicant did in this case. I find that none of the mitigating conditions fully apply.⁴

Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony (the maximum potential sentence includes confinement for five years and a \$10,000 fine).

⁴ The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

- (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must

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 relevant 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.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c).

The comments in the Analysis section of this decision are incorporated in the whole-person concept analysis. To Applicant's credit, he seems to have found a niche in his current employment. His immediate supervisor provided favorable comments about him and his performance. However, I cannot overlook his history of financial irresponsibility and personal conduct. Collectively, these concerns show a pattern of behavior that is troubling. He demonstrated indifference in incurring and resolving numerous traffic tickets he accumulated over the years. His problems with the IRS were of his own doing when he chose to claim dependents that were not his.

Applicant's deliberate failure to disclose information on his public trust position applications is serious, recent, and not mitigated. Overall, I have concerns about his current ability and willingness to comply with laws, rules, and regulations. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude he has not mitigated security concerns pertaining to financial considerations and personal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative

consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to a public trust position.

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
Subparagraphs 1a – 1g:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2a:	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.

ROBERT J. TUIDER
Administrative Judge