



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



In the matter of:)
)
-----) ADP Case No. 08-09733
SSN: -----)
)
Applicant for Public Trust Position)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: David E. Mosley, Esquire

December 17, 2009

Decision

HOWE, Philip S., Administrative Judge:

On April 9, 1993, the Composite Health Care Systems Program Office (CHCSPO), the Defense Office of Hearings and Appeals (DOHA), and the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASD C3I) entered into a memorandum of agreement for DOHA to provide trustworthiness determinations for contractor personnel employed in Information Systems Positions as defined in DoD Regulation 5200.2-R, Personnel Security Program (Regulation), dated January of 1987.

Applicant submitted his Questionnaires for Public Trust Position (SF 85P), on April 4, 2008. On May 5, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a determination of trustworthiness, suitability, and eligibility for the Applicant to hold a Sensitive Systems Position (ADP-I/II/III). The trustworthiness concerns for Applicant arose under Guidelines J (Criminal Conduct) and E (Personal Conduct). 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 acknowledged receipt of the SOR on May 12, 2009. He answered the SOR in writing on May 12, 2009. He did not request a hearing before an administrative judge. DOHA converted the case to a hearing format on or before June 12, 2009. Department Counsel was prepared to proceed on June 12, 2009, and I received the case assignment on June 15, 2009. DOHA issued a Notice of Hearing on June 29, 2009, and I convened the hearing as scheduled on July 15, 2009. The government offered Exhibits (Ex.) 1 through 3, which were received without objection. Applicant testified on his own behalf, called one additional witness, and submitted Exhibit A, without objection. DOHA received the transcript of the hearing (Tr.) on July 27, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is granted.

Findings of Fact

In his Answer to the SOR, dated May 12, 2009, Applicant admitted the factual allegations in ¶ 1.a, and 1.b of the SOR, with explanations. He denied the factual allegations in ¶ 2.a of the SOR. He also provided additional information to support his request for eligibility for a public trust position.

Applicant is 39 years old, married, and has a 16-year-old son from a prior relationship. He works for a defense contractor as a database administrator. He has been so employed since November 2004. After his prison release in 2002, Applicant worked for his brother for six months, then as a carpenter for six months, and for one year at a nationally-known home improvement center. Applicant owns his home and is an active member in his church, where he also teaches. (Tr. 35, 47, 57, 78, 84; Exhibit 1)

Applicant was arrested on or about September 24, 1990, for possession of drugs, possession of stolen property, and possession of drugs with intent to sell them. The Applicant's friend was arrested for the offenses originally, but the drugs were Applicant's because the friend was transporting them for the Applicant's roommates to use. Applicant was a passenger in his friend's car. Applicant denied using these drugs. Applicant turned himself into the police and took the blame for the drugs, exonerating his friend. He pled guilty to the offenses, and received a sentence of fines, community service, and probation. Applicant successfully completed his probation. (Tr. 36; Exhibits 2, 3)

In 1989, Applicant used his pocket knife to stab a man who was in a fight with one of Applicant's friends. The Applicant and his friend had gone to the victim's house to buy some bootlegged liquor. Applicant was intoxicated at the time. When he saw his friend involved in the fight, he assumed the bootlegger attacked his friend. In fact, his

friend was attempting to rob the bootlegger. Applicant stabbed the victim bootlegger several times with the knife. On the news several days later Applicant learned the victim died.

In April 1995 Applicant was arrested and charged with murder and burglary (for stealing beer as he fled from the victim's home). Applicant remained in jail after his arrest until the trial on the charges. In June 1996, the charges were reduced to voluntary manslaughter and burglary as part of a plea agreement. The victim's mother and brother, now deceased, requested at the time that Applicant be given a chance to rejoin society as a productive member of it after serving any prison time. The state court sentenced Applicant to 20 years in jail on the manslaughter charge, and 10 years on the burglary charge, to be served simultaneously. Applicant served 7.5 years in jail. He applied for early release, and was granted it by the state court by the modification and early release in 2002. Applicant was placed on probation for at least five years. After successfully completing the five years, his probation officer suggested he apply to have the probation removed. He did so, and the state court again granted his request, terminating the probation in 2007. (Tr. 37-45, 61-64, 83; Exhibits 2, 3, A)

While in prison, Applicant obtained an associate's degree, and then a bachelor's degree. He majored in history, with computer science as a minor. He was also employed in prison as the coordinator for the prison college education program. He increased participation from 100 to 200 inmates while in that position. He graduated *summa cum laude* with a 3.92 grade point average. He also attended any rehabilitation course the prison offered, such as substance abuse and anger management. He was approved to live in honor housing because he had no demerits or disciplinary problems while in prison. After his release from prison, he attended courses to become a certified network administrator. He is working on a master's degree in computer science with a projected graduation date in 2010. In addition to his employment with the defense contractor, he teaches as an adjunct professor of systems engineering at a local business college. He paid for his college education (that portion of which the state did not pay) while he was in prison. (Tr. 37-41, 84, 85; Exhibit 1)

Applicant's current supervisor testified he hired Applicant away from another unit of the company because of his technical skills and reputation among his staff. This move was a promotion for Applicant. The supervisor regards Applicant as professional, a good worker, reliable, and dependable. Applicant has a good temperament and is constantly learning new information about computers to improve his work skills. According to the supervisor, he is pleased with Applicant's work and is glad he hired him. He considers Applicant trustworthy. Applicant's supervisor learned of Applicant's prison term and conviction after Applicant was initially denied a favorable trustworthiness determination. Knowing those facts, he came and testified on his behalf at the hearing. (Tr. 21-31)

Applicant completed his SF-85P on April 4, 2008, after spending several days writing the answers to the questions. In response to Question 20, "In the last 7 years, have you been arrested for, charged with, or convicted of any offense?" Applicant answered "no." He knew his arrest and conviction for manslaughter and burglary

occurred more than seven years earlier, in 1995, so he assumed he answered the question properly and did not deliberately falsify the answer. He answered Question 11 with his employment activities, and listed his time in the state jail from November 1996 to November 2002 in that area of the SF-85P, without specifically identifying it as a state jail. (Tr. 50-53, 66, 75; Exhibit 1)

The county prosecuting attorney who handled Applicant's case in 1995 wrote a letter in favor of Applicant. He stated in the letter that the intention of the victim's mother and brother was to see Applicant rehabilitated rather than spend his life in jail. He explained that the friend involved with Applicant in the 1989 death, and who was tried in 1996 when Applicant was convicted on his plea, has continued to be involved in crime and currently is in prison. This same prosecuting attorney was the attorney at Applicant's 2002 sentence modification hearing, and did not oppose that modification. (Tr. 42, 43; Exhibit A)

Applicant is a credible and compelling witness. The letter from the prosecuting attorney was very impressive and persuasive because he stated that he rarely writes a recommendation letter, and he willingly provided important background information on the 1996 prosecution. (Exhibit 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 commonsense 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, an applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. 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 an 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 J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining 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.

AG ¶ 31 describes five conditions that could raise a security concern and may be disqualifying. Two conditions may apply to Applicant:

(a) a single serious crime or multiple lesser offenses; and

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant killed a man in 1989. In 1990, he admitted he possessed illegal drugs and was sentenced to probation. In 1995 he was arrested for the 1989 killing, and was in jail from then until November 2002. He was convicted of voluntary manslaughter and

burglary for the 1989 offenses. AG ¶ 31 (a) and (c) apply because of the serious 1989 crime, and the lesser 1990 crime. Also, Applicant admitted both crimes as part of the court procedures involving both offenses.

AG ¶ 32 provides four conditions that could mitigate security concerns under this guideline. Two conditions may apply to Applicant:

(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.

Applicant's offenses occurred 19 and 20 years ago. Since then, there have been no further violations of law. In 1989 Applicant was intoxicated and associated with a person who has continued to be in trouble with the law. Applicant attacked the victim when he thought the victim was attacking Applicant's companion. These are unique facts and circumstances, which are unlikely to recur. The 1990 offense was unique because Applicant was merely transporting drugs for friends. He went to the police station to admit his possession of the drugs, so the driver, who was arrested, could be freed. In both situations, Applicant admitted his guilt, paid his fines, and served his sentences. AG ¶ 32 (a) applies.

Applicant introduced a large amount of rehabilitation information. During his prison incarceration, he obtained two college degrees, lived in honor housing, took rehabilitation courses, and worked as the college course coordinator to help other inmates obtain a college degree. After his release from prison in 2002, Applicant successfully completed five years of probation. At his probation officer's suggestion, he applied for and was granted early probation termination. He immediately obtained employment with his brother and then two other employers until getting a job with his current employer. He continues his educational pursuits, and teaches as an adjunct professor at a local business college. He is now married, and has custody of his 16-year-old son. Applicant is a regular church member and teaches religion classes there. He has not been involved in any violations of law since 1990 when he committed the last one. Applicant meets the requirements of mitigating condition AG ¶ 32 (d).

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes seven conditions that could raise a security concern and may be disqualifying. One mitigating condition applies to Applicant:

(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.

Applicant did not disclose his 1995 arrest for murder and burglary on his SF-85P completed in April 2008. Nor did he disclose his conviction in 1996 for voluntary manslaughter and burglary on his SF-85P. However, Applicant answered Question 20 in accordance with the time frame written on the form. His offenses occurred prior to the seven year cut-off date, which would have been April 2001. The form could have asked for more information, but did not do so. Therefore, there was no deliberate falsification.

AG ¶ 17 provides seven conditions that could mitigate security concerns. None of them apply to the facts in this case because there was no deliberate falsification.

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 an 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.

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 committed an offense in 1989 causing the death of a man. He carried illegal drugs for his friends in 1990. He admitted both offenses. He was convicted in 1996 of the voluntary manslaughter and burglary charges arising from the 1989 offense. Since 1996, he successfully rehabilitated himself by obtaining a college degree, gainful employment, a teaching position, a family, and participating in his church. His actions were serious, and he was 20 years old when the first one occurred. He has not repeated his criminal actions after 1990, 19 years ago. There are obviously permanent behavioral changes. There is no potential for pressure, coercion, exploitation, or duress. There is no likelihood or recurrence or continuation of his past conduct as shown by his present conduct. I was very impressed by Applicant's testimony. The prosecuting attorney's letter on behalf of Applicant was very influential and persuasive in my deliberations. His supervisor's testimony gave important perspective to Applicant's current employment and his promotion with his company. Applicant clearly is not a trustworthiness risk.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant mitigated the trustworthiness concerns arising from his criminal and personal conduct trustworthiness concerns. I conclude the "whole-person" concept for Applicant.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

PHILIP S. HOWE
Administrative Judge