



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ADP Case No. 08-11046
)
)
Applicant for Public Trust Position)

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro se*

June 22, 2010

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the record evidence as a whole, eligibility for access to ADP I/II/III sensitive information is granted.

On April 1, 2008, Applicant signed a Public Trust Position Application (SF 85P). On January 6, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). 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); and the Adjudicative Guidelines effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on January 26, 2010, and requested a hearing before an administrative judge. On February 23, 2010, DOHA assigned the case to me. On February 25, 2010, DOHA issued a Notice of Hearing setting the case

for March 30, 2010. The case was heard as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 9 into evidence without objection. Applicant testified and called two witnesses. He offered Applicant Exhibits (AE) A through C into evidence without objection. The record remained open until April 16, 2010, to give Applicant an opportunity to submit other information. The record closed as scheduled without additional submissions. DOHA received the hearing transcript (Tr.) on April 9, 2010.

Procedural Matters

At the commencement of the hearing, Department Counsel moved to amend the SOR by deleting the words "1.b" from ¶ 2.b. Applicant had no objection, and the motion was granted. (Tr. 6-7.)

Findings of Fact

In his Answer to the SOR, Applicant admitted the allegations contained in SOR ¶ 1.a and 1.b, and denied or refuted all other allegations. Those admissions are incorporated in the following findings.

Applicant is 60 years old and married for 16 years. He and his wife have two children, ages 15 and 12. He enlisted in the Air Force in June 1969 and was honorably discharged in June 1975. He then joined the Air National Guard and retired in April 2000 with an honorable discharge as a technical sergeant (E-6). He served in Viet Nam and Operation Desert Storm, working in field of aviation. He completed the Air Force Noncommissioned Officer Academy Correspondence Program in February 1996. (AE A.) He held a Top Secret security clearance during his military years and received numerous commendations. (AE A.) The Deputy Commander for Applicant's previous command, and now a co-worker, has known Applicant for twenty years. He wrote, Applicant "is a consummate professional very deserving of the public trust that has been granted him by the position he holds at [his place of employment]." (AE C.)

Applicant has a pilot's license and flew aircraft about seven years after leaving the Air National Guard. (Tr. 69.) He managed a local airport for several years. (Tr. 45.) In 2001, Applicant was diagnosed with Meniere's disease, along with a hearing loss, which are conditions that may be attributable to spending years around airplanes. Currently, a physician has evaluated Applicant for Post Traumatic Stress Disorder (PTSD) and recommended that he seek therapy for it. Applicant intends to follow-up with the recommendation. (Tr. 67.)

After retiring in 2000, Applicant worked in various positions in private industry. In March 2008, he began working an entry level clerk's position for a federal contractor, who processes medical claims for service members. (GE I.) His supervisor has rated him as "Achieves Expectations" in all of his Performance Evaluations to date. (AE B(2).) A supervisor for another division at Applicant's work place has known him for ten years

while serving in the National Guard together. He has daily contact with Applicant and stated that he is "loyal and has always put service before self." (AE C.)

In December 2002, Applicant was cited for two counts of Reckless Driving-Endanger Safety. One count was dismissed. The second count was amended to Inattentive Driving for not wearing a seat belt. He pleaded "no contest" and paid a \$287 fine. (GE 4.)

On March 14, 2007, Applicant became frustrated waiting in line to drop off his child at school. He subsequently became embroiled in a verbal altercation with another parent, who filed a complaint against him. He received a ticket in the mail nine days later charging him with Disorderly Conduct. (Tr. 41.) Applicant pleaded "no contest" to an Obstructing A Street charge and paid a \$203 fine. (GE 6.)

In May 2008, Applicant confronted one of his son's friends about returning his son's baseball glove. The friend's mother telephoned the police because she heard Applicant in a heated argument with her son. After the police arrived, they issued a Disorderly Conduct citation to Applicant, which he resolved by paying a \$109 fine on May 22, 2008. (GE 5, 7.)

In February 2009, Applicant and his wife went to a payday loan store to make a payment on a loan and discuss the company's telephone calls to him at his place of employment regarding the debt. Applicant and the store's representative engaged in an altercation, during which she asked Applicant to leave the store. He did. Unbeknownst to him until he read the SOR, she filed a police report, and on March 3, 2009, the police issued him a No-Trespass ban. (GE 8.)

Applicant's wife testified. She was in the Army from 1984 to 1986. She subsequently worked for a military exchange for eleven years. She has a real estate license, but is not working in the field because of the depressed economy. She accompanied her husband to the payday loan store in February 2009. She asserted that the store's representative was rude, and she later filed a complaint against the representative. She considers her husband to be a trustworthy, honest man. (Tr. 72, 76.)

The president of the village where Applicant lives testified. She has known Applicant for 11 years. She is aware of the March 2007 incident at the school and believes that police bias was exhibited toward Applicant. She thinks that the matter should have been resolved informally with the village board and not sent to the village attorney. Over the years, she has always found Applicant to be a respectful and trustworthy person. (Tr. 17-30.)

Applicant completed a SF-85P on April 1, 2008. In response to "*Question 20: Your Police Record: In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s)? (Leave out traffic fines of less than \$150),*" he disclosed the 2002 incident, but did not disclose the 2007 charge. He did not realize that he should

have disclosed the incident because he had not been arrested or taken to the police station. He did not intend to mislead the Government, but misunderstood the question. (Tr. 52-53.)

Applicant testified candidly. He appeared remorseful and embarrassed over the incidents underlying this proceeding. He likes his position and understands the importance of safeguarding sensitive information. He is proud of his commendable service in the Air Force and Air National Guard and continues to live by its Core Values. (Tr. 32.)

Policies

Positions designated as ADP I, ADP II, and ADP III 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 Adjudicative Guidelines (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.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain,

extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable [trustworthiness] decision.”

A person who applies for access to sensitive information seeks to enter 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 10865 provides that “[a]ny determination under this order adverse to an applicant shall be a determination 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 conditions that could raise a security concern and may be disqualifying:

(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 was charged with criminal conduct in 2007, 2008, and 2009, two of which resulted in the imposition of small fines. The evidence is sufficient to raise the above two disqualifications.

After the Government raised a disqualification, the burden shifted to Applicant to present evidence to rebut or mitigate the potential disqualifying conditions. AG ¶ 32 provides a condition that could mitigate security concerns arising from criminal conduct:

(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.

Over a year has passed since the February 2009 incident, which is the latest allegation listed in the SOR. The circumstances of that situation are unclear based on the testimony of Applicant's wife who was present when the situation arose. There is no allegation of any misconduct since then. Applicant is remorseful and embarrassed about the incidents. He presented evidence of successful performance evaluations since starting his employment and complimentary letters from two co-workers who have known him for many years. This evidence is sufficient to establish the application of said mitigating condition to the security concerns raised under this guideline.

Guideline E, Personal Conduct

The security concern pertaining to this guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The Government alleged in SOR ¶ 2.b that Applicant falsified his answer to a question on the SF 85P, regarding disclosure of a 2007 criminal charge. It contended that his omission may raise a security concern and be disqualifying under AG ¶ 16:

(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 denied that he intentionally omitted information about the 2007 Disorderly Conduct charge. When a falsification allegation is controverted or denied, the government has the burden of proving it. An omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

When completing his SF 85, Applicant misunderstood the question in Section 20. He did not think the 2007 incident fell within the purview of inquiry because he was never arrested or went to court on the charge. He acknowledged that he misread it. After listening to his testimony and observing his demeanor, I find that the omission of the information was not intentional. Hence, the evidence does not establish deliberate falsification. SOR ¶ 2.b is found in his favor.

The Government alleged in SOR ¶¶ 2.a and 2.c that the three criminal incidents occurring in 2007, 2008, 2009, and a 2002 traffic violation (albeit minor infractions) also raised security concerns under this Guideline. Based on the evidence, those incidents create a pattern of rule violations and raise a security concern involving Applicant's judgment under AG ¶ 15.

AG ¶ 17 includes a condition that could mitigate security concerns arising under this guideline:

(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.

Applicant expressed remorse and embarrassment over the incidents. He is obtaining treatment for PTSD, which may be a contributing factor to any underlying stressors related to the previous behavior. More than a year has passed since the February 2009 incident and there is no evidence of other misconduct. Both of these facts tend to indicate that similar problems are unlikely to recur. Said mitigating condition has some application to the raised security concerns.

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 applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). They include the following:

(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 include 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 relevant facts and circumstances surrounding this case. Applicant is a 60-year-old man, who commendably and honorably served his country for over thirty years. He has been married for 11 years and has two children. He has received acceptable performance evaluations from his current supervisor since beginning his position in 2008. He is aware of the importance of safeguarding sensitive information, having held a Top Secret security clearance during military service. Other than the four minor incidents that occurred between 2002 and 2009, Applicant's record does not contain sufficient evidence to raise other concerns or indicate that he is a trustworthy risk. To the contrary, he takes his job and responsibilities seriously. Two of his colleagues consider him to be a trustworthy man and not a risk. Given his recent evaluation for PTSD and willingness to engage in counseling and treatment, along with his awareness of the negative affect that similar incidents or allegations could have on his employment, the likelihood of recurrence is minimal.

On balance, Applicant presented sufficient evidence to fully mitigate reliability and trustworthiness concerns arising from criminal and personal conduct. Overall, the record evidence leaves no doubt as to Applicant's present eligibility and suitability for a public trust position.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	FOR APPLICANT
Subparagraphs 1.a through 1.c:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a through 2.c:	For Applicant

Conclusion

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

SHARI DAM
Administrative Judge