



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



In the matter of:)	
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SSN: -----)	ADP Case No. 09-03460
)	
Applicant for Security Clearance)	

Appearances

For Government: Nicole Noel, Esquire, Department Counsel
For Applicant: *Pro se*

September 13, 2010

Decision

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and transcript, Applicant's request for a security clearance is denied.

On August 7, 2008, Applicant submitted an Application for Public Trust Positions (SF 85P) to obtain eligibility for an ADP I/II/III position¹ required for his job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a set of interrogatories² to clarify or augment potentially disqualifying information in his background. After reviewing the results of the background investigation and Applicant's responses to the interrogatories, DOHA adjudicators were

¹ As defined in Chapter 3 and Appendix 10 of DoD Regulation 5220.2-R, as amended (Regulation).

² Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

unable to make a preliminary affirmative finding³ that it is clearly consistent with the interests of national security to grant Applicant's request for a position of trust. On January 26, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise security concerns addressed in the adjudicative guidelines (AG)⁴ for personal conduct (Guideline E) and financial considerations (Guideline F).

Applicant answered the SOR and requested a decision without a hearing. However, Department Counsel timely requested a hearing,⁵ and the case was assigned to me on April 19, 2010. Pursuant to a Notice of Hearing issued on April 20, 2010, I convened a hearing on May 6, 2010. The Government presented ten exhibits that were admitted without objection as Government's Exhibits (Gx.) 1 - 10. Applicant testified on his own behalf, and submitted five exhibits that were admitted without objection as Applicant's Exhibits (Ax.) A - E. Additionally, I left the record open after the hearing to give Applicant time to submit additional relevant information.⁶ The record closed on May 21, 2010, after the Applicant failed to make a post-hearing submission. The same day, DOHA received a transcript (Tr.) of the hearing.

Findings of Fact

Under Guideline F, the Government alleged that Applicant owed about \$15,715 for 25 delinquent debts (SOR 1.a - 1.y). Applicant admitted only the allegations at SOR 1.h and 1.t. The Government also alleged that, between 1993 and 2005, he was arrested and charged with passing 22 worthless checks written between 1988 and 2004, each to obtain property worth less than \$150, and that he was ordered to make restitution as part of plea agreements each time he appeared in court to answer the charges (SOR 1.z - 1.tt).

Under Guideline E, the Government alleged that Applicant falsified his SF 85P by answering "no" to question 16 (*Your Police Record. In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s)?*), and that his answer was intended to conceal his arrests for passing worthless checks during the preceding seven years, as alleged in SOR 1.gg - 1.tt (SOR 2.a). The Government also alleged that Applicant falsified his SF 85P by answering "no" to question 20 (*Your Financial Record - 180-Day Delinquencies. Are you now more than 180 days delinquent on any loan or financial obligation?*), and that his answer was intended to conceal the debts alleged in SOR 1.b, 1.c, and 1.h - 1.z (SOR 2.b). Applicant denied these allegations.

³ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

⁴ The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006). Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

⁵ Authorized by Directive, Section E3.1.7.

⁶ In addition to Ax. A - E, Applicant had proffered several receipts and other documents that were so disorganized as to be of no value in reaching my decision in this case. I directed him to organize the documents and submit them after the hearing. (Tr. 49 - 50)

Applicant's admissions are incorporated in my findings of fact. Having reviewed Applicant's response to the SOR, the transcript, and exhibits, I make the following additional findings of relevant fact.

Applicant is 48 years old, and he is employed by a defense contractor in a logistics support position that requires access to sensitive automated information to perform his duties. He has held his current job as a company employee since August 2008. For about a year before that, he performed the same job as an employee of a "temp" agency. (Gx. 1) Applicant has been steadily employed, albeit in lower-paying jobs, since at least 1997. Applicant is also an ordained minister with post-graduate degrees in divinity. (Id.)

Applicant has been married and divorced twice. His first marriage lasted from 1985 until 1990 and produced three children, now ages 25, 24, and 19. His second marriage began and ended in 2003. (Gx. 1; Tr. 59 - 60) Applicant suffered from cancer between 2000 and 2004. Unfortunately, for most of that period, Applicant had little or no health insurance. As a result, he still owes several unpaid medical bills totaling about \$8,391 (SOR 1.a, 1.b, 1.e - 1.g, 1.j, 1.p - 1.r). Those debts have not been paid or otherwise resolved. (Gx. 3 - 6; Tr. 70 - 73)

Applicant also owes \$298 for an unpaid telephone account (SOR 1.d), \$412 for a delinquent credit card (SOR 1.h), \$266 for an unpaid catalogue shopping account (SOR 1.m), \$934 for an overdrawn on-line bank account (SOR 1.n), \$432 for an unpaid cell phone account (SOR 1.o), \$675 for an unpaid electrical bill (SOR 1.t), \$531 for another unpaid cell phone account (SOR 1.u), and \$209 for an unpaid video rental account (SOR 1.x). These debts have not been paid or otherwise resolved. (Gx. 3 - 5; Tr. 54, 71 - 72)

Applicant also owes a variety of other debts. He owes \$75 to the U.S. Postal Service (SOR 1.i), \$52 to a grocery store for a bad check (SOR 1.l), and \$71 for an unpaid dry cleaning bill (SOR 1.y). (Gx. 2 - 6)

Finally, Applicant owes collection agencies for several debts for unspecified obligations. He owes debts of \$36 (SOR 1.c), \$133 (SOR 1.k), \$1,730 (SOR 1.s), \$1,340 (SOR 1.v), and \$280 (SOR 1.w). (Gx. 3 - 6) There is no information that shows he has paid or otherwise resolved any of these debts.

Between 1993 and 2005, Applicant was arrested or charged with a total of 22 counts of Worthless Check - Obtaining Property Less Than \$150. (SOR 1.z - 1.tt) On each of the charges, the checks had been written between one and five years earlier. Applicant did not contest any of the charges, and the courts ordered him to make restitution. (Answer to SOR; Gx. 6 - 10) Applicant's first wife may have written one or two of the checks not long after they separated in 1990, when they still may have shared a bank account. However, since then, Applicant has not shared a bank account with anyone, and he does not contest that he wrote numerous checks for goods because he did not manage his finances properly. (Tr. 74 - 83, 94 - 95)

Applicant was required to pay support for his children after his first marriage ended. His youngest child turned 18 in 2008, so his support obligations have ended. However, he accrued an arrearage that he is still satisfying through an involuntary wage garnishment. Applicant estimated the current balance on that debt is about \$2,923, for which \$153 is withheld from his pay each month. (Gx. 2)

When he was interviewed during his background investigation, Applicant told the investigating agent that he lived paycheck to paycheck. He has not received any financial counseling or other advice about how to improve his financial condition. Applicant testified that he uses a budget, but he did not provide any details about his current monthly finances that would indicate a systematic approach to money management. Applicant presented information (Ax. C - E) that showed he received settlement offers from some of his creditors, but he did not show that he had acted on any of those offers.

When Applicant submitted his SF 85P in August 2008, he did not disclose that he was more than 180 days past due on any debts at the time or that he had been arrested or charged with any crimes in the preceding seven years. Questions 20 and 16, respectively, required him to disclose such information. (Gx. 1) Applicant denied intentionally falsifying his answers to those questions. In support of his denial, he proffered a handwritten SF 85P worksheet (Ax. A), which shows that he answered “yes” to question 20, but that he did not provide any amplifying information. The same document shows that he answered “no” to question 16. Applicant testified that this worksheet was used as input for the SF 85P he signed. His signature appears immediately below an advisement that 18 U.S.C. 1001 makes it a crime to knowingly and willfully make a false statement to any agency of the U.S. Government concerning a matter within its jurisdiction. (Gx. 1)

Policies

Positions designated as ADP I/II/III are classified as “sensitive positions.” Regulation, ¶ C3.6.15. In deciding whether a person should be assigned to an ADP position, it must be determined that his or her loyalty, reliability, and trustworthiness are such that it is “clearly consistent with the interests of national security” to do so. Regulation, ¶ C6.1.1.1. The Regulation also requires that DoD contractor personnel are entitled to the procedural protections in the Directive before any adverse determination may be made. Regulation, ¶ C8.2.1.

The Directive requires that each decision be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁷ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

⁷ Directive. 6.3.

(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 presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of eligibility for a position of trust.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a position of trust for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one is entitled to a position of trust, an applicant bears a heavy burden of persuasion. A person who has access to sensitive information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring applicants possess the requisite judgment, reliability, and trustworthiness of one who will protect sensitive information as his or her own. Any reasonable doubt about an applicant's suitability for access should be resolved in favor of the Government.

Analysis

Financial

The security concern about Applicant's finances, as stated in AG ¶ 18, is that:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The Government presented sufficient information to support the allegations in SOR 1.a - 1.tt; that is, that Applicant accrued at least \$15,715 for 25 delinquent debts (SOR 1.a - 1.y); that he was arrested and charged with passing worthless checks to obtain property less than \$150 on 21 separate occasions between December 1988 and July 2005 (SOR 1.z - 1.tt). Available information also showed that Applicant has not paid or otherwise resolved his debts and that his financial condition has not improved so as to avoid future unpaid debts or illegal acts. Thus, the record requires application of the disqualifying conditions listed at AG ¶ 19(a) (*inability or unwillingness to satisfy*

debts); AG ¶ 19(c) (*a history of not meeting financial obligations*); and AG ¶ 19(d) (*deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust*).

By contrast, Applicant established that some of his debts and bad check offenses resulted from the end of his first marriage. He also established that about half of his outstanding debts were for medical expenses from a four-year battle with cancer, for which he was not medically insured much of the time. These facts and circumstances require consideration of the mitigating condition at AG ¶ 20(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*). To apply, Applicant must establish both prongs of this mitigating condition; that is, unforeseen events and responsible action subsequent to those events. Applicant has not established that he acted responsibly after his divorce 20 years ago. He continued to mismanage his money and wrote numerous bad checks for much of the next 15 years.

Further, his medical bills have gone largely unaddressed, and he has not even paid those debts of less than \$100 each that are more easily within reach. Finally, Applicant is still paying back child support through wage garnishments, and he has not shown how, if at all, his finances are better so that he may avoid future financial problems. All of the foregoing precludes application of any of the remaining Guideline F mitigating conditions. Applicant has failed to overcome the adverse security concerns raised by the Government's information.

Personal Conduct

As stated at AG ¶ 15, the security concern about Applicant's answers to his SF 85P 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.

The Government's information showed, in relevant part, that Applicant was arrested or charged with writing bad checks at least 13 times between January 2004 and April 2005. Yet, in August 2008, he answered "no" to SF 85P question 16, which asked if he had been arrested or charged with a criminal offense in the preceding seven years. The Government's information also showed that, as of August 2008, Applicant was more than 180 days delinquent on at least those debts alleged in SOR 1.b, 1.c, and 1.h - 1.z. On his signed SF 85P, Applicant answered "no" to question 20, which asked if he was then more than 180 days delinquent on any debt. He denied the SOR 2.a and 2.b allegations that he deliberately falsified his SF 85P answers. In support of his denial, he presented a worksheet that showed he checked "yes" to question 20. The same

worksheet showed he checked “no” to question 16 regarding his arrest record. However, the Government’s information was sufficient to show that Applicant did not disclose the requested information as required, and that he did so intentionally.

Responses to questions on an application for a position of trust constitute statements or representations to the Department of Defense concerning matters within its jurisdiction. To be disqualifying, it must be shown that the statement was made with the intent to deceive or mislead investigators or adjudicators about that information. Applicant’s position is that he did not intend to omit any information about his finances, but he gave no explanation for the omission of his multiple bad check offenses since at least 2004. Applicant is a mature, well-educated man. The questions at issue are clear and straightforward. When he signed his name to the last page of the SF 85P that was submitted for investigation, he represented that all of his answers were true and accurate to the best of his knowledge. He was responsible for the accuracy of the final version of that questionnaire. All of the available information probative of Applicant’s intent when he signed his SF 85P shows that he intended to mislead the Government about important information in his background. Thus, the disqualifying condition at 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*) applies.

In assessing the potential application of the mitigating conditions under AG ¶ 17, I conclude they are either unsupported by the available information or that they are inapposite to the facts of this case. Applicant has not adequately explained his answers, and he did not show that he tried to correct any misrepresentations he made. He did not show that his answers to the SF 85P were the result of incorrect advice from someone authorized to guide him in this matter. Also, his statements are recent, in that they were made as part of the current investigation and adjudication of his suitability for a position of trust. On balance, Applicant has failed to mitigate the security concerns raised by his false answers to the SF 85P.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E and F. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is 48 years old and is presumed to be a mature, responsible adult. In addition to his work for a defense contractor, he is an ordained minister who works in a variety of community outreach circumstances. However, there is no independent information about his ministry or about his on-the-job performance on which to base a favorable conclusion despite the adverse information presented by this record. Applicant had the burden of resolving the doubts raised about his suitability for access to sensitive information, but he failed to meet that burden. As a result, doubts about his judgment, reliability, and trustworthiness remain. Because protection of the national interest is paramount in these determinations, those doubts must be resolved in favor of the Government.

Formal Findings

Formal findings 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
Subparagraph 1.a - 1.tt:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a - 2.b:	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to grant Applicant's access to sensitive information. Request for a position of trust is denied.

MATTHEW E. MALONE
Administrative Judge