



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



In the matter of:)
)
) ADP Case No. 10-01147
)
Applicant for Public Trust Position)

Appearances

For Government: William O’Neil, Esquire, Department Counsel
For Applicant: *Pro se*

October 26, 2011

Decision

MASON, Paul J., Administrative Judge:

Given Applicant’s 20-year history of criminal behavior and deliberate omission of material information from his Public Trust Position Application (SF 85P) in April 2008, the passage of time and Applicant’s good work record is insufficient to meet his ultimate burden of persuasion under the criminal conduct and personal conduct guidelines. Applicant’s eligibility for a public trust position is denied.

Statement of the Case

Applicant completed and certified his Public Trust Position Application (SF 85P) on April 5, 2008. On September 16, 2008, he was interviewed about his criminal history by an investigator from the Office of Personnel Management (OPM). A summary of his interview appears in his interrogatory answers dated February 26, 2009. (GE 5) Applicant agreed with the investigator’s summary, and he agreed that it could be used at a hearing to determine his security suitability. (*Id.*)

On October 13, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under personal conduct (Guideline E) and criminal conduct (Guideline J). The action was taken

pursuant to 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 (AG) made effective within the Department of Defense on September 1, 2006.

Applicant submitted his answer to the SOR on November 15, 2010. DOHA issued a notice of hearing on July 1, 2011, for a hearing on July 20, 2011. The hearing was held as scheduled. At the hearing, eight exhibits (GE 1 through 8) were admitted in evidence (without objection) in support of the Government's case. Applicant and two witnesses testified. Applicant presented no exhibits. DOHA received the transcript on August 4, 2011. The record closed on August 4, 2011.

Findings of Fact

The SOR has four allegations under the personal conduct guideline (SOR ¶ 1), and 12 allegations under the criminal conduct guideline (SOR ¶ 2). Applicant denied SOR ¶ 1.a and admitted SOR ¶ 1.b. He essentially admitted all allegations under SOR ¶ 2. He disagreed with the number of offenses he was found guilty of in SOR ¶ 2.e, and he expressed minor disagreements over the conditions of his sentence in other allegations. Applicant has been married to his current wife since June 1999. He has three children from this marriage and two children from a previous relationship. He has been employed as an order filler with his current employer since March 2008. Before his current employer, he was a processor at a poultry business. He has never possessed a security clearance.

Personal Conduct

In interrogatories submitted to Applicant in February 2009, he was asked to explain why he omitted his arrests and convictions from his SF 85P. (GE 3, SOR ¶ 1.a) He provided no explanation, but he did provide a short explanation of the offenses identified in the question. (*Id.*) In May 2010, he was asked why he did not disclose the requested information on the Declaration of Public Employment form (Optional Form 306). (GE 4, SOR ¶ 1.b) He provided no explanation, but did provide a short account of the disposition of the offenses identified in the question. (*Id.*)

At the beginning of the hearing, Applicant explained that he answered "no" to question 16 (arrest, charge, conviction of any offense in the last 7 years) of his SF 85P because he thought the question requested only information about convictions. (Tr. 40; GE 1; SOR 1.a) In GE 2, the Declaration for Public Employment form (Optional Form 306) reflects that Applicant answered "no" to question 9 (convictions, imprisonment, probation, parole for misdemeanors or felonies in the last 10 years). (SOR 1.b)

Later in the hearing, Applicant was asked again why he did not reveal the criminal information from the SF 85P and the Declaration for Public Employment form. (Tr. 55) His reply was that he concealed the criminal conduct to improve his chances of

obtaining a security clearance. (*Id.*) Concerning question 16 of the SF 85P, he knew when he answered the question that he had arrests in the last seven years. Nonetheless, he answered “no” to the question. (Tr. 55-56) If he was presented with the same criminal questions today, he would answer them truthfully. (Tr. 56)

Criminal Conduct

Applicant attributed the first four offenses of the SOR to having just graduated from high school and associating with the wrong people. (Tr. 44-45) When he was 19 years old (December 1986) he was charged with possession of stolen property. (SOR 2.a) Applicant admitted he was observed wearing a medallion, but testified he borrowed the jewelry. (Tr. 61) The charge was dismissed. (Tr. 62) Applicant was arrested in February 1987 for carrying for an illegal weapon and resisting arrest. (SOR 2.b) He explained he was with some individuals and a gun was found on the ground. He was arrested but released after a couple of hours with no charges being filed. In June 1988, Applicant (21 years old) was charged with marijuana possession with intent to distribute. (SOR 2.c) He admitted that he possessed the marijuana stored in a few small bags but denied an intent to sell. (Tr. 63) No disposition was provided for this offense. In October 1988, Applicant was charged with armed robbery. (SOR 2.d) Applicant admitted stealing a ring (jewelry) but denied he was armed with a weapon. (Tr. 64-66) No disposition of this offense is in the record.

In February 1993, Applicant was charged with two counts of battery. (SOR 2.e) Applicant had an argument with his girlfriend and he claimed he pushed her after she stabbed him. He was found guilty. He received counseling and was placed on probation for 12 months. (Tr. 46) In November 1993, Applicant was charged with driving under influence of alcohol (DUI). (SOR 2.f) He had been drinking at a bar. While driving home, he was stopped and arrested for changing lanes. He was found guilty. In addition to receiving 12 months probation, his license was suspended for six months, and he was required to attend DUI school. In November 1994, Applicant was charged with marijuana possession, second offense. (SOR 2.g) He admitted the offense and paid a fine, but the sentence was suspended. (Tr. 48) In November 1996, Applicant admitted using marijuana and was charged with marijuana possession. (SOR 2.h; Tr. 50) Not listed in the SOR is a marijuana possession charge he admitted for using marijuana in 1999. (Tr. 68-69) He noted he had been arrested several times for using marijuana. (Case file, Applicant’s OPM interview, September 16, 2008)

In October 2001, Applicant was charged with a felony of being a fugitive from justice. (SOR 2.i) The fugitive charge stemmed from his violation of probation for the unlisted 1999 conviction for possession of marijuana (discussed in previous paragraph) in another jurisdiction. The violation was leaving the jurisdiction without permission. He spent about a month awaiting extradition. After he returned to the jurisdiction where the original sentence was imposed, he served approximately two months. He never tried to settle the charge by contacting the authorities or turning himself in, and he was arrested in October 2001 (Tr. 71; GE 8)

In February 2005, Applicant was arrested and charged with operating a motor vehicle without a license, and marijuana possession. (SOR 2.j) He pled to possession and the driving charge was dismissed because he was not driving. (Tr. 51) Adjudication was withheld.

In January 2006, Applicant was charged with DUI. (SOR 2.k) Applicant recalled being intoxicated and was stopped for changing lanes. He was sentenced to 12 months probation, community service and his license was suspended for 12 months. In March 2007, Applicant was arrested for driving with his driver's license suspended or revoked. (SOR 1.c) His license was still under suspension from the conviction in SOR 2.k. Applicant was fined but his probation from SOR 2.k was not revoked.

Character Evidence

Applicant's program manager has known Applicant professionally for three years and recommends him for a position of trust. While he does not have direct participation in performance evaluations, the manager reviews those evaluations. (Tr. 25) The manager does not believe Applicant has ever received a warning for lack of work production or making too many errors in tracking and storing inventory at the facility. (Tr. 28-29) The manager has no knowledge about Applicant's past.

Applicant's supervisor considers Applicant's job performance as outstanding and, like the program manager, recommends Applicant for a position of trust. (Tr. 32) Applicant's supervisor has never seen the SOR and has no idea about Applicant's criminal past. (Tr. 33) The supervisor testified that Applicant needs access to the computer system to keep his employment. (Tr. 36)

Applicant believes the criminal behavior is behind him. He is the only person working to support his family. (Tr. 53-55) He has to have his driver's license to keep his forklift license to operate a forklift at work. (Tr. 53)

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." 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." Regulation ¶ C6.1.1.1. 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. An administrative judge's objective is a fair, impartial and commonsense decision that embraces all available, reliable information about the person, past and present, favorable and unfavorable.

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 decision.

A person who seeks a public trust position enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship is not restricted to normal duty hours. Rather, the relationship is a 24-hour responsibility between an applicant and the federal government. 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.

Analysis

Personal Conduct

Paragraph 15 of the AG sets forth the security concern for 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 personal conduct has two disqualifying conditions under AG ¶ 16 that may be applicable to this case:

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;*

AG ¶ 16.d. *credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected*

information; (2) disruptive, violent, or other behavior in the workplace; (3) a pattern of dishonesty or rule violations; and (4) evidence of significant misuse of government or other employer's time or resources.

When examining the evidence under the personal conduct guideline to determine whether security form falsifications or omissions are deliberate, it is important to keep in mind that every omission of material information is not deliberate. It can occur because of negligence, oversight, or misunderstanding. In April 2008, Applicant omitted material information by excluding his entire criminal history from question 16 of the SF 85P and the Declaration of Federal Employment. The omitted information is material and must always be disclosed so the government can make an informed decision about an applicant's security qualifications.

In his November 2010 answer to the SOR, Applicant denied that he deliberately omitted information from question 16 of the SF 85P; he admitted he deliberately omitted his criminal convictions from question 9 of the Declaration for Federal Employment.

At the early portion of the hearing, Applicant claimed he thought that question 16 referred only to convictions. That explanation would otherwise be considered credible except that question 9 on the Declaration for Federal Employment requires information about convictions, imprisonment, probation, parole, in the last 10 years. Applicant also answered "no" to question 9 of the federal employment form.

At a later stage in the hearing, Applicant admitted he deliberately omitted his criminal history from both application forms because he believed he would be denied a public trust position if the Government knew about his criminal history. The Government has established a case that Applicant deliberately omitted material information within the scope of AG ¶ 16(a) of the personal conduct guideline.

AG ¶ 16(d) applies to Applicant's pattern of criminal conduct that carries independent significance under this guideline as demonstrating a failure to follow rules. Between December 1986 and October 1988, Applicant was either the principal actor or present during the commission of four criminal offenses. Between December 1986 and March 2007, Applicant was prosecuted on several occasions for using marijuana. Specifically, he was placed on probation for an unlisted conviction for marijuana possession in 1999. During his probation he simply left the jurisdiction without informing his probation officer. He never tried to contact anyone or turn himself in for the fugitive charge. He was found guilty of being a fugitive from justice, and was incarcerated for two months.

Another violation of rules occurred during his probation for the January 2006 DUI conviction. A part of the sentence was a fine, community service, and suspension of his driver's license for 12 months. In March 2007, Applicant violated probation by driving with a suspended license. His repeated disregard for the law and probation falls within the scope of AG ¶ 16(d).

There are three mitigating conditions under AG ¶ 17 that are potentially applicable to the circumstances in this case. Those conditions are:

AG ¶ 17(a) the individual made prompt, good-faith efforts to correct the omission, concealment or falsification, before being confronted with the facts;

AG ¶ 17(c) the offense was 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, and

AG ¶ 17(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate stressors, circumstances, or factors that caused untrustworthy, unreliable or other inappropriate behavior, and such behavior is unlikely to recur.

AG ¶ 17(a) is not applicable because Applicant did not correct the omission until he was confronted by the facts at the hearing. In this case, the factual information appears in GE 3 through GE 8 that document Applicant's criminal record.

AG ¶ 17(c) does not apply. By denying he had a criminal record, Applicant provided an untruthful picture of himself to the Government. Although he ultimately told the truth about his criminal history, his deliberate omissions of material information in April 2008 continue to raise doubt regarding his reliability and trustworthiness for a public trust position.

While Applicant has ultimately admitted his deliberate omission of material information from the SF 85P and the federal employment form, his failure to abide by the law and conditions of probation in October 2001 and recently in March 2007, raise lingering questions about his willingness to adhere to rules. AG ¶ 17(d) does not apply. The personal conduct guideline is found against Applicant.

Criminal Conduct

The security concern for criminal conduct is set forth in AG ¶ 30:

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 of the criminal conduct guideline lists two disqualifying conditions that may be applicable to this case:

AG ¶ 31(a) a single serious crime or multiple lesser offenses, and

AG ¶ 31(c) *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.*

The record shows that Applicant was involved in 10 listed criminal offenses and one unlisted offense. The pattern of criminal behavior raises questions about his judgment and trustworthiness. AG ¶¶ 31(a) and 31(c) apply.

AG ¶ 32 lists the mitigating conditions that may be applicable in this case.

AG ¶ 32(a) so much time has passed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and,

AG ¶ 32(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 development.

Regarding AG ¶ 32(a), the administrative judge must decide whether the passage of time presents changed circumstances to support a favorable finding under this mitigating condition. Though more than three years have transpired since Applicant deliberately falsified his security forms, his failure to disclose the truth about why he omitted his criminal history in his response to interrogatories in February 2009 and May 2010, and his answer to the SOR in November 2010, bring his falsifications into the present, and generate residual doubts about his trustworthiness.

Applicant's good performance record for more than three years weighs in his favor. But the favorable impact of his performance does not mitigate his deliberate omission of material information between April 2008 and July 2011, when he finally admitted he provided false information in response to question 16 of the SF 85P. After considering all the evidence presented under the disqualifying and mitigating conditions, the passage of time and Applicant's job performance evidence does not overcome the negative evidence presented under AG ¶¶ 31(a) and 31(e).

Whole-Person Concept

I have examined the evidence with the disqualifying and mitigating conditions in my ultimate finding for Applicant under the personal conduct and criminal conduct guidelines. I have also weighed the circumstances within the context of nine variables known as the whole-person concept. In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors:

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 the participation was 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.

Applicant is 44 years old and married since June 1999, with three children. He also has two children from a previous relationship. The favorable evidence that supports his application for a public trust position is a good job performance since March 2008. In that period, Applicant has impressed his program manager with a high production standard and few errors at work. Both the manager and Applicant's supervisor recommend him for a position of trust.

By contrast, there is more disqualifying evidence that weighs against Applicant's application. His deliberate omission on his SF 85P and his continuing denial in his November 2010 answer to the SOR that he omitted information have not been mitigated. Applicant's criminal conduct from December 1986 to April 2008 (when he provided false answers on the SF 85P) has not been mitigated. I am finding SOR 1.b for Applicant because of his admission in his November 2010 answer that he deliberately omitted information from the Declaration for Federal Employment form.

At the July 2011 hearing, Applicant finally exercised good judgment when he admitted intentionally omitting his criminal history from the security forms. However, his admission is insufficient to overcome his dishonest conduct and long history of criminal conduct.

Formal Findings

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

Paragraph 1 (Personal Conduct, Guideline E): **AGAINST APPLICANT**

Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant

Paragraph 2 (Criminal Conduct, Guideline J): **AGAINST APPLICANT**

Subparagraph 2.a:	For Applicant
Subparagraphs 2.b through 2.i:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a public trust position. Eligibility for a public trust position is denied.

Paul J. Mason
Administrative Judge