



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



In the matter of: )  
)  
) ADP Case No. 10-04783  
)  
Applicant for Public Trust Position )

**Appearances**

For Government: Braden F. Murphy, Esq., Department Counsel  
For Applicant: Pro se

April 29, 2011

**Decision**

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HEINY, Claude R., Administrative Judge:

In August 2009, Applicant was terminated from his employment following theft allegations. Applicant rebutted the trustworthiness concerns raised under personal conduct. Based upon a review of the pleadings and exhibits, eligibility for access to sensitive information and eligibility for a public trust position is granted.

**Statement of the Case**

On December 22, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing trustworthiness concerns under 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); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended

(Regulation), and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

On January 19, 2011, Applicant answered the SOR, and requested a hearing. On March 2, 2011, I was assigned the case. On March 22, 2011, DOHA issued a notice of hearing scheduling the hearing held on April 14, 2011. At the hearing, the Government offered Exhibits (Ex.) 1 and 2, which were admitted into evidence. Applicant testified on his own behalf and submitted Exhibits A through D, which were admitted into evidence. On April 25, 2011, the transcript (Tr.) was received.

### **Findings of Fact**

In Applicant's Answer to the SOR, he admitted the factual allegations of the SOR. Applicant's admission to the SOR allegation is incorporated herein. After a thorough review of the record, pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 30-year-old computer desktop support employee who has worked for a defense contractor since November 2009. (Tr. 29) He is seeking to obtain a public trust position. His supervisor and coworkers state Applicant is organized, efficient, extremely competent, and has excellent rapport with coworkers. He is dependable, reliable, hardworking, conscientious, honest, friendly, courteous, and a valuable team member. (Ex. A, B, C, and D) His annual salary is \$26,000. (Tr. 48) He has one son. (Tr. 47)

In August 2009, Applicant was terminated from his job following allegations of theft. Applicant worked at a large discount department store as an overnight assembler. At night, when the store was closed, he would assemble items such as bicycles for pick-up by customers the following day. His normal shift started at 10:30 p.m. and ended the following morning. On the day in question, Applicant had received two subscription magazines in the mail. One was a computer modification and parts catalogue magazine sold only by subscription and not available in stores. (Tr. 37) The other was a men's magazine. He put the magazines in his bag with his lunch and iPod, planning to read them during his lunch break at work. At approximately 9:30 p.m., approximately an hour before the start of his shift, he arrived at work. It was his habit to always arrive early.<sup>1</sup>

Prior to arriving at the store, Applicant stopped at a gas station and convenience store very near his store and purchased an "energy drink." (Tr. 21) As he entered the store where he worked, he asked the store door greeter if he needed to have a sticker put on his energy drink marking it as having being brought in from outside the store. The greeter assured him that it was not necessary. (Tr. 21, 34) Applicant continued through the store to the break room at the back of the store. On his way, he noticed the discount store had started selling the energy drink. He asked an employee as to when the store

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<sup>1</sup> On the day of his hearing, Applicant arrived at 8:00 a.m. for his scheduled 11:00 hearing. He stated he did not want to be late.

started selling the drink. The employee stated that a day or two earlier the distributor had put in a cooler and stocked it with the drink. (Tr. 22)

Applicant opened the cooler and looked at the various flavors of the energy drink. (Tr. 34) Had he known the store was selling the energy drink, he would have brought his drink there instead of buying it at the convenience store because the energy drink was being sold at a lower price by his store, and as a store employee he was entitled to a 15 percent discount on all items purchased. (Tr. 49) After leaving the cooler, he passed the store's magazine rack, stopping to look at the magazines before proceeding to the break room.

At the break room, his supervisor called Applicant into the office and accused him of stealing the energy drink and magazines. Also present was the store's loss prevention officer (LPO). (Tr. 24) Applicant professed his innocence. He was told he had been seen on the store surveillance system taking the items. He asked to see the video, but his request was denied. He then asked them to view the surveillance of him entering the store; it would show he had the energy drink in his hand when he entered. When his request was denied, he asked that they talk to the store greeter who had seen him enter the store with the drink. They simply stated surveillance showed him stealing the drink and the magazines.

Applicant then asked his supervisor and the store LPO to call the magazine department, because the computer modification magazine and parts catalogue was sold only by subscription, not by the store, and, therefore, would not appear on the store's list of magazines. (Tr. 26, 38) They refused to call anyone. He then asked them to point out the bar code on the magazines, for all items sold by the store required a bar code to allow the checkout machines to properly scan and price the items. As subscription magazines, neither possessed a bar code. Both had come in plastic bags or slip covers. The men's magazine had come in a slip cover because it contained the yearly calendar. (Tr. 36) The other magazine, the one not sold by the store, had also arrived at his home in a slip cover.

Applicant's supervisor and the LPO again stated they did not have to show Applicant anything because it was all on surveillance. He was upset when his requests to view the surveillance were denied. (Tr. 52) Security was then called to escort Applicant from the store after his badge, discount card, case cutter, and tool box key were taken by his supervisor. (Tr. 24) Applicant sat on a bench in front of the store before security told him he could not remain on store property and told him to move to the bus stop bench. (Tr. 27) At the bus stop, Applicant called the police and reported that the store had wrongfully taken his goods. The store had failed to return his bag, his lunch, iPod, magazines, and drink.

A police officer arrived at the bus stop and Applicant told them what had happened. The police officer went into the store. Applicant was not allowed to enter the store even with the police officer. Approximately 15 minutes later, the officer returned

with Applicant's bag without the energy drink or the magazines. The officer said he would file an incident report and gave Applicant his business card. (Tr. 27) The store did not bring criminal charges against Applicant but did enter him in a database indicating he had been terminated for theft. They also denied him any unemployment compensation. Since there was no criminal proceeding, he never had the opportunity to have this matter resolved. As a minimum wage employee, Applicant did not have the resources to hire an attorney to pursue his wrongful termination. (Tr. 27)

Applicant did receive unemployment benefits for a short time before the discount store appealed the matter to the state unemployment agency. (Tr. 28) A decision was entered in the store's favor, and Applicant was required to repay the unemployment compensation he had received. (Tr. 28) He was unemployed until he obtained his current job.

In response to questioning, Applicant indicated that during the year and a half he worked at the store, a number of employees were terminated for accusations of failing to pay for food, opening items on the shelves, or taking money. (Tr. 51) These employees were the more senior employees and were replaced by new hires at a much lower pay rate.

In October 2009, Applicant completed a Questionnaire for Public Trust Positions, Standard Form (SF) 85P. (Ex. 1) On that questionnaire, he disclosed the theft allegations. (Ex. 1, Tr. 33)

## **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 over-arching 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 sensitive information 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**

### **Personal Conduct**

Adjudicative Guideline (AG) ¶ 15 articulates the trustworthiness concerns relating 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 Personal Conduct Disqualifying Conditions under AG ¶ 16 that are potentially applicable include:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

(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 that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(2) disruptive, violent, or other inappropriate behavior in the workplace.

(3) a pattern of dishonesty or rule violations.

Applicant was terminated from his job for alleged theft. Applicant has provided a plausible explanation of the events surrounding his termination, which addresses, extenuates, and mitigates the trustworthiness significance of his actions. Having observed Applicant's demeanor and listened to his testimony, I find his answers truthful, as he did not steal the drink or the magazines.

Applicant received two magazines in the mail and took them to work intending to read them during his lunch break. The computer modification magazine and parts catalogue were sold only by subscription and not sold at the store where he was employed. The other magazine was sold at the store, but the copy retrieved from his bag failed to have a bar code, which shows it was not store property. He reasonably asked his supervisor and the LPO to call the magazine department to verify the store did not stock the computer parts magazine. He brought the drink into the store and asked the door greeter if he needed a sticker put on the drink indicating he had brought the drink into the store from the outside. He was told a sticker was not needed. He credibly testified he would have bought the drink at the discount store had he known the store was selling such drinks because it was not only cheaper, but he was entitled to a discount on store purchases.

Although his supervisor and LPO were not required to show him the surveillance, a review of the surveillance could have ended the theft allegations at that point. Applicant does not deny opening the drink cooler or looking at magazines on his way to the break room. I find it unlikely that someone who had just shoplifted a drink and magazines would call the police seeking their assistance to retrieve his property. I find the theft allegations, although serious, are unfounded.

### **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 the applicant's conduct and all the 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. The alleged conduct is not supported by the character statements provided by Applicant's supervisor and coworkers. His explanation is reasonable and addresses the trustworthiness concerns. 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 the personal conduct allegations.

### **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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant

## **Conclusion**

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

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CLAUDE R. HEINY II  
Administrative Judge