



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



In the matter of:)	
)	
)	ADP Case No. 11-00721
)	
Applicant for Public Trust Position)	

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: *Pro se*

November 23, 2011

Decision

LAZZARO, Henry, Administrative Judge

Applicant’s last criminal conduct occurred in 1989. He has established that he has been totally rehabilitated and is unlikely to commit a criminal act in the future. However, he failed to mitigate the trustworthiness concerns that arise from his longstanding financial problems. He has insufficient income to satisfy his larger delinquent debts, and he continues to accrue deferred student loans that he will be unable to service when they are no longer deferred. Clearance is denied.

On May 27, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing its trustworthiness concerns.¹ The SOR alleges trustworthiness concerns under Guideline F (financial considerations) and Guideline J (criminal conduct). Applicant submitted an undated response to the SOR in which he admitted all allegations except those contained in subparagraphs 1.c, 1.e., 1.f, 1.g, 1.i, and 2.b., and requested a hearing. On August 18, 2011, Department Counsel filed an amendment to the SOR adding three additional Guideline F allegations. Applicant

¹ This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended (Directive), and adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

submitted a response to the Amended SOR, dated September 13, 2011, in which he admitted the three additional allegations.

The case was assigned to me on September 28, 2011. A notice of hearing was issued on October 12, 2011, scheduling the hearing for October 26, 2011.² The hearing was conducted as scheduled. The Government submitted six documentary exhibits that were marked as Government Exhibits (GE) 1-6 and admitted into the record without objection. Applicant testified, called two witnesses to testify on his behalf, and submitted 14 documentary exhibits that were marked as Applicant Exhibits (AE) 1-14, and admitted into the record without objection. The transcript was received on November 10, 2011.

Findings of Fact

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is a 55-year-old man who has been employed as an order filler aboard a military base by a defense contractor since November 2009. He obtained a general educational development (GED) certificate in about 1978, and training as an electrician through the Job Corps in either 1974 or 1975. Applicant worked as an electrician when he was not in jail in the 1970s and 1980s. He worked continuously as an electrical helper from the time he was paroled from the penitentiary in August 2002 until he began working for his current employer. Applicant served in the Army National Guard from October 1976 until November 1977. He received an Undesirable Discharge as the result of one of his civilian criminal convictions. Applicant has never been married, but he does have a 33-year-old son.

Applicant was arrested and convicted of numerous offenses between 1977 and 1989. Those offenses included convictions for Robbery, Burglary, and Delivery of a Controlled Substance. He was repeatedly sentenced to terms of imprisonment for those offenses. Finally, in November 1989, Applicant was charged with Delivery of a Controlled Substance to an undercover police officer. He was convicted of that offense, and eventually two additional charges of Delivery of a Controlled Substance, and he was sentenced to be confined for 20 years.³ Applicant remained in confinement until he was released on parole in August 2002. He remained on parole until either 2009 or 2010.

Applicant attended a Christian college and seminary while he was in the penitentiary. He was awarded what he described as a doctorate degree from that college in October 2001. He obtained a bachelor of arts degree in business administration in December 2010. Applicant was required to attend drug counseling classes while he was

² Applicant waived the 15 day notice requirement on the record (Tr. 16 17).

³ Applicant credibly explained that while SOR subparagraphs 2.j and 2.k allege he was arrested for offenses in 1990 and 1991, those offenses occurred before he was incarcerated in 1989, and he was brought back to court from the penitentiary to dispose of those charges by pleading guilty for concurrent sentences with the sentence initially imposed on him.

in the penitentiary and after his release from the penitentiary as a condition of parole. He successfully completed those classes. There is nothing in the record to indicate that he had any disciplinary problems while he was confined or that he ever violated a condition of his parole.

Applicant began working with a prison ministry program and in a juvenile detention center following his release from the penitentiary. He was awarded a Certificate of Appreciation by a sheriff's department in November 2002 for his involvement with its Minister's Academy Program. Applicant was appointed to serve a pastor by his church in October 2009. He was ordained as an Itinerant Deacon by that church in October 2010. Applicant's character witnesses, who are two managers from his current employer, describe him as a mature and exemplary employee.

SOR subparagraphs 1.a, 1.b, and 1.c list judgments that were entered against Applicant in the combined amount of \$18,985. Applicant admits his liability for those judgments, although he disagrees with the amount of the judgment alleged in SOR subparagraph 1.b. Those judgments date back to debts Applicant incurred in 2005, 2004, and 2006 respectively. He entered into a repayment agreement on the judgment listed in subparagraph 1.a that required him to make monthly payments of \$60. He made several payments, missed other payments, and has not made any payment toward that debt since June 2011. He has not made any payment on the other judgments. SOR subparagraph 1.g is a duplicate entry for the judgment that is listed in subparagraph 1.c.

Applicant satisfied the collection accounts alleged in SOR subparagraphs 1.d, 1.e, and 1.i, which were owed in the combined amount of \$1,141. He entered into a repayment agreement for the collection account alleged in subparagraph 1.j, under which he made two or three payments, but none since July 2011. Applicant disputes the delinquent debts listed in subparagraphs 1.f and 1.k, although he did not submit any documentation in support of those disputes. He admits he is responsible for the debts listed in subparagraphs 1.h, 1.l, and 1.m, but he has not made any payment on those debts.

Applicant attributes his delinquent debts to living beyond his means. Applicant testified his recurring monthly expenses total approximately \$1,937. His net monthly income from his full-time employment is approximately \$1,550. He supplements his full-time employment income by obtaining occasional jobs doing electrical work. Applicant presently owes \$36,111 for student loans on which payments are currently deferred. He is continuing his education and anticipates obtaining approximately \$14,000 in additional student loans. He anticipates he will complete his education in about two years, at which time he will be required to start making payments on the student loans.

Policies

Positions designated as ADP I and ADP II are classified as sensitive positions.⁴ The standard to 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

⁴ Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

person to sensitive duties is clearly consistent with the interests of national security.⁵ Trustworthiness adjudications apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management.⁶ Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination is made.⁷

An administrative judge must consider the disqualifying and mitigating conditions in the Adjudicative Guidelines when evaluating an Applicant's suitability for a public trust position. The administrative judge must also consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. The entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The protection of the national security is the paramount consideration, and any doubt concerning personnel being considered for access to sensitive information will be resolved in favor of national security. Decisions are made in terms of the national interest and are not determinations as to the loyalty of the applicant concerned.⁸

The Government is required to present evidence to establish controverted facts alleged in the SOR.⁹ 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.¹⁰ The applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

Analysis

Guideline F, Financial Considerations

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 sensitive information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. . . . (Adjudicative Guideline [AG] 18)

Applicant has a long-term history of delinquent debt that has resulted in several judgments being entered against him and accounts being submitted for collection. While he has satisfied a few delinquent debts and entered into repayment agreements on other

⁵ Regulation ¶ C6.1.1.1.

⁶ Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004.

⁷ Regulation ¶ C8.2.1.

⁸ Section 7 of Executive Order (EO) 10865.

⁹ Directive ¶ E3.1.14.

¹⁰ Directive ¶ E3.1.15.

debts that he has been unable to abide by, the majority of his delinquent debt remains unresolved. Disqualifying Conditions (DC) 19(a): *inability or unwillingness to satisfy debts*; and DC 19(c): *a history of not meeting financial obligations* apply.

Applicant attributes his financial problems to living beyond his means. A comparison of his net monthly income and his recurring monthly expenses indicates he continues to live beyond his means. While he testified he supplements his full-time pay by securing odd electrical jobs, his inability to remain current on the accounts on which he entered into repayment agreements clearly indicates he does not have the financial resources to resolve his delinquent debts. Further, he presently has over \$36,000 in deferred student loans, which he anticipates will increase to approximately \$50,000 in the next two years, that he will be unable to service when they come out of a deferred status. Finally, there is no evidence that he has received any counselling that will allow him to resolve his delinquent debt in the foreseeable future. Accordingly, the following Mitigating Conditions (MC) do not apply: MC 20(a): *the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment*; MC 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*; MC 20(c): *the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control*; and MC 20(d): *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*. The remaining mitigating conditions have no applicability to the facts of this case.

Guideline J, 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 30

Applicant had a lengthy history of criminal conduct that ended with his multiple convictions for Delivery of a Controlled Substance and 20-year sentence of confinement in 1989. His offenses included Robbery, Burglary, and numerous Delivery of a Controlled Substance charges. DC 31(a): *a single serious crime or multiple lesser offenses* applies.

_____ Applicant's last criminal conduct occurred in 1989. Applicant obtained a degree from a Christian college and seminary while he was confined. There is no indication of any disciplinary issues while he was in custody or on parole. He attended and successfully completed drug counseling while in confinement and on parole. He has obtained a bachelor's degree in business administration since being released on parole and he has maintained a steady work history during that time. His supervisors consider Applicant to be a mature and exemplary employee. Applicant has been recognized by a sheriff's department for his work with inmates in its Ministers Academy Program. Applicant has been designated by his church to be a pastor and ordained Itinerant Deacon. The following mitigating conditions apply: MC 32(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 MC 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 involvement. The remaining mitigating conditions have no applicability to the facts of this case.

Considering all relevant and material facts and circumstances present in this case, the whole-person concept, the factors listed in ¶ 6.3.1 through ¶6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, Applicant mitigated the criminal conduct concern but failed to mitigate the financial considerations concerns. He has not overcome the case against him nor satisfied his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant access to sensitive information.

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 F:	AGAINST APPLICANT
Subparagraphs 1.a-c:	Against Applicant
Subparagraph 1.d and 1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	For Applicant
Subparagraphs 1.j-m:	Against Applicant
Paragraph 2, Guideline F:	FOR APPLICANT
Subparagraphs 2.a-k:	For Applicant

Conclusion

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

Henry Lazzaro
Administrative Judge

