



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ADP Case No. 11-02932
)
Applicant for Public Trust Position)

Appearances

For Government: Greg A. Cervi, Esq., Department Counsel
For Applicant: *Pro se*

11/27/2012

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate Guidelines F (financial considerations) and E (personal conduct) security concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on April 9, 2010. On August 10, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines F (financial considerations) and E (personal conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG), effective within the Department of Defense for SORs issued after September 1, 2006.

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue access to sensitive information for him, and recommended referral to an administrative judge to determine whether such access should be denied or revoked.

On November 18, 2011, Applicant responded to the SOR allegations, and initially elected to have a hearing. However, on January 26, 2012, he elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated March 28, 2012, was provided to him by letter dated April 2, 2012. Applicant signed the receipt for the DOHA transmittal letter on May 30, 2012. He was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. He timely submitted additional material. The case was assigned to me on October 2, 2012.

Findings of Fact

Applicant admitted all the allegations alleged. (Item 4.) His admissions are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

Applicant is a 45-year-old development engineer, who has been employed by a defense contractor since September 2004. (GE 1.) He seeks access to sensitive information in conjunction with a public trust position.

Applicant was awarded a bachelor of arts degree in December 2007, and was awarded a master's degree in human services in May 2010. He served in the Navy Reserve from June 1999 to December 2004. Applicant and his wife married in January 1996. He has two sons from his marriage, ages 15 and 12. He also has a 20-year-old stepdaughter. All three children reside with Applicant and his wife. (GE 1.)

Applicant has a history of documented financial problems that have been ongoing since 2004. The SOR alleges 28 separate allegations under Guideline F (financial considerations) – two allegations of financial criminal conduct and 26 delinquent debts totaling \$27,723. Also alleged in the SOR under Guideline E (personal conduct) are two allegations of falsifying his E-QIP by failing to disclose delinquent debts, and one allegation restating Applicant's criminal behavior of financial misconduct as personal conduct concerns.

In his July 2010 Office of Personnel Management (OPM) interview, Applicant explained that in November 2000, he wrote a check to a supermarket for \$132 with insufficient funds in his account. He stated that his spouse was responsible for paying family bills at the time and he did not find out about the check incident until he was arrested in December 2004. He hired an attorney to investigate the charge and defend him.

During that same period, Applicant learned that his spouse, who was the President of the Parent Teacher Association (PTA) for their local school, had opened

two fiduciary credit accounts on behalf of the PTA, but used the accounts for her personal gain. News of her misappropriation was aired on the local news and was so devastating to her that she attempted suicide. She has since been diagnosed with bipolar disorder and Applicant asserts that her condition explains her behavior and subsequent problems with their family finances.

Applicant was again arrested in June 2006 for misappropriation of fiduciary funds. In July 2006, he pled guilty to misappropriation and the previous check fraud offense and was sentenced to pay a fine and serve two years probation. During his OPM interview, he claimed that although he was represented by counsel, he should not have pled guilty because he did not have an opportunity to explain the circumstances of the case to the judge or separate his hearing from his spouse's case.

In his OPM interview, Applicant further claimed that his financial problems were caused by his spouse's financial irresponsibility. He and his spouse remain married; however, Applicant now handles the family finances. Applicant submitted no evidence that any of the alleged debts have been paid or resolved or that he sought financial counseling.

Personal Conduct

When Applicant completed his April 2010 e-QIP, he failed to list two allegations of financial criminal conduct and any of the 26 debts alleged in the SOR. Applicant certified by his signature when completing his e-QIP that the information he provided was true, complete, and correct to the best of his knowledge and belief and made in good faith. He further acknowledged that a knowing and willful false statement on his e-QIP can be punished by fine or imprisonment or both.

Applicant admitted that he did not list his two allegations of financial criminal conduct or any of his debts claiming that he did not know about all of his debts and was unable to disclose them all. Applicant further stated that, "No deceit or attempt to hold back information for this investigation does not exist. I simply want it stated for the record that even though no one will believe me, I could not and never would harm this country or the security measures that are in place." (Response to FORM.)

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 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.

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

Guideline F, Financial Considerations

The trustworthiness concern relating to the guideline for financial considerations is set out in AG ¶ 18:

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.

This concern is broader than the possibility that an applicant might knowingly compromise classified information in order to raise money. It encompasses concerns about an applicant's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012.)

Applicant's admissions in his SOR answer, corroborated by his credit reports and OPM interview, establish all the allegations in the SOR. The evidence of the two allegations of financial criminal conduct and 26 delinquent debts totaling \$27,723 is sufficient to establish the following disqualifying conditions under this guideline:

AG ¶ 19(a): inability or unwillingness to satisfy debts;

AG ¶ 19(c): a history of not meeting financial obligations; and

AG ¶ 19(e): consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis.

Five financial considerations mitigating conditions under AG ¶¶ 20 are potentially applicable:

(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;

(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;

(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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

None of the mitigating conditions are established. Applicant's two allegations of financial criminal conduct and 26 delinquent debts totaling \$27,723 are numerous, recent, and not the result of circumstances making them unlikely to recur. The only mitigating condition raised by the evidence submitted was his wife's bi-polar condition at the time she was managing the family budget. However, there is no evidence that he acted responsibly. While he claims to have taken responsibility for managing the family budget, Applicant has not submitted any evidence that he has engaged his creditors at any level or made any effort to regain financial responsibility.

Personal Conduct

Under Guideline E, the concern 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. (AG ¶ 15.)

AG ¶ 16 describes one condition that could raise a security concern and may be disqualifying in this case:

(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.

The SOR alleges that Applicant deliberately provided false information or omitted required information on his April 2010 e-QIP. Applicant's explanation that that he did not know about all of his debts and was unable to disclose them is not credible. The e-QIP was quite explicit regarding the financial background information being sought. His added explanation that there was no attempt to "deceive" or "hold back information" rings hollow given his education level and the number of debts owed. The Government established through the evidence presented the disqualifying condition in AG ¶¶ 16(a).

Six personal conduct mitigation conditions under AG ¶ 17 are potentially applicable:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) the offense is 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;
- (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;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and
- (f) the information was unsubstantiated or from a source of questionable reliability.

A statement is false when it is made deliberately -- knowingly and willfully. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported. Here, Applicant knew of financial problems and chose not to disclose them. He certified his answers to be true and correct. Had Applicant's information been relied upon without verification, he may well have successfully vetted for a public trust position. Regardless of the reason Applicant chose not to be forthcoming, the process does not allow for applicants to pick and choose which answers they will answer correctly. When applicants lie on their public trust position applications, they seriously undermine the process as Applicant did in this case. I find that none of the mitigating conditions fully apply.¹

¹ The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

- (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant 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.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c). I have incorporated my comments in the Analysis section in my whole-person analysis.

Applicant is a mature, intelligent adult. He is a talented and dedicated employee of his company. He served in the Navy Reserve for five years. Applicant is married and is a responsible husband and a father. He took over the family finances after recognizing his spouse's shortcomings.

A security clearance adjudication is aimed at evaluating an applicant's judgment, reliability, and trustworthiness. It is not a debt-collection procedure. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) An applicant is not required, as a matter of law, to establish resolution of every debt alleged in the SOR. An applicant need only establish a plan to resolve financial problems and take significant actions to implement the plan. There is no requirement that an applicant make payments on all delinquent debts simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). Applicant may have good intentions, but he did not present any evidence of a financial plan or evidence of significant steps taken to regain financial stability.

Applicant's deliberate failure to disclose information on his e-QIP is serious, recent, and not mitigated. Overall, I have concerns about his current ability and willingness to comply with laws, rules, and regulations. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the

Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

whole-person, I conclude he has not mitigated security concerns pertaining to financial considerations and personal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to a public trust position.

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. – 1.bb:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a. – 2.b.:	Against Applicant

Conclusion

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

ROBERT J. TUIDER
Administrative Judge