



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



In the matter of:)	
)	
)	ADP Case No. 11-10063
)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Caroline Jeffries, Esquire, Department Counsel
For Applicant: *Pro se*

06/25/2013

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant’s eligibility for access to sensitive information is denied.

Applicant signed his Questionnaire for Public Trust Position (SF 85P) on February 3, 2009. The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F, financial considerations, and Guideline E, personal conduct, on May 11, 2012. The action was taken under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the *Adjudicative Guidelines For Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant received the SOR. He answered the SOR in writing and requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on April 15, 2013, and

I received the case assignment on April 23, 2013. DOHA issued a notice of hearing on April 26, 2013 for a hearing on May 2, 2013. Due to technical difficulties with video teleconference equipment, the hearing was cancelled. A second notice of hearing was mailed on May 8, 2013, and I convened the hearing as scheduled on May 13, 2013. The Government offered Exhibits (GE) 1 through 13, which were received, marked, and admitted without objection. Applicant and four witnesses testified. He submitted Exhibits (AE) A through E, which were received, marked, and admitted without objection. DOHA received the transcript of the hearing (Tr.) on May 21, 2013. I held the record open for the submission of additional matters. Appellant timely submitted AE F through AE J, which were received, marked, and admitted without objection. The record closed on June 7, 2013.

Procedural Ruling

Notice

The second hearing notice was mailed on May 8, 2013, less than 15 days before the hearing. I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived his right to 15 days notice. (Tr. at 11.)

Motion to Withdraw

At the hearing, Department Counsel agreed that the debts identified in SOR allegations 1.l and 1.p were the same. Department Counsel motioned to withdraw allegation 1.p as duplicative, and the motion was granted. SOR allegation 1.p is withdrawn from the record. (Tr. 66)

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.c, 1.h-1.j, 1.m-1.o, 1.t, and 2.a of the SOR, some with explanations. He denied the factual allegations in ¶¶ 1.a, 1.b, 1.d-1.g, 1.k, 1.l, 1.p.-1.s, 2.b, and 2.c of the SOR. He also provided additional information to support his request for eligibility for a public trust position.

Applicant, who is 27 years old, works for a DOD contractor as a Tier I help desk leader. He began his current employment in February 2009. Applicant's performance evaluations indicate that he achieved expectations on his work performance and that he is improving his skills as a lead and contributing to the help desk.¹

Applicant graduated from high school in 2004 and enlisted in the United States Navy in September 2004. He received an "other than honorable" discharge from the Navy in March 2006. He has started the process to review his discharge, as he is

¹GE 1; AE F; Tr. 50-51.

seeking to upgrade the characterization of his administrative separation.² He is engaged. He and his fiancée live with his parents. She recently graduated from college and has started working.³

When in the Navy, Applicant and several friends rented an apartment near the base. Applicant signed the lease. He encountered problems with one roommate not paying the rent. Applicant paid this roommate's rent one month, and the roommate refused to reimburse Applicant. One day in 2005, Applicant saw the roommate's debt card at the apartment and took it. He used the card to buy one or two tanks of gas for his car. He explained that he used the card to reimburse himself for the rent he had paid for this roommate. The amount of money involved totaled \$207. Applicant describes this decision as "young, naive, and dumb." He acknowledged that his behavior was wrong.

Applicant's command discovered his conduct and conducted an investigation. The investigation resulted in charges against Applicant under Articles 121 (larceny) and 134 (identity theft) of the Uniform Code of Military Justice (UCMJ). A Captain's Mast before the entire crew was conducted on February 14, 2006. He was found guilty of the charges. His penalty included restriction to the ship for 45 days, extra duties, reduction in rank to pay rate E-2; and forfeiture of one-half of his pay for two months. After the Captain's Mast, his command recommended him for administrative discharge and an "Other Than Honorable" characterization of his discharge. The Navy discharged him on March 20, 2006. Applicant has not been arrested for any criminal activity since his separation from the Navy.⁴

While in the Navy, Applicant obtained several small loans and a \$12,000 car loan for a 2000 Ford Explorer from a credit union. He expected the loan payments to be deducted from his pay, but the Navy discharged him before the loans had been paid. After his discharge, Applicant was unemployed for three months. He started a part-time job as a photographer in June 2006, which did not offer him medical insurance. When he obtained full-time status, he still did not have medical insurance. In 2008, Applicant underwent emergency surgery. Without medical insurance, he did not have any money to pay the \$24,664 medical bill. The amount of this debt overwhelmed Applicant. He did not know how to begin to resolve the debt and as a result, took no action to resolve it.⁵

Applicant currently earns \$16.65 an hour for a 40-hour work week. His monthly gross pay is \$2,664. His net monthly income is \$1,650. He started living with his parents in January 2013, which reduced his rental costs from \$768 a month to \$300 a month. His monthly payment to his parents includes food and internet expenses. His

²The submitted copy of the application is not signed. AE E.

³GE 1; AE E; AE F; Tr. 68, 71-72, 76.

⁴GE 11-GE 13; AE G; Tr. 73-76.

⁵GE 3; Tr. 54-56.

other monthly expenses include a \$400 car payment, \$120 for gas, \$150 for cell phone, and \$100 for car insurance. With the move to his parents home, he has reduced his monthly expenses for rent, food, and other living expenses significantly. Prior to moving in with his parents, he provided the sole financial support for him and his fiancée.⁶

The credit reports reflect that a collection company obtained three judgments against Applicant in July 2006 for \$823 plus interest, fees and costs totaling \$1,162; in July 2006 for \$773 with the same case number as the first judgment listed; and in August 2011 for \$2,295 plus interest, fees and costs totaling \$3,067. Given the date of the judgment and the case number are the same, I find that the two judgments for July 2006 are the same. Applicant never received the court papers, a summons, or a notice of hearing date, notifying him that a case had been filed against him by the creditor. The judgment creditor filed a garnishment against Applicant's current employer in 2011 and 2012, who garnished Applicant's wages to pay these judgments. Applicant's documentation reflects that he paid \$1,973 on the largest garnishment and that the garnishment was renewed for the remaining balance of \$1,189 in June 2012.⁷ Applicant advised that he had paid the garnishments through deductions from his pay and that these debts are paid.⁸

Applicant has not paid the remaining SOR debts, on which he defaulted between September 2005 and October 2008, with one exception: the \$245 medical bill.⁹ He does not have a payment plan in place to pay these debts. He recently spoke with an attorney about filing bankruptcy. After some thought, he decided to hire the attorney. Applicant's retainer fee and filing costs total \$1,780. He has paid the attorney \$350. Once he pays the full fee and costs, his attorney will prepare the necessary papers to proceed with a Chapter 7 bankruptcy petition. Since 2008, Applicant has not incurred any new debt, except the \$245 medical bill in 2009. He does not use credit cards.¹⁰

When he completed his SF-85P, Applicant answered "no" to the following question in Section 20: Your Police Record:

In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s)? (leave out traffic fines of less than \$150.)

⁶Tr. 67-70.

⁷Court rules in each state differ as to how long a wage garnishment can be effective. Since the judgment creditor refiled the largest garnishment, it appears that the time for enforcement of the initial garnishment had expired and necessitated a new filing and issuance of a garnishment for the remaining balance. AE H -AE J.

⁸AE H - AE J; Tr. 56 -58.

⁹Applicant's bills are generally barred from collection under the Statute of Limitations. The DOHA Appeal Board does not recognize the statutory bar as an appropriate means to resolve old debts. The debts in SOR allegations 1.n, 1.o, and 1.q through 1.s are not listed in his 2010 and 2012 credit reports. GE 4- GE 8.

¹⁰AE A; Tr. 70.

He answered “no” this question in Section 22: Your Financial Record

b. Are you now over 180 days delinquent on any loan or financial obligations? Include loans funded or guaranteed by the federal government.

Applicant failed to disclose the charges under the UCMJ. He was not arrested, placed in handcuffs or taken into custody. He did not understand the Captain’s Mast and subsequent non-judicial punishment to be a criminal proceeding, which it is not. He thought that a non-judicial proceeding meant restrictions and loss of pay. NJP proceeding are not a conviction. As for his failure to list or acknowledge his old debts, he could not provide a reasonable explanation other than to say it “didn’t register on his brain” when he was completing the form. He denies any intent to hide this information from the Government. He told the investigator that he did not have a credit report and did not know his debts were included in a credit report.¹¹

Applicant’s mother, father, fiancée, and coworker testified on his behalf. His parents and fiancée are aware of the reasons for the issuance of the SOR. They describe him as honest, trustworthy, reliable, and dependable. His parents indicate that he has matured in the last few years. His coworker describes Applicant as a dedicated, loyal, and dependable worker. He would trust Applicant with his life. All recommend Applicant for access to sensitive information. Applicant’s supervisor and director provided written recommendations. They also describe Applicant as trustworthy and reliable. He is an upstanding employee.¹²

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

¹¹GE 2; Tr. 80-81, 103-104.

¹²AE C; AE D; Tr. 29-48.

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 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 to obtain 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.

AG ¶ 19 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Appellant developed significant financial problems after he left the Navy and because he lacked health insurance. Most of the debts have not been resolved. These two disqualifying conditions apply.

The Financial Considerations guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 20(a) through ¶ 20(f), and the following 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; and
- (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.

Many of Applicant's debts are related directly to his departure from the Navy in March 2006. He did not work for three months, and when he found work, it was part-time. Most of the medical bills relate to his emergency surgery in 2008 and the lack of medical insurance. Although these debts are five years old, AG ¶ 20(a) is not applicable because he could again incur debts for medical care and five years is not that long ago. However, AG ¶ 20(b) partially applies because emergency surgery and the refusal of his employer to provide health insurance are factors beyond his control. This mitigating condition does not fully apply because Applicant has not made any effort in the last five years to resolve even his smallest debts.

While Applicant has not received financial counseling, he has learned to manage his income and expenses, as shown the lack of any new unpaid debts in nearly four years and only one unpaid small medical bill in the last five years. He recently reduced his monthly living expenses by moving into his parents home. His current expenses are

under control. However, he has not taken control of all his debt, the majority of which remain unpaid. Applicant resolved the judgments through the garnishments filed by the creditor against his salary. AG ¶ 20(c) is partially applicable. Guideline F concerns are not mitigated under AG ¶ 20.

SOR allegation 1. t raises questions about Applicant's honesty and conduct while in the Navy, not his unpaid debts. The security concerns about this conduct and his NJP findings are more appropriately addressed under Guideline E, *infra*.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining 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 following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

(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;

(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:

- (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 inappropriate 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.

For AG ¶ 16(a) to apply, Applicant's omission must be deliberate. The Government established that Applicant omitted material facts from his February 2009 SF 85P, when he failed to acknowledge his overdue debts and his NJP while in the Navy. This information is material to the evaluation of Applicant's trustworthiness and honesty. He denied that he intentionally falsified this answer on his e-QIP. Applicant explained that he did not understand that the Captain's Mast and accompanying NJP was a criminal proceeding because his punishment was restriction and loss of pay. Although he cannot provide a reason for not listing his debts, he denies an intent to deceive the Government. When the allegation of falsification is controverted, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.¹³

Section 20 asked for information about criminal conduct, specifically asking for arrests, charges, and convictions, but gave no instructions to include arrests, charges, or convictions under the UCMJ. The Captain's Mast is a NJP, which is an administrative proceeding to resolve a criminal offense. It is not a criminal proceeding, and Appellant was not convicted of a crime. Thus, Applicant did not intentionally falsify his SF 85P when he answered "no" to the question in Section 20. SOR allegation 2.b is found in favor of Applicant.

Since the garnishment actions and one of the judgments were obtained after Applicant completed his SF 85P, he could not falsify any information about these. He also never received any notice of 2006 court action because he left the Navy. However, he was aware he had debts when he completed his SF 85P and did not acknowledge them. When he was in the Navy, he took his roommate's debt card and stole \$207 as a

¹³See ISCR Case No. 03-09483 at 4 (App. Bd. Nov.17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

way to obtain the rent he advanced for his roommate, who had refused to reimburse Applicant. AG ¶¶ 16(a) and 16(d) are established.

The Personal Conduct guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 17(a) through ¶ 17(g), and the following are potentially applicable:

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant's conduct in the Navy was wrong, and he acknowledges that he was wrong. He has not been involved in any criminal activity in more than seven years. He learned from this mistake and has taken responsibility for his conduct. He follows the rules of society. AG ¶ 17(d) applies to allegation 2.a.

Concerning his failure to list his debts, Applicant changed his spending habits in 2008. His limited income has made it difficult for him to repay these debts, but he has not incurred more debts. He is now working towards filing for bankruptcy to eliminate his old debts. Applicant understands that his past debts are information that is important for his trustworthiness determination. There is little likelihood that he will not acknowledge debts in the future. AG ¶ 17(d) applies. After full consideration, I find that Applicant has not met his mitigation burden under AG ¶¶ 17(c) and 17(e).

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) 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. The decision to grant or deny a trustworthiness determination requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a trustworthiness concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a public trust position should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate trustworthiness concern.

Applicant made a wrong decision at age 19. He acknowledges that it was wrong and that he was "young, naive, and dumb." This decision resulted not only in punishment, but discharge from the Navy. He learned from his poor decision and has never again been involved in criminal activity. He complies with the laws of society. His family and coworkers respect his work skills. Both his parents observed Applicant's increased maturity in the last few years and opine that he has grown as an adult. He demonstrated this through his good financial management of his day-to-day living expenses in the last five years. His past debts are old, but not paid, and he lacks sufficient income to resolve these debts. He has taken the first steps to filing bankruptcy, but cannot yet file. He needs time to resolve his debts before access to sensitive information can be granted.

Overall, the record evidence leaves me with 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 his personal conduct, but he has not mitigated the trustworthiness concerns about his finances.

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.c:	For Applicant
Subparagraphs 1.d-1.o:	Against Applicant
Subparagraph 1.p:	Withdrawn
Subparagraphs 1.q-1.s:	Against Applicant
Subparagraph 1.t:	For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Subparagraph 2.c: For 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 .

MARY E. HENRY
Administrative Judge