



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



In the matter of:)	
)	
)	ADP Case No. 07-07868
SSN:)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Gina Marine, Esquire, Department Counsel
For Applicant: Applicant's Companion, Personal Representative

July 14, 2008

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted his Questionnaire for Public Trust Position (SF 85P), on January 4, 2007. On February 29, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F, Financial Considerations; Guideline E, Personal Conduct; and Guideline J, Criminal Conduct, for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on March 19, 2008, and requested a hearing before an Administrative Judge. DOHA received the request on March 24, 2008. Department Counsel was prepared to proceed on April 11, 2008, and I received the case

assignment on April 16, 2008. DOHA issued a notice of hearing on May 5, 2008, and I convened the hearing as scheduled on May 29, 2008. The government offered Exhibits (Gov Ex) 1 through 11, which were admitted without objection. Applicant testified on his own behalf, called two witnesses, and submitted Applicant Exhibits (AE) A-G, which were admitted without objection. The record was held open until June 19, 2008. Applicant submitted two documents which were admitted as AE H (10 pages) and AE I (2 pages). DOHA received the transcript of the hearing (Tr.) on June 5, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

Findings of Fact

In his answer to the SOR, Applicant admitted to SOR allegations ¶¶ 1.a-1.d, 1.f-1.i, 1.l, 1.m, 1.o-1.q, 1.t, and 1.u. He denies SOR allegations ¶¶ 1.e, 1.j, 1.k, 1.n, 1.r, 1.s, 2.a, 2.b and 3.a. In addition, after a thorough and careful review of the pleadings and exhibits, I make the following findings of fact.

Applicant is a 34-year-old male employee of a Department of Defense contractor who is seeking a position of public trust. He has worked for his employer as system specialist since October 2001. He is a high school graduate and has some college credit. From July 1992 to July 2001, he served on active duty in the United States Navy. He was a cryptologic technician. He separated as an E-6 with an honorable discharge. He served in the United States Naval Reserves for three years after separating from active duty. He has a two-year-old daughter, and lives with the mother of his child who he refers to as his common law wife. She served as his personal representative. (Tr at 6-7, 11, 23-24, 44-46; Gov 1; Gov 2 at 12.) In this decision, she is referred to as Applicant's companion.

On January 4, 2007, Applicant submitted a questionnaire for public trust position, Standard Form 85P as part of a routine periodic reinvestigation. He answered, "No" in response to question 22a. which asks, "Your Financial Record. In the last 7 years, have you, or a company over which you exercised some control, filed for bankruptcy, been declared bankrupt, been subject to a tax lien, or had a legal judgment rendered against you for a debt? If you answered "Yes," provide date of initial action and other information requested below." He did not list two judgments entered against him which are alleged in SOR ¶¶ 1.a and 1.b. He also answered, "No" in response to question 22b, which asks, "Are you now over 180 days delinquent on any loan or financial obligation? Include loans or obligations funded or guaranteed by the Federal Government. If you answered, "Yes," provide the information requested below." (Gov 1.) He did not list 19 delinquent debts that were over 180 days old which are alleged in SOR ¶¶ 1.a – 1.s. (Gov 1.)

A subsequent background investigation discovered the following delinquent accounts: a \$385 judgment entered against Applicant in March 2004 (SOR ¶ 1.a; Gov 4 at 2); a \$3,270 judgment entered against Applicant in September 2005 (SOR ¶ 1.b; Gov 4 at 4); a \$9,216 debt related to a car repossession in December 2003 (SOR ¶ 1.c; Gov 4 at 5); a \$5,413 government overpayment debt, charged off in July 2004 (SOR ¶ 1.d; Gov 4 at 5); a \$3,271 debt related to a car repossession in March 2005 (SOR ¶ 1.e; Gov 4 at 6); a

\$1,210 credit card account charged off in May 2002 (SOR ¶ 1.f; Gov 4 at 6); a \$470 cell phone account charged off in December 2005 (SOR ¶ 1.f; Gov 4 at 4); a \$183 bank account, placed for collection in April 2004 (SOR ¶ 1.h; Gov 4 at 6); a \$122 telephone account, placed for collection in May 2001 (SOR ¶ 1.i; Gov 4 at 7); a \$592 telephone account, placed for collection in February 2003 (SOR ¶ 1.j; Gov 4 at 10); a \$3,216 debt for past due rent, placed for collection in February 2006 (SOR ¶ 1.k; Gov 4 at 9); a \$2,031 account placed for collection in November 2003 (SOR ¶ 1.l; Gov 4 at 9); a \$941 bank debt placed for collection in September 2004 (SOR ¶ 1.m; Gov 4 at 10); a \$407 telephone account placed for collection in October 2005 (SOR ¶ 1.n; Gov 4 at 11); a \$198 telephone account placed for collection in July 2006 (SOR ¶ 1.o; Gov 4 at 11); a \$178 insurance account placed for collection in November 2005 (SOR ¶ 1.p; Gov 4 at 11); a \$75 insurance account placed for collection in July 2004 (SOR ¶ 1.q; Gov 4 at 12); a \$144 cable television account placed for collection in December 2000 (SOR ¶ 1.r; Gov 4 at 12); a \$74 account, placed for collection in June 2006 (SOR ¶ 1.s; Gov 4 at 12); and an \$855 account placed for collection in November 2006 (SOR ¶ 1.t; Gov 3 at 2).

Applicant claims the accounts did not show up on his trustworthiness application due to a typographical error. He spent a few days filling out the application and listed his debts on the electronic application. He claims that when he hit the tab key to go to the next section, the computer program deleted his listed delinquent debts. He did not review his trustworthiness application before signing and turning in the document. He did not discover the error until he was interviewed by the investigator conducting his background investigation in February 2007. (Tr at 86-89.)

Applicant's companion testified. She has known Applicant since May 2005. She says that Applicant is an excellent father and responsible human being. She works in the same building as Applicant but in a different department. She states Applicant is professional at work. She and Applicant live together with their daughter. (Tr at 44-47.) She states that Applicant recently took out a \$3,000 loan from his 401(k) account intending to use the money to pay off some delinquent accounts. She encountered a legal issue so most of the money had to be used for her legal fees. (Tr at 45-49.) They had discussed resolving the delinquent accounts over the past several years but have taken no action. Most of the delinquent debts belong to Applicant. His companion went through a divorce in 2005. She filed bankruptcy in October 2006 and her debts were discharged. (Tr at 53-54.)

While on active duty in the United States Navy, Applicant encountered some financial problems. He claims the financial difficulties were caused by the change in pay received when he transferred to different locations. In 1999, his access to Sensitive Compartmented Information (SCI) was suspended as a result of his financial problems. In March 2001, he took a class on how to manage his finances. Applicant was unemployed for three months after separating from active duty. When he accepted a full-time position with his current employer, his annual income was \$37,000 a year. He now earns \$48,000 a year. (Tr at 60-64, 93; Gov 6.)

Applicant claims the debts alleged in SOR ¶¶ 1.e, 1.j, 1.n, 1.r, and 1.s are paid. (Tr at 70-73, 76-78, 80.) He provided proof that the debt alleged in SOR ¶ 1.s was paid. (AE I

at 2.) He did not provide proof, such as receipts, that the debts alleged in SOR ¶¶ 1.e, 1.j, 1.n, and 1.r were paid. He disputes the debt alleged in SOR ¶1.k. This is a debt for unpaid rent after breaking a lease. Applicant was recalled to active duty in February 2002. He states he formally notified his apartment office in order to be released from the lease early. He claims that he disputed the debt on his credit report. (Tr. at 74-76.) Applicant provided a copy of the orders recalling him to active duty. (AE H at 2-5.) He was released from active duty on May 26, 2002. (Gov 2 at 12.) He provided no additional evidence such as written notification to the apartment that he was being called to active duty.

Applicant has not taken steps to resolve the debts alleged in SOR ¶¶ 1.a, 1.b, 1.c, 1.d, 1.f, 1.g, 1.h, 1.i, , 1.l, 1.m, 1.o, 1.p, 1.q, and 1.t. He admits that they are his debts but claims the additional expenses of raising a child has prevented him from resolving these accounts. (Tr at 81-83.)

Applicant and his companion operate from a joint budget. (Tr at 70.) A personal financial statement Applicant submitted in response to interrogatories on October 29, 2007, indicates a net monthly income of \$4,341. Total monthly expenses are \$3,560. Applicant and his companion have approximately \$781 left over each month after expenses. (Gov 2 at 10.) Applicant and his companion have a joint savings account with a \$700 balance. (Tr. at 86.) He is current on federal and state taxes. In May 2008, he received a \$1,200 economic stimulus check from the federal government. He put \$600 in savings and applied the rest towards current expenses. (Tr at 65-67.)

A co-worker of Applicant's testified that he has known Applicant since 2001 when they were co-workers for the same defense contractor. Applicant now works for another defense contractor but they work at the same location. He has daily contact with Applicant at work. He indicates Applicant is extremely professional and has outstanding character. (Tr at 36-41.) Applicant's performance reviews indicate he meets his objectives. (AE A – AE F.)

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 common sense 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 security 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

classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several disqualifying conditions that could raise security concerns. I find Financial Considerations Disqualifying Condition (FC DC) ¶19(a) (an inability or unwillingness to satisfy debts); and FC DC ¶19(c), (a history of not meeting financial obligations) apply to Applicant's case. Applicant has a history of not meeting financial obligations. He encountered financial issues while on active duty in the Navy which resulted in his access to SCI being suspended in 1999. Since his separation from active duty in 2001, he has incurred 20 delinquent debts, a total approximate balance of \$33,079.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Financial Considerations Mitigating Condition (FC 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) is not applicable. Applicant's history of financial irresponsibility is too recent to apply this mitigating condition. The majority of his delinquent debts remain unresolved.

FC 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) partially applies based on Applicant's three month period of unemployment after he separated from active duty. However, the majority of the delinquent accounts appear to have been incurred after Applicant's full-time employment in October 2001. His lack of action towards resolving these accounts indicates a lack of responsibility and disregard for his financial obligations. FC MC ¶ 20(b) is given little weight.

FC 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) does not apply. In March 2001, Applicant attended a financial management class. His track record of financial irresponsibility since that time indicates that he continues to have issues with financial responsibility. The majority of his delinquent accounts remain unresolved. It is unlikely his financial situation will be resolved in the near future.

FC MC ¶20(d) (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) applies with respect to the debt alleges in SOR ¶ 1.s. Although Applicant claims the debts in SOR ¶¶ 1.e, 1.j, 1.n, and 1.r were paid, he provided no proof to verify his assertion. His lack of initiative in resolving the other delinquent accounts gives this mitigating condition less weight.

FC MC ¶ 20(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) potentially applies with respect to the debt alleged in SOR ¶ 1.k for breaking his apartment

lease. Applicant provided proof that he was recalled to active duty in February 2002. However, he did not dispute this debt in his response to interrogatories dated October 29, 2007. (Gov 2 at 5.) He first raised this issue at hearing and provided no documentation such as the copy of the apartment lease and/or a written notice of early termination of his lease. He failed to meet his burden to successfully dispute this debt.

Applicant has not mitigated the concerns raised under Guideline F.

Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶15:

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.

Personal conduct concerns are raised because Applicant failed to list two judgments (SOR ¶¶ 1.a and 1.b) entered against him within seven years of the date he filled out his trustworthiness application in response to question 22a. He also failed to list his delinquent debts that were over 180 days old (SOR ¶¶ 1.a - 1.r) in response to question 22b.

Personal Conduct Disqualifying Condition (PC DC) ¶ 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) applies to Applicant's deliberate omissions of his judgments and delinquent debts on his trustworthiness application. Applicant claims that the debts were deleted due to typographical error, claiming that he typed all of the debts into the electronic questionnaire but the debts were deleted when he hit the tab key to move on to the next section. Considering Applicant's questionnaire for public trust position, SF 85P, appears to be typewritten, I do not find his explanation credible. (see Gov 1.)

Personal conduct concerns can be mitigated. The following Personal Conduct Mitigating Conditions (PC MC) potentially apply to Applicant's case:

PC MC ¶ 17(a) (the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts) does not apply. There is no evidence that Applicant attempted to correct the omission of his financial issues on his trustworthiness application until the issue was raised in February 2007 during his background investigation interview.

PC MC ¶ 17(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) does not apply. Applicant's deliberate omission of his delinquent debts was serious. His less than credible explanation as to why he omitted the delinquent debts on his security clearance application raised questions about his reliability, trustworthiness, and good judgment.

PC MC ¶ 17(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) does not apply because Applicant has not acknowledged that he deliberately omitted his delinquent accounts on his trustworthiness application.

Applicant did not mitigate the security concerns raised under personal conduct.

Guideline J, Criminal Conduct

The security concern raised under the criminal conduct guideline is set forth in ¶ 30 of the Revised Adjudicative Guidelines:

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.

There are two Criminal Conduct Disqualifying Conditions (CC DC) that apply to Applicant's case. They are CC DC ¶ 31(a) (*a single serious crime or multiple lesser offenses*); CC DC ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*). Applicant's deliberate omission of his two judgments and his delinquent debts that were over 180 days old on his trustworthiness application violated Title 18 U.S.C §1001. While somewhat redundant to the concerns raised under guideline E, personal conduct, his deliberate omissions raise a concern under criminal conduct. When Applicant signed the trustworthiness application, he certified that "My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing a willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of Title 18, United States Code.)" (Gov 1 at 7.) Applicant was on notice that any false information provided on the application was a crime.

The criminal conduct concern can be mitigated. I find that it is premature to apply Criminal Conduct Mitigating Condition (CC MC) ¶ 32(a) (*so much time has elapsed 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*) because Applicant's deliberate falsification was recent and he did not accept

responsibility for his deliberate omission.

It is premature to apply CC 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*) for the same reasons mentioned above.

At this time, it is premature to conclude that Applicant has mitigated the criminal conduct concern.

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 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 security clearance must be an overall common sense 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. I considered Applicant's military service, the favorable comments provided by the witnesses, and his six and half year employment history with his current employer. Financial consideration concerns remain due to the extensive amount of delinquent debt Applicant has incurred since 2001 and his lack of effort towards resolving his delinquent accounts. His deliberate omissions of his delinquent accounts on his trustworthiness application raise questions about his reliability, trustworthiness and judgment. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under financial considerations, personal conduct, and 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, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant

Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j:	Against Applicant
Subparagraph 1.k:	Against Applicant
Subparagraph 1.l:	Against Applicant
Subparagraph 1.m:	Against Applicant
Subparagraph 1.n:	Against Applicant
Subparagraph 1.o:	Against Applicant
Subparagraph 1.p:	Against Applicant
Subparagraph 1.q:	Against Applicant
Subparagraph 1.r:	Against Applicant
Subparagraph 1.s:	For Applicant
Subparagraph 1.t:	Against Applicant
Subparagraph 1.u:	Against Applicant

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant

Paragraph 3, Guideline J: AGAINST APPLICANT

Subparagraph 1.a:	Against Applicant
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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.

ERIN C. HOGAN
Administrative Judge