



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



In the matter of:)
)
 [Redacted]) ADP Case No. 12-03793
)
 Applicant for Public Trust Position)

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

08/22/2014

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves trustworthiness concerns raised under Guidelines F (Financial Considerations) and E (Personal Conduct). Eligibility for a public trust position is denied.

Statement of the Case

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on January 6, 2012, seeking eligibility for a public trust position. On December 9, 2013, the Department of Defense (DOD) sent him Statement of Reasons (SOR), citing trustworthiness concerns under Guidelines F and E. DOD acted under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant received the SOR on December 30, 2013; answered it by denying all the allegations on January 11, 2014; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on February 13, 2014, and the case was assigned to an administrative judge on February 21, 2014. On March 21, 2014, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a notice of hearing,

scheduling the hearing to be conducted by video teleconference on April 24, 2014. The hearing was cancelled on April 21, 2014, to consolidate the docket.

The case was reassigned to me on May 20, 2014. On May 27, 2014, DOHA issued a second notice of hearing, scheduling the hearing for July 11, 2014. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. DOHA received the transcript (Tr.) on July 21, 2014.

Findings of Fact

Applicant is a 49-year-old systems analyst employed by a federal contractor since May 2005. He received a bachelor's degree in computer science in 1996. (GX 2 at 9.) He needs a favorable trustworthiness determination in order to work on a contract involving military health care benefits and requires access to sensitive personal and medical information. He has never held a security clearance or eligibility for a public trust position.

Applicant is foreign-born. He came to the United States in 1997 and became a U.S. citizen in 2005. He married in March 1995 and divorced in March 2003. He married his second wife in June 2004, in his native country. They separated in July 2008 and are now divorced. (Tr. 44.)

Applicant has a 17-year-old son born out of wedlock while he was attending college. He supports his son financially but is not legally obligated to pay child support. (GX 2 at 10.)

Applicant was arrested for possession of a controlled substance and possession of drug paraphernalia in July 2000. In his personal subject interview and at the hearing, he stated that he was at a police station, accompanied by a friend, waiting in line to pay a parking ticket. A police officer saw a clear container containing cocaine near him. At the hearing, he testified that his friend was involved in selling drugs, but he was unaware of his friend's drug involvement until they were both arrested. (Tr. 32.) Applicant pleaded guilty and entered a conditional discharge program on advice of his attorney. He completed the diversion program and the charges were dismissed. (GX 2 at 11; GX 3.)

When Applicant submitted his e-QIP, he answered "No" to the question, "Have you EVER been charged with an offense involving alcohol or drugs?" (Emphasis in original.) He did not disclose his July 2000 arrest. (GX 1 at 34.) He explained he did not disclose this arrest because his attorney told him that his arrest had been expunged and there would be no record of it. (GX 2 at 11; Tr. 32.)

During a personal subject interview in February 2012, Applicant again answered "No" when an investigator asked him if he had ever been charged with an offense

involving alcohol or drugs. When the investigator asked him, "What about [the city where he was arrested]?" Applicant disclosed the arrest. (GX 2 at 11; Tr. 70.)

Applicant testified that he submitted his e-QIP online and did not read the instruction preceding a series of ten questions about his "police record." The instruction states, "For this section report information regardless of whether the record in your case has been sealed, expunged, or otherwise stricken from the court record, or the charge was dismissed." The question about offenses involving alcohol or drugs is the last of the ten questions under the "police record" heading. On the printed hard copy, the instruction begins on the bottom of the page preceding the question about drug-related offenses, and Applicant's negative answer to the question is in the middle of the page on which the explanation ends. (GX 1 at 33-34.)

In August 2005, Applicant opened a charge account in his name only. During a personal subject interview (PSI) in February 2012, Applicant told the investigator that his estranged wife charged about \$1,200 to this account. He told the investigator that he had been contacted by the creditor and intended to pay the debt. The debt, alleged in SOR ¶ 1.c, was charged off for \$1,237 in September 2011. (GX 2 at 12; GX 5 at 6.) Applicant settled the debt for \$600 in April 2014. (AX A.)

In September 2002, Applicant borrowed \$118,600 to purchase a home to be used as a rental property. The purchase price was \$147,000. (AX C.) The value of the home rose to about \$350,000, and Applicant opened a line of credit (LOC) for \$121,000 to renovate and expand the house. He was unable to make the payments on the LOC when his tenants stopped paying their rent. The debt was charged off in October 2011. The delinquent LOC is alleged in SOR ¶ 1.b, and it is unpaid. (GX 4 at 2; GX 5 at 5; GX 6 at 2; Tr. 34-36.) Applicant obtained a loan modification on the first mortgage loan, and his payments on that loan are current. (Tr. 42.) The house is now rented for \$1,500 per month, which is enough to pay the first mortgage loan but not the LOC or the maintenance costs. (Tr. 47.)

In November 2002, Applicant purchased another home, which he initially used as his primary residence. (AX B.) He moved to a larger home and converted his residence to a rental property. (Tr. 41.) In September 2009, he borrowed \$50,000 on a LOC on this property. The balance on the LOC, alleged in SOR ¶ 1.a, was charged off for \$51,548 in January 2012. (GX 2 at 12; GX 4 at 1; GX 6 at 1.) This house is now rented for \$850 per month, which is about \$200 per month less than the payments on the first mortgage loan.

Applicant has been trying to sell his two rental properties for about two years. (Tr. 49-50.) He is asking \$250,000 on the property in SOR ¶ 1.b, which would be sufficient to pay off the \$130,000 on the primary loan and the \$120,000 on the LOC. He has an offer for \$200,000 on this property, which would be \$50,000 less than the balances due on the primary loan and the LOC. (Tr. 67.) He is asking \$150,000 for the property in SOR ¶ 1.a, which would cover the primary loan of \$69,000 and the LOC for \$51,000. He has an offer for \$70,000 on this property. (Tr. 64-65. 68.) He has not accepted the offers on either property.

In response to DOHA interrogatories, Applicant submitted a personal financial statement (PFS) in September 2013. He reported net monthly income of about \$8,464; monthly expenses of \$5,100; debt payments of \$1,983; and a net monthly remainder of \$1,382. His PFS included spousal income of \$3,600, which he no longer has because he is now divorced. His monthly expenses include about \$1,100 for clothing, which includes clothing for his son. He lives in a house owned by his sister, and he pays her monthly rent of \$1,300. He listed miscellaneous expenses of \$300 per month. It is unclear whether his PFS reflects his travel once or twice a year to his native country and the country where his son resides. He has a total of about \$3,900 in two bank accounts and about \$120,000 in his 401(k) account. (GX 2 at 14; Tr. 41, 44-46, 48-49.)

Applicant's most recent credit report reflected three debts not alleged in the SOR. The first is a \$754 penalty for early termination of a cellphone contract. Applicant testified that he did not read the contract when he signed it, and the penalty was incurred when he switched to another cellphone service provider. He has refused to pay the penalty. (Tr. 72.) The second debt is a credit card account that Applicant opened in his name for his fiancée, which was charged off in June 2014 for \$3,228. He testified that he was unaware of the debt. The third debt is a student loan for \$7,341, more than 180 days past due, that Applicant cosigned for his niece. He testified that he did not know why his niece stopped making the payments on this debt. (GX 6 at 1-2; Tr. 72-75.)¹

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." 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 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." Regulation ¶ C6.1.1.1. DOD contractor personnel are entitled to the procedural protections in the Directive before any final unfavorable access determination may be made. Regulation ¶ C8.2.1.

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. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information.

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

¹ Conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered the evidence of delinquent debts not alleged in the SOR for these limited purposes.

human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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. The Government must present substantial evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). An applicant has the ultimate burden of demonstrating that it is clearly consistent with national security to grant or continue eligibility for access to sensitive information.

Analysis

Guideline F, Financial Considerations

The SOR alleges two delinquent bank loans (SOR ¶¶ 1.a and 1.b), and a delinquent credit card account (SOR ¶ 1.c). The trustworthiness concern under this guideline 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.

This concern is broader than the possibility that an individual might knowingly compromise sensitive information in order to raise money. It encompasses concerns about an individual'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 sensitive information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's PSI, responses to DOHA interrogatories, testimony at the hearing, and his credit bureau reports establish two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations").

The following mitigating conditions are potentially applicable:

AG ¶ 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;

AG ¶ 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;

AG ¶ 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;

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 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.

AG ¶ 20(a) is not established. Applicant's delinquent debts are numerous, recent, and were not incurred under circumstances making them unlikely to recur.

AG ¶ 20(b) is partially established. Applicant's divorce, his ex-wife's financial irresponsibility regarding the credit card account alleged in SOR ¶ 1.c, and the downturn in the real estate market were circumstances beyond his control. He acted responsibly regarding the first mortgages on his two rental properties. He was unsuccessful in modifying the LOCs on the two properties. He has been unable to sell the properties for an amount that would fully satisfy the debts. However, he has not adjusted his lifestyle or reduced his discretionary spending in order to accumulate funds to satisfy the two delinquent LOCs. He spends \$1,100 on clothing. He has not cogently explained why he chooses to pay \$1,300 per month to rent a large house instead of living in his smaller house where he receives only \$850 per month in rental income. In spite of his financial problems, he travels to his native country and to the foreign country where his son lives once or twice a year.

AG ¶ 20(c) is not established. Applicant has not sought or received financial counseling, and the two delinquent lines of credit are not under control.

AG ¶ 20(d) is established for the credit card debt alleged in SOR ¶ 1.c. It is not established for the LOCs alleged in SOR ¶¶ 1.a and 1.b. After an initial effort to modify the LOCs was unsuccessful, Applicant took no further action and made no payments on them.

AG ¶ 20(e) is not established. Applicant denied all three debts in his response to the SOR, but he provided no information or documentation about the basis for his denial. At the hearing, he admitted all three debts but contended that he was unable to pay the debts in SOR ¶¶ 1.a and 1.b.

Guideline E, Personal Conduct

The SOR alleges that Applicant falsified his e-QIP by answering “No” to the question whether he had ever been charged with an offense involving alcohol or drugs and by deliberately failing to disclose that he had been charged with possession of drug paraphernalia in July 2000. The concern under this guideline 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 [sensitive] 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 relevant disqualifying condition in this case is AG ¶ 16(a):

[D]eliberate 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.

When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant’s state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant’s level of education and business experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Applicant is a mature, well-educated adult. However, he has no previous experience with security clearances or trustworthiness determinations. He tends to ignore written explanations, as evidenced by his failure to note that there was an early-termination penalty in his cellphone contract. He is inexperienced in legal matters, making it more likely that he did not fully understand his lawyer’s advice regarding the disposition of his drug-related arrest. The layout of the e-QIP, especially when viewed on a computer screen, makes it more difficult to connect instructions on one page to a series of questions on another page. I found his explanation for not disclosing his 13-year-old drug-related arrest plausible and credible. Accordingly, I conclude that AG ¶

16(a) is not established. No other disqualifying conditions under this guideline are relevant.

Whole-Person Concept

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. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a public trust position by considering the totality of the applicant's conduct and all relevant circumstances. An 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.

I have incorporated my comments under Guidelines F and E in my whole-person analysis. After weighing the disqualifying and mitigating conditions under those guidelines, and evaluating all the evidence in the context of the whole person, I conclude Applicant has refuted the allegation of falsifying his e-QIP, but he has not mitigated the trustworthiness concerns based on financial considerations. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with national security to grant him eligibility for a public trust position.

Formal Findings

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

Subparagraphs 1.a-1.b:	Against Applicant
Subparagraph 1.c:	For Applicant

Paragraph 2, Guideline E (Personal Conduct): **FOR APPLICANT**

Subparagraph 2.a:	For Applicant
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Conclusion

I conclude that it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for a public trust position is denied.

LeRoy F. Foreman
Administrative Judge