



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



In the matter of:)
)
) ADP Case No. 21-02103
)
Applicant for Security Clearance)

Appearances

For Government: Dan O’Reilly, Esq., Department Counsel
For Applicant: *Pro se*

09/22/2022

Decision

PRICE, Eric C., Administrative Judge:

Applicant failed to mitigate the security concerns under Guidelines J (criminal conduct) and E (personal conduct). His request for eligibility to occupy a position of public trust is denied.

Statement of the Case

On March 2, 2017, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP), seeking eligibility for a public trust position. On November 5, 2021, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), citing trustworthiness concerns under Guideline J (criminal conduct) and Guideline E (personal conduct). DOD acted under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4 (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

On January 6, 2022, Applicant answered the SOR, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government’s file of relevant material (FORM) dated January 27, 2022, including

documents identified as Items 1 through 6. Applicant received the FORM on February 8, 2022. He was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. Applicant submitted no response. Since there were no objections by Applicant, Items 1 through 6 are admitted into evidence. The case was assigned to me on March 25, 2022.

Findings of Fact

After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Under Guideline J, the SOR alleges that Applicant was arrested in February 2017 for theft of mail, found guilty of that offense, and that his sentence included restitution and five years' probation (SOR ¶ 1.a). Under Guideline E, the SOR alleges that he resigned in lieu of being fired as a mail carrier after it was discovered that he opened U.S. mail and stole gift cards (SOR ¶ 2.a), that he received a written warning from a federal contractor for using a company prepaid mailing label to mail personal mail (SOR ¶ 2.b), that his employment with that federal contractor was terminated for not being forthcoming about his criminal history (SOR ¶ 2.d), and that he falsified material facts regarding his criminal history on his March 2017 e-QIP (SOR ¶ 2.c). He admitted the allegations at SOR ¶¶ 1.a., 2.a., 2.b., and 2.d, without explanation. He denied the allegation at SOR ¶ 2.c, stating that his failure to disclose that he had been arrested and was pending trial was due to an unintentional oversight. (Items 1, 2)

Applicant is 42 years old. He graduated from high school in 1999 and earned an associate's degree in 2000. He served on active duty in the Army from 1999 to 2014 and was honorably discharged. He has been married since 2005 and has one child. He worked for a federal contractor from October 2016 to May 2018. (Items 2, 3)

From September 2014 to September 2016 Applicant was employed by the U.S. Postal Service (USPS) as a mail carrier. From about April 2016 to August 9, 2016 he opened mail entrusted to him for delivery and stole items he found inside. On about August 9, 2016, USPS agents approached his mail carrier vehicle, observed that he had opened an envelope containing cash, and informed him that they had surveillance video of him opening mail and removing items. He then admitted that he had been stealing pieces of mail from his assigned carrier routes since about April 2016. He estimated that he had opened approximately 100 pieces of mail per week and removed gift cards he found therein. He said that he had no reason for taking the gift cards other than he had made poor decisions and exercised bad judgement. He resigned from the USPS in lieu of being fired in September 2016. (Items 2, 3, 4, 5).

In October 2016, Applicant was hired by a federal contractor. In approximately January 2017, he received a written warning for improperly using a mailing label purchased by his employer for personal mail. He said that he intended to pay for the personal mail, and thought he had erased the company account number from the pre-paid USPS label before he printed it out so that the company would not be charged for

shipping. He said that he was unaware the company had been charged for the shipment until his supervisor showed him the receipt because his spouse had mailed the package. He told his supervisor that he would pay, and the \$53 shipping cost was deducted from his pay. He also said that he had no other employment difficulties with that employer, and that there was no likelihood of recurrence. (Items 3, 4)

On February 3, 2017, Applicant voluntarily surrendered to federal authorities and was arrested. He was arraigned by a Magistrate Judge on one count of "Theft of Mail Matter by [USPS] Officer or Employee," a felony under 18 U.S.C. §1709. The Magistrate Judge also scheduled trial on the Theft of Mail charge for April 3, 2017. (Items 4, 5)

On March 2, 2017, Applicant completed an e-QIP. In Section 22 of the e-QIP titled "Police Record," he denied that he had been charged with any crime in the past seven years, and denied that he was then awaiting trial on criminal charges. In response to questions about "Employment Activities," he disclosed that he resigned from the USPS in September 2016, but denied that he quit after being told he would be fired and denied that he left by mutual agreement following charges or allegations of misconduct. He also denied that he had received a written warning from his then federal contractor employer. (Item 3)

On April 17, 2017, Applicant pled guilty to Theft of Mail by a USPS employee. On August 14, 2017, he was sentenced to five years' probation, ordered to pay restitution totaling \$75, and fined \$2,000. (Items 4, 5)

During an August 21, 2017 interview with a government investigator, Applicant discussed his March 2017 e-QIP. He said that his failure to disclose that he had been charged with a crime was due to an oversight. He also attributed his failure to disclose that he had resigned from the USPS by mutual agreement following charges or allegations of misconduct to an oversight. He noted that he had no other employment difficulties with the USPS, that there was no likelihood of recurrence, and that his federal contractor employer was aware of the USPS incident. He reported that the only difficulty he had experienced with his federal contractor employer was the written warning for improperly using a company purchased mailing label for personal mail, and that there was no likelihood of recurrence of that behavior. (Item 4)

An incident report dated February 13, 2018 and prepared by security personnel for his federal contractor employer notes that Applicant: "was found guilty of two separate charges in two separate incidents . . . is not forthcoming regarding his convictions for criminal activity [and] has not reported any of this data." The incident report references two criminal convictions and sentences. First, the conviction and sentence for Theft of Mail Matter by a USPS employee (SOR ¶ 1.a). Second, "Charge – Make Utter Issue 150 [Dollars] or over Plea Agreement Filed. Sentence imposed – [February 13, 2018] 2 years' probation." He subsequently admitted that in May 2018, his federal contractor employer terminated his employment because he "was not . . . forthcoming regarding [his] convictions for criminal activity" (SOR ¶ 2.a). (Items 2, 6)

On February 12, 2020 a federal Judge granted Applicant's Motion for Early Termination of Probation, and discharged him from supervised release for the federal Theft of Mail offense. (Item 5)

Applicant's response to the SOR included a brief explanation regarding his failure to disclose any criminal history in his March 2017 e-QIP. He acknowledged that his responses were inaccurate and noted that if he had gone back and reviewed his answers, he would have corrected his responses. Applicant did not submit any other documents or evidence with his answer, and did not submit a response to the FORM. (Item 2)

Policies

The standard set out in the adjudicative guidelines 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. SEAD 4, ¶ E.4. 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 adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of 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. Under AG ¶ 2(b), any doubt 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 assignment to a public trust position.

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 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.

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. Those that are potentially applicable in this case include:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; and

(c) individual is currently on parole or probation.

Applicant's admissions and the evidence in the FORM establish that he was arrested for a federal crime (Theft of Mail by USPS Employee) in February 2017, that he was convicted of that offense in April 2017, and that in August 2017 he was sentenced to five years' probation, ordered to pay \$75 restitution, and fined \$2,000. AG ¶ 31(b) applies. AG ¶ 31(c) does not apply because he was granted early release from federal probation in February 2020.

AG ¶ 32 provides conditions that could mitigate security concerns. Two potentially apply in this case:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Neither mitigating condition is fully established. There is mitigating information including that the criminal behavior alleged occurred more than five years before the SOR was issued, and there is some evidence of successful rehabilitation including Applicant's compliance with the terms of his federal probation resulting in early release in February 2020, apparent payment of the court-ordered restitution and fine, and the absence of any evidence of criminal activity since his release from federal probation. However, Applicant has not provided sufficient evidence to fully establish either mitigating condition and his criminal and subsequent conduct do not support a conclusion that the security concerning behavior is unlikely to recur and cast doubt upon his current reliability, trustworthiness, and good judgment.

His criminal conduct was not a single, isolated incident and raises substantial questions about his current reliability and trustworthiness. Over a period of more than three months he opened approximately 100 pieces of mail per week that had been entrusted to him to deliver and stole items of value he found therein. Approximately five months after he resigned from the USPS because of that misconduct he was reprimanded by another employer for using a prepaid USPS label to send personal mail. The following month he was arrested and arraigned before a Magistrate Judge on the charge of Theft of Mail by a USPS Employee, but one month later he denied that he had any recent criminal history in his e-QIP. Approximately six months after he was sentenced for stealing from the mail, he was sentenced to two years' probation for a separate offense involving a financial instrument. Although the financial instrument offense was not alleged in the SOR and details of the criminal conduct are unclear, the available evidence reflects that he was sentenced in February 2018 to two years' probation after pleading guilty to a criminal offense. His conduct casts doubt on his current reliability, trustworthiness, and good judgment. The above mitigating information is insufficient to dispel the criminal conduct security concern.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions 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 national security eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, willingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information;

(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, trustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive 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 government protected information;

(2) any disruptive, violent, or other inappropriate behavior;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

AG ¶¶ 16(a) through (d) apply. Applicant admitted and the record evidence establishes that: (1) he resigned in lieu of being fired by the USPS from his employment as a mail carrier because it was discovered that on multiple occasions he had opened and stolen from mail not addressed to him, (2) he received a written reprimand from another employer for using a company purchased mailing label for personal use, and (3) that he was fired by that employer for not being forthcoming about his criminal history. After considering the record evidence as a whole, I also conclude that he deliberately falsified material facts in his March 2017 e-QIP for the reasons discussed below.

In his March 2017 e-QIP Applicant denied any criminal history and deliberately failed to disclose that he had been charged with a crime and was then pending trial on that charge. During his background interview and in response to the SOR he said that his failure to answer these questions correctly was an unintentional oversight. Considering the record evidence, I do not find his claim credible. He engaged in a pattern of deception regarding his criminal history and other conduct reasonably likely to adversely impact adjudication of his e-QIP. First, the criminal history that he denied and did not disclose was that while employed as a USPS mail carrier, he opened and stole items of value from mail he had been entrusted to deliver. Notably, his false e-QIP responses were approximately one-month after he had been arraigned on the Theft of Mail charge by a federal Magistrate Judge, and after that judge set dates for his trial on that charge. Second, in another section of his e-QIP he also falsely denied or failed to disclose that he had resigned from the USPS in lieu of being fired after admitting to USPS agents that he had been stealing from the mail. Third, he was later fired by the company that employed him when he submitted his e-QIP because he was not forthcoming about that same Theft of Mail offense and a separate crime.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 17:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts, and
- (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.

Applicant's conduct cannot be looked at on an individual or piecemeal basis. While employed as a mail carrier he opened hundreds of pieces of mail weekly and stole items of value he found therein over a period of more than three months. After being caught by investigators and confessing his misconduct, he resigned from the USPS in lieu of being fired. He then went to work for a federal contractor and within four months was caught using a company prepaid USPS label to send personal mail. Approximately a month later he was arrested and charged for his multiple thefts from the U.S. mail while employed as a mail carrier and trial on that charge was set for three months later. Yet approximately one month later, he deliberately failed to disclose anything about the Theft of Mail charge or his then pending trial in his e-QIP. He also falsely denied that his departure from the USPS had anything to do with a pending termination action or following allegations of misconduct. More than one year later, his federal contractor employer terminated his employment because he failed to be forthcoming about his conviction for stealing from the mail and a separate financial crime.

He has presented insufficient evidence of prompt, good-faith efforts to correct any omission, concealment or falsification before being confronted with the facts, and the

record reveals none. Collectively, his conduct reveals an individual who repeatedly showed an unwillingness to comply with the law, rules, and regulations; who exercised poor judgment; and who engaged in criminal or deceptive behavior, and failed to accept responsibility for his actions. Applicant's conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. The above mitigating factors are insufficient to dispel the personal conduct security concerns.

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(d):

(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.

Under AG ¶ 2(c), 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines J and E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

I considered that Applicant is 42 years old and that he was honorably discharged from the Army after approximately 15 years of service. He has provided no documentary evidence and did not respond to the FORM with relevant and material facts about his circumstances, which may have helped to rebut, extenuate, mitigate, or explain the security concerns.

After weighing the disqualifying and mitigating conditions under Guidelines J and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant failed to meet his burden of persuasion. The record evidence leaves me with questions and doubts as to his eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant failed to mitigate the security concerns raised under Guideline J, criminal conduct, and Guideline E, personal 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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a – 1.d:	Against Applicant

Conclusion

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

Eric C. Price
Administrative Judge