

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant, who has a history of criminal behavior, falsified his answers to Questions 16 and 20 on his Public Trust Position Application (SF-85P) by failing to acknowledge and list his past criminal offenses and a debt of approximately \$5,271 that was over 180 days delinquent. He failed to mitigate security concerns under Guidelines E and J. Eligibility is denied.

CASENO: 06-17187.h1

DATE: 05/31/2007

DATE: May 31, 2007

In Re:)	
)	
-----)	
SSN: -----)	ADP Case No. 06-17187
)	
Applicant for Public Trust Position)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
JOAN CATON ANTHONY**

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, who has a history of criminal behavior, falsified his answers to Questions 16 and

20 on his Public Trust Position Application (SF-85P) by failing to acknowledge and list his past criminal offenses and a debt of approximately \$5,271 that was over 180 days delinquent. He failed to mitigate security concerns under Guidelines E and J. Eligibility is denied.

STATEMENT OF THE CASE

In May 2003, Applicant executed and signed an application for a position of public trust (SF-85P). In September 2004, he executed and signed a second SF-85P application. The Defense Office of Hearings and Appeals (DOHA) reviewed Applicant's eligibility to occupy an automated data processing (ADP) position designated as an ADP I, II, or III position to support a contract with the Defense Department. As a result of the review, the agency recommended Applicant's case be submitted to an administrative judge to determine whether Applicant is eligible to occupy such a position.

Acting under Department of Defense Directive 5220.6, dated January 2, 1992, as amended (Directive), DOHA issued a Statement of Reasons (SOR) to Applicant on September 26, 2006.¹ The SOR details the factual basis for the action and alleges security concerns under Guidelines J and E of the Directive.

In addition to the Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (revised adjudicative guidelines) approved by the President on December 29, 2005. The revised adjudicative guidelines were then modified by the Defense Department and promulgated, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive and Appendix 8 to DoD Regulation 5200.2-R, and they apply to all adjudications and other determinations where a SOR has been issued on September 1, 2006, or thereafter.² The revised adjudicative guidelines apply to this case because the SOR is dated September 26, 2006, and this is an ADP I, II, III trustworthiness determination. A copy of the revised adjudicative guidelines was provided to Applicant along with the SOR.

Applicant answered the SOR in writing on October 17, 2006, and requested that his case be determined on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) on January 8, 2007. The FORM contained documents identified as Items 1 through 6. By letter dated January 10, 2007, a copy of the FORM was forwarded to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt.

¹See Memorandum from the Deputy Under Secretary of Defense for Counterintelligence and Security, dated November 19, 2004, Subject: Adjudication of Trustworthiness Cases (directing DOHA to utilize Defense Department Directive 5220.6 to resolve contractor cases forwarded to it for a trustworthiness determination, to include those cases involving ADP I, II, and III positions).

²See Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

Applicant received the file on January 17, 2007. Applicant did not file any information within the required time period. On May 2, 2007, the case was assigned to me for a decision.

RULINGS ON PROCEDURE

1. The Government moved to amend SOR subparagraph 2.a. to delete the reference to subparagraph 1.e. In support of its motion, the Government noted that the incident referred to in subparagraph 1.e. post-dates Applicant's execution of the SF-85P alleged in the paragraph and therefore could not be the source of a falsification allegation. Applicant was given notice of the Government's motion to amend and did not object. Accordingly, for good cause shown, the Government's motion to amend the SOR is granted.

2. The Government's argument in the FORM incorrectly references Guideline J Disqualifying Condition (DC) E2.A10.1.2.1. and DC E2.A10.1.2.2 and Guideline E DC E2.A5.1.2.2³. These disqualifying conditions were superceded by Guideline J and Guideline E revised adjudicative guidelines, effective September 1, 2006, which apply to this case because the SOR was issued September 26, 2006.⁴ The record reflects that Applicant was given a copy of the applicable revised adjudicative guidelines and informed that they, and not the superceded guidelines, applied in his case. He raised no objections or questions. The wording and plain meaning of the relevant provisions of the old and revised adjudicative guidelines are essentially the same. Accordingly, I find the Government's citations to the old adjudicative guidelines in the Argument section of the FORM arose from clerical mistake or oversight and caused Applicant no prejudice or harm. Throughout this decision, revised adjudicative guidelines J and E, effective in all trustworthiness adjudications in which a SOR was issued September 1, 2006, and thereafter, will be cited and applied.

FINDINGS OF FACT

The amended SOR contains five allegations of disqualifying conduct under Guideline J, Criminal Conduct, and four allegations of disqualifying conduct under Guideline E, Personal

³Guideline J DC E2.A10.1.2.1 reads: "Allegations or admissions of criminal conduct, regardless of whether the person was formally charged." Guideline J DC E2.A10.1.2.2. reads: "A single serious crime or multiple lesser offenses." Guideline E DC E2.A5.1.2.2. reads: "The deliberate omission, concealment, or falsification of relevant and material 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."

⁴The applicable DCs under the revised Guideline J adjudicative guideline are found at ¶¶ 31(a) and 31(c). The applicable DC under revised adjudicative Guideline E is found at ¶ 16(a). Revised Guideline J ¶31(a) reads as follows: "a single serious crime or multiple lesser offenses." Revised Guideline J ¶ 31(c) reads as follows: "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted." Revised Guideline E ¶ 16(a) reads as follows: "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."

Conduct. (Item 1.) Applicant admitted all allegations in the SOR. (Item 3.) His admissions are incorporated herein as findings of fact.

Applicant is 40 years old, unmarried, and employed by a Defense contractor as a Claims Analyst III. He attended college for one year. (Item 4.)

The Government alleged and Applicant admitted that on or about May 31, 1992, he was arrested and charged with (1) Driving Under the Influence (DUI), (2) DUI with a blood alcohol content of .10, (3) Speed Not Prudent to Avoid a Collision, and (4) No Proof of Insurance. Applicant admitted he pled guilty to Counts (1) and (4) and that Counts (2) and (3) were dismissed. The Government alleged Applicant was sentenced to 3 years probation, one day of jail time, and restitution of \$2,237.29, ordered to complete a substance abuse screening program, but failed to comply. The Government further alleged that a probation revocation hearing was scheduled for May 31, 1993; that on May 31, 1994, a warrant was issued; that on July 30, 2003, the warrant was quashed, and Applicant was reentered to a substance abuse program. The Government further alleged Applicant failed to comply with the order; that a probation revocation hearing was set for October 23, 2003; that Applicant failed to appear for the hearing, a warrant was issued, and as of January 2005, the warrant was still active. (Item 1; Amended SOR ¶ 1.a.)

Applicant admitted he failed to comply with the order to complete a substance abuse program. He neither admitted nor denied the Government's allegation that he was sentenced to 3 years probation, one day of jail time, and restitution of \$2,237.29. He neither admitted nor denied knowledge of the probation revocation hearing scheduled for May 31, 1993, that a warrant was issued on May 31, 1994, that the warrant was quashed on July 31, 2003, and that he was again ordered to a substance abuse program. He denied knowledge of a probation revocation hearing set for October 23, 2003, and admitted he failed to appear at the hearing. He denied knowledge that a warrant issued pursuant to his failure to appear was still active as of January 2005. (Item 3.) The Government produced no evidence to support the SOR allegations that Applicant denied, nor did it produce evidence to support the allegations that he neither admitted nor denied.

The Government alleged, and Applicant admitted, that on or about June 21, 1993, he was cited for Indecent Exposure of the Genitals and that he pled No Contest to an amended charge of Disturbing the Peace. The Government further alleged Applicant was sentenced to one year probation and ordered to complete a substance abuse program. Applicant admitted he failed to comply with the sentence to complete a substance abuse program. He denied knowledge of a probation revocation hearing set for June 15, 1994, and acknowledged he failed to appear. The Government alleged, and Applicant neither admitted nor denied, that a warrant was subsequently issued on June 15, 1994. The Government alleged that, as of January 2005, the case was still open. Applicant denied knowledge that the case was still open as of January 2005. (Item 1; Amended SOR ¶ 1.b.; Item 3.) The Government produced no evidence to support the SOR allegations that Applicant denied, nor did it produce evidence to support the allegations that he neither admitted nor denied.

The Government alleged, and Applicant admitted, that on about June 16, 1996, he was arrested and charged with (1) DUI with a Prior and (2) DUI with a blood alcohol content of .10 or higher. (Item 1; Amended SOR ¶ 1.c.; Item 3.)

The Government alleged, and Applicant admitted, that on about June 21, 1998, he was arrested and charged with Failure to Appear/DUI, posted bond, and was released. (Item 1; Amended SOR ¶ 1.d.; Item 3.)

The Government alleged that on about July 6, 2003, Applicant was cited for (1) No Current Registration and (2) No Valid Driver's License and was fined \$635. The Government further alleged that, as of February 8, 2005, the case was still open and Applicant owed \$601.24. (Item 1; Amended SOR ¶ 1.e.) In his answer to the SOR, Applicant admitted the citations for No Current Registration and No Valid Driver's License. He stated the charges arose when he drove an intoxicated friend home in the friend's vehicle, and the friend did not have his vehicle registration in his car. Applicant admitted he appeared before a judge. He asserted he paid a fine for the citation of No Valid Driver's License and provided the court with a copy of his friend's vehicle registration. (Item 3.) Applicant provided no evidence to support his assertion that he paid a fine or supplied his friend's vehicle registration to the court. He denied awareness he still owed a fine or that the case was still open as of February 8, 2005. (Item 3.) The Government produced no evidence to support the SOR allegations that Applicant denied.

Applicant completed and certified a SF-85P on May 23, 2003. Question 16 on the SF-85P reads as follows: "16. **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.)" Applicant responded "no" to Question 16 and deliberately failed to list the information set forth in subparagraphs 1.c. and 1.d. of the amended SOR. (Item 1; Amended SOR ¶ 2.a.; Item 3.)

On September 8, 2004, Applicant executed and certified a second SF-85P. He again responded "no" to Question 16 and failed to list the citation and fine he received on about July 6, 2003, as alleged in ¶ 1.e. of the SOR. Applicant asserted his omission was "unknowing." (Item 1, Amended SOR ¶ 2.b.; Item 3.)

On the SF-85P executed by Applicant on September 8, 2004, there appeared a Question 20, which read as follows: "20. **Your Financial Record - 180-Day Delinquencies** Are you now over 180 days delinquent on any loan or financial obligation? (Include loans or obligations funded or guaranteed by the Federal Government.)" Applicant responded "no" to Question 20 failed to list a debt to the U.S. Department of Education for a student loan of approximately \$5,271. Applicant characterized his omission as a mistake. (Item 1, Amended SOR ¶ 2.c.; Item 3.)

The Government alleged that Applicant's July 6, 2003, citation and subsequent fine for No Current Registration and No Valid Driver's License, demonstrated disqualifying conduct under Guideline E. (Amended SOR ¶ 2.d.) Applicant admitted the citations and the levy of a fine by the court. He asserted he had paid the fine and denied still owing money on the fine. He also denied knowing the case was still open, and he asserted he had mailed the court a copy of his friend's vehicle registration to rebut the citation for No Current Registration. (Item 3.) He provided no evidence to corroborate his statements that he had paid the fine and provided the court with a copy of his friend's vehicle registration.

After executing his SF-85P applications in May 2003 and September 2004, Applicant signed and dated the following certification:

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 and willful false statement on this form can be punished by fine or imprisonment or both (See section 1001 of title 18, United States Code.) (Item 4.)

POLICIES

The ADP adjudication process extends only to sensitive positions. Positions designated as ADP I or ADP II are classified as sensitive positions; ADP III positions are not. Regulation ¶ AP 10.2. By memorandum dated November 19, 2004, the Deputy Under Secretary of Defense for Counterintelligence and Security directed DOHA to extend the adjudicative process to ADP III positions as well.

“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.” Regulation ¶ C6.1.1.1. Appendix B of the Regulation sets forth the adjudicative policy, as well as the disqualifying conditions (DC) and mitigating conditions (MC) associated with each guideline.⁵ DoD contractor personnel are afforded the adjudication procedures contained in the Directive. Regulation ¶ C8.2.1.

CONCLUSIONS

Criminal Conduct

The Government’s concern under the Criminal Conduct revised adjudicative guideline is that a history or pattern of criminal activity creates doubt about an individual’s judgment, reliability, and trustworthiness. Two conditions could raise a security concern and may be disqualifying: Disqualifying Condition (DC) 31(a): *a single serious crime or multiple lesser offenses* and DC 31(c): *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.*

Applicant admitted criminal conduct alleged in SOR ¶¶ 1.a., 1.b., 1.c., and 1.d. He also admitted two lesser offenses, traffic violations, alleged at ¶ 1.e. of the SOR, for which he was fined \$635. While Applicant admitted allegation 1.e., his admission is not enough to establish criminal misconduct under Guideline J. He admitted he twice failed to comply with a sentence to complete a substance abuse screening program. (¶¶ 1.a. and 1.b.) He denied knowledge of and failing to appear for probation revocation hearings in 1994 and 2003, and he denied knowledge of warrants issued in May and June 1994 and October 2003 ordering him into a substance abuse screening program.

Applicant denied knowing he had been cited for failing to comply with the terms of his probation, and the Government provided no evidence to support a conclusion that Applicant had

⁵These guidelines were amended and promulgated, effective September 1, 2006.

received notice of a probation revocation hearing in 1993 and a probation revocation hearing in 1994. Applicant also denied knowledge that his failure to appear for a probation revocation hearing resulted in a warrant which was still active as of January 2005. Applicant denied he still owed a fine for two 2003 citations (No Current Registration and No Valid Driver's License), but he failed to provide evidence to corroborate his denial. I conclude that the Government failed to prove Applicant knew about his probation revocation hearings and their consequences. However, Applicant's multiple criminal offenses and his admissions of criminal conduct raise concerns under revised adjudicative Guideline J, ¶¶ 31(a) and 31(c).

Only two mitigating conditions under Guideline J might apply to the facts of Applicant's case. Applicant's admitted criminal conduct might be mitigated under Mitigating Condition (MC) 32(a) if he provided credible evidence to show that *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*. Applicant's admitted criminal activity spans a period of six years, from 1992 to 1998. He provided no credible evidence to substantiate a conclusion that he has complied with court orders to participate in a substance abuse screening program. His failure to comply with the court orders casts doubt on his reliability, trustworthiness, and reliability and his ability to follow laws, rules and regulations. Accordingly, I conclude MC 32(a) is inapplicable.

Applicant's admitted criminal conduct might be mitigated under MC 32(d) if he provided *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*. Applicant failed to show that sufficient time had passed to reasonably conclude his criminal activity had ceased and would not be repeated in the future. I conclude he failed to provide evidence of successful rehabilitation. Accordingly, MC 32(d) does not apply.

Guideline E - Personal Conduct

Personal 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*. Guideline E, ¶ 15.

Under Guideline E, a security concern is raised by an individual's *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*. Guideline E, ¶ 16(a).

Applicant executed and signed public trust position applications in May 2003 and September 2004. After responding "no" to Question 16 on the SF-85P he executed in May 2003, Applicant failed to list his arrest in about June 1996 for DUI with a Prior and DUI with a blood alcohol content of .10 or higher. He also failed to list his arrest in June 1998 and charge of Failure for Appear/DUI, for which he posted bond and was released. After responding "no" to Question 16 on the SF-85P he executed in September 2004, Applicant failed to list his citation in July 2003 for (1) No Current

Registration and (2) No Valid Driver's License. After responding "no" to Question 20 on the SF-85P he executed in September 2004, Applicant also failed to list and identify an education debt of \$5,271, which was more than 180 days delinquent.

Applicant admitted he deliberately falsified his answer to Question 16 on the SF-85P he executed and signed in May 2003. He characterized his falsification of his answer to question 16 on the SF-85P he executed in September 2004 as "unknowing" and provided no further explanation. He characterized his falsification of his answer to Question 20 on the SF-85P he executed in September 2004 as "mistaken" and provided no further explanation.

The Government established a prima facie case that Applicant falsified his answers to Questions 16 and 20 on his September 2004 SF-85P. The burden of proof thus shifted to Applicant to rebut or mitigate the Government's allegations. Applicant denied he deliberately falsified his answers to the questions, but he provided no credible evidence in support of his denials.

One Guideline E mitigating condition (MC) might be applicable to Applicant's conduct. Pursuant to MC 17(a), personal conduct security concerns might be mitigated if *the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.*

Applicant provided no credible evidence to mitigate his failure to list his arrests for criminal conduct in June 1996 and June 1998 and his citations in 2003. Additionally, he provided no credible evidence for his failure to list his education debt that was over 180 days delinquent. At the time he completed his SF-85P applications, Applicant was a mature adult and a high school graduate. Although he knew, or should have known, the importance of telling the truth to the Government, he had reason to attempt to minimize his knowledge of his criminal conduct and his delinquent education debt. His denials that his falsifications were deliberate were not credible. He did not make good-faith efforts to correct his omissions, concealment, or falsifications before being confronted with the facts. I conclude that MC 17(a) does not apply to the facts of Applicant's case.

Additionally, DOHA alleged that Applicant's 2003 citations for (1) No Current Registration and (2) No Valid Driver's License, alleged under the Criminal Conduct guideline, also raised Guideline E security concerns. (*See SOR ¶ 1.e.*) A security concern under Guideline E is raised by *[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations.* Such conduct can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. *Guideline E, ¶ 15.*

Applicant, who was not in possession of a valid driver's license, drove another person's vehicle, which had no current registration. Applicant's admitted conduct demonstrated a disregard for established rules and regulations related to the safe use of automobiles. While he asserted he broke traffic safety rules to help an intoxicated friend, Applicant supplied no evidence to support his assertion. I conclude Applicant's conduct raises a security concern under Guideline E, ¶ 15, about his reliability, trustworthiness, and ability to protect classified information.

One mitigating condition under Guideline E might apply to these facts. Applicant's conduct might be mitigated if *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. Guideline E, MC 17(c).

When viewed in light of Applicant's several other admitted criminal offenses, Applicant's citations for (1) No Current Registration and (2) No Valid Driver's License are less serious. However, the conduct, which occurred in the recent past, reveals an unwillingness to comply with rules and regulations and is supported by Applicant's admitted criminal conduct dating from 1992. Applicant supplied no credible evidence to support a conclusion that his rule-breaking conduct is unlikely to recur. Accordingly, MC 17(c) is inapplicable.

Whole Person Analysis

In addition to evaluating the disqualifying and mitigating conditions under each guideline, an administrative judge must thoroughly consider and review of all available reliable information about the appellant, past and present, favorable and unfavorable, to arrive at a balanced decision. DoD Regulation 5200.2-R, Appendix 8, describes this process of scrutiny and evaluation as "the whole person concept." The factors to be considered in a whole person analysis include the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the voluntariness of participation; the presence or absence of rehabilitation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; and, the likelihood for continuation or recurrence.

Applicant's admissions and the record evidence establish a pattern of criminal conduct and falsification that casts doubt on his current reliability, trustworthiness, and good judgment. Applicant's criminal conduct spans a period of 12 years, and he offered no evidence of rehabilitation, casting doubt on his trustworthiness. Finally, Applicant deliberately misled the Government regarding his criminal conduct and his financial delinquencies. These actions cast serious doubts on his trustworthiness.

In ICR Case No. 98-0761 at 3 (Dec. 27, 1999), DOHA's Appeal Board states that an administrative judge, in deciding an Applicant's security worthiness, "must consider the record as a whole (Directive Section F.3.) and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*." I have considered the record as a whole and have evaluated Applicant's conduct under the whole person concept of the Directive. I conclude that Applicant has not mitigated the trustworthiness concerns raised by the allegations in the SOR, and he has not demonstrated that it is clearly consistent with the national interest to grant him eligibility for an ADP I, II, or III position.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SO:

Paragraph 1.: Guideline J: AGAINST APPLICANT

 Subparagraphs 1.a. through 1.d.: Against Applicant
 Subparagraph 1.e.: For Applicant

Paragraph 2.: Guideline E.: AGAINST APPLICANT

 Subparagraphs 2.a. through 2.d.: Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant’s eligibility for an ADP I, II, or III position. Eligibility is denied.

Joan Caton Anthony
Administrative Judge