



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



In the matter of:)
)
) ADP Case No. 12-06663
)
)
Applicant for Position of Trust)

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

07/17/2014

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s trustworthiness concerns under Guidelines J, criminal conduct; H, drug involvement; G, alcohol consumption; and E, personal conduct. He mitigated the trustworthiness concerns under Guideline F, financial considerations. Applicant’s eligibility for access to sensitive information is denied.

On February 25, 2014, Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guidelines J, H, G, E and F. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on April 14, 2014, and requested a hearing before an administrative judge. The case was assigned to me on May 15, 2014. DOHA issued a notice of hearing on May 29, 2014. The case was held as scheduled on June 25, 2014. The Government offered Exhibits (GE) 1 through 4, which were admitted into the record without objection. Applicant testified and offered Exhibits (AE) A through H, which were admitted into the record without objection. DOHA received the hearing transcript (Tr.) on July 3, 2014.

Findings of Fact

Applicant admitted all of the allegations in the SOR except ¶¶ 5.a, 5.b, 5.e and 5.f. I incorporated his admissions into the findings of facts. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 42 years old. He is divorced and has no children. He earned a bachelor's degree in 1996. He was employed with the same company for 14 years until he was laid off in 2009.¹

Applicant had some financial problems after he was laid off and depleted his savings and 401(k) account to pay his bills. He was unemployed for nine months. He had some temporary jobs for extended periods, but then would be unemployed again. He received unemployment benefits and was unaware that he was required to pay taxes on them. He testified that he failed to file his federal income tax returns. He stated he has a habit of not filing his federal income tax returns on time. He was not paying attention to his taxes until 2012, when he completed his Electronic Investigations Processing Questionnaire (e-QIP). He stated he had to ask the Internal Revenue Service (IRS) how much he owed. He did not start paying his late taxes until he got a steady job. Applicant arranged a payment plan with the IRS and began making payments in December 2013. He has paid both tax debts alleged in SOR ¶ 5.a (\$1,700) and ¶ 5.b (\$1,800).²

The debt in SOR ¶ 5.c is for a past-due mortgage (\$8,419). Because of Applicant's unemployment he fell behind with his mortgage payments. He used about \$13,000 to \$16,000 from his 401(k) account to make payments. He sought legal advice and was told to stop making his monthly mortgage payments. He did not make any payments for about 30 months. He has a loan modification with the mortgage lender that began in May 2014. He is required to make three consistent monthly payments of \$545 before the loan will be modified. Applicant has made two payments. He has no indication of what the modification payments will be. He intends to satisfactorily complete the trial period.³

¹ Tr. 17-18.

² Tr. 27-35; GE 2 § D; AE A, B.

³ Tr. 35-39; AE C, D.

The debt in SOR ¶ 5.d (\$40) occurred when Applicant's automatic payment to his credit card stopped due to lack of funds. Applicant has paid the debt.⁴ The debt in SOR ¶ 5.e (\$269) was also an automatic payment that stopped when Applicant's account did not have funds to make the payment. The debt is paid.⁵

The debt in SOR ¶ 5.f (\$159) was for a cell phone. Applicant was required to have a cell phone and was told there would be no charges if he returned it within 30 days. He returned it, and they charged him for the phone. He disputed the debt with the company and was told it was resolved. The charge continued to appear on his credit report as delinquent. To resolve it, Applicant paid the debt.⁶

In April 1991, Applicant was arrested and later found guilty of driving while impaired and was sentenced to probation for 12 months, and his driver's license was suspended. In August 1992, he was arrested and later found guilty for operating a vehicle under the influence of alcohol and was sentenced to 30 days house arrest, probation for 12 months, fined \$720, community service, attendance at Alcoholics Anonymous, and his driver's license was suspended for two years.⁷

In August 1994, Applicant was arrested and charged with assault or battery on an officer, a third degree felony and obstruct without violence. He was placed in a pre-trial intervention program, which included three years' probation, 25 hours of community service, and court costs. Applicant violated his probation when he was charged in June 1995 with fraudulent use of a credit card. His pre-trial intervention program was revoked. Adjudication was withheld, and he was placed on probation for three years. He was required to perform 100 hours of community service, and pay restitution and court costs.⁸

In March 1997, Applicant was arrested and charged with driving while intoxicated. He was found guilty and sentenced to 30 days in jail, required to serve 21 days, one year probation, court costs, and his driver's license was revoked for ten years.⁹

In December 1998, Applicant was arrested for domestic battery. The charge was later dropped. In January 2004, Applicant was arrested for possession of marijuana. Adjudication of the charge was withheld upon payment of the fines imposed. In January

⁴ Tr. 40-41; AE E.

⁵ Tr. 41; AE F.

⁶ Tr. 41-44; AE G.

⁷ GE 3.

⁸ GE 3.

⁹ Tr. 78; GE 3.

2013, Applicant was cited for failing to report an accident and careless driving. He received a fine.¹⁰

From 1990 to at least September 8, 2013, Applicant used marijuana with varying frequency. In March 2005, he used Oxycodone about once a day without a valid prescription. He used his girlfriend's prescription. From 1994 to July 2002, he used cocaine about ten times. He stated he did not like it, but used it because of peer pressure. He did not purchase it for himself, but on one occasion contributed money to purchase it. He stated he was always using alcohol when he consumed illegal drugs.¹¹

From January to December 2001, Applicant illegally used gamma-gydroxybutyric acid (GBH) for his personal consumption.¹² Applicant heard it was a mood enhancer. He stated he used it to help him refrain from drinking too much alcohol. He stated it helped for a few months, but was very unstable. He produced it from different substances he purchased over the Internet. He was about 29 years old when he manufactured the substance in his home. The substance would induce a deep sleep, and Applicant became concerned that it was too difficult to monitor. He participated in this endeavor due to peer pressure.¹³

Applicant stated he no longer uses marijuana. He had no idea how many times over 23 years he used marijuana. He experimented with other drugs, but thought marijuana was safe. He was a heavy user in his 30s. He stated he would not get stoned before work.¹⁴

Applicant continued to use marijuana after he completed his e-QIP on January 31, 2012, and again after he was interviewed by a DOD investigator on March 23, 2012, during which his use of illegal drugs was discussed.¹⁵

Applicant has consumed alcohol from 1989 to at least April 2014, at times in excess. Applicant uses alcohol to make him more social. He stated that he used marijuana because he believed it helps him to drink less alcohol. He believed marijuana curbed his alcohol urge. He does not think there is anything that will help him stop drinking alcohol. He participated in AA as part of a criminal sentence, but does not

¹⁰ Tr. 75-78; GE 2 § B, GE 3.

¹¹ Tr. 46-53; GE 3.

¹² Tr. 55-56. Applicant explained that the substance included floor stripper and lye in certain amounts. When combined the chemicals would react and the substance would be edible. He would mix it with grape juice and drink it.

¹³ Tr. 53-59.

¹⁴ Tr. 46, 59-68.

¹⁵ Tr. 65-71.

attend now. He does not plan on abstaining from alcohol consumption. He last had alcohol in April 2014.¹⁶

Government Interrogatories asked Applicant if he used marijuana from January 12, 2013, to September 8, 2013? He answered he used “1 gram with dinner per day.”¹⁷ He indicated that he decided to stop using marijuana on September 8, 2013. He wrote: “I have no plans for future use.” At his hearing, Applicant testified his last use of marijuana was April 2014. He testified he does not intend to use marijuana in the future.¹⁸

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 overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all 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.”

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,

¹⁶ Tr. 46-47, 71-74, 79-82.

¹⁷ GE 2 § A page 6.

¹⁸ Tr. 74, 79-82.

or mitigate facts admitted by applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable trustworthiness decision.

A person who seeks access to sensitive information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of 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 conditions that could raise security concerns. I have considered all of them under AG ¶ 19, and the following are potentially applicable:

- (a) inability or unwillingness to satisfy debts; and

- (c) a history of not meeting financial obligations.

Applicant has numerous delinquent debts that he failed to pay for a significant period of time. I find the above disqualifying conditions have been raised.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. I have considered all of the mitigating conditions under AG ¶ 20, and the following are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(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;

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

(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.

Applicant was unemployed and had difficulty paying his bills. He had two tax liens against him for failing to pay his taxes. He only recently resolved his numerous delinquent debts, so AG ¶ 20(a) only partially applies. Applicant's financial problems were the result of his unemployment. Once he began working he paid his delinquent debts and was able to obtain a loan modification for his mortgage. He used his savings and his 401(k) account to pay his debts. AG ¶ 20(b) applies because the conditions that caused his financial problems were beyond his control and he acted responsibly under the circumstances. He has made a good-faith effort to resolve his delinquent debts. AG ¶¶ 20(c) and 20(d) apply.

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to drug involvement:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Drugs are defined as mood and behavior altering substances, and include: (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under drug involvement AG ¶ 25 and conclude the following have been raised:

(a) any drug abuse; and

(b) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

Applicant has a long history of using marijuana from 1990 to April 2014. He has used cocaine. He has used Oxycodone without a valid prescription, and he illegally processed and manufactured GBH for his own use. He completed his e-QIP on January 31, 2012. He completed Government Interrogatories in October 2013 where he admitted to using marijuana daily with dinner from January 2013 to September 2013. At that time, he stated his intention to not use marijuana in the future, but continued to do so even after receiving the SOR. All of the above disqualifying conditions apply.

I have considered all of the mitigating conditions under drug involvement AG ¶ 26. The following are potentially applicable:

(a) the behavior happened so long ago, was so infrequent or happened under circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(b) a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

None of the above mitigating conditions apply.

Guideline J, Criminal Conduct

AG ¶ 30 sets out the security concern relating 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.

I have considered the disqualifying conditions under criminal conduct AG ¶ 31 and the following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant has numerous criminal arrests and convictions. I find the above disqualifying conditions apply.

I have considered all of the mitigating conditions for criminal conduct under AG ¶ 32, and the following are potentially applicable:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life; and
- (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.

I find none of the mitigating conditions apply.

Guideline G, Alcohol Consumption

AG ¶ 21 expresses the security concern pertaining to alcohol consumption:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

I have considered all of the disqualifying conditions under AG ¶ 22 and the following are potentially applicable:

- (a) alcohol-related incidents away from work, such as driving under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent; and

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.

Applicant has consumed alcohol from 1989 to at least April 2014, at times to excess and to the point of intoxication. He has been arrested and convicted of driving while impaired, operating under the influence of alcohol, and driving while intoxicated. He indicated he used marijuana to help him curb his alcohol consumption. I find the above disqualifying conditions apply.

I have considered all of the mitigating conditions under AG ¶ 23 and the following are potentially applicable:

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

(b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser).

Applicant continues to consume alcohol and make poor decisions. He stated he used marijuana to help him curtail his urge to drink alcohol. He failed to provide sufficient evidence to establish actions he is taking to overcome his problem. He failed to provide evidence that he responsibly uses alcohol or has established a pattern of abstinence. I find none of the above mitigating conditions apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I have considered all of them and specifically considered the following:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such

as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant continued to use marijuana after completing his e-QIP and following an interview with a DOD investigator where his illegal drug use was discussed. I find Applicant's personal conduct raises the above disqualifying conditions.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and the following are potentially applicable:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under unique circumstances that it is unlikely to recur, and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

Applicant did not provide an explanation for his continued use of marijuana after he was placed on notice it was a concern. Despite stating in his Government Interrogatory that he did not intend to use marijuana in the future, he continued to do so, including after he received the SOR, which stated drug involvement was a concern. His conduct involves questionable judgment and an unwillingness to comply with rules and regulations, which raises questions about his reliability, trustworthiness, and ability to protect sensitive information. None of the above mitigating conditions apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for access to sensitive information 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) 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 access to sensitive information 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, H, G, E, and F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is 42 years old. He had financial problems when he was unemployed and has paid his delinquent debts. He has a long history of illegal drug abuse and criminal conduct. He continued to use illegal drugs after completing his e-QIP and answering Government Interrogatories, despite stating he would not use them in the future. Applicant has a history of untrustworthy and unreliable conduct. He repeatedly broke the law and exercised poor judgment. The evidence leaves me with serious questions and doubts about Applicant's eligibility and suitability for access to sensitive information. For all these reasons, I conclude Applicant mitigated the trustworthiness concerns under Guideline F, financial considerations, but failed to mitigate the trustworthiness concerns arising Guideline J, criminal conduct, Guideline H, drug involvement, Guideline G, alcohol consumption, 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
Subparagraphs 1.a-1.h:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a-2.d:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Paragraph 4, Guideline G:	AGAINST APPLICANT
Subparagraphs 3.a-3.b:	Against Applicant

Paragraph 4, Guideline F:

FOR APPLICANT

Subparagraphs 4.a-4.f:

For Applicant

Conclusion

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 Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Carol G. Ricciardello
Administrative Judge