



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



In the matter of:)	
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)	
[NAME REDACTED])	ADP Case No. 14-02877
)	
)	
Applicant for Position of Trust)	

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

05/22/2015

Decision

MALONE, Matthew E., Administrative Judge:

Applicant mitigated the trustworthiness concerns about his criminal and personal conduct. His consumption of alcohol was the underlying cause of most of the documented criminal offenses. Of his own volition, Applicant has not consumed alcohol or driven a car for about five years. His omissions from his security clearance application of adverse information in his background were unintentional, and he did not fail to cooperate with a government investigator during his subject interview. Applicant's request for eligibility to occupy a position of trust is granted.

Statement of the Case

On March 25, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to obtain eligibility for an ADP I/II/III position¹ for his job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Department of Defense (DOD) were unable to determine that it is clearly consistent with the interests of national security to grant Applicant's request for a position of trust.²

On September 6, 2014, DOD issued Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise trustworthiness concerns addressed through the adjudicative guideline (AG)³ for personal conduct (Guideline E) and criminal conduct (Guideline J). Applicant timely responded to the SOR (Answer) and requested a hearing. The case was assigned to me on March 3, 2015, and I convened a hearing on March 26, 2015. Department Counsel for the Defense Office of Hearings and Appeals (DOHA) presented Government Exhibits (Gx.) 1 - 3.⁴ Applicant testified and presented Applicant's Exhibits (Ax.) A and B. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on April 3, 2015.

Findings of Fact

Under Guideline J, the Government alleged that in March 2003, Applicant was arrested and charged with public intoxication (SOR 1.a); that in September 2003 he was cited for having an expired vehicle license and not having possession of his driver's license (SOR 1.b); that in May 2005, he was cited for speeding at more than 25 miles per hour over the speed limit (SOR 1.c); that in July 2006, he was arrested and charged with loitering - prostitution (SOR 1.d); that in December 2006, he was arrested and charged with reckless driving and running a stop sign (SOR 1.e); that in January 2007, he was arrested and charged with driving under the influence (DUI) (SOR 1.f); that in March 2009, he was arrested and charged with reckless driving (SOR 1.g); that in October 2009, he was arrested and charged with DUI (SOR 1.h); that in October 2009, he was arrested and charged with three counts of breach of trust with fraudulent intent (SOR 1.i); and that in February 2010, he was arrested and charged with public intoxication (SOR 1.j). Applicant denied SOR 1.i, and admitted the other allegations.

Under Guideline E, the Government alleged that Applicant deliberately omitted from his EQIP the criminal charges listed in SOR 1.d, 1.e, 1.g, 1.i, and 1.j, as required

¹ As defined in Chapter 3 and Appendix 10 of DOD Regulation 5200.2-R, as amended (Regulation).

² Required by the Regulation, as amended, and by DOD Directive 5220.6, as amended (Directive).

³ The adjudicative guidelines were implemented by DOD on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

⁴ The Government's Exhibit List is included in the record as Hearing Exhibit (Hx.) 1.

by EQIP Section 22, which addresses arrests or charges in the preceding seven years (SOR 2.a); and that he refused to provide information about “certain criminal charges” during a subject interview (SI) with a DOD investigative agent in May 2013 (SOR 2.b). Applicant denied both of these allegations.

Applicant also provided explanatory remarks with his Answer. In addition to the facts established by Applicant’s admissions, and based on all available information, I make the following findings of fact.

Applicant is 39 years old and is employed as a claims processor by a defense contractor. It is a position that requires eligibility for a position of trust. His employer supports management of the health care system used by members of the military, and Applicant must be found suitable to be entrusted with related personally identifiable information (PII). Applicant graduated from high school in 1994 and served in the U.S. Army as an information systems network operator between February 1995 and August 1999. He held a secret-level security clearance while on active duty and he was honorably discharged. He also served in the Army Reserve for six months in 2005. As a civilian, Applicant worked in retail sales for various employers from July 2002 until November 2011. Thereafter, except for a few part-time jobs, he was unemployed until he was hired by his current employer in April 2013. (Gx. 1; Gx. 3)

When Applicant submitted his EQIP, he disclosed the two DUI arrests alleged at SOR 1.f and 1.h. He also disclosed that he completed court-ordered alcohol counseling in 2007 and obtained additional alcohol counseling in 2011.⁵ Subsequent to his application, Government investigators ostensibly obtained records about the other arrests and citations alleged under Guideline J, and which served as the basis for Applicant’s May 2013 SI. (Gx. 1)

As to SOR 1.i, Applicant does not deny that he was charged with the stated offense, but denied any misconduct. The basis for this allegation is an FBI report listing one of his DUI offenses, one of his reckless driving offenses, and the charge of breach of trust with fraudulent intent. In October 2009, Applicant was working at a department store, where he had been employed for four years. He left that job after being accused of not properly charging customers for merchandise. He was subsequently charged as alleged at SOR 1.i. Applicant testified that he hired an attorney, he never had to appear in court, and that the case was dismissed when witnesses for the prosecution did not show up for the trial. The FBI report shows the Applicant was acquitted after a bench trial. Applicant also claimed that, a few months later, the record of this charge was expunged. (Answer; Gx. 1; Gx. 2; Tr. 39 - 43, 66 - 68)

Applicant relied for his decision to omit the SOR 1.i arrest in his EQIP on the fact that the charges had been dismissed and the record had been expunged. He did not understand that he still was required to disclose the arrest. As alleged in SOR 2.b, when

⁵ Applicant also disclosed other adverse financial information that was not alleged.

Applicant was interviewed by a Government investigator in May 2013, he was reluctant to discuss the details of that event and felt he was being forced to incriminate himself. Applicant testified that he generally felt intimidated during the interview. He has consistently denied any misconduct. (Answer; Gx. 1; Gx. 3; Tr. 27 - 29, 39 - 40, 68)

Applicant admits that he was charged with disorderly conduct and public intoxication in 2003 (SOR 1.a), and that he was arrested and charged with loitering in 2006 (SOR 1.d). As to the latter charge, he adamantly has denied any conduct involving prostitution. The only basis for these SOR allegations is the summary of Applicant's subject interview. He averred he did not disclose those charges in his EQIP due to a combination of confusion about what was required by the pertinent questions and a lack of recollection of the details about those events due to the passage of time. (Answer; Gx. 3; Tr. 53, 84 - 85)

Applicant also admitted that he was charged with the traffic offenses alleged in SOR 1.b, 1.c, 1.e, and 1.g. The allegations at SOR 1.b and 1.c do not constitute criminal conduct. The reckless driving charges are criminal offenses, in that, they potentially could have resulted in a 30-day jail sentence under certain circumstances.⁶ Applicant did not disclose these charges in his EQIP for many of the same reasons he did not disclose his criminal offenses. (Answer; Gx. 3; Tr. 52 - 57, 84 - 85)

Applicant also disclosed in his EQIP that he received alcohol-related counseling in 2011. After his car was repossessed in 2009, and after his last DUI the same year, he chose to not renew his driver's license or buy another car. Also, although there is no documented diagnosis that he is alcohol dependent, Applicant regularly attends Alcoholics Anonymous (AA). He knows that his drinking caused him problems, and he uses AA to help him stay away from alcohol. (Answer; Gx. 1; Tr. 47, 61 - 65)

Applicant's performance at work has been above average. He has not had any disciplinary problems there. He has not engaged in any adverse conduct since 2010.

Policies

Positions designated as ADP I/II/III are classified as "sensitive positions."⁷ In deciding whether a person should be assigned to an ADP position, it must be determined that his or her loyalty, reliability, and trustworthiness are such that it is "clearly consistent with the interests of national security" to do so.⁸ The Regulation also requires that DOD contractor personnel are entitled to the procedural protections in the Directive before any adverse determination may be made.⁹

⁶ See [NAME OF JURISDICTION REDACTED] Code of Laws Title 56, Chapter 5, Article 23, Section 2920.

⁷ Regulation, ¶ C3.6.15.

⁸ Regulation, ¶ C6.1.1.1.

⁹ Regulation, ¶ C8.2.1.

The Directive requires that each decision be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,¹⁰ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of eligibility for a position of trust.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a position of trust for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government's case. Because no one is entitled to a position of trust, an applicant bears a heavy burden of persuasion. A person who has access to sensitive information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring applicants possess the requisite judgment, reliability, and trustworthiness of one who will protect sensitive information as his or her own. Any reasonable doubt about an applicant's suitability for access should be resolved in favor of the Government.

Analysis

Criminal Conduct

Available information is sufficient to support the factual allegations at SOR 1.a - 1.j. However, the allegations at SOR 1.b and 1.c are not criminal offenses. The charge at SOR 1.i is documented in the Government's FBI report (Gx. 2), but Applicant was acquitted. The remaining allegations of two DUIs, two incidents of reckless driving, and three other misdemeanor charges, present facts which establish a trustworthiness concern addressed at AG ¶ 30, as follows:

¹⁰ Directive. 6.3.

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.

More specifically, available information requires application of the disqualifying condition at AG ¶¶ 31(a) (*a single serious crime or multiple lesser offenses*).

The following AG ¶ 32 mitigating conditions are available to Applicant if based on sufficient information:

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

(c) evidence that the person did not commit the offense; 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.

Applicant has not been charged with or committed any criminal offense in almost five years. He was acquitted of the SOR 1.i allegation regarding breach of trust. His traffic violations, and more seriously, reckless driving charges are unlikely to recur as he no longer drives. Most of his criminal conduct involved alcohol consumption, which no longer occurs. Applicant has been steadily employed and performing well in his current job for over two years. All of the foregoing support the mitigating conditions at AG ¶¶ 32 (a), (c), and (d). On balance, the trustworthiness concerns raised by the Government's information are mitigated.

Personal Conduct

The Government showed that Applicant did not disclose in his EQIP that he was charged with the criminal offenses alleged at SOR 1.d, 1.e, 1.g, 1.i, and 1.j. It was also established that Applicant was reluctant to discuss with a Government investigator the details of the conduct alleged in SOR 1.i. These facts potentially raise a trustworthiness concern about personal conduct, which is addressed at 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 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 following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation;

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

Also at issue here is the disqualifying condition at AG ¶ 16(a):

deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

As to AG ¶¶ 15(a) and (b), the former does not apply because Applicant completed and submitted the EQIP, met with an investigator for a subject interview, as required, and generally cooperated with security processing. The more appropriate question is whether his reluctance to discuss “certain criminal charges” in his background constitutes a disqualifying refusal to respond contemplated by AG ¶ 15(b). I conclude it does not. During his subject interview, Applicant provided information and responded to questions about a wide variety of events and circumstances, adverse and otherwise. When it came to discussing the breach of trust charges, of which he was exonerated, he has claimed credibly that he felt intimidated by the investigator’s insistence that he discuss the details of conduct that he has denied. I observed Applicant’s demeanor and mannerisms throughout his hearing as he testified and responded to questions about this matter. I find he was sincere in his claim, and I find it probable that, rather than refuse to discuss the matter out of an unwillingness to cooperate, he was simply intimidated to a point that he reasonably did not feel he should discuss the matter. Certainly, if DOD adjudicators believed Applicant’s reticence about this one event was a substantial breach of his obligation to cooperate, the matter should have been administratively terminated. Based on the foregoing, AG ¶¶ 15(a) and (b) do not apply.

As to the applicability of AG ¶ 16(a), I conclude that Applicant did not intend to conceal any of his arrests. Rather, he either did not understand what was required of the question or he did not recall in sufficient detail the events at issue. To be disqualifying, his omissions must have been made with a knowing intent to deceive. That is not the case here. Applicant was open and candid about his past conduct, particularly as it concerns his problems with alcohol. I have also considered that he also disclosed other adverse information that is not at issue here. On balance, I conclude there was no disqualifying conduct as alleged under this guideline.

I have evaluated the facts and have applied the appropriate adjudicative factors under Guidelines E and J. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Specifically, I note Applicant is an

honorably discharged Army veteran, who held a security clearance while on active duty. He has built a good work record in his current job for the past two years, and has not engaged in any adverse or improper conduct in the past five years. His alcohol consumption, which was the underlying cause of most of his criminal conduct, is no longer part of his life because he decided on his own to get counseling and to stop drinking. A fair and commonsense assessment of the record as a whole supports a conclusion that Applicant is suitable to occupy a position of trust.

Formal Findings

Formal findings 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:	FOR APPLICANT
Subparagraphs 1.a - 1.j:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a - 2.b:	For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the interests of national security for Applicant to occupy a position of trust. Applicant's request for ADP eligibility is granted.

MATTHEW E. MALONE
Administrative Judge