



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



In the matter of:)	
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)	ADP Case No. 14-00816
Applicant for Public Trust Position)	

Appearances

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

10/09/2014

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny him eligibility for a public trust position. The evidence shows Applicant has a history of inappropriate behavior in the workplace, which resulted in job terminations in 2010 and 2013. Applicant did not present sufficient evidence to explain and mitigate the trustworthiness concern stemming from his unfavorable employment history. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted an application for a position of public trust on August 7, 2013.¹ After reviewing the application and information gathered during a background investigation, the Department of Defense (DOD), on April 17, 2014, sent Applicant a statement of reasons (SOR) detailing a trustworthiness concern under Guideline E for personal conduct. The action was taken under Department of Defense

¹ Exhibit 4.

Directive 5220.6, *Defense Industrial Personnel Security Review Program* (Jan. 2, 1992), as amended (Directive); Department of Defense Regulation 5200.2-R, *Personnel Security Program* (Jan. 1987), as amended (Regulation); and the adjudicative guidelines (AG)² implemented by the DOD on September 1, 2006. The SOR recommended submission of Applicant's case to an administrative judge to determine his eligibility to occupy an automated data processing (ADP) position to support a contract with the DOD.

Applicant answered the SOR on May 3, 2014. He admitted, with explanations, the two personal conduct allegations under Guideline E. On May 13, 2014, he requested a decision based on the written record in lieu of a hearing. Likewise, Department Counsel did not request a hearing.

Thereafter, on June 26, 2014, Department Counsel submitted all relevant and material information that could be adduced at a hearing.³ This so-called file of relevant material (FORM) was mailed to Applicant, who received it July 3, 2014. To date, he has not replied to the FORM. The case was assigned to me October 8, 2014.

Ruling on Evidence

Exhibit 5 is a report of investigation from the background investigation of Applicant. The four-page document is a summary of an interview of Applicant on September 5, 2013. Under the rules that govern these cases, a report of investigation may be received and considered as evidence when it is authenticated by a witness.⁴ Although Applicant, who is not law trained and representing himself, has not raised this issue, I am raising it *sua sponte*. Exhibit 5 is not authenticated in any way, and Department Counsel has not made an argument to support its admissibility.⁵ According, it is not admissible and I have not considered it.

Findings of Fact

Applicant is a 27-year-old employee who is seeking to obtain eligibility to occupy a position of public trust for a customer service job with a health care company that has

² The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

³ The file of relevant material consists of Department Counsel's brief and supporting documents, some of which may be identified as evidentiary exhibits in this decision.

⁴ Directive, Enclosure 3, ¶ E3.1.20; see ISCR Case No. 11-13999 (App. Bd. Feb. 3, 2014) (restating existing caselaw that a properly authenticated report of investigation is admissible).

⁵ Department Counsel's brief at 2.

a contract with the DOD. He has had this job since August 2013. It appears he is working in support of a contract with the Defense Health Agency.⁶

Applicant married in 2011. His educational background includes obtaining a high-school diploma in 2005, attending college during 2005-2007 without obtaining a degree, and attending a vocation school where he completed a pharmacy technician program of study in 2008.

Applicant was employed as a pharmacy technician for a large, retail pharmacy from September 2009 to May 2010. His employment ended when he was fired after an allegation of theft of Ritalin. This matter is alleged in SOR ¶ 1.a.

In his August 2013 application, Applicant stated that he left the job because he was let go after allowing an ongoing dispute with his manager go too far.⁷ He further explained that the reason he was fired was “[t]he manager always criticized me and condescended to me constantly, I was frustrated and accidentally left the pharmacy with medication in my smock and was fired for theft.”⁸

In his May 2014 answer to the SOR, Applicant provided a fuller explanation for the job termination as follows:

I admit I was let go from this position. But the reason why I took the medication was because the pharmacy manager singled me out daily and always told me my job performance was bad and that I was incompetent. I was the only male that worked in her pharmacy because I was transferred there. She cut my hours because of personal reasons and I did not qualify for benefits. I could not afford the medication I needed to perform my job duties to her expectations. And because I could not meet her expectations, she continued to cut my hours and berate/insult me in front of fellow staff and even customers. [The pharmacy] followed up to verify. I paid them back what I owed for the medication, voluntarily surrendered my [state] pharmacy technician license, and they never filed criminal charges.⁹

After the termination from his job at the pharmacy, Applicant worked a variety of jobs.¹⁰ Then in January 2012, he took a job as a field representative with a company

⁶ Exhibit 6.

⁷ Exhibit 4 at 19.

⁸ Exhibit 4 at 19.

⁹ Exhibit 3.

¹⁰ Exhibit 4 at 15–17.

engaged in health and sports nutrition. That job ended when he was terminated in March 2013 for seeking employment with a vendor. This matter is alleged in SOR ¶ 1.b.

In his August 2013 application, Applicant stated that he left the job because he was let go after seeking employment with a vendor to the company.¹¹ He further explained that the reason he was fired was for seeking employment with a vendor and that he and his supervisor were not getting along.¹²

In his May 2014 answer to the SOR, Applicant provided a fuller explanation for the job termination as follows:

I admit I was terminated from this position. The regional manager was flying out to the east coast to film her parts for a movie and was neglecting her job duties here. I received many complaints from vendors we worked with so I reported her to upper management. She was given warnings and soon discovered that I sent in reports. At this point she started to micro-manage me on purpose to an extent that I grew to hate my job. So I reached out to vendors seeking employment and was terminated for that reason once my regional manager found out.¹³

Applicant has not submitted any type of supporting documentation in response to the SOR or the FORM.

Law and Policies

This case involves an adjudication of Applicant's eligibility to occupy an ADP position, not an adjudication of eligibility for a security clearance. In deciding ADP cases, we follow the procedures contained in the Directive, and we apply the 2006 adjudicative guidelines. The standard that must be met for assignment to sensitive duties is that the person's loyalty, reliability, and trustworthiness are such that assigning the person to sensitive duties is "clearly consistent with the interests of national security." Regulation ¶ C6.1.1.1. Contractor personnel are entitled to the procedural protections in the Directive before any final unfavorable access determination is made. Regulation ¶ C8.2.1. And in all cases, the protection of the national security is the paramount consideration.

Discussion

Under Guideline E for personal conduct, the concern is that "[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules

¹¹ Exhibit 4 at 14.

¹² Exhibit 4 at 14.

¹³ Exhibit 3.

and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect [sensitive] information."¹⁴

Here, the SOR alleges and the evidence shows that Applicant was fired twice, the first time in 2010 after an allegation of theft of prescribed medication, and the second time in 2013 after he sought employment from a vendor to the company. These matters amount to inappropriate workplace behavior and fall under two Guideline E disqualifying conditions.¹⁵ The terminations are indicative of questionable judgment, untrustworthiness, unreliability, failure to follow rules and regulations, or dishonesty.

Guideline E contains several conditions that could mitigate the trustworthiness concern.¹⁶ I have considered all of the mitigating conditions and none, individually or in combination, is sufficient to mitigate the concern stemming from Applicant's inappropriate workplace behavior. The terminations occurred in the span of about three years. He attributed the terminations to problems with management. The first termination in 2010 is quite serious. It involved the theft of a prescription drug, which was certainly contrary to his responsibilities as a licensed pharmacy technician. The second termination in 2013 is less serious. He was terminated for a breach of business etiquette by seeking employment with one of his employer's vendors. Taken together, the terminations are suggestive of a pattern of conduct in which Applicant has difficulty in the workplace with management and then acts out in inappropriate ways in response to the difficulty. And that pattern of conduct is not clearly consistent with the interests of national security.

To conclude, the evidence leaves me with doubt about Applicant's eligibility and suitability for a public trust position. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I gave due consideration to the whole-person concept.¹⁷ For all these reasons, I conclude Applicant did not mitigate the personal conduct concern.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline E:	Against Applicant
Subparagraphs 1.a–1.b:	Against Applicant

¹⁴ AG ¶ 15.

¹⁵ AG ¶¶ 16(c) and (d).

¹⁶ AG ¶¶ 17(a)–(g).

¹⁷ AG ¶ 2(a)(1)–(9).

Conclusion

In light of the record as a whole, it is not clearly consistent with the interests of national security to grant Applicant eligibility for an ADP position. Eligibility for access to sensitive information is denied.

Michael H. Leonard
Administrative Judge