



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



In the matter of:	)	
	)	
[Redacted]	)	ADP Case No.14-00904
	)	
Applicant for Public Trust Position	)	

**Appearances**

For Government: Fahryn Hoffman, Esq., Department Counsel  
For Applicant: *Pro se*

12/24/2014

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**Decision**

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FOREMAN, LeRoy F., Administrative Judge:

This case involves trustworthiness concerns raised under Guidelines J (Criminal Conduct), F (Financial Considerations), and E (Personal Conduct). Eligibility for a public trust position is denied.

**Statement of the Case**

Applicant submitted an Electronic Questionnaires for Investigation Processing (e-QIP) on July 24, 2013. On July 16, 2014, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), citing trustworthiness concerns under Guidelines J, F, and E. DOD acted under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant received the SOR on July 22, 2014; answered it on August 22, 2014; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on October 29, 2014, and the case was assigned to me on October 31, 2014. The Defense Office of Hearings and Appeals (DOHA) sent Applicant a notice

of hearing on November 3, 2014, scheduling the hearing for November 19, 2014. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 8 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A and B, which were admitted without objection. Department Counsel's letter to Applicant transmitting copies of GX 1 through 8 is attached to the record as Hearing Exhibit (HX) I. I kept the record open until December 4, 2014, to enable Applicant to submit additional documentary evidence. He timely submitted AX C. Department Counsel's comments regarding AX C are attached to the record as HX II. DOHA received the transcript (Tr.) on December 3, 2014.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted all the allegations except SOR ¶¶ 2.k and 3.a, which he denied. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 49-year-old call center representative employed by a federal contractor since June 2013. He worked in customer-service jobs in the private sector until May 2013 and was unemployed for about one month before beginning his current job. His performance reports for July, August, and September 2014 reflected that his productivity was above average, and he was rated as highly effective. (AX B.) He has never held a security clearance or eligibility for a public trust position.

Applicant married in December 1994 and divorced in August 1999. He married his current spouse in August 1999, and they separated in June 2013. He and his wife have recently reconciled and are living together. (Tr. 34.) He has an adult child from his first marriage and a 10-year-old daughter from his second marriage.

Applicant attended a technical school from July 1985 to April 1986 and received a computer certification. (Tr. 37.) He enlisted in the U.S. Air Force in 1988 under a delayed-entry program and entered on active duty in January 1989.

In April 1989, while on active duty in the U.S. Air Force, he was tried by court-martial. Department Counsel submitted no official records of Applicant's trial by court-martial, and the evidence is conflicting regarding the details. In his response to the SOR, Applicant admitted SOR ¶ 1.a, which alleges that he was charged with larceny, bad checks, and wrongful use of cocaine. The SOR does not allege which charges resulted in convictions.

In his e-QIP and during a personal subject interview (PSI) in August 2013, Applicant stated that the court-martial convicted him of passing bad checks. He told the investigator that he was charged with possession and use of cocaine in 1989, and the charges were referred to a court-martial but were dismissed before trial. He believed that the dismissal of the charges was in return for his cooperation in a criminal investigation. (GX 4 at 5.) He told the investigator that he was sentenced to a bad-conduct discharge, confinement for one year, forfeiture of all pay and allowances, and

reduction to the lowest enlisted rank. In his answer to the SOR, he admitted that he was sentenced to confinement for 15 months. At the hearing, however, he testified that he served one year in confinement. (Tr. 48.) His bad-conduct discharge was executed in April 1991. (GX 1 at 31; GX 4 at 5.)

In August 1994, Applicant was charged with grand larceny (a felony), possession of burglary tools (a felony), and damaging property. (GX 3.) In his PSI, Applicant stated that these charges were based on his presence in an acquaintance's vehicle that contained several stolen car radios. He told the investigator that he was convicted of larceny and possession of burglary tools and was required to pay restitution to the victims. (GX 4 at 8.) The court records reflect that the prosecutor filed a *nolle prosequi* for the burglary-tools charge. (GX 7 at 1.)

In September 1994, Applicant was charged with trespassing and destroying private property. (GX 3.) Applicant pleaded guilty to trespassing and was sentenced to six months in jail (suspended) and unsupervised probation for three years (GX 7 at 3.) The court records do not reflect the disposition of the charge of destroying private property.

In January 2000, Applicant was charged with being a habitual offender, a felony. (GX 3.) He testified that the charge was based on multiple traffic offenses. He pleaded guilty to a misdemeanor. (Tr. 50.) The record does not reflect what sentence was imposed.

In December 2000, Applicant was charged with driving with a revoked driver's license<sup>1</sup> and being a habitual offender, a felony. (GX 3.) In August 2001, he pleaded guilty and was sentenced to two years in jail, with one year suspended, and unsupervised probation for five years. (GX 3; GX 4 at 7; GX 7 at 11.) He served his confinement in a work-release program. (GX 1 at 32; Tr. 51.) In March 2012, the state governor granted Applicant's petition to expunge this conviction. (Response to SOR; Tr. 53; AX C.)

In February 2005, Applicant was cited for speeding by driving 67 miles per hour (mph) in a 55 mph zone, a non-criminal infraction. He was fined \$60 plus court costs. (GX 7 at 13.)

In August 2005, Applicant was cited for following too closely, a non-criminal infraction. He was fined \$30 plus court costs. (GX 7 at 15.)

In August 2007, Applicant was cited for driving an uninspected vehicle, a non-criminal infraction. The citation was dismissed. (GX 7 at 17.)

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<sup>1</sup> His arrest record reflects that he was charged with "DUI [driving under the influence] or Endanger—Driving with Revoked License," indicating that the statute under which he was charged covers two alternative offenses, DUI or driving with a revoked license. In his PSI, Applicant stated that he was arrested for driving with a revoked license.

In September 2007, Applicant was charged with public swearing and intoxication. He testified the charges arose when he was arguing with his stepson about his stepson's disrespectful behavior. (Tr. 52.) He was fined \$25 plus court costs. (GX 7 at 19.)

In October 2007, Applicant was cited for operating an uninspected vehicle and a seat-belt violation. The uninspected-vehicle citation was dismissed and he was fined \$25 plus court costs for the seat-belt infraction. (GX 7 at 21-24.)

The SOR alleges that Applicant was cited for failure to obey a traffic signal in September 2009 and was fined for the infraction. He admitted this allegation in his answer to the SOR, but there is no documentary evidence of the infraction or its disposition in the record.

In May 2013, Applicant was cited for failing to have his vehicle inspected. He was fined \$30 plus court costs. (GX 7 at 25.)

In August 2014, Applicant was involved in an automobile accident. He was cited for following too closely and fined \$200. (Tr. 55.) This incident is not alleged in the SOR.

The SOR alleges 11 delinquent debts. All the debts are reflected on Applicant's credit bureau reports (GX 2 and GX 5), except the debt in SOR ¶ 2.k, which is reflected only on GX 2.

SOR ¶ 2.a is a delinquent home improvement store account for \$1,557. SOR ¶¶ 2.b and 2.h are delinquent department store accounts for \$3,951 and \$221. SOR ¶ 1.c is a bank account in collection for \$309. SOR ¶¶ 2.d, 2.e, and 2.f are medical bills in collection for \$309, \$465, and \$413. SOR ¶ 2.i is a delinquent charge account for an electronics store for \$218. SOR ¶ 2.j is a delinquent credit card account for \$210. Applicant admitted these debts, and they are all unresolved. (Tr. 69-72.)

SOR ¶ 2.k is a delinquent cell phone account. Applicant denied this debt on the ground he had never had an account with the carrier alleged in the SOR. He has not disputed this debt with the original creditor, the collection agency, or the credit bureau. (Tr. 72.)

SOR ¶ 2.g is a delinquent home mortgage loan. When the SOR was issued, foreclosure proceedings had begun. Applicant's application for a loan modification was approved on May 1, 2014. The modified loan reduces his payments from \$902 to \$833 per month. (Answer to SOR; AX A; Tr. 65-68.)

Applicant contacted a non-profit credit counseling agency and received some suggestions. (Answer to SOR; Tr. 30.) He also contacted a debt-consolidation agency. As of the date of the hearing, he had not decided which agency he would work with to resolve his debts. (Tr. 88-89.)

Applicant testified that he and his wife have a joint net monthly income of about \$3,900. In February 2014, Applicant submitted a personal financial statement reporting a net monthly remainder of about \$1,665. (GX 6.) He testified that the remainder has since been reduced by his wife's car payments. He does not know the amount of her car payments. (Tr. 87.)

When Applicant submitted his e-QIP in July 2013, he answered "Yes" to the questions in Section 22 asking whether any of the following had ever happened to him:

- Convicted of a crime, sentenced to imprisonment for more than one year, and incarcerated for not less than one year;
- Charged with any felony offense;
- Convicted of domestic violence or a crime of violence against a child, dependent, cohabitant, former spouse, or someone with whom a child is shared in common;
- Charged with an offense involving firearms or explosives; or
- Charged with an offense involving alcohol or drugs.

The instructions for Section 22 stated that information should be reported regardless of whether the record has been sealed, expunged, or otherwise stricken from the court record. Applicant answered "Yes" to the question whether he was sentenced to imprisonment for a term exceeding one year and was incarcerated as a result of that sentence for not less than one year. He did not disclose the felony charges in August 1994 and January 2000. He did not disclose the wrongful use of cocaine alleged in SOR ¶ 1.a or the DUI alleged in SOR ¶ 1.e. (GX 1 at 30-31.) However, he disclosed the felony habitual-offender charge in December 2000, the September 2007 charge of public intoxication, and the October 2007 charge of drunk in public. (GX 1 at 29.)

In his answer to the SOR, Applicant denied intentional falsification. He inadvertently deleted information while completing the e-QIP. He stated that he acted hastily and "just forgot to give the description" of the omitted offenses.

## **Policies**

Positions designated as ADP I and ADP II are classified as "sensitive positions." 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 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. DOD contractor personnel are entitled to the procedural protections in the Directive before any final unfavorable access determination may be made. Regulation ¶ C8.2.1.

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 AG. 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. 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. 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 access to sensitive information.

## **Analysis**

### **Guideline J, Criminal Conduct**

The SOR alleges a court-martial conviction in 1990 that resulted in a bad-conduct discharge and a sentence to confinement for 15 months<sup>2</sup> (SOR ¶ 1.a), two civilian convictions in 1994 (SOR ¶¶ 1.b and 1.c), two habitual-offender convictions in 2000 (SOR ¶¶ 1.d and 1.e), and seven convictions of minor offenses and infractions between 2005 and 2013 (SOR ¶¶ 1.f-1.i).

The concern raised by criminal conduct is set out in AG ¶ 30: "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."

Applicant's admissions and the court records establish SOR ¶¶ 1.a-1.e and 1.i. The evidence establishes two disqualifying conditions under this guideline: AG ¶ 31(a) ("a single serious crime or multiple lesser offenses") and AG ¶ 31(c) ("allegation or

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<sup>2</sup> It is not necessary to decide whether the length of Applicant's confinement triggers the disqualification imposed by the Bond Amendment, 50 U.S.C. § 435b, as amended, because the Bond Amendment applies only to clearances that would provide access to special access programs (SAP), Restricted Data (RD), or any other information commonly referred to as "sensitive compartmented information" (SCI).

admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted"). The infractions alleged in SOR ¶¶ 1.f, 1.g, 1.h, 1.j, 1.k, and 1.l are non-criminal infractions. While they may be cognizable under Guideline E, they are not crimes and offenses encompassed under Guideline J.

The following mitigating conditions are potentially relevant:

AG ¶ 32(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

AG ¶ 32(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.

Neither mitigating condition is established. Applicant's last felony conviction was 13 years ago. However, since his habitual-offender conviction in August 2001, he has been involved in the seven minor offenses and infractions alleged in SOR ¶¶ 1.f-1.l, plus one additional infraction in August 2014 that was not alleged.<sup>3</sup> These minor offenses and infractions preclude a finding that his criminal conduct is unlikely to recur and demonstrate that he is not rehabilitated.

### **Guideline F, Financial Considerations**

The SOR alleges 11 delinquent debts. Applicant admitted that he had done nothing to resolve nine debts. He disputed one debt but has done nothing to resolve it. He successfully modified his delinquent home mortgage loan alleged in SOR ¶ 1.g.

The concern under this guideline 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.

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<sup>3</sup> Conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered the August 2014 infraction for these limited purposes.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's admissions, corroborated by his credit bureau reports, establish two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations").

The following mitigating conditions are potentially relevant:

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(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.

AG ¶ 20(a) is not established. Applicant's delinquent debts are numerous, recent, and were not incurred under circumstances making them unlikely to recur.

AG ¶ 20(b) is not established. Applicant's marital separation and subsequent reconciliation disrupted the family finances. He has resolved the delinquent home mortgage loan in SOR ¶ 1.g, but he has not acted responsibly regarding the other debts alleged in the SOR.

AG ¶ 20(c) is not established. Applicant contacted a credit-counseling agency and a debt-consolidation agency. Although he received some suggestions from the



credit-counseling agency, he has not decided which agency he will work with, and his delinquent debts are not under control.

AG ¶ 20(d) is established for the delinquent home mortgage loan, but it is not established for the other debts alleged in the SOR.

AG ¶ 20(e) is not established. Applicant has denied having an account with the cell phone carrier alleged in SOR ¶ 1.k, but he has not disputed the debt with the original creditor, the collection agency, or the credit bureau.

A person is not required to establish resolution of every debt alleged in the SOR. The adjudicative guidelines do not require that an individual make payments on all delinquent debts simultaneously, nor do they require that the debts alleged in the SOR be paid first. He or she need only establish a plan to resolve financial problems and take significant actions to implement the plan. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). Applicant has no plan and has done nothing to resolve the debts in SOR ¶¶ 1.a-1.f and 1.h-1.k.

### **Guideline E, Personal Conduct**

The SOR alleges that Applicant falsified his e-QIP by failing to disclose drug-related charges in SOR ¶ 1.a and the alcohol-related charges in SOR ¶ 1.e. The concern under this guideline is set out in AG ¶ 15:

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 relevant disqualifying condition in this case is 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." When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant's level of education and business experience are relevant to determining whether a failure to disclose relevant information was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

Applicant admitted in his PSI and at the hearing that he was charged with a cocaine-related offense. However, contrary to the allegation in SOR ¶ 1.a, the evidence indicates that he was not tried for the offense.

The evidence regarding the December 2000 incident alleged in SOR ¶ 1.e indicates that he was charged with violating a statute that proscribed driving either under the influence or with a revoked license and that in his case a revoked license was involved. Thus, I conclude that there is insufficient evidence to establish that he was charged with an alcohol-related offense.

With respect to the cocaine offense, I am satisfied that Applicant did not intentionally omit it from his e-QIP. He disclosed his confinement imposed by a court-martial, a felony charge and conviction for being a habitual offender, and two minor alcohol-related offenses. His explanation that he inadvertently omitted the cocaine offense is plausible in light of his pattern of carelessness alleged in SOR ¶¶ 1.h, 1.j, and 1.l (three instances of having an uninspected vehicle), and in SOR ¶¶ 2.a-2.f and 2.g-2.j (multiple instances of financial inattention). I conclude AG ¶ 16(a) is not established.

### **Whole-Person Concept**

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a public trust position by considering the totality of the applicant's conduct and all relevant circumstances. An 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.

I have incorporated my comments under Guidelines J, F, and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. Applicant's lifestyle for the past 25 years has been one of indiscipline and inattention to duty. He has taken a step in the right direction by securing a modification of his home mortgage loan, but he has yet to establish a track record of responsible conduct.

After weighing the disqualifying and mitigating conditions under Guidelines J, F, and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has refuted the allegation that he falsified his e-QIP, but he has not mitigated the trustworthiness concerns raised by his criminal conduct and financial problems. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with national security to grant him eligibility for a public trust position.

### **Formal Findings**

Paragraph 1, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	Against Applicant
Subparagraphs 1.f-1.h:	For Applicant
Subparagraph 1.i:	Against Applicant
Subparagraphs 1.j-1.l:	For Applicant
Paragraph 2, Guideline F (Financial Considerations):	AGAINST APPLICANT
Subparagraphs 2.a-2.f:	Against Applicant
Subparagraph 2.g:	For Applicant
Subparagraphs 2.h-2.k:	Against Applicant
Paragraph 3, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraph 3.a:	For Applicant

### **Conclusion**

I conclude that it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for a public trust position is denied.

LeRoy F. Foreman  
Administrative Judge