



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

Applicant for Position of Trust

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ADP Case No. 14-01002

Appearances

For Government: Caroline E. Heintzelman, Esquire, Department Counsel
For Applicant: *Pro se*

11/03/2014

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, eligibility, I conclude that Applicant did not mitigate the trust concerns regarding his finances and drug activities. Eligibility to hold a position of public trust is denied.

History of the Case

On April 28, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the affirmative determination of eligibility for granting approval to hold a public trust position, and recommended referral to an administrative judge to determine whether eligibility to hold a public trust position should be granted, continued, denied, or revoked. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AGs) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on June 16, 2014, and elected to have his case decided on the basis of the written record. Applicant received the Government's File of Relevant Material (FORM) on July 2, 2014, and he did not respond to the FORM. The case was assigned to me on October 9, 2014.

Summary of Pleadings

Under Guideline F, Applicant allegedly (a) incurred an adverse judgment against him in October 2012 for \$917 and (b) accumulated 19 delinquent debts. Together, his delinquent debts exceed \$27,000.

Under Guidelines H and J, Applicant allegedly (a) used marijuana from approximately 2011 to at least 2012; (b) purchased marijuana; and (c) was arrested in January 2011 and charged with marijuana-possession/use, drug paraphernalia-possession/use, Driving Under the Influence (DUI)-Liquor/Drugs/Vapors/Combo, and DUI/Drugs/Metabolite. Under Guideline E, Applicant allegedly (a) falsified his electronic questionnaires for information processing (e-QIP) of October 2013 by omitting his marijuana use and activity and (b) used and purchased marijuana, and was arrested for marijuana-possession/use as alleged in Guidelines H and J.

In his response to the SOR (Item 4), Applicant admitted the allegations covered by the SOR with explanations. He claimed his delinquent debts were attributable to his period of unemployment, and that he is now gainfully employed and ready to address his debts. Addressing his marijuana use, he claimed he has not used marijuana since his 2011 arrest, and only used the substance to minimize his anxiety attack episodes. He claimed he was unable to purchase a medical card to purchase his marijuana and now places his faith in God to address his anxiety attacks. (Item 4) And he claimed he admitted his use of marijuana in his ensuing personal subject interview. (Item 4)

Findings of Fact

Applicant is a 31-year-old customer service representative fo a defense contractor who seeks eligibility to hold a public trust position. The allegations covered in the SOR and admitted to by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in August 1988, and has three children from this marriage. (Item 4) Applicant earned a high school diploma but no college degree or diploma. (Item 4) He claimed no military service and provided no endorsements, performance evaluations, or evidence of community and civic contributions.

Applicant's finances

Between June 2010 and March 2013, Applicant was unemployed. While unemployed he accumulated a number of delinquent debts, one of which was reduced

to judgment in October 2012 in the amount of \$917. (Items 1, 6, and 8-9) Altogether, Applicant accumulated 19 delinquent debts exceeding \$27,000. He attributed his debt delinquencies to his unemployment. (Items 2 and 6) While unemployed, he collected unemployment insurance and received financial support for his housing and necessities from his family. (Item 6) Applicant furnished no evidence of his addressing his individual debts. Since receiving the FORM, Applicant has not made any documented attempts to address his debts. His debts remain unsatisfied as alleged.

Drug use and drug-related arrest

Applicant used marijuana between 2011 and 2012 for claimed medical purposes. He did not have a medical marijuana card or medical prescription for the marijuana he purchased for his personal use. (Items 3 and 6) Applicant turned to marijuana use in 2011 to address his anxiety issues. When in stressful situations, he sometimes experienced panic attacks. Although he consulted a mental health counselor, he was never prescribed any medications for his disorder. (Items 1 and 4)

Applicant used marijuana as needed but could not quantify the extent of his usage. (Item 6) He used marijuana in joint form and credited the drug with helping him relax. (Item 6) He used the drug periodically in 2012 when he ceased having anxiety attacks. Should his anxiety attacks resume, he will consult a mental health professional about using marijuana. (Item 4) He has not used marijuana or any illegal drugs since his last use in 2012. (Item 6)

Records document that in January 2011, Applicant was arrested for possession of marijuana and DUI. He was administered a field sobriety test by police officers at the scene, which he failed to pass. (Item 6) The arresting officer transported Applicant to jail where he was booked and charged with possession of marijuana and DUI. In a convened hearing on September 2011, the court reduced his charges to a misdemeanor DUI offense, sentenced him to 24 hours in jail, and fined him \$1,800. (Item 6)

E-QIP omissions

In completing his e-QIP in October 2013, Applicant omitted his marijuana use and marijuana-related arrest. (Items 1 and 4-6) In a followup interview with an agent of the Office of Personnel Management (OPM) in November 2013, he acknowledged his marijuana use in 2011 and 2012, as well as his 2011 arrest. (Item 6) By all tangible accounts, Applicant's corrections in his personal interview were made voluntarily without any manifest prompting or confrontation by the interviewing OPM agent. Afforded additional time to reflect on his OPM answers, he admitted his omission was deliberate in his response to the SOR.

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could

create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect privacy-based information. These guidelines include "[c]onditions that could raise a security concern [public trust concern] and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." These guidelines must be considered before deciding whether or not eligibility to hold a public trust position should be granted, continued, or denied.

The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable trust risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

Financial Considerations

The Concern: 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. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts. AG, ¶ 18.

Drug Involvement

The Concern: 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. AG, ¶ 24.

Criminal Conduct

The Concern: 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. AG, ¶ 30.

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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, ¶ 15.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's eligibility to hold a public trust position may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility to hold a public trust position depends, in large part, on the relevance and materiality of that evidence. *See United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain eligibility to hold a public trust position. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused a trust position before it can deny or revoke eligibility to hold a public trust position. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard privacy information in his custody and control.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her trust worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances [controls public trust eligibility as well] be clearly consistent with the national interest, access to sensitive information requires an applicant to demonstrate his public trust eligibility is clearly consistent with the national interest. In this regard, the applicant has the ultimate burden of demonstrating his or her public trust eligibility. “[S]ecurity-clearance determinations [and by extension, public trust position eligibility] should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Trust concerns are raised over Applicant’s accumulation of delinquent debts over a considerable number of years that he failed to address with the resources available to him. Applicant’s recurrent problems with managing his finances over an extended number of years (at least since 2010) reflect lapses of judgment in administering his financial responsibilities. Additional trust concerns are raised over Applicant’s use of drugs and his omissions of his drug involvement from his completed e-QIP.

Applicant’s pleading admissions of his delinquent debts, drug activities, and e-QIP omissions covered in the SOR negate the need for any independent proof. See ISCR Case No. 94-1159 at 4 (App. Bd. Dec. 4, 1995 (“any admissions [applicant] made to the SOR allegations . . . relieve Department Counsel of its burden of proof”). See, *generally*, *McCormick on Evidence*, § 262 (6th ed. 2006). Each of the covered allegations are fully documented and provide ample corroboration of his admissions.

Financial issues

Since March 2013, Applicant has enjoyed steady gainful employment without any visible breaks in work status. Credit reports reveal, though, that Applicant neglected to manage his finances and cure the delinquencies in his listed consumer accounts before the issuance of the SOR. Applicant’s loss of income associated with his years of unemployment provides sound explanations for his falling behind with his debts during this period. However, his unemployment problems do not account for his lack of meaningful progress with curing his debt delinquencies after he returned to full-time employment in 2013. While he has since indicated his readiness to address his debts, he has provided no documentary evidence of payment initiatives with any of his listed creditors.

With his increased earnings from his full-time employment at his disposal to address his outstanding judgment and overdue accounts, Applicant could be expected to to make concerted efforts to address his delinquent debts. Applicant’s lack of any positive payment initiatives warrant the application of two of the disqualifying conditions (DC) of the Guidelines DC ¶ 19(a), “inability or unwillingness to satisfy debts;” and DC ¶ 19(c), “a history of not meeting financial obligations.”

Positions designated as ADP I and ADP II are classified as “sensitive positions.” See DOD Regulation 5200.2-R, *Personnel Security Program*, ¶¶ C3, 1.2, 1.1.7, and C3. 1.2.3 (Jan. 1987, as amended). Holding a public trust position involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor. Financial stability in a person cleared to protect privacy information is required precisely to inspire trust and confidence in the holder of the trust position. While the principal concern of a trust position holder’s demonstrated financial difficulties is vulnerability to coercion and influence, judgment and trust concerns are explicit in cases involving debt delinquencies.

Some extenuating circumstances are associated with Applicant’s loss of income during his extended period of unemployment. However, Applicant has had several years since his return to work to show more progress in addressing his finances. As a result, neither MC ¶ 20(a), “the behavior happened a long time 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,” nor MC ¶ 20(b), “the conditions that resulted in the behavior 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,” are entitled to any more than partial application.

Financial counseling could have been helpful to Applicant in devising a repayment plan to address his debts. Records do not reveal any financial counseling initiatives pursued by Applicant before or after his receipt of the SOR. Based on the facts and circumstances presented, MC ¶ 20(c), “the person has received counseling for the problem and/or there are clear indications that the problem is being resolved or is under control,” has no application to Applicant’s situation.

Applicant’s finances have been marked by lengthy unemployment and associated financial instability for a number of years and show insufficient signs of stabilizing since his return to full-time employment in 2013. He still must address his remaining debts covered in the SOR before he can restore his finances to acceptable levels of stability commensurate with holding a public trust position. Afforded opportunities to follow through with updated payment documentation and initiatives, Applicant has failed to document any follow-through on his debts. His financial history reveals limited attention to exploring payment initiatives before or after the issuance of the SOR.

While an applicant need not have paid every debt alleged in the SOR, the applicant needs to establish that there is a credible and realistic plan to resolve identified financial problems, accompanied by significant actions to implement the plan. See ISCR Case No. 07-06482 (App. Bd. May 21, 2008). Applicant’s promises to address his delinquent debts in the future do not constitute a credible, realistic plan to resolve his debts and are entitled very little weight.

Whole-person assessment of Applicant’s financial problems is hampered by the absence of any documented corrective steps and the limited amount of information about his work and personal life. While he is able to show some extenuating

circumstances associated with his period of unemployment, his lack of any documented repayment initiatives with the income sources available to him reflect questionable resolve and accountability. Taken together, Applicant's lack of corrective steps to improve his finances reflect continuing lapses in his overall judgment and still leaves doubts about the stability of his finances. These doubts cannot be reconciled with minimum requirements for retaining the Government's confidence in his financial judgment, reliability, and trustworthiness. Applicant fails to mitigate trust concerns related to his outstanding debt delinquencies and judgment lapses associated therein. Unfavorable conclusions warrant with respect to the allegations covered by the financial considerations guideline.

Drug-related and criminal conduct issues

While suffering from an anxiety disorder, Applicant used marijuana for medicinal purposes on a recurrent basis over a two-year period (2011-2012) without enlisting the assistance of a physician to prescribe it for him. While marijuana possession charges relative to his 2011 arrest did not result in a drug-related conviction, he has never denied his possession of marijuana at the time of his arrest.

On the strength of the evidence presented, two disqualifying conditions of the Adjudicative Guidelines for drug abuse are applicable: DC ¶ 25(a), "any drug abuse," and DC ¶ 25(c), "illegal possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia." Judgment concerns persist over Applicant's past drug use. Only two-plus years have elapsed since Applicant ceased using marijuana. Without more detailed documented accounts of his claimed abstinence, it is too soon to absolve him of any recurrence risks.

Because Applicant's drug-related arrest involved criminal conduct, several disqualifying conditions covered by Guideline J are applicable as well. Applicable disqualifying conditions under the criminal conduct guideline include 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 prosecute or convicted."

With recurrence risks still present relative to Applicant's past marijuana use and purchases, MC ¶ 32(a), "so much time has elapsed since the criminal behavior happened, or it happened under unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," may not be applied at this time. Applicant's arrest history and lack of exhibited remedial steps preclude any safe predictive judgments that he can reliably retain his claimed abstinence. Taking into account all of the facts and circumstances developed in the record, unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 2.a through 2.c, and 3.a of the SOR.

Both from a consideration of the applicable guidelines, and from a whole-person perspective, Applicant fails to demonstrate he possesses the strength of overall character and rehabilitation to meet all of the minimum requirements under the drug and criminal conduct guidelines for continued eligibility to hold a public trust position.

Unfavorable conclusions are warranted relative to the allegations covered by the drug and criminal conduct guidelines.

E-QIP omissions

In the process of completing an e-QIP in October 2013, Applicant omitted his drug use/purchases. In his OPM interview that followed, he attributed his omission to oversight. (Item 6) Not until he responded to the SOR in May 2014 did he admit to falsifying his e-QIP. (Item 4) When responding to the SOR, he admitted to falsifying his e-QIP by omitting his marijuana use and purchases. (Item 4) Applicant's intentional omissions were material to an assessment of public trust position eligibility.

Trust concerns over Applicant's judgment, reliability and trustworthiness are raised under Guideline E as the result of his (a) illegal use/purchase of drugs; (b) drug-related arrest; and (c) his falsifying his e-QIP by failing to disclose his drug usage and purchases. By his statements and actions, Applicant placed in issue his fiducial commitment to safeguarding classified and other sensitive materials. Two of the disqualifying conditions covered by Guideline E are applicable. DC ¶ 16(a), "deliberate omission, concealment, or falsification of relevant facts to 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 [public trust position eligibility] or trustworthiness, or award fiduciary responsibilities," and DC ¶ 16(d)(3), "pattern of dishonesty or rule violations." Each of these disqualifying conditions may be considered in evaluating Applicant's illegal use and purchases of drugs, his drug-related arrest, and his e-QIP omissions.

When first asked about past drug use and activity by the OPM agent that interviewed him in November 2013, Applicant promptly responded affirmatively with his disclosures of his drug use and arrest without any prompting. Applicant may take advantage of MC ¶ 17(a), "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts."

In evaluating all of the circumstances surrounding Applicant's incorporated drug activities and his withholding of material information in his e-QIP about his drug use and purchases in the e-QIP he completed, the answers he provided in his ensuing OPM interview are sufficient to convincingly mitigate the deliberate falsification allegations, but not the allegations pertaining to his marijuana-related activities. Questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, are each core policy concerns of the personal conduct guideline (AG ¶ 15). Considering all of the circumstances surrounding his drug use, purchases, and drug-related arrest and his omissions of marijuana use and purchases in the e-QIP he completed in 2011, only his e-QIP omissions are mitigated under the developed facts in the record. Risks of recurrent drug involvement remain.

From a whole-person standpoint, the evidence reveals recurrent lapses of judgment associated with Applicant's drug-related activities. Although his e-QIP corrections are enough to mitigate the omissions in his clearance application, they are not sufficient to mitigate risks associated with his drug activities. Applicant's partial

mitigation efforts over the past year, while encouraging, are insufficient to overcome the continuing drug concerns the Government has with Applicant's continued drug activities. Under the facts and circumstances considered in this record, only Applicant's e-QIP omissions are mitigated based on a thorough review of the administrative record.

Without any evidence of work performance or community and civic contributions to weigh and consider, there is little evidence in the record by which to make a whole-person assessment of Applicant's accomplishments in his business and personal life. Overall, Applicant's efforts to date are sufficient to meet mitigation requirements imposed by the personal conduct guideline covering his e-QIP omissions, but not his drug-related activities.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE F (FINANCIAL CONSIDERATIONS): AGAINST APPLICANT

Subparagraphs 1.a-1.t: Against Applicant

GUIDELINE H (DRUG INVOLVEMENT): AGAINST APPLICANT

Subparagraphs 2.a-2.c: Against Applicant

GUIDELINE J (CRIMINAL CONDUCT): AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Subparagraph 4.a: For Applicant

Subparagraph 4.b: Against Applicant

Conclusions

In light of all 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 to hold a public trust position. Eligibility to hold a public trust position is denied.

Roger C. Wesley
Administrative Judge

