



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



In the matter of:)	
)	
-----)	ADP Case No. 14-02522
)	
Applicant for Public Trust Position)	

Appearances

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

03/18/2016

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Statement of the Case

On April 4, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing concerns under Guideline E (Personal Conduct) regarding his eligibility to occupy an automated data processing (ADP) position designated ADP-I/II/III. 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 DOD on September 1, 2006. Applicant timely responded to the SOR on April 14, 2015, admitting all allegations raised. He also requested a determination based on the written record.

On July 1, 2015, the Government issued a File of Relevant Material (FORM) containing seven attachments ("Items"). Applicant responded to the FORM by submitting a letter dated August 8, 2015. The case was assigned to me on September 17, 2015. Based on my review of the case file and submissions, I find Applicant failed to mitigate personal conduct concerns.

Findings of Fact

Applicant is a 36-year-old data technician. He has worked for the same defense contractor for about three years, and in the information technology field for about 15 years. He needs eligibility to occupy an ADP position in order to participate in new work projects. (Response to the FORM at 2) Applicant completed two years of post-secondary technical school in 2004. He is single and has one child, for whom he was recently granted joint custody. He bought his first home in 2015. He plans to marry.

In October 2000, at age 21, Applicant was arrested and charged with driving under the influence of alcohol. In January 2001, he was found guilty and sentenced to one day of confinement, fined, ordered to perform community service and to enroll in a substance abuse course, and placed on probation for 24 months. In August 2001, he was arrested and charged with driving under the influence of alcohol - probation violation (terms of probation altered). He was found guilty in September 2001 and sentenced to 73 weeks of confinement. In December 2002, Applicant was arrested and charged with driving while his license was suspended or revoked. Disposition was deferred in May 2004.

In October 2003, Applicant was indicted in a specific U.S. District Court (USDC) on 12 counts of knowingly making a false representation to a federally licensed firearms dealer. In May 2004, he pled guilty to one count of the indictment. Consequently, he was sentenced to 24 months of imprisonment, followed by 36 months of supervised release and 150 hours of community service.

In July 2006, Applicant was arrested and charged with two counts of driving under the influence of alcohol, and willful obstruction of law enforcement officers. In November 2007, he was found guilty, fined, sentenced to jail, ordered to perform community service, and placed on probation for 12 months. This result led to the USDC to sentence Applicant to additional community service hours and to participate in a drug and alcohol program.

Applicant was arrested and charged with driving under the influence of alcohol in February 2007. In June 2007, the USDC revoked Applicant's supervised release, remanded into custody, and ordered to be incarcerated for 24 months. He was released in January 2009. In July 2009, he was arrested and charged with driving under the influence of alcohol, driving while license suspended or revoked, and felony fleeing to elude a police officer for a felony offense.

On or about December 23, 2013, Applicant completed an application for eligibility to occupy an ADP position (A-ADP). In response to:

Section 22 – Police Record . . . Have you EVER been convicted in any court of the United States of a crime, sentenced to imprisonment for a term exceeding one year for that crime, and incarcerated as a result of that sentence for not less than one year? Have you EVER been charged

with any felony offense? Have you EVER been charged with an offense involving firearms or explosives? Have you EVER been charged with an offense [involving] alcohol or drugs?

Applicant answered “no.” In that same A-ADP, Applicant answered “no” to the question:

Section 24 – Use of alcohol . . . Ordered to Seek Counseling . . . Have you EVER been ordered, advised, or asked to seek counseling or treatment as a result of your use of alcohol?

Applicant admits all allegations related to the above. He writes that he has paid his dues to society and that none of his past criminal issues are related to his current work. He notes that he intentionally withheld information on his A-ADP because he needs a security clearance to work on new projects. He writes that he has maintained his employment and had no further run-ins with the law “since [his] state and federal offences 11+ years go.”¹ (Response to the FORM) He enjoys his employment and related projects.

Policies

When evaluating an applicant’s eligibility for ADP, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

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 interest is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to protected information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is

¹ Applicant’s last arrest, in fact, was in July 2009, about six months after having been incarcerated for a 24-month period.

responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision.”

A person who seeks access to protected 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 protected information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information). To allay Applicant’s concerns, it is stressed that his loyalty is not an issue in this matter.

Analysis

Guideline E, Personal Conduct

AG ¶ 15 articulates the security concern relating to personal conduct. It states that 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.

Here, between late 2000 and late 2013, Applicant was arrested, charged, convicted, or sentenced by a Federal or state court on one or more of any number of charges related to alcohol, knowingly making a false representation to a federally licensed firearms dealer, willfully obstructing of law enforcement officers, or providing false answers on an A-ADP. For his convictions, he was ordered to perform numerous hours of community service, attend a substance abuse course and also a drug and alcohol abuse program, and sentenced to serve multiple years in both incarceration and in probation.

In 2013, when asked in a 2013 A-ADP, Applicant failed to disclose any of these matters when asked the questions under Section 22 (regarding whether he had ever been convicted of a crime, sentenced to imprisonment for a term exceeding one year for that crime, and incarcerated as a result of that sentence for not less than one year; ever been charged with any felony offense; ever been charged with an offense involving firearms or explosives; or ever been charged with an offense involving alcohol or drugs) and Section 24 (regarding his having been ordered to counseling). Applicant admits the above is true. Therefore, the following disqualifying conditions are potentially applicable under AG ¶ 16:

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; and

AG ¶ 16(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress

As noted above, Applicant admits to this conduct. His only excuse for the above is related to his A-ADP falsifications, where he falsified his answers to not jeopardize his work availability and job security. I conclude AG ¶¶ 16(a) and 16(e) apply.

AG ¶ 17 provides conditions that could mitigate security concerns:

AG ¶ 17(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

AG ¶ 17(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

AG ¶ 17(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Under these facts, AG ¶ 17(c) is not established. Applicant's offenses are multiple in number, regular in nature, and frequent. Applicant's last arrest was in 2009 and his A-ADP falsifications occurred in late December 2013, about two years ago. They raise serious concerns as considerations during the ADP vetting process. Applicant's failure to disclose such important facts from his past shows a lack of candor, reliability, and trustworthiness.

Moreover, AG ¶ 17(d) and AG ¶ 17(e) are not established. While Applicant now embraces the facts at issue, that does little now to compensate for the protracted investigatory process necessitated from his initial, intentional falsifications. Consequently, no mitigating conditions apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the adjudicative process factors listed at AG ¶ 2(a). Under AG ¶ 2(c), the determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based on 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 incorporated my comments under the guideline at issue in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a 36-year-old data technician who has worked for the same defense contractor for about three years. He needs a security clearance in order to participate in new work projects. He has worked in the information technology field for about 15 years, has about two years of related technical school training, and needs to be deemed eligible to occupy an ADP position in order to participate in new work projects. He is single, has one child, and plans to marry in the foreseeable future.

Applicant openly admits that he concealed his past criminal activities in an attempt to not jeopardize his employment or limit his ability to work on new projects. In doing so, he falsified his answers on his A-ADP. Consequently, he not only undermined the ADP vetting process, but did so at the onset.

Applicant's past criminal conduct and his intentional failure to disclose that conduct - past arrests, charges, convictions, sentences, and court-ordered counseling - betrays the level of honesty and directness expected from an ADP applicant. It also reflects poor judgment, unreliability, and untrustworthiness. While it is notable that he chose to amend his falsifications when confronted with the SOR, his reversals come too late in the process to mitigate related concerns at this time. Given these factors, and the analysis above, I find personal conduct ADP concerns remain unmitigated.

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 E:	AGAINST APPLICANT
Subparagraph 1.a-1.i	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interest of national security to grant Applicant eligibility to occupy an ADP position designated ADP-I/II/III. Eligibility for access to protected information is denied.

Arthur E. Marshall, Jr.
Administrative Judge