



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



In the matter of:)
)
-----) ADP Case No. 08-11708
SSN: -----)
)
Applicant for Public Trust Position)

Appearances

For Government: Jennifer J. Goldstein, Esq., Department Counsel
For Applicant: *Pro se*

March 23, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted his application for a public trust position (SF 85P) on November 15, 2007 (Government Exhibit (GX) 4). On August 28, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing trustworthiness concerns under Guidelines F and J. The action was taken under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on September 10, 2009 (GX 2); answered it on September 27, 2009; and requested determination on the record without a hearing (GX 3). DOHA received his response on October 6, 2009. Department Counsel submitted the government's written case on November 24, 2009. On December 1, 2009, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the government's evidence. Applicant received the FORM on December 28, 2009, and he submitted an undated response that was received by DOHA on February 11, 2010, which was included in the record without objection from Department Counsel. The case was assigned to me on March 7, 2010.

Findings of Fact

In his response to the SOR, Applicant admitted the Guideline F allegation in SOR ¶ 1.f, but he denied the allegations in SOR ¶¶ 1.a-1.e. He admitted the Guideline J allegations in SOR ¶¶ 2.a and 2.b. His admissions are incorporated in my findings of fact.

Applicant is a 25-year-old certified pharmacy technician employed by a defense contractor. He is a high school graduate who attended college for three years but did not obtain a degree. He has never married. He has worked for his current employer since February 2007. He has worked for various employers as a certified pharmacy technician since December 2002. He has not previously applied for a public trust position.

Guideline F, Financial Considerations

Applicant used credit cards for living expenses while in college (GX 6 at 3-5), and he accumulated six delinquent credit card accounts totaling about \$28,516. All the debts except the debt in SOR ¶ 1.c are reflected in Applicant's credit bureau reports (CBR) dated December 28, 2007 (GX 7), July 15, 2009 (GX 8), and November 24, 2009 (GX 9). The debt alleged in SOR ¶ 1.c is reflected in GX 8 and GX 9. Although Applicant denied the allegations in SOR ¶¶ 1.a-1.e, he admitted lesser amounts that did not include interest and penalties on the debts alleged in SOR ¶¶ 1.a, 1.b, 1.d, and 1.e (GX 3; Response to FORM at 4). He indicated in response to DOHA interrogatories that he was negotiating with his creditors to settle the accounts for the amount due minus penalties and interest (GX 5 at 1-4).

Applicant told a security investigator he was unemployed for two months after he dropped out of college (GX 6 at 3). However, he reported no periods of unemployment on his SF 85P (GX 4 at 3).

In December 2009, Applicant accepted an offer of settlement from the creditor alleged in SOR ¶ 1.b, and he made a monthly payment in January 2010 (Response to FORM at 8-9). He received a settlement offer from the creditor alleged in SOR ¶ 1.f, but there is no evidence of any payments on this debt (Response to FORM at 4, 10).

Applicant denied the debt alleged in SOR ¶ 1.c, but there is no evidence he has contacted the creditor or disputed the entry with the credit reporting agencies. There is also no evidence that he has filed disputes with the credit reporting agencies challenging the amounts of the debts alleged in SOR ¶¶ 1.a, 1.c, and 1.e). His credit reports reflect only one disputed account, and it is not with any of the creditors alleged in the SOR (GX 7 at 6; GX 8 at 2; GX 9 at 2).

Applicant submitted a personal financial statement in response to DOHA interrogatories in March 2009. He reported net monthly income of \$1,621, expenses of \$953, debt payments of \$375, and a net remainder of \$293. His monthly debt payments were for a credit card account, student loans, and installment payments to the court in connection with his DUI conviction. He also reported \$2,334 in bank savings and \$300 in stocks and bonds (GX 5 at 6).

Guideline J, Criminal Conduct

Applicant was arrested and charged with shoplifting in November 2005. He completed a diversion program in May 2006 and the charges were dismissed (GX 6 at 12). The government exhibits do not reflect the underlying facts of the incident. According to Applicant, he was with a friend who stole a jacket. In his answer to the SOR, he stated he accepted an opportunity to enter a diversion program “to get the issue over,” even though he was unaware of his friend’s theft (GX 3 at 2).

Applicant began consuming beer in 2002, during his senior year of high school, but not to the point of intoxication. During his first year of college, he consumed beer and hard liquor to the point of intoxication every weekend. During his next two years of college, he consumed about four beers twice a month at social events. Starting in November 2006, he increased his consumption to six beers every Friday and Saturday (GX 6 at 7-8). In November 2007, he was arrested for driving under the influence. Under a plea agreement, he pleaded guilty to “extreme DUI” and having a blood-alcohol level of .15% or more. In February 2008, he was sentenced to ten days in jail, ordered to pay fines and costs totaling \$3,566, and placed on probation for five years (GX 6 at 14). He was ordered to complete ten weeks of alcohol and drug classes and to install an interlock device on his vehicle for one year, and he received a restricted driver’s license that authorized him to drive only to and from work (GX 6 at 6).

As of the date of an interview with a security investigator in October 2008, Applicant had not completed the alcohol and drug classes because he was waiting to be contacted. He had not installed an interlock device because his car was impounded, he could not afford the fees to retrieve it, he had not obtained another car, and he was riding to and from work on the bus (GX 6 at 7). In December 2008, a warrant was issued for his failure to comply with the terms of his probation (GX 6 at 14). The warrant was quashed in February 2009 (GX 6 at 13).

Applicant completed the alcohol and drug classes in June 2009 (Response to FORM at 7). As of March 1, 2009, he was paying \$150 per month on his fines and costs

for the DUI (GX 5 at 5). As of May 15, 2009, he had paid a total of \$2,190, leaving a balance due of \$1,441 (GX 6 at 15-16).

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. Department of Defense 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 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. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). 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 him or her eligibility for assignment to a sensitive position.

Analysis

Guideline F, Financial Considerations

The SOR alleges six delinquent debts totaling \$28,516. The trustworthiness 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 [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Applicant's financial history is sufficient to raise the disqualifying conditions in AG ¶ 19(a) (inability or unwillingness to satisfy debts) and AG ¶ 19(c) (a history of not meeting financial obligations), shifting the burden to him to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15.

Trustworthiness concerns under this guideline may be mitigated if "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(a). This mitigating condition is not established, because Applicant's debts are numerous, not yet fully resolved, and did not occur under circumstances making them unlikely to recur.

Trustworthiness concerns also may be mitigated if "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(b). Applicant claimed to have had a short period of unemployment, a circumstance beyond his control, but he did not list it on his SF 85P. Even if he was unemployed, he has not acted responsibly, because he took no significant action to resolve his delinquent debts until he learned that they might adversely affect his eligibility for a public trust position. He made his first payment on a delinquent debt in January 2010, even though he has been employed at his current job for three years. He has admitted the \$748 debt alleged in SOR ¶ 1.f, but he has not paid it even though he has adequate savings and a steady income.

Security concerns under this guideline also can be mitigated by showing that "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(c). This mitigating condition is not established because Applicant has not received financial counseling and his financial problems are not under control.

Security concerns under this guideline also can be mitigated by showing that “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” AG ¶ 20(d). Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Evidence of past irresponsibility is not mitigated by payment of debts only under pressure of qualifying for a security clearance.

An applicant is not required, as a matter of law, to establish resolution of each and every debt alleged in the SOR. See ADP Case No. 06-18900 (App. Bd. Jun. 6, 2008). An applicant need only establish a plan to resolve financial problems and take significant actions to implement the plan. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). There also is no requirement that an applicant make payments on all delinquent debts simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. *Id.* I conclude AG ¶ 20(d) is not established for the debts alleged in SOR ¶¶ 1.a and 1.c-1.f, because Applicant has not acted in good faith, for the reasons set out above in my discussion of AG ¶ 20(b), and he has taken no significant actions to resolve the debts. AG ¶ 20(b) is established for the debt alleged in SOR ¶ 1.b.

Trustworthiness concerns under this guideline also can be mitigated by showing “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(e). Applicant has expressed his disagreement with the interest and penalties assessed on his delinquent credit card accounts, but he has not documented the basis of his disagreement, nor has he presented documentary evidence that he notified any of the credit reporting agencies or any of the creditors alleged in the SOR that he disputes the existence of the debts or the amounts claimed to be due. I conclude AG ¶ 20(e) is not established.

Guideline J, Criminal Conduct

The trustworthiness concern under this guideline is set out in AG ¶ 30 as follows: “Criminal conduct 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.”

Conditions that could raise a security concern and may be disqualifying include “a single serious crime or multiple lesser offenses” and “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.” AG ¶¶ 31(a) and (c). Applicant’s shoplifting charge in November 2005 and his conviction of DUI in February 2008 raise these two disqualifying conditions.

Applicant is still on probation for his DUI conviction. Thus, AG ¶ 31(d) (individual is currently on parole or probation) also is raised.

Trustworthiness concerns under this guideline may be mitigated by evidence that “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.” AG ¶ 32(a). The first prong of this mitigating condition (“so much time has elapsed”) focuses on whether the criminal conduct was recent. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the totality of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” *Id.*

Applicant’s shoplifting arrest was more than four years ago, which is “a significant period of time.” On the other hand, his track record since the shoplifting arrest is one of excessive alcohol consumption, financial irresponsibility, and a serious DUI conviction, for which he is still on probation. I conclude the first prong of AG ¶ 32(a) is not established. The arrest did not occur under unusual circumstances. Combined with Applicant’s overall behavior, it casts doubt on his reliability, trustworthiness, and good judgment. Thus, I conclude AG ¶32(a) is not established.

Trustworthiness concerns may be mitigated by “evidence that the person did not commit the offense.” AG ¶ 32(c). The record is sparse regarding the circumstances of Applicant’s shoplifting arrest in November 2005. His own explanation tends to negate guilt, but his decision not to contest the charges undermines his protestation of innocence. I am satisfied that there is “substantial evidence” of his culpability. Thus, I conclude AG ¶ 32(c) is not established. However, because of the sparse record, I have given this incident little weight in my evaluation of his trustworthiness.

Finally, trustworthiness concerns may be mitigated if “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.” AG ¶ 32(d). In his response to the FORM, Applicant recited his accomplishments in his current job, but he presented no evidence from his supervisors, no copies of performance appraisals, and no copies of the numerous awards he says he has received. For these reasons, as well as the reasons set out above in my discussion of AG ¶ 32(a), I conclude this mitigating condition is not established.

Whole-Person Analysis

Under 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 the 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for an assignment to a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines F and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline(s), but some warrant additional comment.

Applicant did not request a hearing, limiting my ability to assess his sincerity, credibility, candor, and remorse. He has considerable technical expertise and experience as a certified pharmacy technician, but he does not have a track record of responsible behavior. He consumed alcohol to excess and accumulated heavy credit card debt in college. He dropped out of college, increased his alcohol consumption, and was arrested for shoplifting. He continued to drink heavily and was convicted of a serious DUI offense. He did not significantly address his delinquent debts until he realized his job depended on a favorable trustworthiness determination.

After weighing the disqualifying and mitigating conditions under Guidelines F and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the trustworthiness concerns based on financial considerations. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with national security to grant him eligibility for assignment to a public trust position.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c-1.f:	Against Applicant

Paragraph 2, Guideline J (Criminal Conduct): **AGAINST APPLICANT**

Subparagraphs 2.a-2.b:	Against Applicant
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Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for assignment to a public trust position is denied.

LeRoy F. Foreman
Administrative Judge