



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 15-04924

Appearances

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

01/03/2017

Decision

DAM, Shari, Administrative Judge:

Applicant's criminal problems began in 2006 and continued into 2014. Some of his offenses involved the abuse of alcohol and marijuana. He failed to present sufficient evidence to mitigate the personal and criminal conduct trustworthiness concerns. Based upon a thorough review of the pleadings, exhibits, and testimony, eligibility for access to ADP I/II/III sensitive information is denied.

Statement of the Case

On February 15, 2015, Applicant submitted a public trust position application (SF 85P). On January 31, 2016, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline E, (Personal Conduct) and Guideline J (Criminal Conduct). The action was taken 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 the DOD on September 1, 2006.

Applicant answered the SOR in writing on April 1, 2016 (Answer), and requested a hearing before an administrative judge. The Department of Defense Office of Hearings and Appeals (DOHA) assigned the case to me on September 8, 2016. DOHA issued a Notice of Hearing on September 29, 2016. I convened the hearing as

scheduled on October 18, 2016. Department Counsel offered Government Exhibits (GE) 1 through 7 into evidence, which were admitted without objection from Applicant. He testified, but did not offer any exhibits. DOHA received the transcript of the hearing (Tr.) on November 2, 2016. The record remained open until November 18, 2016, to give Applicant an opportunity to submit other exhibits. He submitted five documents, post-hearing. I marked them Applicant Exhibits (AE) A through E, and admitted them into the record without objection from Department Counsel.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.a, 1.b, 1.c, 1.d, 1.e, and 1.f. He denied those alleged in SOR ¶¶ 1.d and 1.g. SOR ¶ 2.a merely asserts all of the individual allegations in SOR ¶ 1 by reference under an additional guideline, so Applicant's answers to those subparagraphs are the same under SOR ¶ 2.

Applicant is 31 years old and unmarried. He graduated from high school in 2003. He subsequently attended college and trade school between 2006 and 2007. In 2014 he began his current position with a defense contractor. Prior to this position, he worked as an electrician. (Tr. 12-15.)

When he completed a SF 85P in February 2014, Applicant disclosed a history of criminal conduct. (GE 1.) He subsequently discussed his arrests during interviews with a government investigator. (GE 2, 3.)

In December 2006 Applicant was arrested and charged with operating a vehicle while intoxicated (OWI), possessing drug paraphernalia, and OWI with a blood alcohol concentration (BAC) of 0.10 or more. Prior to the arrest, he was at a friend's house where he consumed alcohol and used marijuana. He was 21 years old. In early January 2007 the court revoked Applicant's driver's license for six months; fined him; and ordered him to undergo an alcohol assessment. He was also ordered to serve 30 days in jail, of which 28 days were suspended on condition that he not engage in similar behavior for two years. (Tr. 16-17; GE 2, 7.)

In late January 2007 Applicant was arrested and charged with fourth degree driving while impaired (DWI), and a BAC of 0.08 within 2 hours of driving. In February 2007 he pled guilty and was ordered to undergo a chemical dependence evaluation; fined; placed on unsupervised probation for two years; and required to obtain car insurance. He was again ordered not to engage in similar behavior for two years. The DWI was a misdemeanor conviction. (Tr. 17-18; GE 2, 6.)

In April 2007 Applicant was arrested and charged with driving without a license in possession, and not having proof of insurance. He was fined and his driver's license was again suspended. He was ordered to pay the fine by May 2007 or serve time in jail. He paid the fine. (Tr. 19; GE 7.)

In November 2007 Applicant was arrested and charged with disorderly conduct. The charge was dismissed in December 2007. (Tr. 19-20; GE 5, 7.) This allegation is found in Applicant's favor.

In March 2009 Applicant, age 23, was arrested and charged with possessing or having in possession/control a controlled substance. He pled guilty to the charge, a misdemeanor, and was fined. He said he was regularly smoking marijuana at that time in his life. (Tr. 22-23; GE 6.)

In May 2011 Applicant, age 25, was arrested and charged with possession of drug paraphernalia, possession of a controlled substance (marijuana) by a driver, and driving without liability insurance. In June 2011 he pled guilty to two misdemeanor charges and was placed on unsupervised probation for two years and ordered not to violate criminal laws during that time. He received a 360-day jail term, suspended. He testified he no longer uses marijuana. (Tr. 24-25; GE 6.)

In March 2014 Applicant, age 29, was arrested and charged with domestic assault - intentionally inflict/attempt to inflict bodily harm on another, domestic assault - commit act to cause fear of immediate bodily harm or death, disorderly conduct - offensive/abusive/noisy/obscene, and damage to property - 4th degree. The incident involved his girlfriend, with whom he had a long term relationship. After discovering that she was seeing another man, he broke her cell phone. He pled guilty to the damage to property and the other charges were dismissed. He was fined; sentenced to 45 days of confinement, which sentence was stayed; and he was placed on probation for one year. (Tr. 26-28; GE 7.) He is no longer in a relationship with that girlfriend. (Tr. 32.)

Applicant testified that since the March 2014 arrest he no longer consumes alcohol, uses marijuana, or associates with friends who use marijuana because they now have families. (Tr. 29-30.) He does not want similar incidents to affect his current position, as it is the "best job" he has ever had. (Tr. 30.) In addition to changing friends and appreciating his job, he works 60 hours a week, which gives him little time for abusing alcohol or drugs. (Tr. 31.)

Applicant told his employer about this proceeding and the underlying trustworthiness concerns when he received the SOR. He also told his parents. (Tr. 34.) He is not certain if his employer has a zero tolerance policy about illegal drugs. (Tr. 35.)

Applicant submitted his performance evaluations for 2015 and 2016. His supervisor gave him "more than" effective ratings each year. (AE D, AE E.) His team leader wrote about Applicant, "in the nearly three years he has been with us . . . he has been, and will continue to be, one of our top performers." (AE A.) This team leader is aware of Applicant's criminal background. Applicant also submitted letters from his mother and father, both of whom believe that Applicant has learned from his mistakes and matured. (AE B, AE C.)

Policies

Positions designated as ADP I, II, and III 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, based on all available information, 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.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (Regulation ¶ C8.2.1.)

When evaluating an applicant’s suitability for a public trust position, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant’s eligibility for access to sensitive 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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 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 the 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 states that, “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”

A person applying for access to sensitive information seeks to enter into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to protected information. Decisions include, by necessity, consideration of

the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline E, Personal Conduct

AG ¶ 15 expresses the trustworthiness concern pertaining to personal conduct:

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 [sensitive] 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 ¶ 16 describes a condition that could raise a trustworthiness concern and may be disqualifying:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

Four of Applicant's arrests and convictions involved the misuse of alcohol and/or marijuana. While his conduct in those instances was not alleged separately under the guidelines for alcohol consumption or drug involvement, said conduct is sufficient to raise a personal conduct trustworthiness concern. Applicant's consumption of alcohol to the point of intoxication, and use or possession of illegal drugs on several occasions demonstrated questionable judgment, untrustworthiness, and unreliability, as did his incidents involving driving violations and domestic violence. There is sufficient evidence to raise the above disqualifying condition.

AG ¶ 17 includes three conditions that could mitigate trustworthiness concerns arising under this guideline:

(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;

(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

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

Seven incidents of criminal conduct, four of which involved the abuse of drugs and alcohol, cannot be construed as minor offenses. Applicant's last incident occurred in March 2014 and resulted in a year of probation. These facts continue to raise questions about Applicant's judgment and are not mitigated under AG ¶ 17(c). Applicant acknowledged his misconduct and no longer associates with people who abuse drugs and alcohol. He established some mitigation under AG ¶ 17(d). Applicant's family and employer are aware of his criminal conduct, thus reducing his vulnerability to exploitation based on those issues. AG ¶ 17(e) provides some mitigation.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the trustworthiness concerns pertaining to criminal conduct:

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 ¶ 31 describes two conditions that could raise a trustworthiness concern and may be disqualifying:

(a) a single serious crime or multiple lesser offenses; and

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Between 2006 and 2014, Applicant was arrested and charged on seven occasions with criminal conduct. He was convicted of several crimes, some of which involved alcohol and illegal drugs. The evidence established the above disqualifying conditions.

AG ¶ 32 provides two conditions that could mitigate the trustworthiness concerns raised under this guideline:

(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

(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.

The evidence does not establish mitigation under AG ¶ 32(a). Applicant's history of criminal conduct spanned eight years and began in December 2006. His last arrest was in March 2014, after which he pled guilty to a charge and was again placed on probation. His continuing pattern of criminal conduct negates the argument that his behaviors were merely youthful indiscretions, but rather indicates that he was repeatedly advised and put on probation and told to stay out of trouble. Given that history, sufficient time has not elapsed, since his last conviction and completion of a criminal sentence, from which to determine that similar conduct will not recur. None of the offenses occurred under unusual circumstances.

Applicant presented some evidence of successful rehabilitation. He displayed remorse about his conduct while testifying. He documented a good employment record for 2015 and 2016. Applicant's team leader wrote an impressive letter about Applicant's work and performance. Applicant's parents believe that he matured over the last few years and is serious about changing his life. AG ¶ 32(d) provides some mitigation.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a public trust position by considering the totality of the Applicant's conduct and relevant circumstances. 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. The 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 considered the disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is an intelligent 31-year-old man, who has a history of criminal offenses, some of which involved drugs and alcohol. As a consequence of committing those offenses, his driver's license was suspended three times, and he was placed on probation three times. While he has demonstrated that he is taking steps to avoid similar misconduct, he has not established a sufficient track record of responsible behavior to outweigh his history of criminal conduct. After considering the disqualifying and mitigating conditions, and all facts and circumstances

in the context of the whole-person, the record evidence leaves me with doubt as to Applicant's eligibility and suitability for a position of trust. For these reasons, I conclude that Applicant did not mitigate the trustworthiness concerns arising under the guidelines for personal and criminal conduct.

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
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Subparagraphs 1.a through 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraphs 1.e through 1.g:	Against Applicant

Paragraph 2, Guideline J:	AGAINST APPLICANT
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Subparagraph 2.a:	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 the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for access to ADP I/II/III sensitive information is denied.

Shari Dam
Administrative Judge