



**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. 15-06685

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: Susana Farber, Esq.

04/27/2017

Decision

Harvey, Mark, Administrative Judge:

Applicant did not make sufficient progress filing his state and federal tax returns and paying his taxes. His violations of rules, excessive alcohol consumption, and marijuana possession and use are not recent. Drug involvement, personal conduct, and alcohol consumption trustworthiness concerns are mitigated. Financial considerations trustworthiness concerns are not mitigated. Eligibility for a public trust position is denied.

Statement of the Case

On April 23, 2014, Applicant signed an Electronic Questionnaire for National Security Positions (e-QIP) (SCA). (Government Exhibit (GE) 1) On June 7, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant, pursuant to DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, and modified; DOD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), which became effective on September 1, 2006.

The SOR alleges trustworthiness concerns under Guidelines E (personal conduct); G (alcohol consumption), F (financial considerations), and H (drug

involvement). (HE 2) The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the interests of national security to grant or continue Applicant's eligibility to occupy a public trust position, which entails access to sensitive information. (HE 2) The DOD CAF recommended referral to an administrative judge to determine whether such access to sensitive information should be granted, continued, denied, or revoked. (HE 2)

On July 8, 2016, Applicant responded to the SOR allegations. (HE 3) On August 19, 2016, Department Counsel indicated she was ready to proceed. On October 13, 2016, the case was assigned to me. On December 22, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice setting the hearing for January 18, 2017. (HE 1) The hearing was held as scheduled. At the hearing, the Government provided six exhibits; Applicant offered one exhibit; and all exhibits were admitted into evidence without objection. (Tr. 13-14; GE 1-6; Applicant Exhibit (AE) A) On January 26, 2017, DOHA received a transcript of the hearing (Tr.). The record was initially held open until March 20, 2017, and after two extensions elapsed, on April 25, 2017, the record closed. (Tr. 58, 70; HE 4) No post-hearing documents were received. (HE 4)

Findings of Fact¹

In his Answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a through 1.y, and 3.a. He made some partial admissions to some of the other SOR allegations. He also provided extenuating and mitigating information. (HE 3) His admissions are accepted as findings of fact. Additional factual findings follow.

Applicant is a 54-year-old customer service clerk employed by the same contractor since 2002. (Tr. 44, 54; GE 1; AE A) In 2014, the contractor received a DOD contract. He has never served in the U.S. Armed Forces. (Tr. 55) He has never married, and he has four children with the same woman, who are ages 15, 18, 21, and 25. (Tr. 30, 55; GE 1; GE 2) His child support responsibilities resulted from children born from two other relationships, and they were born in 1984 and 1988. (Tr. 56; GE 1) He attended a business college. (Tr. 54) He has a real estate license and a bookkeeper certificate. (Tr. 54-55) Several of Applicant's family members served in the military, and Applicant enjoys supporting the military in his current position. (Tr. 45)

Drug Involvement

A physician lawfully under state law issued a marijuana use card to Applicant. (Tr. 19-20) Applicant used marijuana. (Tr. 19) He did not hold a public trust position at the time he used marijuana. (Tr. 35) He was aware of the restrictions against marijuana possession in federal law. (Tr. 36) He used marijuana from June 2009 to October 2012. (Tr. 36, 57-58; SOR response) He did not know whether his employer prohibited illegal drug use. (Tr. 58) His life has changed, and he does not use illegal drugs. (Tr. 37) He wants to have a good relationship with his children. (Tr. 37-38)

¹ Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Alcohol Consumption and Personal Conduct

From 1981 to 2011, Applicant was involved in 25 incidents involving the police and/or the courts. He was convicted of 14 offenses. In 1981, Applicant was convicted of disturbing the peace. (SOR ¶ 1.a) In 1983, he was convicted of reckless driving. (SOR ¶ 1.b) In 1985, he was convicted of driving while license suspended/revoked for reckless driving and stop light offense. (SOR ¶ 1.c)

In 1986, Applicant was charged with battery and exhibiting deadly weapon other than a firearm, and the charges were dismissed. (SOR ¶ 1.d) In 1986, he was convicted of disturbing the peace. (SOR ¶ 1.e) In 1987, he was charged with resisting arrest and obstructing a police officer, and his probation was revoked. (SOR ¶ 1.f)

In 1987, Applicant was convicted of driving without a valid driver's license. (SOR ¶ 1.g) In 1988, he was convicted of driving while his license was suspended or revoked. (SOR ¶ 1.h) In 1989, he was convicted of misdemeanor driving under the influence of alcohol (DUI). (SOR ¶ 1.i)

In 1990, Applicant was convicted of battery on a police officer. (SOR ¶ 1.j) In 1992, he was convicted of evading a police officer. (SOR ¶ 1.k) In 1993, he was charged with battery on a police officer, and the record does not indicate the disposition of this offense. (SOR ¶ 1.l)

In 1993, Applicant was convicted of DUI .08% or greater blood-alcohol content. (SOR ¶ 1.m) In 1995, he was charged with DUI .08% or greater blood-alcohol content. The record does not indicate the disposition of the 1995 DUI offense. (SOR ¶ 1.n) In 1995, he was convicted of eluding the police. (SOR ¶ 1.o)

In 1998, Applicant was charged with DUI .08% or greater blood-alcohol content, and disorderly conduct/public intoxication, and the record does not indicate the disposition of these offenses. (SOR ¶¶ 1.p and 1.q) In 1999, he was charged with taking down an electricity or cable television line and making an unauthorized connection, and the record does not indicate the disposition of the offense. (SOR ¶ 1.r) In 1999, he was charged with DUI .08% or greater blood-alcohol content, and the record does not indicate the disposition of the 1999 DUI offense. (SOR ¶ 1.s)

In 2000, Applicant was charged with DUI and driving with a suspended or revoked license, and the record does not indicate the disposition of the 2000 DUI offense. (SOR ¶ 1.t) In 2004, he was charged with evading a police officer, obstructing officer, and driving with a suspended license, and the record does not indicate the disposition of these offenses. (SOR ¶ 1.u) In 2008, he was convicted of evading a police officer. (Tr. 39; SOR ¶ 1.v) He acknowledged that evading a police officer was a felony. (Tr. 39)

In 2010, Applicant was convicted of DUI. (Tr. 20-21; SOR ¶¶ 1.w and 1.x) He denied that he committed any DUIs after October 2010. (Tr. 21) In October 2011, he was arrested for DUI. (Tr. 20) The 2011 DUI charge was dismissed because Applicant

was only inside a vehicle, and he was not driving. (Tr. 20-21, 46; SOR ¶ 1.y) He has not had any arrests after October 2011. (Tr. 41)

Applicant took alcohol and drug classes, and he received outpatient alcohol treatment. (Tr. 41-42) He was not aware of any diagnosis of alcohol abuse or dependence. (Tr. 42) He consumes small amounts of alcohol. (Tr. 42) Applicant's driver's license was revoked after his most recent DUI conviction. (Tr. 47-48) He does not have a driver's license because Department of Motor Vehicle records indicate he has delinquent child support. (Tr. 43, 53-54) He said he did not owe delinquent child support, and he was seeking the records to prove his child support debt was paid. (Tr. 53-54) He also has to complete a three-month DUI class. (Tr. 43-44, 49) He will also need to install an alcohol-interlock device on his vehicle. (Tr. 43, 49) He may owe some fines from the most recent DUI. (Tr. 48-49) He does not own a car. (Tr. 49)

In sum, Applicant was cited or charged with DUI nine times: 1983, 1989, 1993, 1995, 1998, 1999, 2000, 2010, and 2011. He was convicted of DUI in 1989, 1993, and 2010. He also had arrests for other alcohol-related offenses such as driving with an open container of alcohol, underage drinking of alcohol, and public intoxication. He has not been arrested after 2011.

Financial Considerations

Applicant was the victim of fraud. (Tr. 16, 26) His checks and credit cards were stolen, and his checks were forged. (Tr. 26) He filed a police report with the local police and sheriff's department for the stolen checks and forged documents. (Tr. 26) In November or December 2016, he employed a law firm to dispute and validate his accounts on his credit report. (Tr. 16, 28) I requested that Applicant provide a copy of the validation and dispute report from the law firm (Tr. 69); however, no post-hearing documentation was provided. He promised to pay the debts that are verified. (Tr. 25) His fiancée passed away about six years ago, and he had expenses from four minor children and court costs from litigation over the custody of the children. (Tr. 24) Two of his children are in college, and the other two live in Applicant's home. (Tr. 29)

Applicant recognized his landlord as the creditor in SOR ¶ 4.e for \$581; however, he did not believe he owed his landlord. (Tr. 22-23) He paid a debt for about \$2,000. (Tr. 25) He acknowledged responsibility for the debt in SOR ¶ 4.c for \$1,495 relating to his repossessed vehicle. (Tr. 49-50) He plans to pay the debt in SOR ¶ 4.c; however, he did not present any evidence about resolution of this debt. (Tr. 50-51)

Applicant's SOR lists five medical debts in SOR ¶¶ 4.h through 4.i for \$1,759, \$743, \$477, \$222, and \$143. (Tr. 51) Applicant had medical insurance, and he did not understand the basis for the medical debts. (Tr. 51-52)

In addition to the debts previously discussed, Applicant's SOR alleges the following debts: ¶ 4.d is collection debt for \$811; ¶ 4.e is a collection debt for \$581; ¶ 4.f is a telecommunications-collection debt for \$478; ¶ 4.g is a collection debt for \$250; ¶ 4.m is a charged-off bank debt for \$707; ¶ 4.n is a collection debt for \$949; ¶ 4.o is a

publishing company collection debt for \$176; ¶ 4.p is a telecommunications-collection debt for \$148; and ¶ 4.q is a library-collections debt for \$110. In his SOR response, he denied all of these debts. During his Office of Personnel Management (OPM) interview Applicant denied knowledge or responsibility for the delinquent debts on his credit report, except for SOR ¶ 4.c relating to his repossessed vehicle. (Tr. 52; GE 2)

SOR ¶¶ 4.a and 4.b allege that Applicant did not file his state and federal tax returns for tax years 2013 and 2014. Applicant said he relied on his employer to withhold sufficient funds to pay his taxes, and he relied on the Internal Revenue Service (IRS) and the state tax authorities to send orders to his employers if additional funds were required. (Tr. 17-18, 31, 59-61) He has not filed his tax returns for tax years 2013, 2014, and 2015. (Tr. 31-32)² His SCA indicates he has followed this process with the government determining his taxes throughout his working career from the age of 16. (GE 1) He told the OPM investigator that he never filed state or federal tax returns and relied on the state or federal government to determine how much he owed. (GE 2) He said the IRS and/or the state were receiving \$75 monthly. (Tr. 31) He estimated he owed about \$4,000 for tax years 2013 and 2014. (Tr. 32) He had an appointment for January 20, 2017, to made arrangements with a commercial tax-return preparer to prepare his unfiled tax returns. (Tr. 18-19) I requested that Applicant provide his federal tax transcripts for the last five years and his state tax documentation; however, no post-hearing documentation was provided. (Tr. 62)

Character Evidence

Applicant's human resources director described Applicant as "an employee in good standing." (AE A) Applicant is a trustworthy employee and "has not had any performance or attendance issues." (AE A)

² Applicant's SOR does not include four allegations: (1) he did not timely file his 2015 state and federal income tax returns; (2) he owes about \$4,000 for delinquent state and federal income taxes; (3) he may not have paid his fine for his most recent driving under the influence of alcohol (DUI) conviction; and (4) he did not timely file several state or federal tax returns prior to tax year 2013. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See also ISCR Case No. 12-09719 at 3 (App. Bd. April 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). These four allegations will not be considered except for the five purposes listed above.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a [public trust position].” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Government’s authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. See *Id.* at 527.

Positions designated as ADP I and ADP II are classified as “sensitive positions.” Regulation ¶¶ C3.1.2.1.1.7, C3.1.2.2, 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. 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. See Regulation ¶ C8.2.1.

When evaluating an applicant’s suitability for a public trust position, an 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. An 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.

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. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive 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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to sensitive information. See *Egan*, 484 U.S. at 531. “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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s suitability for a public trust position. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her access to sensitive information[.]” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

The protection of national security and sensitive records is paramount. 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.”

Analysis

Financial Considerations

AG ¶ 18 articulates the trustworthiness concern relating to financial problems:

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.

AG ¶ 19 provides three disqualifying conditions that raise a trustworthiness concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts,” “(c) a history of not meeting financial obligations,” and “(g) failure to file annual Federal, state, or local income tax returns as required” Applicant’s SOR response, SCA, OPM interview, credit reports, and hearing record establish the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(g) requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

(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;

(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;

(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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;³ and

(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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's eligibility [for a public trust position], there is a strong presumption against the grant or maintenance of a [public trust position]. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising [trustworthiness] concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in [public trust position] decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

No mitigating conditions fully apply; however, Applicant presented some important positive financial information. Circumstances beyond his control adversely affected his finances: Applicant was the victim of fraud; his fiancée passed away and he became solely responsible for his four children; and he had litigation expenses related to child custody. In November or December 2016, he employed a law firm to dispute

³ The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

and validate his accounts on his credit report. He promised to pay the debts that are verified.

The negative financial considerations concerns are more substantial. The SOR alleges, and the record establishes that Applicant has failed to file his federal and state income tax returns for several years. He currently owes about \$4,000 in taxes.

A willful failure to timely make (means complete and file with the IRS) a federal income tax return is a misdemeanor-level federal criminal offense.⁴ For purposes of this decision, I am not weighing Applicant's failure to timely file his federal income tax returns against him as a federal crime. See note 2, *supra*. He did not receive notice of a Guideline J or E trustworthiness concern in the SOR about his failure to file his tax returns.

The record establishes that Applicant failed to timely file several federal and state income tax returns. The DOHA Appeal Board has commented:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a clearance adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward *inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to classified information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016) (emphasis in original). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-5340

⁴ Title 26 U.S.C. § 7203, willful failure to file return, supply information, or pay tax, reads:

Any person . . . required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to . . . make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor

A willful failure to make return, keep records, or supply information when required, is a misdemeanor without regard to existence of any tax liability. *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Walker*, 479 F.2d 407 (9th Cir. 1973); *United States v. McCabe*, 416 F.2d 957 (7th Cir. 1969); *O'Brien v. United States*, 51 F.2d 193 (7th Cir. 1931).

at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015). The Appeal Board clarified that even in instances where an “[a]pplicant has purportedly corrected [the applicant’s] federal tax problem, and the fact that [applicant] is now motivated to prevent such problems in the future, does not preclude careful consideration of [applicant’s trustworthiness] in light of [applicant’s] longstanding prior behavior evidencing irresponsibility” including a failure to timely file federal income tax returns. See ISCR Case No. 15-01031 at 3 and note 3 (App. Bd. June 15, 2016) (characterizing “no harm, no foul” approach to an Applicant’s course of conduct and employed an “all’s well that ends well” analysis as inadequate to support approval of access to classified information with focus on timing of filing of tax returns after receipt of the SOR).

In ISCR Case No. 15-01031 at 2 (App. Bd. June 15, 2016), the Appeal Board reversed the grant of a security clearance, and noted the following primary relevant disqualifying facts:

Applicant filed his 2011 Federal income tax return in December 2013 and received a \$2,074 tax refund. He filed his 2012 Federal tax return in September 2014 and his 2013 Federal tax return in October 2015. He received Federal tax refunds of \$3,664 for 2012 and \$1,013 for 2013.

Notwithstanding the lack of any tax debt owed when the tax returns were filed in ISCR Case No. 15-01031 (App. Bd. June 15, 2016), the Appeal Board provided the following principal rationale for reversing the grant of a security clearance, “By failing to file his 2011, 2012, and 2013 Federal income tax returns in a timely manner, Applicant did not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information.” ISCR Case No. 15-01031 at 4 (App. Bd. June 15, 2016) (citations omitted).

Applicant admitted his responsibility for the debt resulting from his repossessed vehicle alleged in SOR ¶ 1.c. He did not describe any progress resolving the debt in SOR ¶ 1.c. His explanations do not mitigate financial considerations trustworthiness concerns.

Drug Involvement

AG ¶ 24 articulates the trustworthiness concern concerning drug involvement:

[u]se 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.

The disqualifying conditions in AG ¶¶ 25(a) and 25(c) could raise a trustworthiness concern and may be disqualifying in this case: “any drug abuse”;⁵ and “illegal drug possession.” Applicant used and possessed marijuana from June 2009 to October 2012.⁶ AG ¶¶ 25(a) and 25(c) apply.

AG ¶ 26 provides for potentially applicable drug involvement mitigating conditions:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment;
- (b) a demonstrated intent not to abuse any drugs in the future, such as:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) an appropriate period of abstinence; and
 - (4) a signed statement of intent with automatic revocation of clearance for any violation.
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and
- (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

⁵AG ¶ 24(b) defines “drug abuse” as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

⁶AG ¶ 24(a) defines “drugs” as substances that alter mood and behavior, including:

- (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule (Sch.) I controlled substances. See Drug Enforcement Administration listing at http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

Applicant has not possessed and used marijuana since October 2012. His marijuana possession and use is not recent. Drug involvement trustworthiness concerns are mitigated.

Alcohol Consumption

AG ¶ 21 articulates the Government's concern about alcohol consumption, "[e]xcessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness."

Two alcohol consumption disqualifying conditions could raise a trustworthiness concern and may be disqualifying in this case. AG ¶¶ 22(a) and 22(c) provide:

(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent; and

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.

AG ¶¶ 22(b), 22(d), through 22(g) do not apply. There was no evidence of: alcohol impairment or intoxication at work; an alcohol abuse, alcohol dependence, or alcohol use disorder diagnosis; and failure to follow any court orders concerning alcohol use.

AG ¶¶ 22(a) and 22(c) apply. Applicant was cited or charged with DUI nine times from 1983 to 2011. He was convicted of DUI in 1989, 1993, and 2010. He also had arrests for other alcohol-related offenses such as driving with an open container of alcohol, underage drinking of alcohol, and public intoxication. He engaged in binge alcohol consumption to the extent of impaired judgment.⁷

Four Alcohol Consumption Mitigating Conditions under AG ¶¶ 23(a)-23(d) are potentially applicable:

(a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

⁷ The term "binge" drinking is not defined in the Adjudicative Guidelines. "Binge drinking is the most common pattern of excessive alcohol use in the United States. See the Center for Disease Control website, (stating "The National Institute on Alcohol Abuse and Alcoholism defines binge drinking as a pattern of drinking that brings a person's blood alcohol concentration (BAC) to 0.08 grams percent or above. This typically happens when men consume 5 or more drinks, and when women consume 4 or more drinks, in about 2 hours." <https://www.cdc.gov/alcohol/fact-sheets/binge-drinking.htm>).

(b) the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser);

(c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and

(d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

AG ¶ 23(b) applies. There is no evidence of irresponsible alcohol consumption after Applicant's DUI arrest in 2011. He has received some alcohol-related counseling over the years.

Trustworthiness and security clearance cases are difficult to compare, especially under Guideline G, because the facts, degree, and timing of the alcohol abuse and rehabilitation show many different permutations. The DOHA Appeal Board has determined in cases of substantial alcohol abuse that AG ¶ 23(b) did not mitigate trustworthiness or security concerns unless there was a fairly lengthy period of abstaining from alcohol consumption. See ISCR Case No. 06-17541 at 3-5 (App. Bd. Jan. 14, 2008); ISCR Case No. 06-08708 at 5-7 (App. Bd. Dec. 17, 2007); ISCR Case No. 04-10799 at 2-4 (App. Bd. Nov. 9, 2007).

I have carefully considered the Appeal Board's jurisprudence on alcohol consumption and Applicant's history of alcohol consumption. He has a sustained period of responsible alcohol consumption. His alcohol consumption has not been the primary cause of any incidents involving the police, courts, or at his employment since 2011. Applicant has eliminated doubts about his current reliability, trustworthiness, and good judgment in relation to his alcohol consumption. Alcohol consumption trustworthiness concerns are mitigated.

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 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 ¶ 16 describes two conditions that could raise a trustworthiness concern and may be disqualifying in this case:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing. . . .

From 1981 to 2011, Applicant was involved in 25 incidents involving the police and/or the courts. He was convicted of 14 offenses. AG ¶¶ 16(d)(3) and 16(e) are established.

AG ¶ 17 lists four conditions that could mitigate trustworthiness concerns in this case:

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant engaged in a lengthy series of traffic violations and crimes from 1983 to 2011. Some of the arrests, charges, and citations did not result in convictions or findings

of guilty. His misconduct is not recent. AG ¶¶ 17(c) and 17(e) apply, and personal conduct trustworthiness concerns are mitigated.

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 all the circumstances. 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.

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. AG ¶ 2(c). I have incorporated my comments under Guidelines F, H, G, 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 is a 54-year-old customer service clerk employed by the same contractor since 2002. His youngest four children are ages 15, 18, 21, and 25. He attended a business college. He has a real estate license and a bookkeeper certificate. Several of Applicant's family members served in the military, and Applicant enjoys supporting the military. His human resources director described Applicant as "an employee in good standing." (AE A) He is a trustworthy employee and "has not had any performance or attendance issues." (AE A)

Several circumstances beyond his control adversely affected his finances: after the death of his fiancée, he became solely responsible for his four youngest children; he had litigation expenses related to child custody; and he was the victim of fraud. He took action to attempt to verify his responsibility for his debts, and he made some payments.

Applicant has not filed his state and federal tax returns for several years.⁸ He also owes about \$4,000 in taxes.

⁸The recent emphasis of the Appeal Board on security and trustworthiness concerns arising from tax cases is instructive. See ISCR Case No. 14-05794 at 7 (App. Bd. July 7, 2016) (reversing grant of security clearance and stating, "His delay in taking action to resolve his tax deficiency for years and then taking action only after his security clearance was in jeopardy undercuts a determination that Applicant has rehabilitated himself and does not reflect the voluntary compliance of rules and regulations expected of someone entrusted with the nation's secrets."); ISCR Case No. 14-01894 at 2-6 (App. Bd. Aug. 18,

It is well settled that once a concern arises regarding an applicant's eligibility for a public trust position, there is a strong presumption against the grant or renewal of access to sensitive information. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated financial considerations concerns lead me to conclude that grant of access to sensitive information to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a public trust position in the future. With a track record of behavior consistent with his obligations, he may well be able to demonstrate persuasive evidence of his worthiness for a public trust position.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Drug involvement, personal conduct, and alcohol consumption trustworthiness concerns are mitigated; however, financial considerations concerns are not mitigated.

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:	FOR APPLICANT
Subparagraphs 1.a through 1.y:	For Applicant
Paragraph 2, Guideline G:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline H:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

2015) (reversing grant of a security clearance, discussing lack of detailed corroboration of circumstances beyond applicant's control adversely affecting finances, noting two tax liens totaling \$175,000 and garnishment of Applicant's wages, and emphasizing the applicant's failure to timely file and pay taxes); ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014) (reversing grant of a security clearance, noting not all tax returns filed, and insufficient discussion of Applicant's efforts to resolve tax liens). More recently, in ISCR Case No. 14-05476 (App. Bd. Mar. 25, 2016) the Appeal Board reversed a grant of a security clearance for a retired E-9 and cited applicant's failure to timely file state tax returns for tax years 2010 through 2013 and federal returns for tax years 2010 through 2012. Before his hearing, he filed his tax returns and paid his tax debts except for \$13,000, which was in an established payment plan. The Appeal Board highlighted his annual income of over \$200,000 and discounted his non-tax expenses, contributions to DOD, and spouse's medical problems. The Appeal Board emphasized "the allegations regarding his failure to file tax returns in the first place stating, it is well settled that failure to file tax returns suggest that an applicant has a problem with complying with well-established government rules and systems. Voluntary compliance with such rules and systems is essential for protecting classified information." *Id.* at 5 (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002) (internal quotation marks and brackets omitted). See also ISCR Case No. 14-03358 at 3, 5 (App. Bd. Oct. 9, 2015) (reversing grant of a security clearance, noting \$150,000 owed to the federal government, and stating "A security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly failure to honor other obligations to the Government has a direct bearing on an applicant's reliability, trustworthiness, and ability to protect classified information.").

Paragraph 4, Guideline F:	AGAINST APPLICANT
Subparagraphs 4.a through 4.c:	Against Applicant
Subparagraphs 4.d through 4.q:	For Applicant

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 sensitive information is denied.

Mark Harvey
Administrative Judge