



**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. 16-01663

Appearances

For Government: Tovah Minster, Esq., Department Counsel

For Applicant: *Pro se*

12/14/2017

Decision

RIVERA, Juan J., Administrative Judge:

It has been over two years since Applicant's driving while intoxicated (DWI) arrestd. There is no evidence of any subsequent alcohol-related incidents or issues of concern. He pleaded guilty and successfully participated in a substance abuse training program. He disclosed his misconduct to his supervisors and discussed the offense with a government investigator. He is remorseful about his DWI conviction, and promised not to repeat his behavior. He has learned his lesson from his past mistake. He mitigate the trustworthiness concerns under Guidelines G (alcohol consumption) and J (criminal conduct). Eligibility to hold a position of trust is granted.

Statement of the Case

Applicant submitted an electronic questionnaire (Application) requesting eligibility for a position of trust (automatic data processing (ADP) position) on September 19, 2015. The Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) listing trustworthiness concerns under Guidelines G and J on September 22, 2016.

Applicant answered the SOR on October 22, 2016, and elected to have his case decided on the written record in lieu of a hearing. A copy of the Government's file of relevant material (FORM), adducing the evidence supporting the trustworthiness concerns, was provided to him by letter dated November 25, 2016. Applicant received the FORM on February 14, 2017. He was allowed 30 days to submit any objections to the FORM and to provide material in explanation, extenuation, and mitigation. He did not respond to the FORM and submit no objections. The case was assigned to me on October 1, 2017. I admitted the FORM evidence and have considered it.

Findings of Fact

In his Answer, Applicant admitted the Guideline G allegation in SOR ¶ 1.a (driving while intoxicated (DWI) in October 2015), and the cross-allegation under Guideline J (SOR ¶ 2.a). His SOR admissions are incorporated herein as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is a 30-year-old employee of a federal contractor. He graduated from high school on an unspecified date, and received his bachelor's degree in 2010. He married in June 2010 and separated in August 2015.

Applicant's employment history shows that he was employed part time between 2006 and 2011, during and after he was in college. He has been employed full time since September 2011. His current employer, a federal contractor, hired Applicant in February 2012. This is his first application for a position of trust.

In October 2015, Applicant was charged with DWI. He pleaded guilty, and the presiding judge suspended the imposition of the sentence. In February 2016, he was placed on unsupervised probation for a period of 24 months. Applicant was also required to attend a Victim's Impact Panel and a Substance Abuse Traffic Offenders Program, and to pay a fine and court costs. He complied with all the terms of his sentence, except for the unsupervised probation. He is anticipated to remain on probation until February 2018.

Concerning the DWI, Applicant explained that his wife had recently left him after a 13-year relationship. The night of the DWI was the first time he "had been out" after she moved out of the home. Applicant acknowledged that his explanation was not an excuse for his misconduct, but that he hoped it would explain his aberrational behavior. He implied that this was not his normal behavior. Applicant stated that he voluntarily disclosed his DWI to his employer and to a government investigator. Applicant believes that the end of his marriage created an unusual circumstance that led to his DWI, which will not repeat itself. He averred in his SOR answer that he has not been involved in any additional alcohol-related incidents after October 2015.

Policies

In issuing the SOR, DOD acted 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);¹ and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* implemented by DOD on September 1, 2006.

While the case was pending a decision, the Security Executive Agent implemented Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017, which replaced the 2006 AG, and are applicable to all adjudicative decisions issued on or after June 8, 2017. I decided this case under the current AGs implemented by SEAD 4.

The DOD considers ADP positions to be “sensitive positions.” For a person to be eligible for sensitive duties, the person’s loyalty, reliability, and trustworthiness must be such that assigning the person to a sensitive position is clearly consistent with the national security interests of the United States. AG ¶ 2.c. Applicants for ADP positions are entitled to the procedural protections in the Directive before any final unfavorable access determination is made. (Under Secretary of Defense’s Memorandum for the Director, Defense Office of Hearings and Appeals, dated November 19, 2004)

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 with 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.

A public trust position decision resolves whether it is clearly consistent with the interests of national security to grant or continue an applicant’s access to sensitive information. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national security interest of the United States to grant or continue his or her access to sensitive information.

Persons with access to sensitive information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment,

¹ ADP cases are adjudicated under the provisions of the Directive. (Deputy Under Secretary of Defense’s Memorandum for the Director, Defense Office of Hearings and Appeals, dated November 19, 2004.)

reliability, and trustworthiness of those who must protect national security as their own. The “clearly consistent with the interests of national security” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” AG ¶ 2(b). Eligibility for a public trust position decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing access to sensitive information.

Analysis

Alcohol Consumption

AG ¶ 21 articulates the security concern relating to alcohol consumption:

Excessive 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

In October 2015, shortly after submitting his application, Applicant was charged with DWI. He pleaded guilty to DWI in February 2016. He complied with all the terms of his sentence, except for the 24 months unsupervised probation. He is anticipated to remain on probation until February 2018. AG ¶ 22 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case:

(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 the frequency of the individual's alcohol use or whether the individual has been diagnosed with alcohol use disorder, and

(c) habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with alcohol use disorder.

The record established the above disqualifying condition, requiring additional inquiry about the possible applicability of three mitigating conditions under AG ¶ 23:

(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 judgment;

(b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified

consumption or abstinence in accordance with treatment recommendations;

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

(d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

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 security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. 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 security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified 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).

All the above mitigating conditions apply. The DWI happened in October 2015. It has been over two years since Applicant's last alcohol-related incident. There is no additional evidence of any alcohol-related incidents or issues of concern. Applicant pleaded guilty and successfully participated in counseling or a substance abuse training program. He disclosed his misconduct to his supervisors and discussed the offense with a government investigator. Applicant's statements in his answer to the SOR indicate he was remorseful about his DWI conviction. He acknowledged the possible danger he could have caused to others with his misconduct, and promised not to repeat his behavior. It appears he has learned his lesson from his past mistake.

Guideline J, Criminal Conduct

Under Guideline J, the concern is that criminal activity "creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations." AG ¶ 30.

The SOR cross-alleged the same facts and circumstances alleged under Guideline G under Guideline J - Applicant's 2016 DWI conviction. He complied with all the terms of his sentence, except for the 24 months unsupervised probation. He is anticipated to remain on probation until February 2018. Applicant averred that he has not been involved in any alcohol-related misconduct since October 2015.

Applicant's criminal behavior raises security concerns under AG ¶ 31:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; and
- (c) the individual is currently on parole or probation.

AG ¶ 32 lists two conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31:

- (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, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

AG ¶ 32(a) and (d) apply and mitigate the criminal misconduct security concerns. Applicant's DWI occurred in October 2015. It has been two years since the offense and Applicant complied with the terms of his sentence, except for the 24-months unsupervised probation, which expires in February 2018. There is no evidence of any additional questionable behavior.

In his answer to the SOR, Applicant presented some evidence showing that he is on the right track to establish his successful rehabilitation. He pleaded guilty to the offense; noted that his wife leaving him may have prompted his aberrational behavior; and wisely acknowledged that she leaving him was not an excuse for his criminal behavior.

This was Applicant's first offense, and there is no evidence of additional misconduct or alcohol-related incidents. The sentence as a whole, including the extent of the substance abuse training Applicant was required to attend, indicates the presiding judge considered his misconduct serious, but not egregious. Applicant's statements in his answer to the SOR indicate he was remorseful about his DWI conviction. He acknowledged the possible danger he could have caused to others, and promised not to repeat his behavior. It appears he has learned his lesson from his past mistake.

I specifically considered that Applicant will be on probation until February 2018. His probation should be over about two and one-half months after the date of my decision. Considering the evidence as a whole, I find that Applicant's 2015 DWI no longer creates a doubt about his judgment, reliability, trustworthiness, and his willingness and ability to comply with laws, rules, and regulations.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶¶ 2(a) and 2(d). I have incorporated my comments under Guidelines G and J in my whole-person analysis. Some of these factors were addressed under those guidelines, but some warrant additional comment.

Applicant started working for a federal contractor in 2012, and this is his first trustworthiness application. He is now fully aware that for him to be eligible for a position of trust, he will be required to demonstrate his trustworthiness, character, honesty, and good judgment. Any future criminal behavior will destroy the trust placed upon him by the Government and show that he is unreliable, untrustworthy, and lacks judgment. The alcohol consumption and criminal conduct trustworthiness concerns are 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 G:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is in the interest of national security to grant eligibility for a position of trust to Applicant. Eligibility for a position of trust is granted.

JUAN J. RIVERA
Administrative Judge