



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



In the matter of:

ADP¹Case No. 16-02157

Applicant for Public Trust Position

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel

For Applicant: *Pro se*

November 1, 2017

Decision

MOGUL, Martin H., Administrative Judge:

Statement of the Case

On December 21, 2016, in accordance with Department of Defense (DoD) Directive 5220.6, as amended (Directive), the DoD issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guidelines F and E.² (Item 1.) The SOR further informed Applicant that, based on information available to the government, DoD adjudicators could not make the preliminary affirmative finding it is clearly consistent with the national interest to grant or continue Applicant's access to sensitive personal information.

On January 6, 2017, Applicant submitted a written reply to the SOR (RSOR), and he requested that his case be decided on the written record in lieu of a hearing. (Item 1.) On March 1, 2017, Department Counsel issued the Department's written case. A

¹ The Statement of Reasons incorrectly cited this case as an ISCR case, but it is an ADP case.

² I considered the previous Adjudicative Guidelines, effective September 1, 2006, as well as the new Adjudicative Guidelines, effective June 8, 2017. My decision would be the same if the case was considered under the previous Adjudicative Guidelines, effective September 1, 2006.

complete copy of the file of relevant material (FORM) was provided to Applicant. In the FORM, Department Counsel offered four documentary exhibits. (Items 1-4.) Applicant was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. A response was due on April 26, 2017. Applicant submitted no additional evidence. The case was assigned to this Administrative Judge on October 1, 2017. Based upon a review of the pleadings and exhibits, national security eligibility for access to sensitive information is denied.

Findings of Fact

After a thorough and careful review of the pleadings, and exhibits, I make the following findings of fact:

Applicant is 35 years old. He is married and has two children. He obtained an Associate's degree in 2003. He is employed as a field support technician by a defense contractor, and he seeks access to sensitive information in connection with his employment in the defense sector. (Item 2.)

Guideline F, Financial Considerations

The SOR lists five allegations (1.a. through 1.e.) regarding financial difficulties, specifically regarding gambling issues, under Adjudicative Guideline F. The allegations will be discussed below in the order they were listed on the SOR:

1.a. The SOR alleges that from approximately 2000 through at least October 2016, Applicant has engaged in compulsive gambling with varying frequency, which has resulted in the loss of at least \$77,000. Applicant admitted this allegation in his RSOR. (Item 1.)

1.b The SOR alleges that from April 2006 to December 2006, Applicant received treatment for a condition diagnosed as gambling addiction. Applicant admitted this allegation in his RSOR. (Item 1.)

1.c. The SOR alleges that since at least 2015, Applicant has continued to gamble notwithstanding his treatment, as set for the in subparagraph 1.b., above for his gambling addiction. Applicant admitted this allegation in his RSOR. (Item 1.)

1.d. The SOR alleges that Applicant has borrowed money from various sources to finance his gambling habit. Applicant admitted this allegation in his RSOR. (Item 1.)

1.e. The SOR alleges that in about March 2006, Applicant stole approximately \$3,000 from his employer to use for gambling. Applicant was arrested and charged with Felony Theft. Applicant plead guilty to the charge and was sentenced to five years of probation, 13 months of confinement and court-ordered gambling treatment. Applicant admitted this allegation in his RSOR. (Item 1.)

Guideline E, Personal Conduct

The SOR lists three allegations (2.a. through 2.c.) regarding Personal Conduct, under Adjudicative Guideline E. The allegations will be discussed below in the order they were listed on the SOR:

2.a. The SOR alleges that in about April 2001, Applicant was charged with Theft –Shoplifting, and he plead guilty to the charge. Applicant admitted this allegation in his RSOR. (Item 1.)

2.b. The SOR alleges that in about October 2001, Applicant was arrested and charged with Theft – Take/Drive Motor Vehicle – No owner consent. He plead guilty to the charge. Applicant admitted this allegation in his RSOR. (Item 1.)

2.c. The SOR alleges that the information set forth in subparagraphs 1.a. through 1.e., above also has Personal Conduct concerns. Applicant admitted this allegation in his RSOR. (Item 1.)

Policies

The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to the DoD and DOHA by the Defense Security Service and Office of Personnel Management. DoD contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made.

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AGs. 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(d), describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the whole-person concept. The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to national security eligibility will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. 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. Under Directive ¶ E3.1.15, the 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. . . .” The applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

A person who applies 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 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.

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

Failure 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 classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. Because Applicant has had gambling problems for many years, even after he went through a gambling rehabilitation program and as recently as at least 2016, and because these gambling problems caused him other serious financial difficulties, I find that the evidence is sufficient to raise disqualifying conditions (a), (c) (d), (h), and (i) as applicable in this case:

(a) inability to satisfy debts;

(b) unwillingness to satisfy debts regardless of the ability to do so;

- (c) a history of not meeting financial obligations;
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, expense account fraud, mortgage fraud, filing deceptive loan statements and other intentional financial breaches of trust;
- (e) consistent spending beyond one's means or frivolous or irresponsible spending, which may be indicated by excessive indebtedness, significant negative cash flow, a history of late payments or of non-payment, or other negative financial indicators;
- (f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required;
- (g) unexplained affluence, as shown by a lifestyle or standard of living, increase in net worth, or money transfers that are inconsistent with known legal sources of income;
- (h) borrowing money or engaging in significant financial transactions to fund gambling or pay gambling debts; and
- (i) concealing gambling losses, family conflict, or other problems caused by gambling.

AG ¶ 20 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 20 including:

- (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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
- (c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts;

(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;

(f) the affluence resulted from a legal source of income; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

No evidence was introduced to establish that Applicant's gambling issues are under control. Therefore, I do not find that any of the mitigating factors under AG ¶ 20 are applicable in this case, and I find against for Applicant under Guideline F.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. Because of Applicant's gambling issues as reviewed above under Guideline F, plus the two arrests for criminal acts of theft in 2001, I find that the evidence is sufficient to raise disqualifying conditions (c) and (d), in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(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 individual may not properly safeguard classified or sensitive information;

(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 individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;

- (2) any disruptive, violent, or other inappropriate behavior;

- (3) a pattern of dishonesty or rule violations; and

- (4) evidence of significant misuse of Government or other employer's time or resources;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

- (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing;

- (2) while in another country, engaging in any activity that is illegal in that country;

- (3) while in another country, engaging in any activity that, while legal there, is illegal in the United States;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

AG ¶ 17 provides conditions that could mitigate security concerns. I considered all of the mitigating conditions under AG ¶ 17 listed below, but did not find that any of them are applicable in this case.

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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 contributed to 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;

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

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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 national security eligibility for access sensitive information clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. I have incorporated my comments under Guidelines F and E in my whole-person analysis.

Overall, the record evidence leaves me with significant questions and doubts as to Applicant's eligibility and suitability for access sensitive information. For all these reasons, I conclude Applicant has not mitigated the Financial Considerations and Personal Conduct trustworthiness concerns under the whole-person concept.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a.:	Against Applicant
Subparagraph 1.b.:	Against Applicant
Subparagraph 1.c.:	Against Applicant
Subparagraph 1.d.:	Against Applicant
Subparagraph 1.e.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Subparagraph 2.b.:	Against Applicant
Subparagraph 2.c.:	Against Applicant

Conclusion

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

Martin H. Mogul
Administrative Judge