



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



In the matter of:)	
)	
[NAME REDACTED])	ADP Case No. 14-04509
)	
Applicant for Position of Trust)	

Appearances

For Government: Gina Marine, Esq., Department Counsel
For Applicant: *Pro se*

11/21/2015

Decision

MALONE, Matthew E., Administrative Judge:

Applicant mitigated the trustworthiness concerns raised by his financial problems. Despite the presence of other debts not alleged in this case, he is taking sufficient steps to resolve his debts and ensure similar financial problems do not recur. However, Applicant failed to mitigate the concerns related to a drug-related arrest and his long history of using marijuana. His request for eligibility to occupy a position of trust is denied.

Statement of the Case

On April 16, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to obtain eligibility for an ADP I/II/III position¹ for his

¹ As defined in Chapter 3 and Appendix 10 of DOD Regulation 5200.2-R, as amended (Regulation).

job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Department of Defense (DOD) were unable to determine that it is clearly consistent with the interests of national security to grant Applicant's request for a position of trust.²

On February 4, 2015, DOD issued Applicant a Statement of Reasons (SOR) alleging facts which raise trustworthiness concerns addressed through the adjudicative guidelines (AG)³ for financial considerations (Guideline F), drug involvement (Guideline H), and criminal conduct (Guideline J). Applicant timely responded to the SOR (Answer) and requested a hearing. The case was assigned to me on July 9, 2015, and I convened a hearing on August 5, 2015. Department Counsel for the Defense Office of Hearings and Appeals (DOHA) presented Government Exhibits (Gx.) 1 - 7.⁴ Applicant and one other witness testified. Applicant also presented Applicant's Exhibits (Ax.) A - C. I held the record open after the hearing to receive additional relevant information. The record closed on August 11, 2015, when I received a six-page submission included, without objection, as Ax. D.⁵ DOHA received the hearing transcript (Tr.) on August 13, 2015.

Findings of Fact

Under Guideline F, the Government initially alleged that Applicant owes \$15,602 for 10 delinquent or past-due debts (SOR 1.a - 1.j). On March 10, 2015, Applicant responded by admitting with explanations all of the Guideline F allegations. On June 11, 2015, Department Counsel amended the SOR to add as SOR 1.k a past-due student loan debt for \$78,752, which Applicant admitted with an explanation.⁶

Under Guideline H, the Government alleged that Applicant used marijuana between June 1997 and December 2012 (SOR 2.a); that in May 2009, Applicant pleaded guilty to a misdemeanor charge of marijuana possession and was ordered to complete a drug rehabilitation program (SOR 2.b); and that after Applicant was diagnosed with cannabis dependence in May 2010, he used marijuana again in December 2012 (SOR 2.c). Under Guideline J, the drug-related criminal offenses alleged at SOR 2.a and 2.b were cross-alleged as criminal conduct (SOR 3.a). Applicant admitted with explanations the Guideline H and Guideline J allegations.

² Required by the Regulation, as amended, and by DOD Directive 5220.6, as amended (Directive).

³ The adjudicative guidelines were implemented by DOD on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

⁴ Department Counsel provided a copy of the letter forwarding to Applicant advance copies of Gx. 1 - 7, included as Hearing Exhibit (Hx.) 1, and a list identifying Gx. 1 - 7 (Hx. 2).

⁵ Department Counsel's memorandum forwarding Ax. D and waiving objection thereto is included as Hx. 3.

⁶ Department Counsel's amendment and Applicant's response thereto are included as Hx. 4.

In addition to the facts established by Applicant's admissions, and based on all available information, I make the following findings of fact.

Applicant is 36 years old and is employed by a defense contractor in an information technology (IT) position that requires eligibility for a position of trust. His employer supports management of the health care system used by members of the military. Applicant must be found suitable to be entrusted with personally identifiable information (PII) associated with the health care system's constituents. Applicant has a bachelor's degree in computer science earned in 2002, and he was hired for his current position in March 2013. Applicant has solid workplace reputation for reliability, expertise, and integrity. (Answer; Gx. 1; Ax. A)

From March 2003 until March 2011, Applicant worked in an IT position at a national business and financial systems corporation. However, when his position was relocated, he could not move and accepted a severance package. Applicant was unemployed until May 2011, when he was hired for IT work at a national cable television company. In July 2012, he again found himself unemployed when his position was relocated to another state. Other than occasional part-time work as a painter, Applicant was unemployed until he was hired for his current job eight months later. Before March 2011, Applicant earned about \$43,000 annually. In his current job, he earns about \$54,000 annually. (Answer; Gx. 1; Tr. 46 - 47, 50 - 57)

Applicant and his wife have been married since September 2009, and they have one infant child together. She is a civilian employee of the National Guard as well as a technical sergeant (E-6) in the U.S. Air Force Reserve. She earns about \$3,000 monthly in her civilian job, but earns about \$6,000 when on active duty. Applicant's wife was deployed overseas for four months in 2012. She expects to be deployed overseas a second time in late 2015 or early 2016. (Answer; Tr. 89, 110 - 112)

When Applicant submitted his EQIP, he disclosed five past-due debts. Credit reports obtained during his background investigation reflect all of the debts alleged in the SOR. The debts are for accounts opened in 2008 or 2009. Applicant acknowledged that he was over-extended financially when he lost his job in 2011. He and his wife had bought a house in 2008, and were not able to move to keep his job. In 2011, Applicant also was unable to pay his income taxes and incurred a \$10,000 debt to the IRS that was enforced through a lien. Further, Applicant became delinquent on the student loans he used to finance his college education. (Answer; Gx. 1 - 6; Tr. 46 - 48, 58 - 60)

Applicant paid the debt at SOR 1.g, and is in a repayment plan for another collection account debt (SOR 1.e). Applicant is in a repayment plan for his tax debts, and he is in a student loan rehabilitation program to resolve his tuition debts. Earlier this year, Applicant retained the services of a debt consolidation and financial counseling firm. Through a debt management plan (DMP), Applicant is repaying four other debts, paying \$344 each month. Available information shows Applicant has been making regular payments on his DMP and other repayment plans. He also has received advice on personal financial management from that company, and has not incurred any

new delinquent debt. However, Applicant acknowledged at hearing that his mortgage was about a month past due. (Answer; Ax. B; Ax. D; Tr. 48 - 50, 104 - 106)

Applicant also disclosed in his EQIP that he started smoking marijuana in 1997, but that he stopped in December 2012. In May 2009, Applicant was arrested and charged with misdemeanor possession of marijuana. He pleaded guilty and was placed on 12 months probation. Applicant's driver's license was suspended for 12 months and he was ordered to complete drug counseling as a condition of his probation and having his license restored. Evaluations and counseling records show that he was diagnosed as being cannabis dependent, and that he was told he should abstain from future marijuana use. Applicant denies being aware of that diagnosis, but the discharge summary shows that he was given a copy of the diagnosis and that he discussed a plan for remaining abstinent with his counselor. Citing the stress of his wife's overseas deployment, Applicant used marijuana more than once in 2012. Applicant claims his marijuana use over the years was not constant and that he stopped for long periods when he was seeking employment and had to pass pre-employment drug screening. Applicant still has occasional contact with friends with whom he used marijuana and who still use marijuana. (Answer; Gx. 1; Gx. 2; Gx. 7; Tr. 82 - 98)

Applicant has a solid record at work. He has a reputation for reliability and professionalism. He is pleasant to work with and has a good work ethic. Some of his personal references are aware of his financial problems, but there is no indication he has informed anyone he used marijuana. (Ax. A)

Policies

Positions designated as ADP I and II are classified as "sensitive positions."⁷ In deciding whether a person should be assigned to an ADP position, it must be determined that his or her loyalty, reliability, and trustworthiness are such that it is "clearly consistent with the interests of national security" to do so.⁸ The Regulation also requires that DOD contractor personnel are entitled to the procedural protections in the Directive before any adverse determination may be made.⁹

The Directive requires that each decision be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,¹⁰ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of eligibility for a position of trust. Decisions must also reflect

⁷ Regulation, ¶ C3.6.15.

⁸ Regulation, ¶ C6.1.1.1.

⁹ Regulation, ¶ C8.2.1.

¹⁰ Directive. 6.3.

consideration of the factors, commonly referred to as the “whole-person” concept, listed in the guidelines at AG ¶ 2(a).¹¹

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a position of trust for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government’s case. Because no one is entitled to a position of trust, an applicant bears a heavy burden of persuasion. A person who has access to sensitive information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring applicants possess the requisite judgment, reliability, and trustworthiness of one who will protect sensitive information as his or her own. Any reasonable doubt about an applicant’s suitability for access should be resolved in favor of the Government.

Analysis

Financial Considerations

Available information is sufficient to support all of the SOR allegations under this guideline. Applicant accrued delinquent debts starting when he could not relocate with his job in 2011. Those debts had not been paid or otherwise resolved when the SOR was issued in 2015. These facts raise a trustworthiness concern about Applicant’s finances that is expressed, in relevant part, at AG ¶ 18, as follows:

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 classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

More specifically, available information requires application of the disqualifying conditions at AG ¶¶ 19(a) (*inability or unwillingness to satisfy debts*); and 19(c) (*a history of not meeting financial obligations*).

Additionally, I have considered the following pertinent AG ¶ 20 mitigating conditions:

(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

¹¹ “(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.”

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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.¹²

Applicant's financial problems continue because he still has several unresolved debts; however, his current professional and personal circumstances have made it possible for him to address his debts. Applicant's debts arose from, or were exacerbated by loss of income due to loss of employment in 2011 and 2012, and in part, by the fact he was overextended financially when he lost his job. Applicant's lack of meaningful income for the eleven months before he was hired by his current employer were largely circumstances beyond his control. In the past year, Applicant has established repayment plans for some of his debts as his ability to pay has allowed. He also received professional advice about managing his personal finances. Although he does not have significant positive cash flow each month, his corrective efforts in this regard, and his candor about all facets of his finances, show good judgment and make it unlikely he will experience such financial problems in the future. All of the cited mitigating conditions apply, and on balance, the security concerns about Applicant's finances are mitigated.

Drug Involvement

Available information about Applicant's use of marijuana reasonably raises the trustworthiness concern expressed at AG 24, as follows:

Use 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.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or

¹² The mitigating conditions at AG ¶¶ 20(e) and 20(f) are not pertinent to these facts and circumstances.

cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

More specifically, Applicant's drug use requires application of the disqualifying conditions at AG ¶¶ 25(a) (*Any drug abuse (see above definition)*); 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*); and 25(e) (*evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program*).

I have also considered the potential applicability of the following pertinent mitigating conditions under AG ¶ 26:

(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; and

(b) a demonstrated intent not to abuse any drugs in the future, such as: (1) dissociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant has used marijuana with varying frequency for most of his adult life. After being arrested for drug possession, a court-ordered clinical evaluation resulted in a diagnosis of cannabis dependence. Nonetheless, he renewed his use of marijuana in 2012, but stopped, as he had before, because he needed to pass a pre-employment drug screening. Additionally, Applicant is still in contact with friends with whom he used marijuana. Abstinence of three years might, under other circumstances, be sufficient to mitigate the this trustworthiness concern; however, because Applicant's previous periods of abstinence have only been undertaken for employment needs, it is reasonable to conclude that Applicant will resume using marijuana when he knows he will not be tested. As an employee of a defense contractor, Applicant is subject to a zero-tolerance policy regarding drug use. I am not confident, given his past conduct in this regard, that he will continue to abstain from illegal drug use. Applicant's response to the Government's information does not support application of the cited mitigating conditions under this guideline. On balance, I conclude he has not mitigated the trustworthiness concerns about his drug use.

Criminal Conduct

Available information about Applicant's drug-related arrest and his continued involvement with illegal drugs thereafter is sufficient to raise trustworthiness concerns about criminal conduct. Those concerns are expressed at AG 30, as follows:

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.

More specifically, Applicant's conduct requires application of the disqualifying conditions at AG ¶¶ 31(a) (*a single serious crime or multiple lesser offenses*) and 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*). I have also considered the potential application of the following pertinent mitigating conditions under AG ¶ 32:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; 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.

I conclude these mitigating conditions do not apply for the same reasons the AG 26 mitigating conditions do not apply. Applicant has not otherwise presented information sufficient to mitigate the trustworthiness concerns about his drug-related criminal conduct.

I have evaluated the facts and have applied the appropriate adjudicative factors under Guidelines F, H, and J. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Specifically, I note Applicant's positive response to his financial problems. He has the support of his co-workers and others who feel he is of good character and reliability. However, there are lingering concerns about his willingness to use illegal drugs, even after his arrest and diagnosis of drug dependence. Because Applicant did not sufficiently address this facet of the Government's trustworthiness concerns, doubts about his suitability for a position of trust remain. The positive information about his workplace performance and reputation for reliability is not sufficient to overcome those doubts. Because protection of national security is the principal focus of these adjudications, any remaining doubts must be resolved against the Applicant.

Formal Findings

Formal findings 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 F:	FOR APPLICANT
Subparagraphs 1.a - 1.k:	For Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a - 2.c:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the interests of national security for Applicant to occupy a position of trust. Applicant's request for ADP eligibility is denied.

MATTHEW E. MALONE
Administrative Judge