



**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. 14-05939

Appearances

For Government: Richard A. Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

07/31/2015

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant has mitigated the trustworthiness concerns regarding criminal conduct. Eligibility to occupy a public trust position is granted.

Statement of the Case

On March 13, 2014, Applicant applied for a public trust position and submitted an Electronic Questionnaire for Investigations Processing (e-QIP).¹ On January 22, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, pursuant to DOD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended and modified (Regulation); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (effective within the DOD on September 1, 2006) (AG) for all adjudications and other determinations made under the Directive. The SOR alleged trustworthiness concerns under Guideline J (Criminal Conduct), and detailed reasons why the DOD adjudicators could not make a preliminary

¹ Government Exhibit 1 (e-QIP, dated March 13, 2014).

affirmative finding under the Directive that it is clearly consistent with the interests of national security to grant or continue Applicant's eligibility for occupying a public trust position to support a contract with the DOD, and recommended referral to an administrative judge to determine whether such eligibility should be granted, continued, denied, or revoked.

It is unclear when Applicant received the SOR as there is no receipt in the case file. In a written statement, notarized on February 18, 2015, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on May 26, 2015. The case was assigned to me on June 1, 2015. A Notice of Hearing was issued on June 5, 2015, scheduling the hearing for June 24, 2015. I convened the hearing, as scheduled.

During the hearing, four Government exhibits (GE 1 through GE 4) were admitted into evidence, without objection. Applicant testified. The transcript (Tr.) was received on July 1, 2015. I kept the record open to enable Applicant to supplement it, and he submitted documents which were marked and accepted as Applicant exhibits (AE) A through AE H, without objection. The record closed on July 15, 2015.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations pertaining to criminal conduct (§ 1.a.) of the SOR. Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact.

Applicant is a 34-year-old employee of a defense contractor, and he is seeking to retain his eligibility for occupying a public trust position to support a contract with the DOD. He has never served in the U.S. military.² He is a 1999 high school graduate with periodic attendance at two technical and community colleges, but no degree.³ Applicant joined his current employer in March 2013, initially as a data entry clerk, but was subsequently promoted to a leadership specialist position,⁴ and he has been serving in a part-time position, initially as a crew member, but now as a shift lead, with a fast-food restaurant.⁵ Applicant was married in 2001 and divorced in 2012.⁶ He has a daughter, born in 2002, and a son, born in 2004.⁷

² GE 1, *supra* note 1, at 15.

³ GE 1, *supra* note 1, at 9-10; GE 2 (Personal Subject Interview, dated April 17, 2014), at 4; Tr. at 5.

⁴ GE 1, *supra* note 1, at 10-11; Applicant's Answer to the SOR, dated February 18, 2015, at 2; AE E (Letter, dated July 14, 2015).

⁵ GE 1, *supra* note 1, at 11-12; GE 2, *supra* note 3, at 4; Applicant's Answer to the SOR, *supra* note 4, at 2. At one point, Applicant was awarded Employee of the Month. See AE D (Statement, dated July 13, 2015).

⁶ GE 1, *supra* note 1, at 17.

⁷ GE 1, *supra* note 1, at 23.

Criminal Conduct

On January 21, 2004, Applicant, his older brother, a former coworker (Mr. X), and another individual (Mr. Z), were “hanging out” at a convenience store and playing pool. They eventually departed. While in the car that Applicant was driving, Applicant’s brother suggested that they rob the convenience store. Applicant failed to object because he did not want to embarrass himself or subject himself to subsequent derisive actions or name-calling. While Applicant remained in the vehicle, the other three individuals, armed with a revolver, a pistol, and a shotgun, robbed the convenience store, taking a safe from it. Approximately \$2,000 to \$4,000 was retrieved from the safe and distributed among the robbery participants. Applicant received \$300.⁸

On a later date, Applicant learned that Mr. Z had been arrested and would inform the police as to the details of the robbery if Applicant failed to bail him out of jail. Applicant took no action. A short time later, the police called Applicant and told him to come to the police station. While there, he was shown the surveillance video of the robbery. Applicant confessed as to the details of the robbery, including his participation in it. On March 12, 2004, Applicant was charged with (1) armed robbery, (2) possession of a weapon during a violent crime, and (3) safecracking. He remained in the county jail for four days before being bailed out. The charges were eventually dismissed and the case was referred to federal authorities for further action.⁹

On February 25, 2005, Applicant was indicted by a grand jury for (1) interference with commerce by threat of violence (armed robbery), and (2) violent crime/drugs/machine gun (use of a firearm during a criminal act). Upon a plea agreement, Applicant entered a plea of guilty, and on August 2, 2005, he was convicted as charged. During the hearing, although Applicant did not enter the convenience store, and he did not possess a weapon during the robbery, the judge advised Applicant of the Hand of One doctrine.¹⁰ Because of his cooperation, Applicant was sentenced to imprisonment for 84 months (7 years), supervised release for 5 years, and ordered to pay an assessment of \$200 and restitution of \$1,000.¹¹ The other participants in the robbery were sentenced to imprisonment for 122 months.¹² Applicant satisfied the restitution and assessment requirements, and based on good behavior, in June 2011,

⁸ GE 2, *supra* note 3, at 8-9. Although Applicant estimated that \$2,000 was found in the safe, court records indicate that \$4,000 was the total amount of the theft. See GE 4 (U.S. District Court Record, various dates), at 5.

⁹ GE 3 (Federal Bureau of Investigation (FBI) Identification Record, dated March 28, 2014), at 2.

¹⁰ The “Hand of One” doctrine states that when a crime is committed the “hand of one is the hand of all.” That means that if two or more people work together to commit a crime, everyone in that group is responsible for all the acts of all the other members. For example, as in this instance, when two people agree to rob a store, and the person who goes into the store robs the clerk using a weapon, then the get-away driver can be charged with armed robbery as well, even though he never even went into the store, and didn’t possess a weapon. GE 2, *supra* note 3, at 9.

¹¹ GE 3, *supra* note 9, at 3; GE 4, *supra* note 8, at 1-5; Tr. at 36.

¹² Tr. at 35. Applicant’s brother was indicted on 11 counts of criminal conduct and sentenced to prison until December 2027.

he was released to a transition home where he remained until August 2011. He was then placed on probation for five years, scheduled to end in August 2016.¹³ Applicant has never violated any terms of his initial sentence or his supervised release or probation.¹⁴

Applicant concedes that he was aware of his brother's plan to rob the convenience store, but although he was opposed to being part of the scheme, he froze and did not speak up or turn away. Instead, because he was the youngest of seven siblings, and he was young and inexperienced, he did and said nothing.¹⁵ Applicant has not seen the other participants in the robbery since they were either in court or in the same prison together.¹⁶ Because Applicant is still on supervised release, he cannot visit his brother in prison. His brother does call him from prison from time to time merely to check up on him.¹⁷ Despite the trouble his brother has gotten him into, Applicant forgives him because they are brothers.¹⁸

Character References

The general manager of the restaurant where Applicant has a part-time job hired Applicant even though Applicant was candid about his criminal background. He characterized Applicant as loyal, honest, intelligent, and trustworthy. Applicant works around credit cards and thousands of dollars in the restaurant and has been accountable for it. There have never been any cash shortages or discrepancies. He is trusted to make bank deposits.¹⁹ A restaurant coworker who was trained by Applicant also referred to Applicant's integrity and dedication. Despite Applicant's criminal history, she believes that Applicant is a person of strong moral character with an unprecedented work ethic.²⁰ Applicant's three sisters are all very supportive of Applicant. They acknowledge his past criminal history but stress his efforts to rebuild his life as he has matured into a wonderful man. They believe he is honest, loyal, dedicated, trustworthy, and a decent person.²¹

¹³ GE 2, *supra* note 3, at 9; Tr. at 36-37.

¹⁴ GE 2, *supra* note 3, at 9, 11-12.

¹⁵ Tr. at 24, 60.

¹⁶ Tr. at 53-54.

¹⁷ Tr. at 55.

¹⁸ Tr. at 55, 60

¹⁹ AE G (Character Reference, dated July 10, 2015).

²⁰ AE B (Character Reference, undated).

²¹ AE A (Character Reference, dated July 13, 2015); AE F (Character Reference, dated July 9, 2015); AE H (Character Reference, undated).

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 security clearance.”²² As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. Positions designated as ADP I/II/III are classified as “sensitive positions.”²³ “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.”²⁴ 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.²⁵

When evaluating an applicant’s suitability for a public trust position, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for a public trust position.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and common sense decision. 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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”²⁶ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation,

²² *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

²³ Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

²⁴ Regulation ¶ C6.1.1.1.

²⁵ Regulation ¶ C8.2.1.

²⁶ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “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).

extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.²⁷

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 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. Furthermore, security clearance determinations, and by inference, public trust determinations, should err, if they must, on the side of denials.²⁸ 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.

Analysis

Guideline J, Criminal Conduct

The security concern under the guideline for Criminal Conduct is set out in AG ¶ 30:

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.

The guideline notes several conditions that could raise trustworthiness concerns. Under AG ¶ 31(a), "a single serious crime or multiple lesser offenses" is potentially disqualifying. Similarly, AG ¶ 31(d) may apply if an "individual is currently on parole or probation." As noted above, on February 25, 2005, Applicant was indicted by a grand jury for (1) interference with commerce by threat of violence (armed robbery), and (2) violent crime/drugs/machine gun (use of a firearm during a criminal act). Upon a plea agreement, Applicant entered a plea of guilty, and on August 2, 2005, he was convicted as charged. Applicant was sentenced to imprisonment for 84 months (7 years), supervised release for 5 years, and ordered to pay an assessment of \$200 and restitution of \$1,000. He is currently on supervised release until August 30, 2016. AG ¶¶ 31(a) and 31(d) have been established.²⁹

²⁷ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

²⁸ *Egan*, 484 U.S. at 531.

²⁹ The guideline also contained a provision under AG ¶ 31(f) that "conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year" was disqualifying unless an approved waiver authority granted a

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from criminal conduct. Under AG ¶ 32(a), the disqualifying condition may be mitigated where “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.” It is also potentially mitigating under AG ¶ 32(b) where “the person was pressured or coerced into committing the act and those pressures are no longer present in the person’s life.” Similarly, AG ¶ 32(d) may apply where “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.”

AG ¶¶ 32(a) and 32(d) apply, and AG ¶ 32(b) partially applies. As noted above, Applicant was aware of his big brother’s plan to rob the convenience store, but although he was opposed to being part of the scheme, he froze and did not speak up or turn away. Instead, as the youngest and least experienced of seven siblings, he did and said nothing to stand up to his big brother. When his brother and two associates robbed the convenience store in January 2004, Applicant remained in the car, unarmed. He received \$300 from the robbery proceeds. When the armed robbery took place, Applicant was implicated, charged, and convicted – a perfect example of the “hand of one is the hand of all.” At his guilty plea, Applicant agreed that he had assisted, aided, or abetted the robbery. Because of his cooperation, Applicant was sentenced to imprisonment for 84 months (7 years), supervised release for 5 years, and ordered to pay an assessment of \$200 and restitution of \$1,000. The other participants in the robbery were sentenced to imprisonment for 122 months. Applicant satisfied the restitution and assessment requirements, and based on good behavior, in June 2011, he was released to a transition home where he remained until August 2011. He was then placed on probation for five years, scheduled to end in August 2016. Applicant has never violated any terms of his initial sentence or his supervised release or probation. At the time of the robbery, Applicant’s actions did cast doubt on his reliability, trustworthiness, or good judgment.

On the other hand, Applicant’s actions occurred over 11 years ago, and there has been no recurrence. He admitted what he had done and entered a plea of guilty. There is additional substantial evidence of successful rehabilitation, including but not limited to the passage of time without recurrence of any criminal activity, expressions of remorse, evidence of restitution, job training, and good employment record. In the ensuing years after his release from imprisonment, Applicant has held, and continues to hold a full-time job during the week, and a part-time job during weekends. He has been promoted by both employers. After comparing Applicant’s actions with his reputation, it appears that his criminal actions were out of character for him. The authorities apparently came to the same conclusion. Applicant has incorporated tools and coping mechanisms into his life. With his changed lifestyle, stark experience, and new maturity, it is unlikely that such criminal behavior will recur, and it no longer casts doubt on his reliability, trustworthiness, or good judgment.

waiver in a meritorious case. The provision regarding a waiver was repealed by Pub. L. No. 110-181, § 3002 (Jan. 1, 2008) (The Bond Amendment).

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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.³⁰

There is some evidence against mitigating Applicant's conduct. He was aware of his brother's plan to rob a convenience store but said nothing to alter those plans. Instead, he froze, and failed to object. The armed robbery was successful and Applicant shared in the ill-gotten gain from that robbery. Applicant was convicted of armed robbery and use of a firearm during a criminal act. He was sentenced to imprisonment for 84 months (7 years), supervised release for 5 years, and ordered to pay an assessment of \$200 and restitution of \$1,000. He is currently on supervised release until August 30, 2016.

The mitigating evidence is more substantial and compelling. He cooperated with the authorities and the court, paid his debt to society by completing his periods of imprisonment and in a transition home, and paying his restitution and assessment. The robbery occurred over 11 years ago, and there has been no recurrence of criminal conduct. Applicant admitted what he had done and has exhibited remorse for his actions. His family and friends see noticeable maturity in him. Applicant has focused on his children, family, and his work. He continues to hold a full-time job during the week and a part-time job during weekends. His employers and coworkers speak very favorably about him, and he has been promoted by both employers. Little can be gained by adhering inflexibly to the disqualifying guideline condition regarding being currently on parole or probation. (See AG ¶¶ 2(a)(1) through 2(a)(9).)

³⁰ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant mitigated the trustworthiness concerns arising from his criminal conduct concerns.

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 J: | FOR APPLICANT |
| Subparagraph 1.a: | For Applicant |

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility to occupy a public trust position to support a contract with the Department of Defense. Eligibility is granted.

ROBERT ROBINSON GALES
Administrative Judge