



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



In the matter of:)	
)	
)	ADP Case No. 07-01284
SSN:)	
)	
Applicant for Public Trust Position)	

.Appearances

For Government: Paul M. DeLaney, Esquire, Department Counsel
For Applicant: *Pro Se*

July 22, 2009

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to sensitive information is granted.

Applicant submitted her Questionnaire for Public Trust Position (SF 85P) on January 31, 2005, resubmitted it on January 5, 2009 and recertified it on January 9, 2009. On February 9, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline J for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005 and effective within the Department of Defense for SORs issued after September 1, 2006.

Department Counsel prepared a File of Relevant Material (FORM) and mailed Applicant a complete copy on May 14, 2009. Applicant received the FORM on May 27,

2009. She had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation or mitigation. She submitted a response and additional evidence dated June 20, 2009. DOHA assigned this case to me on July 7, 2009. The government submitted twelve exhibits, which have been marked as Item 1-12 and admitted into the record. Applicant's response to the SOR has been marked and admitted as Item 2. Her response and attachments to the FORM are admitted into evidence.

Findings of Fact

In her Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a and 1.b with explanations. She denied the factual allegations in ¶ 1.c of the SOR. She also provided additional information to support her request for eligibility for a public trust position.¹

Applicant, who is 56 years old, works as a customer service representative for a Department of Defense contractor. She started her current job in January 2005. Her supervisor and unit co-ordinator describe her as trustworthy, reliable and dependable. They and her co-workers greatly respect her work skills. She works with them as a team member and provides assistance to her co-workers whenever needed. Customers have written complimentary letters to her employer about the assistance she has provided to them.²

Applicant is divorced. She has three adult children, two sons who are 35 and 32, and a daughter who is 33. Her daughter is a Sergeant First Class in the Army National Guard and the single mother of a 14-year-old daughter. When her daughter was deployed, she provided Applicant with a power of attorney to manage her finances and care for her daughter. Applicant did not take advantage of her access to her daughter's finances; rather, Applicant managed the finances as necessary and took care of her granddaughter. Applicant cares for legally blind, elderly parents and an elderly uncle in her home. Applicant's parents have lived with her for the last four years and her uncle has lived with her for nearly 20 years.³

In 1996, Applicant and a friend stole items from a local mall store. Store security stopped them and called the police, who arrested and charged Applicant and her friend with retail theft. At court, Applicant plead no contest to this charge and paid a fine. Subsequent to this incident, in 1998, Applicant sought medical help from a psychiatrist because of urges she felt. The psychiatrist diagnosed her with Obsessive-Compulsive

¹Item 4.

²Item 5; Response to FORM.

³*Id.*

Disorder with Kleptomania and Major Depression, recurrent.⁴ The psychiatrist prescribed medication.⁵

By 2002, Applicant had discontinued her medication, as it was ineffective. In May 2002, the police arrested and charged her with burglary and possession of burglary tools after store security reported her and a male friend for taking clothing from retail stores. Applicant acknowledged this arrest, but denied being charged with burglary. She believed the police charged her with retail theft, not burglary. However, the criminal complaint does not support her belief. Applicant retained counsel to represent her in this matter. Her counsel and the prosecutor agreed that she would plead guilty to Petty Larceny, would complete a Petty Larceny course, would complete 50 hours of community service, and would stay out of trouble for one year. Her attorney filed the plea agreement in court on July 31, 2002. Applicant complied with the terms of the agreement and the court closed the case on October 29, 2003.⁶

Applicant worked in a local grocery store for 20 years, until it closed in 2003. Her supervisor described her as a valued and trusted employee, to whom he entrusted highly sensitive employee and business information. Applicant told him about her shoplifting charges when they occurred. He stated these incidents were out of character for her. Despite these charges, he did not question her honesty. He described her as a very kind, concerned and caring individual, who cares for elderly relatives.⁷

In 2004, Applicant worked one night a week in a shoe store. The store experienced problems with theft of some jewelry items. The store accused Applicant of theft, but never proceeded with criminal charges against her or sought to have her arrested. Rather, her employment ended. Applicant denies that she stole any items from the store and the record lacks any clear evidence that she actually stole items from this store. Applicant acknowledged this accusation in her SF-85P, when she listed this job and disclosed the theft allegation as the reason for her job termination.⁸

In 2006, Applicant again sought medical assistance. She met with her psychiatrist and raised the possibility that she suffered from Attention Deficit Hyperactivity Disorder (ADHD). Her psychiatrist referred her for an evaluation and testing. The results suggested that Applicant met the criteria for ADHD. Her psychiatrist prescribed medication to manage her ADHD. Applicant takes her medication and is doing well. Her psychiatrist indicated that the Obsessive Compulsive Disorder comes

⁴Applicant met with this psychiatrist once in 1995. See Response to FORM.

⁵Item 7; Item 10; Response to FORM.

⁶Item 4; Item 7; Item 8; Item 10.

⁷Response to FORM.

⁸Item 4; Item 5; Item 6; Item 7.

and goes over her lifetime. Her psychiatrist also stated that as long as Applicant continues with her treatment her progress is good.⁹

Applicant provided 12 statements from various individuals who have known her for a long time. These individuals include her supervisor, a former supervisor, unit coordinator, co-worker, daughter, and friends. Many are aware of her problems with theft in the past and know about her ADHD diagnosis. Some state that the theft conduct is out of character for her. She held positions of trust when employed by the grocery store. All generally agreed that Applicant is trustworthy, reliable and dependable and recommend her for a security clearance.¹⁰

Applicant participates in community service activities. She pays her bills in a timely manner and has an excellent credit score.¹¹

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” (See Regulation ¶¶ C3.1.2.1.1.7 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.” (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. 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, 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 the factors listed in the adjudicative process. The administrative judge’s over-arching 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.

⁹Response to FORM; Item 11. Item 11 contains an authorization from Applicant to the security investigator to ask her psychiatrist three questions. It is unclear from the document if the psychiatrist actually answered the questions as only Applicant’s signature is on the form. In addition, because the second question is not answered, the answer to the third question about prognosis is confusing. Because the information in this document is unclear and confusing, I give it little weight.

¹⁰Response to FORM.

¹¹*Id.*

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 [sensitive] information 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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.¹²

¹²After any decision, the losing party has a right to appeal the case to the Defense Office of Hearings and Appeals Appeal Board. The Appeal Board’s review authority is limited to determining whether three tests are met:

E3.1.32.1. The Administrative Judge’s findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge;

E3.1.32.2. The Administrative Judge adhered to the procedures required by E.O. 10865 (enclosure 1) and this Directive; or

E3.1.32.3. The Administrative Judge’s rulings or conclusions are arbitrary, capricious, or contrary to law.

The Appeal Board does not conduct a “*de novo* determination”, recognizing that its members have no opportunity to observe witnesses and make credibility determinations. The Supreme Court in *United States v. Raddatz*, 447 U.S. 667, 690 (1980) succinctly defined the phrase “*de novo* determination”:

[This legal term] has an accepted meaning in the law. It means an independent determination of a controversy that accords no deference to any prior resolution of the same controversy. Thus, in *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 23 [(1974)], the Court had occasion to define “*de novo* proceeding” as a review that was “unfettered by any prejudice from the [prior] agency proceeding and free from any claim that the [agency’s] determination is supported by substantial evidence.” In *United States v. First City National Bank*, 386 U.S. 361,368 [(1967)], this Court observed that “review *de novo*” means “that the court should make an independent determination of the issues” and should not give any special weight to the [prior] determination of the administrative agency.

(Internal footnotes omitted). See ISCR Case No. 07-10396 (App. Bd., Oct. 2, 2008) and ISCR Case No. 07-07144 (App. Bd., Oct. 7, 2008). In ISCR Case No. 05-01820 (App. Bd. Dec 14, 2006), the Appeal Board criticized the administrative judge’s analysis, supporting grant of a clearance for a PRC-related Applicant, and then decided the case itself. Judge White’s dissenting opinion cogently explains why credibility determinations and ultimately the decision whether to grant or deny a clearance should be left to the judge who makes witness credibility determinations. *Id.* at 5-7. See also ISCR Case No. 04-06386 at 10-11 (App. Bd. Aug. 25, 2006)(Harvey, J., dissenting) (discussing limitations on Appeal Board’s authority to reverse hearing-level judicial decisions and recommending remand of cases to resolve material, prejudicial error) and ISCR Case No. 07-03307 (App. Bd. Sept. 29, 2008). Compliance with the Agency’s rules and regulations is required. See *United States ex. rel. Acardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Lopez v. FAA*, 318 F.3d 242, 247-

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.

Section 7 of Executive Order (EO) 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “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 ¶ 31 describes conditions that could raise a security concern and the following may be disqualifying in this case:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant twice stole merchandise from local stores and twice plead guilty in court to this criminal conduct. In 2004, an employer accused her of stealing merchandise from its store and ended her employment. These disqualifying conditions apply.

AG ¶ 32 provides conditions that could mitigate security concerns:

- (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;

248 (D.C. Cir 2003); *Nickelson v. United States*, 284 F. Supp.2d 387, 390 (E.D. Va. 2003)(explaining standard of review).

(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.

In 2004, Applicant's employer accused her of theft, but did not file a criminal complaint or pursue the matter through the criminal courts. The employer's failure to actively pursue its accusation of retail theft raises questions about the legitimacy of its accusation, particularly in light of Applicant's strenuous denial that she stole anything. In addition, this accusation is contrary to the trust both her current and past employers have in her. Throughout many years of working, Applicant has always acted in the best interest of her employer. Except for one employer, all others gave her good evaluations for honesty. I find that this accusation is insufficient to establish criminal conduct by Applicant. AG ¶ 32(c) applies.

AG ¶¶ 32(a) and (d) apply to the remaining criminal conduct issues. Applicant has two criminal convictions related to store theft and a third accusation of theft by a former employer, raising the possibility of a pattern of conduct. Applicant's last store theft and related criminal conviction occurred in 2002, seven years ago. Her only other theft conviction occurred six years earlier in 1996. Applicant has established that at the time she committed these thefts, she suffered from Obsessive Compulsive Disorder, which was untreated. Her second incident occurred after she stopped her medication, which had not helped her condition. Since this time, she has been diagnosed with ADHD and provided medication, which manages her condition. Through medical intervention, Applicant has controlled her urge to pilfer store items.

She works in the community and cares for three elderly relatives. She also cares for her teenaged granddaughter when her daughter is deployed. She has an excellent employment record and is well respected by her colleagues and customers. Her past employer placed her in a position of trust, which she did not violate. Likewise, she did not violate her daughter's trust in her to manage her finances and care for her child. Applicant has mitigated the government's security concerns about her past criminal conduct.

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 relevant 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 security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant’s eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant’s criminal conduct occurred later in her life and resulted in two misdemeanor convictions. A false allegation of theft resulted in a job loss. After her first criminal conviction, Applicant sought a psychiatric consultation. As a result, the psychiatrist diagnosed major depression, recurrent and obsessive compulsive disorder and provided medication. Applicant re-offended after stopping her medications. She again sought medical treatment in 2006. After testing and evaluation, the psychiatrist also diagnosed ADHD. She takes different medication and complies with her medical treatment plan. Her prognosis for continued medical improvement is good as she continues to manage her diagnosed conditions.

Applicant cares for three elderly relatives in her home and has for some time. She is highly respected at her place of work by her supervisors and co-workers. With the exception of the one part-time job in 2004, Applicant has had a long, steady and successful working career. She participates in community activities and maintains excellent finances. She is a responsible individual as shown by all that she does. Her former supervisor’s statement that these theft incidents are out of character is supported by all her actual lifestyle and the confidence of her supervisors in her. Her honesty is also supported by her disclosure of the theft accusation. There is no paper record of the accusation and but for her honesty in acknowledging the accusation, the government is not likely to have known about it. She has been straightforward about her criminal past. There is very little likelihood that she can be pressured, coerced or exploited because of it.

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 her criminal conduct.

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
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

MARY E. HENRY
Administrative Judge