

KEYWORD: Personal Conduct

DIGEST: Applicant is a 29-year-old supervisor working for a defense contractor health care company. In 2001, a charge for shoplifting was dismissed. She paid restitution. She did not list the dismissed charge on her public trust application in 2005 because she relied on advice from a security employee present during the time she completed the application. She has mitigated the trustworthiness concerns raised under personal conduct concerns. Applicant's eligibility for a trustworthiness position is granted.

CASENO: 06-21986.h1

DATE: 03/28/2007

DATE: March 28, 2007

In re:)	
)	
)	
-----)	ADP Case No. 06-21986
SSN: -----)	
)	
Applicant for Public Trust Position)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
NOREEN A. LYNCH**

APPEARANCES

FOR GOVERNMENT

Nichole Noel, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 29-year-old supervisor working for a defense contractor health care company. In 2001, a charge for shoplifting was dismissed. She paid restitution. She did not list the dismissed charge on her public trust application in 2005 because she relied on advice from a security employee present during the time she completed the application. She has mitigated the trustworthiness concerns raised under personal conduct concerns. Applicant's eligibility for a trustworthiness position is granted.

STATEMENT OF THE CASE

On November 21, 2005, Applicant submitted an application for a position of public trust, an ADP I/II/III position. The Defense Office of Hearings and Appeals (DOHA) declined to grant the application under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (the "Directive").¹ On December 7, 2006, DOHA issued Applicant a Statement of Reasons (SOR) detailing the basis for its decision. The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline E, Personal Conduct of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued.

The case was assigned to me on January 26, 2006. A notice of hearing was issued on February 21, 2007, scheduling the hearing for March 7, 2007. The hearing was conducted as scheduled. The government submitted one exhibit that was marked as Government Exhibit (GE) 1. Applicant submitted eight exhibits (AE) A-I. The exhibits were admitted without objection. Applicant testified on her own behalf. DOHA received the hearing transcript (Tr.) on March 15, 2007.

FINDINGS OF FACT

Applicant admitted allegation 1.a in her SOR response under Guideline E.² She denied allegation 1.b. The admissions are incorporated as findings of fact. After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a 30-year-old woman employed as a supervisor in a position of public trust for a health insurance company. She graduated from high school in 1996, and received her college degree in 2001.³ After college, she worked in the banking field for seven years. She has worked for her current employer since November 2005. She is a single mother with one child (aged nine years).⁴

When Applicant was in college in 2001, she received public assistance for herself and her child. She struggled to support her son. She was concerned that she might be pregnant with another child. On June 19, 2001, she entered a grocery store and took a pregnancy test from the shelf. She entered the restroom and used it. She had no intention of paying for it. At the time she had no cash, but she did have a credit card. She was arrested as she was leaving the store.⁵

¹This action is taken under Executive Order 10865, dated February 20, 1960, as amended.

²Applicant's Answer to SOR, dated December 27, 2006, included in file at 1.

³GE 1 (Application for Public Trust Positions (SF 85P), dated November, 21 2005) at 1-9.

⁴*Id.*

⁵Tr. 32-34.

Applicant paid restitution to the store and the charge was dropped. Applicant took a required class about petty shoplifting that included watching a video and participating in a group discussion. The district attorney at that time told her that in the future she would not have to list anything on any application forms concerning the dismissed shoplifting charge.⁶

On November 21, 2005, Applicant completed her public trust application form (SF 85 P). In response to Question 16-Your Police Record: “In the last 7 years, have you been arrested for, charged with, or convicted of any offenses(s)? (Leave out traffic fines of less than \$150.) She answered “no.” She did not list the arrest for shoplifting on June 21, 2001.⁷

She inquired about the intent of the question to the security officer assisting the new hires. He advised her after hearing about the shoplifting incident and the dismissal that he did not think it would be a problem not to list it. He further explained that if any further information was needed she would be contacted.⁸ She also believed since the charge was dismissed it did not have to be reported.

Applicant was one of approximately 30 new employees completing the public trust application. She provided a statement of another new employee who verified that Applicant specifically inquired about the shoplifting charge.⁹

Applicant has an excellent employment record.¹⁰ She received several shining star awards. Her annual performance rating is above average.¹¹ As a team leader she received excellent reviews. All her evaluations exceeded expectations. Her colleagues praise her ability to accomplish projects in a timely fashion.¹² She served as a mentor to several new employees in the company.¹³

Applicant regrets making the mistake in June 2001. She realizes it was stupid and wrong. She learned her mistake and believes in a strong work ethic. She progressed in her career field and is now a supervisor with an excellent work history. She is more mature and lives in a stable environment. She is a responsible parent, earning a sufficient salary to support her son.

POLICIES

⁶Applicant’s letter dated December 19, 2006 at 1.

⁷Tr.8.

⁸Memorandum from colleague, dated December 14, 2006, included in file.

⁹*Id.*

¹⁰AE B (Annual Performance Evaluation, dated 2005).

¹¹AE F (Performance Feedback, dated 2006).

¹²AE A (Letters of reference (4) from 2007).

¹³Tr.23.

The President has “the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information.”¹⁴ In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information and determining trustworthiness within the executive branch.

To be eligible for a security clearance or access to sensitive information, an applicant must meet the security guidelines contained in the Directive. The revised Adjudicative Guidelines set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. Additionally, each security decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the adjudicative process factors listed in ¶ 6.3 of the Directive, and AG ¶ 2(a). The adjudicative guideline at issue in this case is:

Guideline E - Personal Conduct - 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.
any other failure

Conditions that could raise a trustworthiness concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to this adjudicative guideline, is set forth and discussed in the conclusions below.

“The adjudicative process is an examination of a sufficient period of a person’s life to make an affirmative determination that the person is eligible for a security clearance.”¹⁵ An administrative judge must apply the “whole person concept,” and consider and carefully weigh the available, reliable information about the person.¹⁶ An administrative judge should consider the following factors: (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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.¹⁷

¹⁴ *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

¹⁵ Directive, ¶ E2.2.1.

¹⁶ *Id.*

¹⁷ *Id.*

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information.¹⁸ Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts.¹⁹ An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.”²⁰ Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.²¹ The same rules apply to trustworthiness determinations for access to sensitive positions.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline E of the revised Adjudicative Guidelines (AG) most pertinent to the evaluation of the facts in this case.

Guideline E (Personal Conduct)

In this matter, the government provided substantial evidence that Applicant was arrested for shoplifting on June 19, 2001, and did not disclose the dismissed charge. This raises Personal Conduct Disqualifying Condition (PC DC) AG ¶16 (c) (*credible adverse information in several adjudicative 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 person may not properly safeguard protected information*).

With the government’s case established, the burden shifts to Applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against her. I considered the Personal Conduct Mitigating Condition (PC MC) AG ¶16 (a), (*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*). Applicant’s shoplifting of the pregnancy test was almost seven years ago. It was an isolated incident. The charge was dismissed and Applicant paid restitution. Applicant completed her required class concerning the charge. Her circumstances are quite different today. She is a supervisor earning a good salary and is a responsible parent. Thus, this mitigating condition applies in this case.

Personal Conduct Disqualifying Condition (PC DC) AG ¶16 (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 benefit status, determine security clearance eligibility or trustworthiness, or*

¹⁸ Directive, ¶ E3.1.14.

¹⁹ Directive, ¶ E3.1.15.

²⁰ ISCR Case No. 01-20700 at 3 (App. Bd. December 19, 2002).

²¹ Directive, ¶ E2.2.2.

award fiduciary responsibilities) is raised. Applicant deliberately omitted the information concerning the 2001 shoplifting charge because she had legal advice in 2001 and inadequate advice from the security personnel when she completed the application.

She, in fact, asked the question directly to the security personnel concerning the 2001 dismissed charge. She was told that if further information was needed, she could provide it. Applicant has presented mitigating information that is credible concerning the fact she did not deliberately conceal or falsify relevant facts from the application form in 2005. Thus, Personal Conduct Mitigating Condition (PC MC) AG ¶ 17 (b) (*the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully*) applies.

The issue before me is whether she has presented sufficient evidence of extenuation, mitigating or changed circumstances to warrant a favorable trustworthiness determination. I find that Applicant has presented such information and mitigated the government's concerns under Guideline E.

Whole Person

In all adjudications, the protection of our national security is the paramount concern. The objective of the trustworthy determination process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for assignment to sensitive duties. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered all the evidence and the "whole person" in evaluating Applicant's trustworthiness. Applicant has an exemplary work history. Her incident of shoplifting occurred more than six years ago. She learned her mistake and has lived responsibly in all areas of her life. Applicant did not deliberately falsify her public trust application. Applicant's evidence indicates that it is clearly consistent with the national interest to grant Applicant eligibility for assignment to sensitive duties. Eligibility is granted.

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 E:

FOR APPLICANT

Subparagraph 1.a:
Subparagraph 1.b:

For Applicant
For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national interest to grant Applicant's request for a determination of trustworthiness and eligibility for assignment to sensitive duties. Eligibility is granted.

Noreen A. Lynch
Administrative Judge