



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ADP Case No. 06-22993
SSN: -----)
)
Applicant for Public Trust Position)

Appearances

For Government: Nichole Noel, Esquire, Department Counsel
For Applicant: *Pro se*

January 9, 2008

Decision

FOREMAN, LeRoy F., Administrative Judge:

Applicant submitted her Questionnaire for Public Trust Position (SF 85P), on October 13, 2005. On August 20, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant eligibility for a public trust position, citing trustworthiness concerns under Guideline F (Financial Considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), 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.

Applicant acknowledged receipt of the SOR on September 3, 2007; answered the SOR in writing on September 6, 2007; and requested a hearing before an administrative judge. DOHA received the request on September 11, 2007. Department Counsel was prepared to proceed on September 26, 2007. The case was assigned to an administrative judge on October 16, 2007, and reassigned to me on October 24,

2007, based on workload. DOHA issued a notice of hearing on November 1, 2007, and I convened the hearing as scheduled on November 14, 2007. The government offered exhibits (GX) 1 through 7, which were received without objection. Applicant testified on her own behalf and submitted exhibits (AX) A through C, without objection. I kept the record open until November 30, 2007, to enable Applicant to submit additional matters. On November 19, 2007, she submitted AX D and E, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on November 21, 2007. The record closed on November 30, 2007. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for assignment to a public trust position is granted.

Procedural Ruling

The hearing was convened less than 15 days after the notice of hearing was issued. I advised Applicant of her right under Directive ¶ E3.1.8 to written notice at least 15 days before the hearing. Applicant affirmatively waived her right to 15 days notice. (Hearing Exhibit I; Tr. 19.)

Findings of Fact

In her answer to the SOR, Applicant admitted all the factual allegations in the SOR, with explanations. Her admissions in her answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 51-year-old appointment clerk employed by a defense contractor supporting a military hospital. She has worked for her current employer since September 2005. She has never held a security clearance or received a trustworthiness determination.

Applicant was married in 1989 and divorced in 2000. Her ex-husband died in 2002. She and her ex-husband agreed to divide their joint obligations, but her ex-husband did not pay his share. Applicant kept up the payments on of the joint debts until she became ill.

Applicant underwent surgery for thyroid cancer in August 2003, a second thyroid surgery in November 2004, and a hysterectomy in January 2005 (Tr. 37). She was unable to work and fell behind on her debt payments. Her debts increased when she used credit cards for living expenses while she was medically unable to work (Tr. 38-39, 46). After her thyroid surgery, she became an insulin-dependent diabetic and suffers from hypertension (Tr. 39).

The SOR alleges eight delinquent debts totaling \$18,855 that were charged off or placed for collection between December 2003 and December 2005. Applicant admitted all the debts and explained that she originally owed about \$8,500 but the amounts of the debts rose because of late charges and penalties (Tr. 24). Her creditors refused to accept partial payments (Tr. 39).

In January 2006, Applicant moved her ailing father from hospice care to her home where she cared for him until his death in September 2006 (Tr. 60). In February 2007, her daughter, who was pregnant with her first child and whose husband was deployed to Iraq, injured her knee and was unable to drive or walk. Applicant took two months of leave without pay to care for her daughter (Tr. 38, 62). Applicant returned to work in April 2007 (Tr. 63).

Applicant hired a bankruptcy lawyer in 2006, but she was unable to pay his entire fee. Instead, she made monthly payments of whatever amount she could afford, starting with a \$250 payment in May 2006 (GX 6 at 2; Tr. 68-69). In January 2007, she responded to DOHA interrogatories about her financial situation and stated she intended to file a bankruptcy petition (GX 6 at 3). In February 2007, she responded to further DOHA interrogatories and stated she was postponing her bankruptcy, because she was taking a leave of absence from work to care for her daughter who was undergoing knee surgery (GX 7 at 2). She made her last payment to her lawyer on October 19, 2007, and her petition for Chapter 7 bankruptcy was filed on October 22, 2007 (AX A and E).

Applicant and her lawyer could not identify the current owners of some of the debts. Instead of attempting to track down all the debts, they simply listed in her bankruptcy petition all creditors that appeared on her most recent credit reports, except for the holder of the note on her truck, a 1998 Dodge truck with 118,000 miles on it. (AX D; AX E at 14). Her truck payments are current (Tr. 70, 75).

In October 2007, Applicant completed a consumer credit counseling course, and in November 2007, she completed a course on personal financial management (AX B and C). Both courses were completed by agencies approved by the bankruptcy court.

Applicant closed all her credit card accounts two years ago (Tr. 63). She has been meeting all her current financial obligations (Tr. 71). Her take-home pay is about \$1,600 per month (Tr. 64). As of the date of the hearing, her monthly expenses included a monthly payment of \$250 for her truck and \$300 for medications, and she had virtually no monthly remainder, had no savings, and was not contributing to any retirement plans.

In November 2007, Applicant received a raise from \$11.05 per hour to \$13.98 per hour (Tr. 66-67). She now has medical insurance through her employer. She is enrolled in an indigent program with her hospital because of her history of cancer and diabetes (Tr. 71).

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” (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.” (Regulation ¶

C6.1.1.1.) 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. (Regulation ¶ C8.2.1.)

When evaluating an Applicant's suitability for a public trust position, an 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 an evaluation of the whole person. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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."

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to classified information. (See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).) Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. (Directive ¶ E3.1.15.) An applicant has the ultimate burden of demonstrating that it is clearly consistent with national security to grant a favorable trustworthiness determination.

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."

Analysis

Guideline F, Financial Considerations

The trustworthiness concern relating Financial Considerations is set out in AG ¶ 18:

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

Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. AG ¶ 19(b) is a two-pronged condition that is raised where there is "indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt." AG ¶ 19(c) is raised when there is "a history of not meeting financial obligations." AG ¶ 19(e) is raised when there is "consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis."

AG ¶ 19(b) is not raised, because there is no evidence of "frivolous or irresponsible spending." However, Applicant's delinquent debts, her admitted inability to pay them, and her use of credit cards to fund basic living expenses that were beyond her ability to pay them are sufficient to raise AG ¶¶ 19(a), (c) and (e). No other enumerated disqualifying conditions under this guideline are raised by the evidence.

Under AG ¶ 20(a), a disqualifying condition may be mitigated where "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." This is a compound mitigating condition, with three disjunctive prongs and one conjunctive prong. It may be established by showing the conduct was "so long ago," or "so infrequent," or "occurred under such circumstances that it is unlikely to recur." If any of the three disjunctive prongs are established, the mitigating condition is not fully established unless the conduct "does not cast doubt on the individual's current reliability, trustworthiness, or good judgment."

Applicant's delinquent debts are recent and frequent. However, they are the result of a confluence of events: her divorce, the death of her ex-husband, her serious illness resulting in uninsured medical bills and loss of employment, the illness and death of her father, and the injury of her pregnant daughter whose husband was deployed to Iraq. This confluence of unfortunate events is not likely to recur. Furthermore, Applicant reacted to these events by attempting to pay her debts until she was too ill to work. She

unsuccessfully attempted to negotiate partial payments. Her devotion to her family motivated her to care for her father and daughter without regard to her own financial needs. Under all the circumstances, her financial problems do not cast doubt on her current reliability, trustworthiness, or good judgment. I conclude this mitigating condition is established.

Under AG ¶ 20(b), security concerns under this guideline may be mitigated where “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.” Both prongs, i.e., conditions beyond the person’s control and responsible conduct, must be established. The events listed in the preceding paragraph were beyond Applicant’s control, and her response to them was reasonable. I conclude this mitigating condition is established.

Evidence that “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” is potentially mitigating under AG ¶ 20(c). This mitigating condition also has two prongs that may be either disjunctive or conjunctive. If the person has received counseling, it must also be shown that there are clear indications the problem is being resolved or under control. However, if the person has not received counseling, this mitigating condition may still apply if there are clear indications that the problem is being resolved or under control. Applicant produced evidence of counseling in connection with her bankruptcy filing. She had no financial delinquencies before her illness in 2003. Her current financial obligations are up-to-date. A discharge in bankruptcy will resolve her financial problems that arose during 2003-2005. Based on the evidence of record, including the contents of her bankruptcy petition, there is no reasonable likelihood that she will not receive a discharge in bankruptcy. I conclude this mitigating condition is established.

The mitigating condition in AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” The concept of good faith “requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.” ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). A discharge in bankruptcy will make her debts uncollectable, but it not “repay” or “resolve” Applicant’s debts within the meaning of AG ¶ 20(d). Thus, I conclude AG ¶ 29(d) is not established.

Whole Person Concept

Under the whole person concept, an 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. In addition to the enumerated disqualifying and mitigating conditions under each guideline, an administrative judge should consider the nine adjudicative 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) 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.

Applicant is a mature woman who had a clean credit record until her illness in 2003. At the hearing, she presented herself as somewhat unsophisticated in financial matters, but very candid, sincere, and credible. Even after her divorce and the death of her ex-husband, she kept up the payments on the joint debts from her marriage. Since her employment in 2005, she has lived frugally and within her means. She has demonstrated her reliability and strong sense of obligation by taking care of her family, even though it worked to her financial detriment. She has lived paycheck to paycheck, using her meager monthly net remainder to pay her lawyer's fee for the bankruptcy. Now that she has satisfied that obligation, she will have some funds for her eventual retirement and for unexpected expenses.

Although Applicant's bankruptcy does not establish the mitigating condition in AG ¶ 20(d), it removes her vulnerability to pressure, coercion, exploitation, or duress. Considering the unusual confluence of events that caused her financial problems and her reasonable and responsible response to those events, I believe the likelihood that her financial problems will recur is nil.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the trustworthiness concerns based on financial considerations. Accordingly, I conclude she has carried her burden of showing that it is clearly consistent with national security to grant her eligibility for a public trust position.

Formal Findings

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

Paragraph 1, Guideline F: FOR APPLICANT

Subparagraphs 1.a-1.h: 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 a public trust position is granted.

LeRoy F. Foreman
Administrative Judge