

KEYWORD: Personal Conduct

DIGEST: Applicant is a 24-year-old employee of a defense contractor. Applicant disclosed on her Questionnaire for Public Trust Positions in June 2004 that she was terminated from former employment for theft in April 2004. She is making restitution in the amount of \$12,000.00. She has not mitigated the concerns under the Personal Conduct Guideline. Eligibility for an ADP I/II position is denied.

CASENO: 05-04769.h1

DATE: 03/20/2006

DATE: March 20, 2006

In Re:

SSN: -----

Applicant for Trustworthiness Determination

ADP Case No. 05-04769

DECISION OF ADMINISTRATIVE JUDGE

NOREEN A. LYNCH

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 24-year-old employee of a defense contractor. Applicant disclosed on her Questionnaire for Public Trust Positions in June 2004 that she was terminated from former employment for theft in April 2004. She is making restitution in the amount of \$12,000.00. She has not mitigated the concerns under the Personal Conduct Guideline. Eligibility for an ADP I/II position is denied.

STATEMENT OF THE CASE

On June 30, 2004, Applicant submitted an application for a position of public trust. On October 26, 2005, the Defense Office of Hearings and Appeals (DOHA), under Department of Defense Regulation 5200.2-R, *Personnel Security Program*, (Jan. 1987), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, (Directive), issued a Statement of Reasons (SOR) to Applicant. ⁽¹⁾ The SOR detailed reasons why DOHA could not make a determination that it is clearly consistent with the national interest to grant Applicant's request for a determination of trustworthiness because of security concerns arising under Guideline E (Personal Conduct).

On November 3, 2005, Applicant submitted a notarized response to the factual allegation set forth in the SOR, and elected to have the case decided on the record in lieu of a hearing. Department Counsel submitted the government's written case on December 29, 2005. Department Counsel provided a complete copy of the File of Relevant Material (FORM) ⁽²⁾ to Applicant, along with notice of her opportunity to file objections and submit material to refute, extenuate, or mitigate the government's case. Applicant received the FORM on January 9, 2006. Applicant submitted a written response to the FORM on February 8, 2006. This case was assigned to me on February 9, 2006.

FINDINGS OF FACT

Applicant admitted the factual allegation in the SOR pertaining to personal conduct under Guideline E (subparagraph 1.a.).⁽³⁾ This admission is incorporated as a finding 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 24-year-old employee for a defense contractor.⁽⁴⁾ She graduated from college in December 2003. After leaving college, Applicant worked in various positions. She submitted an application for a position of trust in connection with her employment in June 2004.⁽⁵⁾

From September 1999 until April 2004, Applicant worked as a bookseller for a major book chain.⁽⁶⁾ In April 2004, after five years of employment, the company terminated the Applicant. During an investigation by the bookstore, Applicant acknowledged that she took new and used books home from the store without any authorization. Some of the books were "stripped" and were not for sale. She claimed management did not specifically tell the employees they could not take the stripped books. Nevertheless, Applicant did not return all the new or used books.⁽⁷⁾

Applicant signed an agreement that she took the books from the store. Although the police were not involved, the reason for her termination was "theft" of store merchandise. The store ordered her to pay \$12,000.00 in restitution by monthly payments of \$50.00. Applicant pays approximately \$300.00 to \$500.00 a month in restitution. As of January 2006, she paid a total of \$3,400.00.⁽⁸⁾

When Applicant began working for a defense contractor, she signed the application for a public trust position (SF-85P). She disclosed her theft in answer to question 12 regarding her employment record.⁽⁹⁾

Applicant explained in her affidavit, dated October 2005, she did not believe she was stealing. Since other employees did the same thing, she believed it was fine with management. She now states it is wrong to take anything from the workplace and would not do it again.⁽¹⁰⁾

In her 2006 response to the FORM, Applicant explained that the book company did not press charges because they believed her to be trustworthy. She did return one box of books to the store.⁽¹¹⁾

Applicant is now a Patient Care Advocate. She earned several awards in her two years of service. Her supervisor rating

indicated "exceeds or meets standards." (12)

POLICIES

Enclosure two of the Directive sets forth adjudication guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative factors listed in paragraph 6.3 of the Directive.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically, these are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. (13) The government has the burden of proving controverted facts. (14) The burden of proof is something less than a preponderance of the evidence. (15) Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against her. (16) Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. (17)

No one has a right to a security clearance (18) and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." (19) Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. (20) Section 7 of Executive Order 10865 specifically provides industrial security clearance 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." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant. (21) It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Personal Conduct - Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegation set forth in the SOR:

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. Personal Conduct is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information.

When Applicant completed her security application form in 2004, she answered "yes" to Question 12 on her application and admitted theft from her employer in 2004 and subsequent termination. While it was laudable that Appellant disclosed the information, the government established its case for allegation 1.a under Guideline E. Personal Conduct Disqualifying Condition (PC DC) 1 (*reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances.*)

It is true Applicant is making restitution payments as required under her agreement with her former employer. In fact, her monthly payments surpass the minimum monthly amount. Nonetheless, she took approximately \$12,000.00 worth of store merchandise without permission. She still owes almost \$9,000.00 in restitution. Her work-related conduct occurred over a period of years. Thus, PC DC 5 (*a pattern of dishonesty or rule violations*) applies.

The allegation is substantiated by Applicant's own admission. She breached a trust that exists between employer and employee. Her actions are pertinent to a determination of her overall judgment, trustworthiness and reliability. Her rationalization that other employees did the same thing and that management never directly told her she could not take

the books home calls into question her trustworthiness. PC MC 1 (*the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability*) does not apply.

Applicant's actions, although known to her previous employer, are not something one would normally be willing to share with others. She is in a position now where she owes a great deal of money and this makes her vulnerable to financial blackmail, coercion or exploitation. PC MC 5 (*the individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or pressure*) does not apply.

I balanced all the factual circumstances and applied them to the adjudicative criteria established in the Regulation in light of the whole person concept. I conclude Applicant has not mitigated the security concerns arising from her personal conduct, and it is accordingly decided against Applicant.

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 (Personal Conduct) AGAINST APPLICANT

Subparagraph 1. a: Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly not consistent with national interest to grant Applicant's request for a determination of trustworthiness. Clearance is denied.

Noreen A. Lynch
Administrative Judge

1. In ADP trustworthiness determinations, I am required to follow the procedural rules of the Directive but the substantive guidelines from the Regulation.
2. The government submitted six items in support of its contentions.
3. Item 3 (Applicant's Answer to SOR, dated November 3, 2005) at 1-2.
4. Item 2 (Transmittal Letter Receipt, dated October 26, 2005) at 1.
5. Item 4 (Application for Public Trust Positions (SF-85P), dated June 30, 2004) at 1-8.
6. *Id.* at 3.
7. *Id.*
8. Applicant's Response to FORM, dated January 2006.
9. Item 4 *supra* note , 5 at 1.
10. Item 5 (Applicant's Affidavit, dated October 14, 2004.) at 1.
11. Applicant's Response to FORM, *supra* note 7 at 1.
12. Applicant's Certificates, included in file.
13. ISCR Case No. 96-0277 (July 11, 1997) at 2.
14. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
15. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
16. ISCR Case No. 94-1075 (App. Bd., August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
17. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.
18. *Egan*, 484 U.S., at 531.
19. *Id.*

20. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

21. Executive Order No. 10865 § 7.