

DATE: September 15, 2006

In Re:

SSN: -----

Applicant for Trustworthiness Determination

P Case No. 06-07172

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Jr., Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has numerous delinquent debts totaling more than \$12,000, dating back to 1999. Her current family income leaves a monthly shortfall of more than \$400. She failed to disclose several delinquent debts on her Questionnaire for Public Trust Positions (SF 85P). Trustworthiness concerns based on financial considerations, personal conduct, and criminal conduct have not been mitigated. Eligibility for assignment to sensitive positions is denied.

STATEMENT OF THE CASE

On May 3, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to not grant Applicant a favorable trustworthiness determination. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges concerns under Guidelines F (Financial Considerations), E (Personal Conduct), and J (Criminal Conduct). Under Guideline F, it alleges 14 delinquent debts. Under Guidelines E and J, it alleges Applicant intentionally falsified her SF 85P by failing to disclose several debts that were more than 180 days delinquent.

Applicant answered the SOR in writing on May 25, 2006, and elected to have the case decided on the written record in lieu of a hearing. She admitted all the delinquent debts alleged in the SOR but denied falsifying her SF 85P.

Department Counsel submitted the Government's written case on July 18, 2006. A complete copy of the file of relevant material (FORM) was provided to Applicant, and she was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. She received the FORM on July 27, 2006, and responded on August 9, 2006. The case was assigned to me on August 22, 2006.

FINDINGS OF FACT

Based on the entire record, I make the following findings of fact:

Applicant is a 35-year-old claims associate for a defense contractor. She has worked for her current employer since March 1998. She is married and has two children.

On August 16, 2004, Applicant submitted a SF 85P, seeking eligibility for assignment to sensitive positions (FORM Item 4). In response to question 22b, she disclosed two debts more than 180 days delinquent, but she did not disclose the delinquent debts alleged in SOR ¶¶ 1.a, 1.b, 1.d, and 1.e, which were reflected on her credit report dated August 31, 2004 (FORM Item 6).

In an interview with a security investigator on March 16, 2005, Applicant denied that her failure to disclose all her delinquent debts was intentional, but she offered no explanation for the omissions. She submitted a financial statement showing a monthly shortfall of about \$441. The financial statement did not reflect payments on any of the delinquent debts.

A credit report dated March 28, 2006, reflected that all the delinquent debts remained unpaid (FORM Item 7). Six of the debts are delinquent credit card accounts totaling \$10,716. Five debts are medical bills, each for less than \$100. The remaining three debts are for cable service (\$106), cell phone service (\$170), and a clothing store charge account (\$1,689).

In her answer to the SOR, Applicant admitted all the debts alleged (FORM Item 2). In her response to the FORM, she admitted her financial situation was "inexcusable" and the result of poor judgment, and she submitted documentation that she had contacted a consumer credit counselor. She did not submit any evidence of payments, settlement offers, or payment plans for the delinquent debts.

POLICIES

The adjudicative guidelines set out in Department of Defense Regulation 5200.2-R, *Personnel Security Program* (Jan. 1987), as amended and modified (Regulation), are used to make ADP trustworthiness determinations. Department of Defense contractor personnel are afforded the right to the procedures contained in DOD Directive 5220.6 before any final unfavorable access determination may be made. DOD 5200.2-R, ¶ C8.2.1.

The Directive addresses only security clearances, and it does not mention "sensitive positions" or ADP positions. However, the Regulation specifically classifies ADP I and ADP II positions 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. Appendix 8 (App. 8) of the Regulation sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk." Regulation, App. 8 at 132. Each eligibility determination must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Regulation. An administrative judge should consider: (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. *Id.*

In security clearance cases, the Government must initially present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. Directive, ¶ E3.1.14. Thereafter, the applicant is responsible for presenting evidence 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 the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

"Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2. These same burdens of proof apply to trustworthiness determinations for ADP positions.

CONCLUSIONS

Guideline F (Financial Considerations)

Under this guideline, "[a]n individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." Regulation, App. 8 at 144. A person who fails or refuses to pay long-standing debts or is financially irresponsible may also be irresponsible or careless in his or her duty to protect sensitive information.

Two disqualifying conditions (DC) under this guideline could raise a trustworthiness concern and may be disqualifying in this case. DC 1 applies where an applicant has a history of not meeting his or her financial obligations. DC 3 applies where an applicant has exhibited inability or unwillingness to satisfy debts. *Id.* Applicant's financial history and her admissions establish DC 1 and DC 3.

Since the government produced substantial evidence to establish DC 1 and DC 3, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

A trustworthiness concern based on financial problems can be mitigated by showing the delinquent debts were "not recent" (MC 1) or "an isolated incident" (MC 2). Regulation, App. 8 at 144. Applicant has multiple delinquent debts that are not resolved. I conclude MC 1 and MC 2 are not established.

A concern arising from financial problems can be mitigated by showing they are the result of conditions "largely beyond the person's control" (MC 3). *Id.* Applicant admits her financial programs are the result of her bad judgment and not the result of conditions beyond her control. I conclude MC 3 is not established.

A mitigating condition (MC 4) applies when an applicant "has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control." *Id.* Applicant has engaged the services of a credit counseling agency, but she has offered no evidence that her financial problems are being resolved. I conclude MC 4 is not established.

A concern arising from financial problems can be mitigated by showing a good-faith effort to resolve debts (MC 6). *Id.* 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). Although Applicant has recently sought help from a credit counseling agency, she has presented no evidence of settlement offers, payments, payment plans, or any other documentation of a good-faith effort to resolve her debts. The evidence indicates she is unable to meet current obligations, much less begin repaying older delinquent debts. I conclude MC 6 is not established.

Guideline E (Personal Conduct)

"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." Regulation, App.8 at 142. The same considerations apply to assignments to sensitive duties.

A disqualifying condition (DC 2) under this guideline may be established by "deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities." *Id.* When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record

evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

On her SF 85P, Applicant failed to disclose delinquent debts dating back to 1999. However, when she was confronted with her credit record by a security investigator, she was able to discuss her delinquent debts in detail. She indicated to the investigator that her financial situation "is a private matter, not for open discussion." (FORM Item 5 at 5.) Although she denied intentional falsification, she has offered no explanation or excuse for not disclosing all her debts that were more than 180 days delinquent, even though she appeared familiar with them when she was interviewed by a security investigator. I conclude DC 2 is established.

Since the government produced substantial evidence to establish DC 2, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Two mitigating conditions (MC) are relevant to this case. MC 2 applies when "the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily." Regulation, App. 8 at 143. MC 3 applies when "the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts." *Id.* Neither condition is established, because Applicant's falsification was recent and she did not provide the correct information until she was confronted with her credit report by a security investigator.

Guideline J (Criminal Conduct)

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Disqualifying conditions may be based on allegations or an applicant's admission of criminal conduct, whether or not charged (DC 1). A single serious crime or multiple lesser offenses may also be disqualifying (DC 2). Regulation, App. 8 at 150.

It is a felony, punishable by a fine or imprisonment for not more than five years, or both, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances and trustworthiness determinations are within the jurisdiction of the executive branch of the Government of the United States. *See Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). A deliberately false answer on an application for a public trust position is a serious crime within the meaning of this guideline. I conclude DC 2 is established.

Criminal conduct can be mitigated by showing it was not recent (MC 1), an isolated incident (MC 2), or there is clear evidence of successful rehabilitation (MC 6). Regulation, App. 8 at 150. The issues under both MC 1 and MC 6 are whether there has been a significant period of time without any evidence of misconduct, and whether the evidence shows changed circumstances or conduct. Applicant's falsification was recent and pertained to her ongoing application for a trustworthiness determination. Thus, MC 1 is not established.

The evidence reflects only one falsification on the SF 85P, and no other incidents of falsification. Accordingly, I conclude MC 2 is established.

An admission of guilt and acceptance of responsibility is often the first step to rehabilitation. Applicant has denied falsifying her SF 85P, but she has not offered any explanation for omitting relevant and material information in her answer to question 22b. She has not expressed remorse for her falsification. Candor is important, and Applicant was unable or unwilling to be candid about her background. I conclude MC 6 is not established.

"Whole Person" Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered the general adjudicative guidelines in the Regulation, App. 8 at 132. In considering the "nature, extent, and seriousness of the conduct," I have considered that Applicant has numerous delinquent debts dating back to August 1999, and I have considered that her falsification of the SF 85P is a felony. In considering "the frequency and recency" of her conduct, I have considered that she has numerous delinquent debts that are unresolved. In considering her "age and maturity at the time of the conduct," I have considered that she is a mature, adult woman who has held her job since March 1998. I have considered the "absence of rehabilitation and other pertinent behavioral changes." Although she

claims that she is not vulnerable to pressure, coercion, exploitation, or duress, it is clear that she is financially overextended. Lastly, in considering the likelihood of continuation or recurrence, I have noted the absence of evidence that she has changed her financial habits or benefitted from the credit counseling she has recently sought. After weighing the disqualifying and mitigating conditions under each applicable guideline and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the trustworthiness concerns based on financial considerations, personal conduct, and criminal conduct. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with the interests of national security to grant her eligibility for assignment to sensitive positions.

FORMAL FINDINGS

The following are my findings as to each allegation in the SOR:

Paragraph 1. Guideline F (Financial): AGAINST APPLICANT

Subparagraphs 1.a through 1.o Against Applicant

Paragraph 2. Guideline E (Personal Conduct): AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Paragraph 3. Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 3.a: Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for assignment to sensitive duties. Eligibility is denied.

LeRoy F. Foreman

Administrative Judge