

DATE: January 22, 2007

In re:

SSN: -----

Applicant for ADP I/II/III Position

P Case No. 06-10644

DECISION OF ADMINISTRATIVE JUDGE

SHARI DAM

APPEARANCES

FOR GOVERNMENT

Julie R. Edmunds, Esq., Department Counsel

FOR APPLICANT

David E. Lasker, Esq.

SYNOPSIS

Applicant is a 22-year-old student who works part-time for a company that administers government health care benefits. In 2002, she was arrested for theft, a misdemeanor, arising from an incident at work. In 2004, she was convicted of the charge after she did not comply with all terms of a Deferred Prosecution Program. The Government alleged she failed to disclose the 2002 arrest, her previous employment position, and subsequent termination, during the application process for an ADP clearance. She mitigated the trustworthiness concerns raised by criminal and personal conduct. Her eligibility for assignment to a sensitive position is granted.

STATEMENT OF THE CASE

On May 29, 2003, Applicant submitted a public trust position application (SF-85P). The Defense Office of Hearings and Appeals (DOHA) declined to grant the application under Department of Defense Regulation 5200.2-R, *Personnel Security Program*, (Jan. 1987), as amended (Regulation), and Department of Defense Directive 5220.6, *Defense Industrial Security Personnel Review Program* (Jan. 2, 1992), as amended, (Directive). On July 27, 2006, DOHA issued a Statement of Reasons (SOR), alleging trustworthiness concerns under Guidelines J (criminal conduct), and E (personal conduct) of the Directive.

In a sworn statement, dated September 25, 2006, Applicant responded to the SOR allegations and requested a hearing. On October 16, 2006, this case was assigned to me. A Notice of Hearing was issued on November 9, 2006, setting the case for hearing on November 27, 2006. At the hearing Department Counsel introduced Government Exhibits (GX) 1 and 2 into evidence without objections. Applicant testified in her case and introduced Applicant Exhibit (AX) A into evidence without an objection. DOHA received the hearing transcript (Tr.) on December 8, 2006.

PROCEDURAL ISSUES

On October 12, 2006, Department Counsel filed a Motion to Amend the SOR by deleting the following language from the first paragraph of the SOR: "paragraph 3-614, Department of Defense Regulation 5220.2-R and." Applicant did not

object to the amendment and I granted the Motion (Tr. 7).

FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in her Answer to the SOR and at the hearing, I make the following additional findings of fact:

Applicant is 22 years old and a student at a local college, studying electron microscopy. (Tr. 60) She lives with her parents (Tr. 65). In September 2002, Applicant began a part-time position with a company that administers a government health insurance plan.

Applicant admitted that in December 2002, she was arrested and charged with Theft-Movable Property, a misdemeanor. She was 18 years old at the time. In March 2003, she pled guilty and was placed in a Deferred Prosecution Program. She was ordered to pay \$209 in fines, attend a class for women offenders, write an apology to the victim, and complete 50 hours of community service. Upon completion of the terms, the criminal charge would be dropped (Tr. 31). The arrest arose after she stole \$50 from a customer's wallet that was left at a check out counter where she had been working part-time for about five months (Tr. 33). Immediately after the incident, the employer suspended her and terminated her in June or July of 2003. (Tr. 34; 53).

In May 2003, Applicant's present employer gave her a SF-85P to complete because they received a government contract that required employees to have ADP clearances. The employer did not provide her or her co-workers with any assistance or instructions for completing the application (Tr. 65). Based on advice from her parents and friends, she did not disclose the March 2003 arrest because she thought her participation in the deferred prosecution program exempted her from including it under Question 20. *Your Police Record* (Tr. 38). She did not disclose her previous part-time employment under Question 11. *Your Employment Activities* because she was told she did not "have to list a job if you haven't worked there for six months or more, or it's -- it's considered a temporary job, not a long term," (*Id.*). She did not list any information under Question 12. *Your Employment Record* because she had not been terminated from that prior part-time job when she completed the form. She was 19 years at the time she initially filled out the SF-85P.

In October 2003, someone from the Human Resources Department (HR) handed Applicant her SF-85P and pointed out specific sections that needed to be corrected or changed, such as addresses and zip codes (Tr. 41-42). She did not know she was required to reread and update all sections of the form at that time, which would have required her to list the employment termination that occurred in July 2003 (Tr. 57).

In August 2004, the government revoked the deferred prosecution and sentence agreement because Applicant did not complete all 50 hours of community service, and the court entered a guilty finding. Although she completed the classroom requirements for the women's offender program, wrote an apology letter, and paid the fine, she was unable to complete 15 hours because she was in a car accident that left her without transportation to the community service center (Tr. 54). She did not finish her first semester of college as a result of the accident either (Tr. 64). She was unrepresented throughout the criminal proceeding and had limited awareness of the importance of complying with all terms of the agreement (Tr. 30;65).

In February 2005, HR again approached Applicant regarding the correction of other sections on the SF-85P, e.g., the name of her current supervisor (Tr. 43). Because no one advised her to carefully review the document in its entirety and update any section where circumstances had changed since she initially filled it out in March 2003, she addressed HR's specific requests, resigned the application, and did not disclose the 2003 termination or criminal conviction entered in 2004 (Tr. 59). She admitted she did not list her prior part-time employment, subsequent termination, and criminal charge on the form throughout the application process as alleged, but denied that she deliberately falsified the application (Tr. 66). Based on her testimony and demeanor, I find her explanation credible.

Two of Applicant's supervisors testified. Her immediate supervisor for the past two years considers Applicant to be a very conscientious employee who does an excellent job (Tr. 14). The Unit Coordinator has known Applicant for 12 years and has been her unit's supervisor for the last two years. She stated Applicant "consistently achieves an expected average of 99.9 percent in regards to quality, and she also handles tasks that nobody else in the mail room does, and she does excellent work," (Tr. 19). Applicant's Performance Reviews from September 2002 through September 2006

consistently note that she achieves company's expectation in many categories and exceeds expectations in other categories (AX A). None of her job duties have changed since she was hired, including her access to sensitive information (Tr. 46).

POLICIES

Positions designated as ADP I or ADP II are classified as sensitive positions. Regulation ¶AP10.2.1. ADP III positions are nonsensitive positions. Regulation AP102.3.1. By memorandum dated November 19, 2004, the Deputy under Secretary of Defense for Counterintelligence and Security directed DOHA to resolve all contractor cases submitted for trustworthiness determinations, including ADP I, II, and III, under the Directive. Thus, even though they are nonsensitive positions, ADP III cases are treated in the same way and adjudicated under the same guidelines and procedures as ADP I and II cases.

"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 of the Regulation sets forth the adjudicative policy, as well as the disqualifying conditions and mitigating conditions associated with each guideline. DoD contractor personnel are afforded the adjudicative procedures contained in the Directive. Regulation ¶ C8.2.1.

CONCLUSIONS

Based on the entire record, including Applicant's admission in her Answer to the SOR and at the hearing, I make the following additional findings of fact:

Guideline J: Criminal Conduct

Under this guideline a trustworthiness concern may exist when a pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

The Government's evidence and Applicant's admissions establish a potential disqualification under disqualifying condition (DC) 1: (*Any conduct, regardless of whether the person was formally charged*). In 2002, Applicant was arrested for theft and pled guilty to the charge in 2004.

The Government having raised a trustworthiness concern, the burden shifted to Applicant to mitigate or rebut the allegations. Applicant has not been involved in any form of criminal conduct since December 2002, four years ago. She continues to pursue a college degree and has maintained satisfactory work performance ratings at her current job since she was hired in September 2002. She acknowledged her mistake and embarrassment by her conduct. Based on that evidence, mitigating condition (MC) 5: (*There is clear evidence of successful rehabilitation*) applies to this case.

The allegation contained in SOR ¶ 1.b., claiming that Applicant's falsification of her SF-85P constituted a felony under federal law, is concluded in her favor based on a determination set forth under Guideline E that she did not deliberately omit information.

Guideline E: Personal Conduct

A trustworthiness concern may arise when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

The Government alleged Applicant falsified her SF-85P in March 2003, October 2004, and February 2005 by failing to disclose her 2002 part-time employment, the 2003 termination, and December 2002 arrest, which constituted a potential disqualification under DC 2: (*The 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 determines security clearance eligibility or trustworthiness, or award fiduciary responsibilities*) of this guideline. Applicant admitted that she did not disclose the

information, but denied that she intentionally did so.

When a falsification allegation is controverted or denied, 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. ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004).

When Applicant completed the SF-85P in March 2003, she did not disclose the December 2002 arrest because she was on a deferred prosecution program and thought she was not required to include it. She did not disclose her former part-time job on the belief that she had worked there less than six months and it was not a permanent position. In October 2003, she was still on the deferred prosecution program when her employer requested minor corrections to specified questions. In February 2005, her employer again directed her to revise specific sections of the application and did not advise her to review and update the entire form if circumstances transpired. As a result of her inexperience, lack of advice, and reliance on the specific directions given to her by her employer each time she was asked to correct and resign the form, she did not disclose information about the 2002 arrest, prior job, and subsequent termination. However, her failure was due to a lack of knowledge and assistance in completing the form, rather than a deliberate attempt to mislead the Government. Hence, I conclude she did not intentionally falsify her SF-85P. Accordingly, the allegations contained in ¶¶ 2.a. through 2.c. are concluded in her favor.

"Whole Person" Analysis

In addition to evaluating the disqualifying and mitigating conditions under each guideline, the adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Section E.2. of Enclosure of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the conduct of the applicant, an administrative judge should consider: (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.

I considered the totality of the evidence in view of the "whole person" concept, including Applicant's young age at the time of the theft and now, the consistent lack of competent assistance and direction from her employer throughout the application process, as well as her sincere demeanor while testifying and candid disclosure about the theft charge, coupled with her overall embarrassment and remorse about the incidents underlying this case. I took into account her educational pursuits and satisfactory performance in her part-time job over the last four years. I gave significant weight to her supervisors' credible testimony, including the fact that she has competently performed the same job for the past four years without an ADP clearance and demonstrated that she takes her position seriously. I also believe that the behavior underlying the issues raised in the SOR will not recur in the future as a result of her current understanding of the ADP application process and criminal justice system. Applicant mitigated the security concerns raised by her criminal and personal conduct. Accordingly, Guidelines J and E are concluded for her.

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 as follows:

Paragraph 1: Guideline J (Criminal Conduct) FOR APPLICANT

Subparagraphs 1.a.-1.b.: For Applicant

Paragraph 2: Guideline E (Personal Conduct) FOR APPLICANT

Subparagraphs 2.a.-2.c.: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for assignment to sensitive duties. Her application for eligibility is granted.

Shari Dam

Administrative Judge