DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
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SSN: -----------	)	
	)	
Applicant for Public Trust Position	)	

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel
For Applicant: *Pro se*

October 30, 2008

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves trustworthiness concerns raised under Guidelines F (Financial Considerations) and E (Personal Conduct). Eligibility for assignment to a public trust position is denied.

Statement of the Case

Applicant submitted her Questionnaire for Public Trust Position (SF 85P) on November 28, 2005. On March 21, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny her application, citing trustworthiness concerns under Guidelines F and E. 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 March 27, 2008. She answered the Guideline F allegations on May 6, 2008, and requested a determination on the record without a hearing. She answered the Guideline E allegations on June 30, 2008. Department Counsel submitted the government's written case on August 21, 2008. On August 22, 2008, a complete copy of the file of relevant material (FORM), including Government Exhibits (GX 1) through 14, was sent to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the government's evidence. She received the FORM on September 2, 2008, but she did not respond within the prescribed 30-day period, which expired on October 2, 2008.

On October 9, 2008, Applicant mailed Applicant's Exhibit (AX) A to DOHA, and it was received on October 14, 2008. Department Counsel did not object to consideration of her untimely submission, but argued that it should be given no weight. Department Counsel's comments are attached to the record as Hearing Exhibit I. The case was assigned to me on October 24, 2008.

Findings of Fact

In her answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a, 1.b, 1.c, 1.e, 1.i, and 1.j. Her admissions are incorporated in my findings of fact.

Applicant is a 35-year-old employee of a defense contractor. She has worked for her current employer since November 2005. She has never received a trustworthiness determination.

Applicant was previously married and divorced. The date of her divorce is not reflected in the record, but it appears to have been before November 2002. She and her former spouse had two children, ages 14 and 12, who live with their father. She also has a 17-year-old child whose father has custody and who lives with his grandmother. Applicant pays child support for all three children. She has an 18-year-old daughter who was living with her at the time of her application for a public trust position (GX 5 at 6-7; GX 6 at 4-5).

In October 2005, Applicant filed a petition for Chapter 7 bankruptcy, alleged in SOR ¶ 1.a. In her petition, she listed assets of $600 and liabilities of $54,236.23. She listed net monthly income of $1,280 and her expenses of $1,250. The court granted Applicant a discharge in March 2006 (GX 7 at 3-52).

Applicant told a security investigator the bankruptcy was caused by unemployment and her divorce (GX 6 at 3). Her SF 85P reflects unemployment from December 1997 to September 1999, August 2001 to July 2002, March and April 2003, and January to May 2005. After Applicant's bankruptcy discharge, she was unemployed from September to November 2005, when she started her current job (GX 5 at 3-5).

When Applicant was divorced, her spouse agreed to be responsible for a joint credit union loan of about $20,000. He allowed the payments to become delinquent, and Applicant included the debt in her bankruptcy.

Applicant signed a one-year lease for an apartment in November 2002. After three months, she stopped paying rent and moved to low-income housing. The apartment landlord obtained a judgment against her, which was included in her bankruptcy.

Applicant was laid off from work in March 2003 and was unable to pay her rent. The landlord obtained a judgment for unpaid rent, which was included in her bankruptcy.

Applicant purchased a used car in about March 2003 and made payments until November 2003, when she surrendered the car and stopped making payments because the car was not operating properly. This debt was included in her bankruptcy.

Applicant moved into another apartment in May 2004, taking over an existing lease from her former sister-in-law. After paying rent for two months, she moved in with a friend and stopped paying rent on the apartment. The landlord obtained a judgment for unpaid rent, which was included in her bankruptcy.

During an interview with a security investigator on August 7, 2006, Applicant stated the cell phone bill alleged in SOR ¶ 1.d should have been included in her bankruptcy, but it is not listed on Schedule F of her bankruptcy petition, nor is the cell phone company listed in the certificate of service. The debt arose in 2004 when Applicant returned the cell phone without completing the contract because she was unhappy with the service (GX 6 at 6).

In her response to the SOR, Applicant claimed she did not know anything about the debts alleged in SOR ¶¶ 1.f and 1.g. Her most recent credit report reflects that the debt alleged in SOR ¶ 1.g is a delinquent student loan (GX 8 at 2). The debt alleged in SOR ¶ 1.f does not appear on the most recent credit report.

On October 9, 2008, Applicant submitted evidence that she was enrolled in a consumer credit counseling service (AX A). The counseling service proposed a payment plan for the debts alleged in SOR ¶¶ 1.d, 1.e, and 1.h through 1.k. The plan includes the cell phone debt in SOR ¶ 1.d, which Applicant denied in her answer to the SOR. The plan does not address the unpaid fines alleged in SOR ¶¶ 1.b and 1.c or delinquent student loan alleged in SOR ¶ 1.g. There is no evidence her creditors have agreed to the payment plan or that she has made any payments.

Applicant’s net monthly income is about $1,120. Her expenses are about $940 per month, leaving a net remainder of about $180. She has virtually no savings and owns a car worth about $2,000.

The following table summarizes the evidence concerning the delinquent debts alleged in the SOR.

SOR	Debt	Amount	Answer To SOR	Status	Evidence
1.b	Parking Ticket	$108	Admit	Unpaid	GX 4
1.c	Traffic Fine	$585	Admit	Paid in part	GX 4
1.d	Cell Phone	$421	Deny	Unpaid	GX 4; GX 6 at 6; AX A
1.e	Bad Check	$228	Admit	Unpaid	GX 4; GX 8 at 2; AX A
1.f	Student Loan	$1,529	Deny	Not Proven	GX 4; GX 8
1.g	Student Loan	$2,432	Deny	Unpaid	GX 4;GX 8 at 2
1.h	Collection	$713	Deny	Unpaid	GX 4; GX 8 at 2; AX A
1.i	Medical	$229	Admit	Unpaid	GX 4; GX 8 at 2; AX A
1.j	Medical	$339	Admit	Unpaid	GX 4; GX 8 at 2; AX A
1.k	Cell Phone	$626	Deny	Unpaid	GX 4; GX 8 at 1; AX A

When Applicant submitted her SF 85P in November 2005, she answered “yes” to question 16, asking if she had been charged with or convicted of any offense other than traffic fines of less than $150. She disclosed receiving a ticket in May 2005 for riding in a HOV [High Occupancy Vehicle] lane, but she did not disclose a $585 fine imposed in January 2005 for driving on a suspended, revoked, or cancelled license. The record reflects issuance of a warrant for failure to appear in court in May 2005, but it does not reflect whether the warrant was served or Applicant responded to it (GX 14). Although the SOR ¶ 1.c alleged she failed to appear in court for the driver’s license offense, the court records reflect that the charge of failure to appear occurred in November 2003 in connection with the traffic ticket alleged in SOR ¶ 1.b (GX 13).

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 entitled to adjudication under 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, the 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 the factors listed in the adjudicative process. The entire process is a conscientious scrutiny of a number of variables known as the “whole person concept.” AG ¶ 2(c). The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. The administrative judge’s over-arching adjudicative goal is a fair, impartial, and common sense decision.

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 protection of the national security is the paramount consideration. “Any doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security.” AG ¶ 2(b). An unfavorable trustworthiness determination is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines for a favorable determination.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” An applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

Analysis

Guideline F, Financial Considerations

The SOR alleges a Chapter 7 bankruptcy discharge in March 2006 (SOR ¶ 1.a) and ten delinquent debts totaling $7,210 (SSOR ¶¶ 1.b-1.k). Applicant admitted five delinquent debts totaling $1,489 (SOR ¶¶ 1.b, 1.c, 1.e, 1.i, and 1.j). The trustworthiness concern under this guideline 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.

Several disqualifying conditions under this guideline could raise trustworthiness concerns and may be disqualifying in this case. AG ¶ 19(a) is raised where there is an “inability or unwillingness to satisfy debts.” AG ¶ 19(b) 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.”

Applicant’s financial history raises AG ¶¶ 19(a), (c), and (e). AG ¶ 19(b) is not established because there is no evidence of frivolous or irresponsible spending.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 19(a), (c) and (e), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Trustworthiness concerns based on financial problems can be mitigated by showing that "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." AG ¶ 20(a). Applicant's delinquent debts are numerous, recent, and not the product of unusual circumstances that are not likely to recur. They raise doubt about her current reliability, trustworthiness, and good judgment. I conclude AG ¶ 20(a) is not established.

Trustworthiness concerns under this guideline also can be mitigated by showing that "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." AG ¶ 20(b). Both prongs, i.e., conditions beyond the persons's control and responsible conduct, must be established.

Applicant's divorce and her periods of unemployment were conditions beyond her control, establishing the first prong of AG ¶ 20(b). The second prong, however, is not established. Applicant's bankruptcy was precipitated by her divorce and periods of unemployment, but she contributed to her financial distress by repeatedly disregarding her obligations with respect to her apartment leases, car loan, and traffic violations. Her last period of unemployment was after her bankruptcy and before her current employment. She has worked steadily for almost three years. In response to DOHA interrogatories, she promised to resolve all her delinquent debts by November 2007, but she presented no evidence of any actions to resolve her delinquent debts until October 9, 2008, when she enrolled in a consumer credit counseling program.

Trustworthiness concerns under this guideline also can be mitigated by showing 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." AG ¶ 20(c). Although Applicant has enrolled in a credit counseling program, this mitigating condition is not established because it does not encompass all her delinquent debts, there is no evidence the payment plan has been accepted by her creditors, and there is no evidence of payments under the plan.

Trustworthiness concerns under this guideline also can be mitigated by showing that "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." AG ¶ 20(d). 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).

Applicant has enrolled in a credit counseling program and submitted a proposed payment plan, but this mitigating condition is not established because Applicant has produced no evidence that she has made any payments under the plan.

Guideline E, Personal Conduct

The SOR ¶ 2.a cross-alleges the unresolved parking ticket and unresolved traffic violation alleged in SOR ¶¶ 1.b and 1.c. The SOR ¶ 2.b alleges Applicant falsified her SF 85P by failing to disclose her $585 fine for driving on a suspended, revoked or cancelled driver's license. The concern under this guideline is set out in AG ¶ 15 as follows:

> 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.

The disqualifying condition in AG ¶ 16(c) is relevant to Applicant's failures to resolve the parking ticket and traffic violation. This disqualifying condition is raised by "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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." Applicant's disregard for her legal obligations is sufficient "credible adverse information" to raise this disqualifying condition.

The relevant disqualifying condition pertaining to her failure to disclose her traffic violation is set out in AG ¶ 16(a) as follows:

> [D]eliberate 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 benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission, standing alone, does not 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 of the omission. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

Applicant's denied falsifying her SF 85P. She admitted being fined $585 for driving without a valid license. She has offered no explanation for disclosing the HOV violation but not disclosing her more recent and more serious offense of driving without a valid license. I conclude the security concern in AG ¶ 16(a) is raised.

Trustworthiness concerns raised by false or misleading answers on an application for a public trust position may be mitigated by showing that “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” AG ¶ 17(a). In her answer to the SOR, she insisted she answered the question truthfully. While her answer to question 16 on the SF 85P was truthful, it was incomplete, and she made no effort to correct the omission. I conclude AG ¶ 17(a) is not established.

Trustworthiness concerns raised by personal conduct can be mitigated by showing “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.” AG ¶ 17(c). This mitigating condition is not established because Applicant’s falsification was not minor, it was recent, it did not happen under unique circumstances, and it casts doubt on her reliability and trustworthiness.

Whole Person Concept

Under the whole person concept, the 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. The administrative judge should consider the nine adjudicative process 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) the 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 sensitive position must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments under Guidelines F and E in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed in my discussions of Guidelines F and E, but some warrant additional comment.

Applicant has suffered periods of unemployment and a marital breakup, but she received a fresh start with her Chapter 7 bankruptcy discharge in March 2006. She had one additional period of unemployment after her bankruptcy, but has been steadily employed for almost three years. She is again in financial distress. For the first time, she has enrolled in a credit counseling program, but it is too soon to tell if she will adhere to whatever payment plan she can devise. Her lack of candor on her SF 85P raises questions about her reliability and trustworthiness. After weighing the disqualifying and mitigating conditions under Guidelines F and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the trustworthiness concerns raised by her financial problems and personal conduct. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with national security to grant her eligibility for assignment to a public trust position.

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 F (Financial Considerations):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b-1.e:	Against Applicant
Subparagraph 1.f:	For Applicant
Subparagraphs 1.g-1.k:	Against Applicant
Paragraph, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for assignment to a public trust position is denied.

LeRoy F. Foreman
Administrative Judge