



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
-----) ADP Case No. 07-17516
SSN: -----)
)
Applicant for Public Trust Position)

Appearances

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

October 16, 2008

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves trustworthiness concerns raised under Guidelines F (Financial Considerations) and E (Personal Conduct). Eligibility for access to sensitive information is denied.

Statement of the Case

Applicant submitted her Questionnaire for Public Trust Position (SF 85P), on March 18, 2007. On June 10, 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 June 17, 2008; answered it on July 15, 2008; and requested a decision on the record without a hearing. Department Counsel submitted the government's written case on August 27, 2008. On August 28, 2008, a complete copy of the file of relevant material (FORM) 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 3, 2008, and responded on September 23, 2008. DOHA received her response on September 29, 2008, and Department Counsel did not object to my consideration of her response. The case was assigned to me on October 7, 2008.

Findings of Fact

In her answer to the SOR, Applicant admitted all the delinquent debts alleged under Guideline F. In response to the allegations of falsifying her two SF 85P questionnaires, she admitted giving negative answers to the questions about delinquent debts but claimed she misunderstood the questions. Her admissions are incorporated in my findings of fact.

Applicant is a 49-year-old employee of a defense contractor providing health care services to military personnel and their families. She has worked for her current employer since November 2004. She previously worked for another defense contractor at the same military installation from July 2001 to November 2004. She received a favorable trustworthiness determination in July 2001.

Applicant completed high school and attended a community college from September 1977 to May 1979, but she did not receive a degree (GX 5 at 1-2). She was married in April 2004. This appears to have been a second marriage, but the record contains little information about her first marriage. She and her second husband separated in February 2008, and they intend to obtain a divorce (GX 7 at 34). She has two children, a 28-year-old daughter and a 17-year-old son (GX 5 at 5).

When Applicant submitted her SF 85P in March 2007, she answered "yes" to question 22a, asking, "In the last 7 years, have you . . . filed for bankruptcy, been declared bankrupt, been subject to a tax lien, or had legal judgment rendered against you for a debt?" She disclosed a lawsuit to collect a debt in January 2007. She answered "no" to question 22b, asking, "Are you now over 180 days delinquent on any loan or financial obligation?" Applicant's credit report dated March 30, 2007, reflected the 21 delinquent debts alleged in the SOR, including an unsecured personal loan and two delinquent car loans that resulted in repossessions in September 2006 and August 2001. Seventeen delinquent debts had been referred for collection more than two years before she submitted her SF 85P.

In response to DOHA interrogatories on November 14, 2007, she stated she answered "no" to question 22b because she misunderstood the question (GX 7 at 8). She gave the same explanation in her response to the FORM. In her answer to the SOR, she claimed she thought the question applied only to loans.

In a previous SF 85P executed in August 2004, she had answered "no" to questions 22a and 22b. Her credit report dated October 8, 2004, reflected a \$406 debt reported to the credit bureau in December 2001 and assigned for collection; an installment account debt of \$393 assigned for collection on which the last activity was in November 2001; a \$1,334 medical bill assigned for collection on which the last activity was in September 2002; a \$99 medical bill reported in January 2002 and assigned for collection; \$386 medical bill assigned for collection on which the last activity was in January 2000; an \$80 medical bill reported in November 2001 and assigned for collection; a \$10,764 debt reported in January 2004 and assigned for collection; and a \$54 debt reported in September 2001 and assigned for collection.

The SOR alleges 21 delinquent debts totaling about \$37,721. The two largest debts (\$15,750 and \$12,302) are the result of deficiencies after Applicant defaulted on her car loans and the cars were repossessed. One is for an unsecured personal loan (\$182). Five delinquent debts totaling \$1,719 are for telephone service. There are ten delinquent medical bills totaling \$3,099. Of the ten delinquent medical bills, five are for less than \$100.

In a statement to a security investigator in January 2005, Applicant explained that the terms of her first divorce decree required her ex-husband to pay the delinquent medical bills, but she became liable for them when he did not pay them (GX 13 at 1). She also told the investigator she had received consumer credit counseling (GX 13 at 2). In her response to the SOR, she stated that she has had three vehicles repossessed: the first because she could not afford the payments, the second because of a divorce (with no further details provided), and the third because she trusted her husband to pay all the bills and he neglected to make the car payments. In a statement to a security investigator in May 2007, she attributed about \$400 of the delinquent telephone service debt to collect calls from her daughter (GX 8 at 4).

In November 2007, Applicant retained a lawyer to file a Chapter 7 bankruptcy petition. In response to DOHA interrogatories on November 14, 2007, she stated all her delinquent debts will be included in the bankruptcy, but she did not include a bankruptcy schedule of creditors in her response to the interrogatories. She received the pre-bankruptcy credit counseling required by the court in October 2007 (GX at 11). As of the date of her response to the FORM (September 23, 2008), she had paid the lawyer \$1,800 of the \$2,000 fee. The bankruptcy petition will not be filed until she pays the rest of the lawyer's fee.

Applicant's net monthly income is about \$1,655, plus \$600 from Social Security and child support. Her monthly household expenses are about \$1,541 and monthly payments on current debts are about \$1,885. Her husband had been contributing about \$1,454 to the household income, but he has stopped contributing now that they are separated and intend to be divorced. When her husband was contributing to the family income, they had a net monthly remainder of about \$283 available to pay their delinquent debts. Without her husband's contribution, she has a net monthly shortfall of about \$1,171.

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. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole person concept.” 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 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.

Four disqualifying conditions under this guideline could raise a trustworthiness concern 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 long-standing delinquent debts, established by her admissions and corroborated by her credit reports, raise AG ¶¶ 19(a) and (c). While there is no direct evidence of "frivolous" spending, Applicant's history of purchasing more than she can afford is sufficient to establish the "irresponsible spending" under AG ¶ 19(b) and the "consistent spending" beyond her means under AG ¶ 19(e).

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 19(a), 19(b), 19(c) and 19(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). 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 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 financial history reflects medical bills that were beyond her control. Her ex-husband's failure to pay the medical bills in accordance with the divorce decree also was beyond her control. The medical bills, however, are a relatively small part of her financial picture, many of them for less than \$100. She has not explained why several small medical bills for less than \$100 have not been settled even though some of them have been outstanding for many years. Her neglect of these bills was not responsible.

Applicant is now facing another divorce, apparently beyond her control. She attributed one of the car repossessions to a divorce, but offered no details about the effect of the divorce on her ability to pay the car loan. On the other hand, she admitted that at least one of her three car repossessions was the result of purchasing a car she could not afford. Applicant has several delinquent telephone bills and has not explained how and why they became delinquent, except to explain that one delinquent bill was incurred when she accepted collect calls worth more than \$400 from her adult daughter. I conclude AG ¶ 20(b) is not established, because Applicant has not acted responsibly in the face of her limited financial resources.

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). Applicant has received the pre-bankruptcy counseling required by the court, and she told a security investigator in January 2005 she had received consumer credit counseling. This mitigating condition is not fully established, however, because her financial situation is not under control.

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 done virtually nothing to repay her creditors. Her debts will be legally unenforceable if she receives a Chapter 7 discharge, thus reducing her vulnerability to economic pressure. As of the date of her response to the FORM, she had not accumulated sufficient funds to fully pay the bankruptcy attorney's fee. In light of her negative cash flow, it is impossible to predict accurately when, if ever, the bankruptcy petition will be filed. Applicant receives some credit for seeking legal advice and adopting a plan to resolve her debts, but the actions leading to her delinquent debts and longstanding failure to resolve her debts raise doubts about her reliability, trustworthiness, and good judgment. See ISCR Case No. 01-26675 at 3 (App. Bd. Jun. 13, 2003).

Guideline E, Personal Conduct

The SOR alleges Applicant falsified her SF 85P in August 2004 by answering "no" to question 22b (debts on loans or other financial obligations over 180 days delinquent) and not disclosing the delinquent debts alleged in SOR ¶¶ 1.a through 1.n

(SOR ¶ 2.a). It also alleges she falsified her SF 85P in March 2007 by answering “no” to the same question and not disclosing the delinquent debts alleged in SOR ¶¶ 1.a through 1.t (SOR ¶ 2.a). 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 same “special interest” regarding the security clearance process also applies to the process for making trustworthiness determinations. The relevant disqualifying condition in this case 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 explanation for not disclosing her numerous debts on either of her two SF 85P questionnaires is that she did not understand the question. She claimed she thought the question only applied to loans, even though it asks about “any loan or financial obligation.” She did not explain why she did not disclose the unsecured personal loan. She admitted three car repossessions, but did not explain why the defaulted car loans were not disclosed even if the question applied only to loans. She has education beyond high school. Her handwritten statement to a security investigator, response to the SOR, and responses to interrogatories were articulate and generally responsive. She has worked in clerical and administrative positions for defense contractors since July 2001. Under all the circumstances, I find her explanation for not disclosing her delinquent debts implausible. Because she did not request a hearing, I have limited ability to assess her credibility. 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). Applicant made no effort to correct

her August 2004 application, and she repeated the same negative answer to question 22b in her March 2007 application, even though she had been questioned by security investigators about her delinquent debts in January 2005. She did not disclose the delinquent debts omitted from her second SF 85P until she was interviewed by a security investigator in May 2007. 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 falsifications were not minor, they were repeated in her most recent application, they did not happen under unique circumstances, and they cast 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 is a mature woman who has occupied a public trust position since July 2001. She has longstanding delinquent debts, but she has never adopted a disciplined plan to take control of her spending. Whether she will be able to accumulate the funds to pay her lawyer to file a Chapter 7 bankruptcy petition is not clear. Whether she will change her spending habits if she receives a Chapter 7 discharge is even less clear. Her lack of candor on her SF 85P raises questions about her reliability and trustworthiness. After weighing the disqualifying and mitigating conditions under Guideline and E, 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 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

Subparagraphs 1.a-1.u: Against Applicant

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

Subparagraphs 2.a-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 access to sensitive information is denied.

LeRoy F. Foreman
Administrative Judge