



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



In the matter of:)
)
) ADP Case No. 08-03440
)
)
Applicant for Public Trust Position)

Appearances

For Government: Robert E. Coacher, Esquire, Department Counsel
For Applicant: *Pro Se*

September 8, 2009

Decision

RIVERA, Juan J., Administrative Judge:

Applicant failed to mitigate the trustworthiness concerns arising from financial considerations and personal conduct. Applicant's eligibility to occupy an ADP I/II/III position is denied.

Statement of the Case

On October 11, 2007, Applicant submitted a Public Trust Position Application (SF 85P).¹ On March 2, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to her, detailing the basis for its preliminary decision to deny Applicant eligibility for a public trust position, citing trustworthiness concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive 5220.6,

¹ FORM Item 4.

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) effective within the Department of Defense for SORs issued after September 1, 2006.

On March 19, 2009, Applicant responded to the SOR allegations, and elected to have her case decided on the written record in lieu of a hearing (Item 3). A complete copy of the file of relevant material (FORM), dated April 3, 2009, was provided to her by letter dated April 8, 2009. Applicant signed the receipt for the DOHA transmittal letter on April 14, 2009. She was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. She failed to submit any materials, comments, or objections in response to the FORM. The case was assigned to me on June 25, 2009.

Findings of Fact

Applicant admitted all the factual allegations in SOR ¶ 1, except for SOR ¶¶ 1.s and 1.aa, which she denied. She also denied SOR ¶¶ 2.a and b. Her admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 37-year-old defense contractor employee. She attended college from January through April 2002; however, it is not clear from the record the number of credits she completed, or whether she received a degree. She separated from her spouse in May 2004, and they were divorced in August 2004. She has three sons. Her oldest son is in college. It is not clear from the record whether they are all from this marriage, what their ages are, how long they have been in Applicant's custody, or whether they received financial assistance from their father.

Applicant worked for six different employers from July 1999 through August 2007 (Item 4). She was laid off in between jobs for approximately 30 days during 2006 and in 2007. Applicant has been unemployed since August 2007. She left her last job under unfavorable circumstances, because she used her company credit card for gas without authorization (Item 4, p. 3).

In her public trust position application, Applicant answered "Yes," to question 19 (asking whether in the last seven years she had filed for bankruptcy, had been subject to a tax lien, or had a judgment rendered against her). She answered "No," to question 20, asking whether she was currently over 180 days delinquent on any loan or financial obligation. She failed to disclose the debts alleged in SOR ¶¶ 1.a, 1.b, 1.d through 1.o, and 1.q. Her security clearance background investigation addressed her financial problems, and included the review of her two answers to DOHA interrogatories (Items 5 and 6), excerpts of documents related to her 2004 bankruptcy petition (Item 8), and 2007, 2008, and 2009 credit bureau reports (CBR) (Items 11, 10, and 9, respectively).

In her 2007 interview with a government investigator, consistent with her answers to the SOR, Applicant admitted most of the debts alleged in the SOR and provided explanations about her financial problems. She explained that her financial problems were created by her 2004 divorce. She was awarded minimal financial assistance through the court, receiving no alimony or maintenance and only \$50 for child support.

Following her divorce, Applicant was overwhelmed by her debts. She was not earning enough money to pay both her day-to-day living expenses and her prior legal obligations. At the time, she had no budget or payment plan to pay her debts. In June 2004, she filed for bankruptcy protection; however, she retracted her petition in August 2004. Applicant explained that she was concerned about the adverse effects her filing for bankruptcy would have on her future plans of opening her own business. She also felt responsible to her creditors and wanted to make good on her obligations.

In her 2007 statement, Applicant also claimed she was receiving financial assistance from a mortgage company employee who was helping her to review her financial options. This included a debt consolidation plan, negotiations with the creditors to settle some of the debts, and obtaining a second job to generate sufficient income to pay for the possible debt consolidation plan.

Applicant's SOR alleges 24 debts totaling approximately \$29,700, all of which are established by the record evidence. Her debts include four unpaid judgments (two dating back to 2004, one from 2005, and one from 2007); an unpaid 2006 returned check, the unauthorized use of her company credit card in 2007, numerous delinquent medical debts, unpaid utility bills, and two repossessed cars. In 2007, Applicant sought the assistance of an attorney to help her file for bankruptcy protection. She intends to resolve her financial problems by filing for bankruptcy protection sometime in the near future. She provided no documentary evidence to show she has filed for bankruptcy.

Applicant presented no other documentary or corroborating evidence of any efforts taken to contact any of her creditors, to pay any of her debts, or to otherwise resolve any of her financial obligations.

SOR ¶¶ 2.a alleged that Applicant falsified question 20 of her 2007 SF 85P (asking whether she was currently over 180 days delinquent on any loan or financial obligation), when she answer "No," and failed to disclose the debts alleged in SOR ¶¶ 1.a, 1.b, 1.d through 1.o, and 1.q. Applicant explained she mistakenly believed that the question was addressing only student loans. In her response to the SOR, she indicated that "the choice was not intentional," and that she has always admitted and discussed her debts. She also averred she was honest in discussing her financial problems during her background interview.

Applicant deliberately failed to disclose her delinquent debts. In reaching this conclusion, I considered Applicant's failed 2004 bankruptcy filing, her failure to present any evidence of efforts to pay or resolve any of her debts since then, the number of her

delinquent debts, the small value of many of the individual debts, the aggregate value of the debt, and the period over which the debts have been delinquent.

Applicant is a single mother of three, living from paycheck to paycheck, while trying to gain financial stability and keep her life on track. Notwithstanding her financial problems, she has managed to help her older son through college and needs to maintain her financial stability to help her children (Item 6). Her 2007 personal financial statement shows that she has a negative remainder after paying all her bills each month without considering the delinquent debts alleged in the SOR (Item 6).

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The government’s authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. See *Id.* at 527.

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 afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. See Regulation ¶ C8.2.1.

When evaluating an applicant’s suitability for a public trust position, an 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 an evaluation of the whole person. An administrative judge’s controlling adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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 government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive

information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to classified information. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security and trustworthiness suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant 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 [or access to sensitive information].” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance [or trustworthiness] determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security.” Section 7 of Executive Order (EO) 10865 provides that 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.”

Analysis

Guideline F, Financial Considerations

Under Guideline F, the trustworthiness concern is that an applicant’s 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 classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. AG ¶ 18.

The SOR alleges 24 delinquent/charged off accounts, including four judgments, a returned check, and numerous medical and utility bills totaling approximately \$29,700. All of the delinquent debts are established by the record evidence. Except for her failed 2004 bankruptcy filing, Applicant presented no evidence of efforts to pay or resolve the alleged financial obligations, many of which have been delinquent for many years. AG ¶

19(a): inability or unwillingness to satisfy debts, and AG ¶ 19(c): a history of not meeting financial obligations, apply in this case.

AG ¶ 20 lists six conditions that could mitigate the financial considerations security concerns:

(a) 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;

(b) 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;

(c) 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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; and

(f) the affluence resulted from a legal source of income.

Applicant's sparse favorable evidence fails to raise the full applicability of any mitigating condition. Her financial problems are ongoing and her evidence fails to show they occurred under such circumstances that it is unlikely that they will recur. Her financial problems and her failure to fully address the trustworthiness concerns cast doubt on Applicant's current reliability, trustworthiness, or good judgment. AG ¶ 20(a) does not apply.

Applicant presented evidence that could establish circumstances beyond her control contributing to her inability to pay her debts, i.e., her divorce, being a single mother of three, and her periods of unemployment. AG ¶ 20(b) applies, but only partially. Applicant's evidence is not sufficient to show how her 2004 divorce continues to impact her current financial situation and whether she acted responsibly under the circumstances. Applicant has been employed from 1999 to 2007, albeit with small periods of unemployment between jobs and unemployed since 2007. Notwithstanding, she presented little evidence of efforts to contact creditors to pay, settle, or to resolve her debts beyond her failed 2004 bankruptcy filing and her intention to file for bankruptcy protection in the future.

AG ¶ 20(c) does not apply because, there are no clear indications that her financial problems are being resolved or are under control. Her inability to pay even small debts shows she was financially overextended, and that her financial problems are likely to recur. The remaining mitigating conditions are not reasonably raised by the facts in this case.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security/trustworthiness concern stating:

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.

Applicant deliberately falsified material facts on her public trust position application when she failed to disclose that she was over 180 days delinquent on most of the financial obligations alleged in the SOR. In reaching this conclusion, I considered Applicant's failed 2004 bankruptcy filing, the lack of evidence of efforts to pay or resolve any of her debts since she acquired them, the number of her delinquent debts, the small value of many of the individual debts, the aggregate value of the debt, and the period over which the debts have been delinquent. Additionally, Applicant bounced a check, and used a company credit card for gas without authorization.

Applicant's actions create trustworthiness concerns under two disqualifying conditions. Her behavior triggers the applicability of disqualifying conditions AG ¶¶ 16(a) "deliberate 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," and 16(e) "personal conduct or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing."

AG ¶ 17 lists seven conditions that could mitigate the personal conduct security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) 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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

After considering the above mitigating conditions, I find none are fully established by the sparse record evidence. Applicant falsified her SF 85P. It was not until after she was confronted during the interview process that she admitted her delinquent debts. Her falsification is a serious offense (felony), it is recent, and casts doubt on her reliability, trustworthiness, and judgment. Moreover, Applicant's financial problems led her to engage in questionable behavior. Her questionable behavior increased her vulnerability to exploitation, manipulation, or duress.

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant 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.

The ultimate determination of whether to grant eligibility for a security clearance, or public trust position, must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature, trained woman, and a good mother. She has been successful working for numerous employers since 1999. There is no evidence of any security violation, or that she is not a competent worker. These factors show some responsibility and mitigation.

On the other hand, there are more substantial circumstances that weigh against Applicant in the whole person analysis. She presented little evidence of efforts to resolve her debts. There are no clear indications that her financial problem is being resolved or is under control. Her inability to pay even relatively small debts shows she is financially overextended. Based on the available evidence, she does not have the financial means to resolve her financial problems.

Moreover, she deliberately falsified her public trust position application when she failed to disclose her full financial situation. Considering her 2004 bankruptcy filing, the number and aggregate value of debts and judgments, and the period over which the debts have been delinquent, Applicant knew or should have known of her delinquent debts and judgments at the time she completed her application. Applicant's financial problems have led her to engage in illegal activities such as passing a bad check, abusing her employer's credit card privileges, and falsifying her SF 85P.

Considering the record as a whole, Applicant's financial behavior and personal conduct raise doubt about her ability to have access to sensitive information and her trustworthiness. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from her financial considerations and personal conduct.

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:	AGAINST APPLICANT
Subparagraphs 1.a - 1.aa:	Against Applicant

Paragraph 2, Guideline E:

AGAINST APPLICANT

Subparagraphs 2.a and 2.b:

Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility to occupy an ADP I/II/III position. Applicant's eligibility to occupy an ADP I/II/III position is denied.

JUAN J. RIVERA
Administrative Judge