



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



In the matter of:)	
)	
XXXXXXXX, XXXXX)	ADP Case No. 08-03652
SSN: XXX-XX-XXXX)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

May 27, 2009

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate Guideline F (Financial Considerations) security concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

Applicant submitted her Public Trust Position Application (SF-85P), on April 11, 2007. On October 17, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F (Financial Considerations) for Applicant.

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 January 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 October 22, 2008. She answered the SOR in writing on December 5, 2008, and requested a hearing before an Administrative Judge. DOHA received the request on December 8, 2008. Department Counsel was prepared to proceed on December 29, 2008, and I received the case assignment on February 11, 2009.

DOHA issued a notice of hearing on March 4, 2009, scheduling the case for April 7, 2009. The hearing was held as scheduled. The Government offered Government Exhibits (GE) 1 through 6, which were received without objection. Applicant testified on her own behalf, and offered Applicant Exhibits (AE) A and B, which were received without objection.

I held the record open until April 21, 2009 to afford the Applicant an opportunity to submit additional material. On April 21, 2009, Applicant submitted an e-mail request seeking an extension of her submission deadline. Without objection from the Government, I granted her request for an extension until April 28, 2009. Applicant timely submitted AE C through G without objection. DOHA received the hearing transcript (Tr.) on April 15, 2009.

Findings of Fact

In her Answer to the SOR, Applicant admitted the factual allegations. After a complete and thorough review of the evidence, I make the following additional findings of fact:

Applicant is a 58-year-old team lead in the enrollment production department of her defense contractor employer. She has worked for this employer since July 2007. GE 1, Tr. 15. She seeks access to sensitive information in conjunction with a public trust position, which is a condition of her employment. Tr. 15-16.

Applicant did not complete high school, but was awarded her GED in January 1969. She also was awarded an insurance certification from a vocational school in April 2007, which allowed her to sell insurance in her state. Tr. 14-15. Applicant was previously married from November 1968 to February 1981. That marriage ended by divorce. She has four adult children born during that marriage. Applicant is not married, but is involved in a 22-year relationship. Tr. 11-12.

Applicant's background investigation addressed her financial situation and included the review of her April 2007 SF-85P, two July 2008 Answers to DOHA Interrogatories, and April 2007, February 2008 and September 2008 credit reports. GE 1 – 6.

The Government alleged in the SOR and established by Applicant's admissions and/or evidence presented that Applicant has/had nine delinquent debts totaling \$8,160.00. The debts consist of two judgments, two past due accounts and five collection accounts. Applicant's indebtedness began after she was laid off from her job in November 2000 and have been ongoing. Response to SOR, GE 3, Tr. 17-36.

Applicant has provided no documentation demonstrating that she has paid and/or resolved any of the nine debts listed in SOR. Following her lay-off in November 2000, she remained unemployed until August 2001. Tr. 21, 36. Her SF-85P reflects subsequent periods of unemployment from September 2003 to November 2003, January 2004 to March 2004, October 2004 to January 2005, July 2005 to March 2006, and August 2006 to April 2007. GE 1, AE C.

When she was interviewed in July 2007 by an Office of Personnel Management (OPM) investigator regarding her indebtedness, she indicated she planned to sell her house "in about a year" and use the profits to pay off her debts. GE 3. By fall 2008, she realized the "bottom fell out of the [real estate] market" and she was unable to sell her house and gain the expected profits to pay off her debts. Tr. 25-26, 40. Applicant stated that "stupidity" and never learning how to manage her money and helping her children contributed to her current financial situation. Tr. 37.

Applicant stated that many of her family members have served in the military to include her father, brothers, cousins, brothers-in-law, nephews, nieces and a son. She professed her loyalty as an American and stated she would never do anything to compromise national security. Response to SOR, GE 3.

Applicant submitted performance evaluations covering the time frame April 2007 to March 2009 from her current employer reflecting above average performance, a Certificate of Appreciation for "Outstanding Department Support" received in August 2008, and an "All Star Award" received in October 2008. AE A, AE B, AE E, AE F. Applicant's post-hearing budget reflects a net monthly remainder of \$120.00. AE G.

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See 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." (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. 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, 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 Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. 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 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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

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.” See *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The trustworthiness concern relating to the guideline for Financial Considerations 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.

The guideline notes several conditions that could raise trustworthiness concerns. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Applicant accumulated nine delinquent accounts, totaling \$8,160.00 as noted *supra*. Her indebtedness began in 2000 and has been ongoing. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from financial difficulties. Applicant experienced several periods of unemployment and was unable to sell her house as a result of a distressed real estate market. Two potential mitigating conditions apply under this concern.

Under AG ¶ 20(b), it may be mitigating where “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.” As noted, Applicant experienced several periods of unemployment, the first occurring in 2000 and the most recent ending in 2007. She has been continuously employed since July 2007. In 2007, she expressed her intent to an OPM investigator to sell her house in the 2008 timeframe and use the profits to pay off her debts. However, as the real estate market deteriorated, she decided against putting her house on the market.

I note Applicant’s financial problems are not recent, and she has been employed since July 2007. Since becoming employed, Applicant has made no progress in resolving any of the alleged debts. She also indicated she never learned how to manage money and provided financial assistance to her children even if doing so was to her detriment. To invoke full application of AG ¶ 20(b), the Applicant must have acted responsibly. Applicant failed to show that these factors precluded her from addressing any of her debts in whole or in part, especially since becoming employed and being aware her financial situation was a security concern since at least from the time of her OPM interview in July 2007.

AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Applicant produced no such evidence. Her post hearing submissions indicated that her attempts to resolve her indebtedness were either unsuccessful or she was unable to provide documentation of payment plans with creditors. I conclude none of these potentially mitigating conditions apply.

The objective of a trustworthiness determination is the fair-minded, commonsense assessment of a person’s trustworthiness and fitness for access to sensitive information. Indeed, the “whole person” concept recognizes we should view a

person by the totality of his acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the facts listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has not mitigated the financial considerations security concern. She has not overcome the case against her and satisfied her ultimate burden of persuasion.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has not mitigated the trustworthiness concerns arising from her financial considerations.

In fairness to the Applicant, this decision should not be construed as a determination that she cannot or will not attain the state of financial stability necessary to justify the holding of a public trust position. To the contrary, her mitigating evidence and whole person analysis suggests a sound potential for positive reform and outstanding accomplishments in the defense industry. Should Applicant be afforded an opportunity to reapply for a public trust position in the future, she may well demonstrate persuasive evidence warranting a favorable result.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"¹ and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the Government's case. For the reasons stated, I conclude she is not eligible for access 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:	AGAINST APPLICANT
Subparagraph 1.a. – 1.j.:	Against Applicant ²

¹ See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

² Note – The SOR inadvertently left out SOR ¶ 1.i.

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

ROBERT J. TUIDER
Administrative Judge