



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



In the matter of:)	
)	
-----)	ADP Case No. 08-03712
SSN: -----)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Ray T. Blank, Jr., Esquire, Department Counsel
For Applicant: *Pro Se*

March 3, 2010

Decision

LYNCH, Noreen A., Administrative Judge:

On November 2, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns arising under Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline F (Financial Considerations). 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.

On November 27, 2009, Applicant answered the SOR. She elected to have her case decided on the record in lieu of a hearing. Department Counsel submitted the

government's written case on December 24, 2009.¹ Applicant received a complete file of relevant material (FORM) on December 31, 2009, and was provided the opportunity to file objections, and submit material to refute, extenuate, or mitigate the government's case. Applicant submitted a letter, undated, received on January 4, 2010. DOHA assigned the case to me on February 19, 2010. Based upon a review of the case file, pleadings, and exhibits, Applicant's eligibility for a public trust position is denied.

Findings of Fact

In her Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.d, 3.b, 3.k, and 3.s. She denied the remaining allegations in the SOR.

Applicant is a 31-year-old employee of a defense contractor. She graduated from high school in 1997, and attended a technical school from August 2003 until March 2006. She is single and has four daughters. She has worked for her current employer since December 2006 (Item 4).

In April 1996, Applicant was arrested and charged with forgery, burglary, criminal conspiracy, and armed robbery. She pled guilty to all charges and was sentenced to five years confinement and court costs (Item 11). Applicant was incarcerated from January 1999 until January 2002 (Item 9). Applicant indicated that she drove two acquaintances to an unspecified location. The two individuals were involved in an armed robbery (Item 5).

Applicant was charged with breach of trust with fraudulent intent in November 1998. She paid a fine of less than \$250 (Item 8). She claimed she wrote a check that was "dishonored" (Item 12).

In July 2006, Applicant was arrested and charged with financial identity fraud. She was convicted and sentenced to three years confinement and a \$100 fine (Item 6). Applicant's sentence was converted to probation for one year, which she completed in 2007. Applicant denied that she was guilty of identity fraud (Response to FORM).

Applicant completed a Questionnaire for Public Trust Positions on December 9, 2006. She answered "Yes" to Section 20 asking whether she had been convicted of any offense in the last 7 years. She disclosed a speeding ticket. Applicant did not disclose her 2006 conviction for financial identity fraud. She explained that she made restitution for the underlying incident (Applicant's answer to FORM).

In an interview with a Department of Defense (DoD) investigator conducted on March 23, 2007, Applicant denied any direct involvement before, during, or after the armed robbery in 1996 (Item 5). She claimed she had no idea that the passengers in her vehicle were engaged in armed robbery. She stated she learned of the incident approximately ten days later. She admits pleading guilty and being incarcerated, but she believes she was a victim of circumstances and was wrongly incarcerated (Item 5).

¹The government submitted 15 items in support of the allegations.

The police report (Item 9) reflects that Applicant was in her vehicle before the robbery, and she picked up the two individuals as they were fleeing the scene.

In an interview on January 30, 2008, Applicant reported to the DoD investigator that she drove two individuals to a mall but again denied any direct involvement with the 1995 armed robbery (Item 5).

Applicant signed an affidavit on February 19, 2009. She again denied any direct involvement with the 1995 armed robbery. Despite the police reports, documentation from the FBI record, her guilty pleas, and other documents in the record, Applicant maintained that she “never participated in any events” and was not guilty of any of the criminal incidents for which she was incarcerated (Item 12).

In Applicant’s December 2009, response to the FORM, she stated that after reading the file in depth, the items that were listed on the SOR for which she was arrested were correct “but the circumstances surrounding the situations were not correct or accurate.” Applicant acknowledged that the deliberate omissions in her December 9, 2006, Standard Form 85P and subsequent interviews constitute violations of 10 U.S.C. Section 1001, which is a felony (Item 2).

At issue are the following delinquent debts totaling approximately \$9,356, as reflected in a credit report (Item 14), and as noted in the SOR as allegations ¶¶ 1.a through 1.t under Guideline F (Financial Considerations).

In choosing an administrative decision, Applicant chose to rely on the written record. The facts she submitted with regard to her past and her financial situation are limited to her answer to the SOR allegations, in which she stated:

In regards to my credit report, there are several items on there in dispute with companies. I have items with Alltel and Verizon where I co-signed for individual family members for cell phones. They failed to honor their contract and these items showed up on my credit report. I am in the process of working out payments with some of the companies to payoff some of these accounts.

The delinquent debts are comprised of debts referred to collection or charged-off in 2003 and 2005 (Item 6). Applicant did not disclose information as to what gave rise to the majority of these obligations. She did list two other accounts on her 2006 SF 85P that were 180 days delinquent. No indication is given as to whether she ever pursued financial counseling or has made any efforts to address the debts at issue. Applicant denied the majority of the delinquent debts but did not submit any documentation to substantiate the basis of a legitimate dispute. Despite her assertion that she is in the process of “working out payments”, she has not demonstrated that any debt has been resolved. Applicant did not provide any evidence regarding her current financial situation.

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 overarching adjudicative goal is a fair, impartial, and commonsense 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 *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the trustworthiness concern pertaining to criminal conduct, “Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.”

AG ¶ 31 describes conditions that could raise a concern and may be disqualifying, (a), “a single serious crime or multiple lesser offenses,” and ¶ 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”.

Applicant was arrested in 1996, and pled guilty to forgery, burglary, criminal conspiracy, and armed robbery in 1999. She was incarcerated from 1999 until 2002. She was charged in 1998, and fined for breach of trust with fraudulent intent. She was arrested in 2006, and convicted for financial identity fraud. She served one year probation, which ended in 2007. She intentionally falsified her SF 85P in December 2006, and made false statements in subsequent interviews with government officials, which is a violation of 10 U. S. C. Section 1001. AG ¶ 31(a), and 31(c) apply.

AG ¶ 32 provides conditions that could mitigate concerns:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment, and

(d) there is evidence of successful rehabilitation, including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

None of the mitigating conditions apply. Applicant has a history of engaging in criminal behavior, including a history of offenses involving a lack of integrity. She has been convicted of forgery and fraud offenses, in addition to burglary, conspiracy, and armed robbery. Her prior criminal history involves conduct demonstrating a lack of trustworthiness. She provided false information in her SF 85P in 2006. She has minimized or denied her criminal actions, despite her convictions and the documented police and FBI records. She presented insufficient evidence to support mitigation.

Guideline E, Personal Conduct

AG ¶ 15 expresses the concern pertaining to personal conduct, "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."

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. Under AG ¶ 16(a), a disqualifying condition exists when there is "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 eligibility or trustworthiness, or award fiduciary responsibilities." Under 16(b), a disqualifying condition exists when "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative."

On December 9, 2006, Applicant signed her SF 85P, in which she deliberately falsified her application by not disclosing her 2006 arrest and conviction for financial identity fraud. She was still on probation. She instead listed a speeding ticket and a fine. In 2007 and 2008 interviews, Applicant deliberately misled officials about her 1996 involvement in an armed robbery. She signed an affidavit in 2009, that again provided statements that she never participated in the events and that she was not at fault. These deliberate falsifications constitute a violation of 10 U.S.C. Section 1001, a felony.

In her December 2009, response to FORM, Applicant offered more explanations concerning the deliberate falsifications noted above. She acknowledged the arrests and convictions and her incarceration but believed the "incident regarding the fraud/identity was through no fault of her own."

After considering the mitigating conditions outlined in AG ¶ 17, I conclude that none of them apply. Applicant did not make prompt or good-faith efforts to correct her falsification or concealment. She provided no information that supports she was ill advised in completing her SF 85P. She submitted no documentation concerning counseling. She has not acknowledged her criminal behavior despite her incarceration. She has provided nothing for the record to show that she has met her burden of mitigation for her personal conduct.

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 debts⁶ is potentially disqualifying. Similarly under AG & 19(c), a history of not meeting financial obligations⁶ may raise security concerns. Applicant has \$9,356 in delinquent debts. To date, these debts remain unaddressed. The evidence is sufficient to raise these disqualifying conditions.

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying conditions may be mitigated where 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.⁶ Most of Applicant's debts became delinquent in 2003 and 2005. They are still delinquent and have not been addressed. This mitigating condition does not apply.

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.⁶ Applicant did not provide any information to support the application of this mitigating condition.

Evidence 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 control⁶ is potentially mitigating under AG & 20(c). Applicant did not provide any documentation for the record to indicate any financial counseling. Applicant did not submit any documentation to show that she has paid any debts. Therefore, AG & 20(d), the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts,⁶ does not apply.

Under AG ¶ 20(e), it may be mitigating when "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." Applicant disputed two delinquent debts in her response to FORM, but she did not produce any documentation concerning this alleged dispute or evidence that she is trying to resolve the delinquent debts.

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 public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has a ten-year history of criminal acts. She still does not acknowledge her past behavior. She falsified her SF 85P in December 2006. She made false statements in subsequent interviews with government officials. Applicant's claims that she was a victim of circumstance are not credible.

Applicant chose to rely on the written record in this administrative determination. In so doing, she failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding mitigation. She has failed to meet her burden.

Overall, the record evidence leaves me with questions and doubts with regard to Applicant's, eligibility for a trustworthiness position. For all these reasons, I conclude Applicant has not mitigated the criminal conduct, personal conduct, and financial considerations trustworthiness concerns. As noted above, AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of the national security."

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 J:	AGAINST APPLICANT
Subparagraphs 1.a:-1.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a:-2.d:	Against Applicant
Paragraph 3, Guideline F:	AGAINST APPLICANT

Subparagraphs 3.a:-3.t:

Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

NOREEN A LYNCH
Administrative Judge