



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



In the matter of:)
)
-----) ADP Case No. 08-03720
SSN: -----)
)
Applicant for Public Trust Position)

Appearances

For Government: Paul L. DeLaney, Esq., Department Counsel
For Applicant: *Pro se*

August 17, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

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

Statement of the Case

Applicant submitted her application for a public trust position (SF 85P) on April 5, 2007, and recertified it on July 6, 2007. On November 19, 2008, the Defense Office of Hearings and Appeals (DOHA) sent her a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny her application, citing trustworthiness concerns under Guidelines F and J. DOHA acted under 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 adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR in an undated document that was received by DOHA on May 5, 2009, but her answer was returned to her on June 4, 2009, because it was incomplete. She responded in an undated document that was received by DOHA on July 6, 2009, and she requested a determination on the record without a hearing. Department Counsel submitted the government's written case on July 30, 2009. On the same day, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the government's evidence. Applicant did not receive the FORM until May 20, 2010, but the record does not reflect the reason for the delay. She did not respond to the FORM. The case was assigned to me on July 20, 2010.

Findings of Fact

In her response to the SOR, Applicant admitted the Guideline F allegations in SOR ¶¶ 1.a-1.m, denied ¶¶ 1.n-1.q, admitted ¶ 1.r, denied ¶ 1.s, and admitted ¶¶ 1.t and 1.u. She admitted the Guideline J allegations in SOR ¶¶ 2.a and 2.b. Her admissions are incorporated in my findings of fact.

Applicant is a 29-year-old claims specialist employed by a defense contractor since September 2005. She worked as a customer service representative in the private sector from January to October 2000, was unemployed from October 2000 to September 2001, and then worked as a bill collector from September 2001 until she began her current job. She has never held a security clearance or a public trust position.

Applicant is unmarried and has no children. The record does not reflect that she financially supports anyone other than herself.

Applicant's credit bureau reports reflect the 21 delinquent debts alleged in the SOR, including the debts that she denied in her response to the SOR. (GX 9; GX 10.) The delinquent debts total more than \$16,700, and she has admitted debts totaling more than \$12,800. In response to DOHA interrogatories, she did not offer specific explanations for any of the debts. Instead, she stated that she has not been able to resolve any of her debts because she does not earn enough money. She stated that she was considering consumer credit counseling, but there is no evidence that she sought or obtained any counseling. (GX 8 at 2, 10.)

Applicant filed for Chapter 13 bankruptcy in October 2000. It was dismissed in February 2001. (GX 10 at 3.) The reason for dismissal is not reflected in the record. Her petition for bankruptcy was not alleged in the statement of reasons.

Applicant disclosed on her SF 85P that she was convicted of driving with a suspended license in December 2003 and sentenced to one day in jail. She also disclosed that she was convicted of prostitution in January 2005 and placed on probation for two years. (GX 7 at 7.)

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 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 the procedural protections in the Directive before any final unfavorable access determination may be made. Regulation ¶ C8.2.1.

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. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information.

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 an evaluation of the whole person. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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. The Government must present substantial evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. 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. “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). 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). An applicant has the ultimate burden of demonstrating that it is clearly consistent with the interests of national security to grant or him or her eligibility for assignment to a sensitive position.

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.

Applicant's financial history raises the disqualifying conditions in AG ¶ 19(a) (inability or unwillingness to satisfy debts) and AG ¶ 19(c) (a history of not meeting financial obligations). Thus, she has the burden to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15.

Trustworthiness concerns under this guideline may be mitigated if "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 mitigating condition is not established, because Applicant's debts are numerous, not yet resolved, and there is no evidence that they occurred under circumstances making them unlikely to recur.

Trustworthiness concerns also may be mitigated if "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). Applicant was unemployed from October 2000 to September 2001, but she has been employed continuously since September 2001. She is financially responsible only for herself. The record reflects that she filed a petition for Chapter 13 bankruptcy when she became unemployed, but it was dismissed in February 2001, before completion. She submitted no evidence of efforts to resolve, compromise, or settle her debts. This mitigating condition is not established.

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). This mitigating condition is not established because Applicant has not sought or received financial counseling and her financial problems are 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). Good faith means acting 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). This mitigating condition is not established because Applicant submitted no evidence of efforts to repay or resolve her debts.

Trustworthiness concerns under this guideline also can be mitigated by showing "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.” AG ¶ 20(e). This mitigating condition is not established because Applicant has not disputed any of the debts.

Guideline J, Criminal Conduct

The trustworthiness concern under this guideline is set out in AG ¶ 30 as follows: “Criminal conduct 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.”

Conditions that could raise a security concern and may be disqualifying include “a single serious crime or multiple lesser offenses” and “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.” AG ¶¶ 31(a) and (c). Applicant's disclosure of criminal conduct on her SF 85P and her admissions in her response to the SOR establish these two disqualifying conditions.

Trustworthiness concerns under this guideline may be mitigated by evidence that “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.” AG ¶ 32(a). The first prong of this mitigating condition (“so much time has elapsed”) focuses on whether the criminal conduct was recent. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the totality of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” *Id.*

Applicant has provided no information regarding the circumstances of her two criminal convictions. Her conviction for prostitution occurred while she was gainfully employed and only eight months before she began her current position. It reinforces the Guideline F concern that she might engage in illegal conduct to generate additional income. She was on probation until early 2007. She submitted her SF 85P in April 2007 and has been trying since then to obtain a favorable trustworthiness determination. She has not demonstrated that she can be trusted to refrain from illegal conduct once the pressure of qualifying for a position of trust is lifted. I conclude that AG ¶ 32(a) is not established.

Finally, trustworthiness concerns may be mitigated if “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.” AG ¶ 32(d). Applicant provided no evidence from supervisors, neighbors, friends, or coworkers

about the quality of her performance or constructive community involvement. For this reason, as well as the reasons set out in the above discussion of AG ¶ 32(a), I conclude that she has not provided sufficient evidence of successful rehabilitation. No other enumerated mitigating conditions under this guideline have been established.

Whole-Person Analysis

Under the whole-person concept, an 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 relevant circumstances. An 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 an assignment to a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines F and J in my whole-person analysis.

Applicant did not request a hearing, limiting my ability to assess her sincerity, credibility, candor, and remorse. She provided little information about the circumstances of her financial difficulties and criminal conduct.

After weighing the disqualifying and mitigating conditions under Guidelines F and J, 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 criminal conduct. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with the interests of national security to grant her eligibility for assignment to a public trust position.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

Subparagraphs 1.a-1.u:

Against Applicant

Paragraph 2, Guideline J (Criminal Conduct):

AGAINST APPLICANT

Subparagraphs 2.a-2.b:

Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of 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