



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ADP Case No. 08-03721
SSN: XXX-XX-XXXX)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Stephanie Hess, Esq., Department Counsel
For Applicant: Jonathan M. Andes, Esq.

August 24, 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 July 27, 2007. On February 27, 2009, 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 March 6, 2009. She answered the SOR in writing on March 17, 2009, and requested a hearing before an administrative judge. DOHA received the request on March 23, 2009. Department Counsel was prepared to proceed on May 18, 2009, and I received the case assignment on May 21, 2009.

DOHA issued a notice of hearing on May 29 2009, scheduling the case for June 9, 2009. The hearing was held as scheduled. The government offered Government Exhibits (GE) 1 through 4, which were received without objection. Applicant testified on her own behalf, and offered Applicant Exhibits (AE) A through and P, which were received without objection. DOHA received the hearing transcript (Tr.) on June 17, 2009.

Findings of Fact

Applicant admitted all of the SOR allegations. Her admissions are accepted as findings of fact.

Applicant is a 53-year-old customer service representative, who has been employed by a defense contractor since July 2007. GE 1, Tr. 47. She seeks to retain access to sensitive information in conjunction with a public trust position, which is a condition of her employment. Tr. 47-48.

Applicant attended a business school from September 1975 to April 1976, and was awarded a secretarial degree in April 1976. GE 1, Tr. 43. She has been married since April 1984. Applicant and her husband have one child, a 13-year-old daughter. GE 1.

Applicant's background investigation addressed her financial situation and included the review of her July 2007 SF-85P, her September 2008 Answers to DOHA Interrogatories, and her September 2008 and August 2007 credit reports. GE 1 – 4.

The government alleged in the SOR and established by Applicant's admissions and or evidence presented that she has seven delinquent debts totaling \$314,753. The debts consist of five charged off accounts, one judgment, and one foreclosure proceeding. (SOR ¶¶ 1.a. – 1.g.)

Applicant attributes her financial difficulties to several factors to include being out of work for "about a month" after an injury, her husband's cumulative two and one-half years of unemployment beginning in 2005, and the unscrupulous practices of a lender. Tr. 12, 18-20, 25. Shortfalls in income led to Applicant getting behind on her bills, and using credit cards to pay living expenses. Ultimately, her lender foreclosed on their home. Applicant and her husband used the services of a debt consolidation company until her husband lost one of his jobs. Applicant and her husband attempted to work with their mortgage company, but "they weren't willing to work with us." Tr. 21-24.

Applicant and her family are now renting a house for \$1,000 per month. She drives a late model minivan with high mileage in need of repair, Tr. 21, 24. Applicant estimates, based on her current combined salary with her husband after monthly expenses, she has net remainder of “[m]aybe \$100.” At her hearing, she stated she had “[p]robably \$100” in her savings account and typically had a checking account balance of “[p]retty close to none.” She described her situation as, “[w]e really live paycheck to paycheck trying to do better.” Tr. 29-32.

Applicant and his wife are unable to pay the debts alleged. They consulted with a bankruptcy attorney and on February 9, 2008, signed a retainer agreement for him to represent them in a chapter 7 proceeding. The agreement requires them to pay their attorney \$2,050 plus a \$299 filing fee before he will initiate bankruptcy proceedings. GE 2. As of the hearing date, they had only paid their bankruptcy attorney \$400 towards his fee. Tr. 36-37. Applicant’s financial recovery plan is to file chapter 7 bankruptcy as soon as she and her husband are able to pay the remainder their bankruptcy attorney’s required fee. Their ability to pay the balance of attorney fees has recently been hampered by expensive automobile repair bills for her husband’s late model sedan after the “motor blew up.” Tr. 38.

Applicant summarized her position as, “We’re trying to do the best we can and, provide for our daughter and keep a roof over our head.” Tr. 46. As of her hearing date, her financial recovery plan was to pay her bankruptcy attorney his fee when able, and file chapter 7 bankruptcy. Tr. 48-49.

Applicant submitted 16 reference letters. Collectively, these letters convey a powerful message that Applicant is hard working, honorable, trustworthy, wonderful wife, mother and friend, and a most caring and giving person. The authors of these letters included childhood friends, co-workers, relatives, members of her religious organization, and her personal representative. AE A – AE P. This characterization was consistent with how she presented herself at her hearing.

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 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 seven delinquent accounts, totaling \$314,753 as noted *supra*. Her indebtedness began as early as 2005 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 an injury causing her to miss work for a brief period, but more significantly her husband was unemployed cumulatively for two and one-half years beginning in 2005. This loss of income led to significant financial problems that have been ongoing. 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 was out of work for a brief period due to an injury, and her husband was unemployed for significant periods of time. With the loss of income, Applicant and her husband lost their home to foreclosure and accumulated other debts as noted in the SOR.

I note that Applicant’s financial problems are not recent and have been ongoing for several years. The record is clear that Applicant and her husband experienced some conditions beyond their control as discussed *supra*, which led to their current dilemma, and attempted to work with their creditors. For this reason, I am able to apply partial credit under mitigating condition AG ¶ 20(b).

AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Unfortunately, Applicant has been unable to initiate a good-faith effort to repay overdue creditors. Her current strategy is to declare chapter 7 bankruptcy, but cannot do so until she pays her bankruptcy attorney fees. As of her hearing, she had paid \$400 towards a \$2,050 attorney fee and \$299 filing fee. Since she executed her retainer agreement with her attorney, she has a remaining balance of at least \$1,949 and remains in arrears with debts totaling at least \$314,753. Moreover, Applicant has no definitive ongoing plans that will allow her to move forward with bankruptcy, which will allow her to obtain a fresh start and establish a track record of financial responsibility. Given the significant amount of unresolved debt leveraged in favor of Applicant, I am unable to apply mitigating condition AG ¶ 20(d).

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 factors 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 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. Were it merely a matter of favorable character evidence alone, Applicant would prevail. Given the amount of Applicant's indebtedness, greater progress is required in her debt resolution. 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.g.: Against Applicant

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

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