



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



In the matter of:)
)
(Redacted)) ADP Case No. 08-06228
)
Applicant for Public Trust Position)

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: Jonathan Bell, Esq.

February 25, 2011

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves trustworthiness concerns raised under Guideline I (Psychological Conditions). Eligibility for access to sensitive information is denied.

Statement of the Case

Applicant submitted an application for a public trust position on February 1, 2008. On September 29, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny her application, citing trustworthiness concerns under Guideline I. 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 within the Department of Defense on September 1, 2006.

Applicant received the SOR on October 5, 2010; answered it on October 7, 2010; and requested a hearing before an administrative judge. DOHA received the request on October 8, 2010. Department Counsel was ready to proceed on October 21, 2010, and

the case was assigned to me on November 3, 2010. DOHA issued a notice of hearing on November 9, 2010, scheduling it for December 1, 2010. Applicant retained a lawyer, who entered his appearance on November 23, 2010, and requested additional time to prepare. I granted his request, and DOHA issued an amended notice of hearing on December 1, 2010, rescheduling the hearing for December 16, 2010. I convened the hearing as rescheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified, presented the testimony of two witnesses, and submitted Applicant's Exhibits (AX) A through F, which were admitted without objection. DOHA received the transcript (Tr.) on December 27, 2010.

Administrative Notice

At Department Counsel's request, and without objection from Applicant, I took administrative notice of the relevant provisions of the American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., 2000) (DSM-IV).¹ Extracts of the relevant provisions of DSM-IV are attached to the record as Hearing Exhibit I.

Findings of Fact

Applicant is a 26-year-old project coordinator employed by a federal contractor. She has worked for her current employer since February 2008.

Applicant had a normal, happy childhood until her preteen years, when she started feeling depressed, suffering from migraine headaches, and withdrawing from friends and family. She started acting out, associating with the wrong people, shoplifting, setting small fires 10-15 times in places like trash cans and construction sites, and trying to "look cool and impress other people." She also spray-painted police cars and stole a key to a police gun cabinet. (Tr. 29-30, 49.) At age 14, while working as a volunteer in a hospital, she set fire to a mattress in a stairwell, which led to her arrest and detention. She was in juvenile detention for arson from June 1999 to March 2001. She testified she attempted suicide twice while in detention. (Tr. 65.) She received psychiatric and psychological counseling, anger management classes, and group therapy while she was in detention. She was diagnosed with depression and treated with mood stabilizers and antidepressants. (GX 5 at 1-2.)

After being released from detention, Applicant was required to continue with psychological counseling. She was treated by a psychologist from March 2001 to August 2001. Her treatment record reflects 17 visits. It contains progress notes but no diagnosis. The last progress notes dated August 28, 2001, note that Applicant "is doing much better overall," and they end with a notation reflecting a follow-up visit in one week. (GX 4 at 26.) There were no further visits with this psychologist.

¹ DSM-IV is cited in one of the psychological evaluations received in evidence (AX A). The relevant provisions of DSM-IV are unchanged in the more recent DSM-IV-TR.

Applicant's psychologist died in June 2006. In August 2008, her psychologist's spouse, also a psychologist and her deceased husband's partner at the same counseling center, reviewed her husband's progress notes at DOHA's request, and she concluded that Applicant would have been diagnosed by her husband with pyromania and dysthymic disorder. According to DSM-IV, the essential feature of pyromania is "the presence of multiple episodes of deliberate and purposeful fire setting." The essential feature of dysthymic disorder is "a chronically depressed mood that occurs for most of the day more days than not for at least 2 years." The psychologist explained that pyromania is a disorder of impulse control, which could impair judgment or reliability. She concluded that Applicant's prognosis would have been "guarded" as of her last visit in August 2001, recognizing that a more recent psychological evaluation could modify that prognosis. (GX 4 at 6.)

After completing the counseling required by the juvenile court, Applicant decided, after consulting with her parents, that she did not need further counseling. She stopped taking the medication for depression, because it was causing her to gain weight. (Tr. 35-36.)

Applicant returned to high school, took a night course and a correspondence course to catch up, and completed high school in June 2002. She began doing volunteer work with her church and working part time during the school year. She graduated from college cum laude in August 2006 with a bachelor's degree in political science. (Tr. 36-37.) She worked as an intern in a federal government agency from January to April 2006. (GX 1 at 7; GX 2 at 5; AX B; Tr. 74.)

Applicant started working for her current employer as a low-level administrative assistant. She was soon promoted to be an executive assistant, and was then promoted to be a project coordinator, her current position. (Tr. 39-40.) After Applicant submitted her application for a public trust position, a DOHA-selected psychologist evaluated her in May 2009. This psychologist made the following clinical findings:

The profile obtained suggests that [Applicant] attempts to present a social acceptable appearance particularly to those in positions of authority. She is a very outgoing and affable young woman who tends to minimize or cloak her psychological issues. I find this troubling given the amount of psychotherapy she has in the past. Test findings portray a woman who at times can be over-reactive and one who tends to seek out experiences that might be considered capricious and immature in nature. I have questions regarding her current psychological status. She seems prone to seek out a self-indulgent life-style and appears to lack a level of insight into her deeper emotional complexities. The data suggest that her affect states may not be stable, but rather superficial and charged with rapidly changing feelings. Signs of inner turmoil or weakness are almost customarily denied or downplay[ed]. Unfortunately based on the findings I would have reservations putting [Applicant] in a delicate position of trust. I

would recommend that she revisit the idea of starting therapy to complete the work she had begun while learning to face her difficulties head on.

The psychologist diagnosed Applicant with histrionic personality disorder² with narcissistic personality features³. (GX 5 at 2.) Applicant testified that she spent a total of about one hour with this psychologist, most of the time while taking a test on a computer. She talked with the psychologist 15 to 30 minutes. (Tr. 44.)

In November 2010, Applicant sought a second opinion from another psychologist regarding the May 2009 diagnosis of histrionic personality disorder with narcissistic personality features. This psychologist recited the DSM-IV diagnostic criteria and concluded that Applicant showed a total absence of histrionic features and no symptoms of narcissism. She described Applicant as “a normal, well-adjusted young adult who demonstrates none of the character traits that might make her a security risk.” (AX A at 1-2.) The psychologist did not recite the factual basis for her conclusion that none of the diagnostic criteria were met. Applicant testified that this psychologist also administered a test, which Applicant completed at home, followed by two face-to-face consultations, each lasting 60 to 90 minutes. (Tr. 45-46.) There is no indication that this psychologist considered the 2001 treatment notes or the August 2008 assessment based on those notes.

In December 2010, Applicant obtained another evaluation from a psychiatrist experienced with evaluating applicants for security clearances and assignment to sensitive positions. He reviewed the 2001 treatment notes and the August 2008

² The DSM-IV diagnostic criteria for a diagnosis of histrionic personality disorder are: a pervasive pattern of excessive emotionality and attention seeking, beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following: (1) is uncomfortable in situations in which he or she is not the center of attention; (2) interaction with others is often characterized by inappropriate sexually seductive or provocative behavior; (3) displays rapidly shifting and shallow expression of emotions; (4) consistently uses physical appearance to draw attention to self; (5) has a style of speech that is excessively impressionistic and lacking in detail; (6) shows self-dramatization, theatricality, and exaggerated expression of emotion; (7) is suggestible, *i.e.*, easily influenced by others or circumstances; (8) considers relationships to be more intimate than they actually are.

³ The DSM-IV diagnostic criteria for narcissistic personality disorder are: a pervasive pattern of grandiosity (in fantasy or behavior), need for admiration, and lack of empathy, beginning by early adulthood and present in a variety of contexts, as indicated by five (or more) of the following: (1) has a grandiose sense of self-importance (e.g. exaggerates achievements and talents, expects to be recognized as superior without commensurate achievements); (2) is preoccupied with fantasies of unlimited success, power, brilliance, beauty, or ideal love; (3) believes that he or she is “special” and unique and can only be understood by, or should associate with, other special or high-status people (or institutions); (4) requires excessive admiration; (5) has a sense of entitlement, *i.e.*, unreasonable expectations of especially favorable treatment or automatic compliance with his or her expectations; (6) is interpersonally exploitative, *i.e.*, takes advantage of others to achieve his or her own ends; (7) lacks empathy: is unwilling to recognize or identify with the feelings and needs of others; (8) is often envious of others or believes that others are envious of him or her; (9) shows arrogant, haughty behaviors or attitudes.

assessment based on those notes, but there is no indication that he considered the May 2009 assessment. His conclusions were:

It is my professional opinion, beyond a reasonable doubt, that [Applicant] is a mature, honest, and serious employee, who is dedicated to her job and her country, and who can be counted upon to think and act rationally and responsibly in case of a crisis. She is not suffering from a personality disorder that would affect her ability to safeguard classified information. So much time has elapsed since the criminal behavior of her adolescence that it is unlikely to recur and does not cast doubt on her reliability, trustworthiness, or sound judgment. There is strong evidence of successful rehabilitation from the unlawful and self-punitive behaviors of her early adolescence.

AX B at 3. Applicant testified that she had two meetings with the psychiatrist, each lasting about one hour. (Tr. 46-47.)

Applicant's performance appraisal for February 2008-February 2009 rated her as exceeding expectations in six elements of technical knowledge and meeting expectations in two elements. It rated her as exceeding expectations in seven elements of professional skills and meeting expectations in two elements. (AX D at 4-5.) Her most recent appraisal for the period ending in February 2010 rated her as exceeding expectations in all elements of technical knowledge and exceeding expectations in all elements of work management except one, for which she was rated as meeting expectations. (AX D at 6-7.) She has received several accolades for her performance, commenting on her dependability, attention to detail, enthusiasm, analytical skills, and leadership. One of her supervisors described her as one of their superstars. (AX D at 1-3.)

Applicant's current first-line supervisor testified that Applicant has continued her exemplary performance and has become her supervisor's "right hand person." (Tr. 94.) The supervisor testified that Applicant is extremely reliable and dependable. She does not act impulsively and has no problems with persons in authority. (Tr. 102-03.) Applicant's counsel read aloud each of the DSM-IV diagnostic criteria for histrionic personality disorder and narcissistic personality disorder, and asked her supervisor if Applicant exhibited any of them. Her supervisor answered in the negative for each of the criteria, admitting on cross-examination that she was not a qualified medical professional (Tr. 97-100, 104.)

Three of Applicant's friends describe her as dependable, efficient, competent, and "a reliable, natural born leader who is never afraid to take on responsibility and holds her integrity at the forefront of all her actions." (AX E at 1-2, 4.) Applicant's aunt and uncle, who are aware of her problems during adolescence, describe her as hard working, self-reliant, and compassionate. (AX E at 5.)

Applicant's mother testified that Applicant had a normal childhood, was a good student, and actively involved in childhood activities. When Applicant was in junior high school, she became withdrawn and uninterested in outside activities. After Applicant completed her detention and the six months of counseling required by the juvenile court, she and her parents discussed whether she could continue to receive counseling. Her parents had noticed that she had changed and was again involved in outside activities. They decided to stop the counseling, with the understanding that it could be resumed if Applicant showed any signs of regression. When Applicant returned to high school, she continued to be a good student and was inducted into the National Honor Society. She was awarded a college scholarship and worked part time in college to help support herself. She was on the fencing team in college and she continues to maintain a high level of physical fitness. She has an excellent relationship with her mother and her siblings. (Tr. 113-24.)

Applicant is a member of a local fencing team, a community emergency response team, a local volunteer fire department, and a local volunteer fire and rescue squad. (AX C at 2, AX F; Tr. 40.) Her fire chief describes her as "a hard worker who consistently displays integrity, enthusiasm, commitment and responsibility." (AX E at 3.) The volunteer coordinator for the community emergency response team describes her as "extremely committed, dependable, thorough, interested in helping the community and in doing the right things right." (AX E at 6.)

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 I, Psychological Conditions

The SOR alleges Applicant received mental health treatment from June 1999 to March 2001 while incarcerated for arson (¶ 1.a); and that she received mental health treatment from March 2001 to August 2001, was diagnosed with dysthymic disorder and pyromania (¶ 1.b), and received a “guarded” prognosis (¶ 1.c). It also alleges that in May 2009 she was diagnosed with histrionic personality disorder with narcissistic personality features, with a recommendation that she return to therapy (¶ 1.d). Finally, it alleges that as of December 2009, Applicant was not undergoing any mental health therapy or treatment and not taking any medications (¶ 1.e).

The trustworthiness concern relating to Guideline I is set out in AG ¶ 27:

Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. A duly qualified mental health professional (e.g., clinical psychologist or psychiatrist) employed by, or acceptable to and approved by the U.S. Government, should be consulted when evaluating potentially disqualifying and mitigating information under this guideline. No negative inference concerning the standards in this Guideline may be raised solely on the basis of seeking mental health counseling.

AG ¶ 28 sets out the three disqualifying conditions under this guideline:

(a) behavior that casts doubt on an individual's judgment, reliability, or trustworthiness that is not covered under any other guideline, including but not limited to emotionally unstable, irresponsible, dysfunctional, violent, paranoid, or bizarre behavior;

(b) an opinion by a duly qualified mental health professional that the individual has a condition not covered under any other guideline that may impair judgment, reliability, or trustworthiness; and

(c) the individual has failed to follow treatment advice related to a diagnosed emotional, mental, or personality condition, e.g., failure to take prescribed medication.

Applicant's detention for arson, the diagnosis of pyromania based on her psychological counseling in 2001, and the diagnosis of histrionic personality disorder and narcissistic personality disorder by a DOHA-selected psychologist are sufficient to establish AG ¶ 28(a) and (b). The disqualifying condition in AG ¶ 28(c) is not established by the notation on the psychologist's progress notes about a follow-up in one week, because the record does not reflect whether the notation was a treatment recommendation or a mere expectation that Applicant would return for further counseling. However, Applicant's decision, in consultation with her parents, to stop taking her medication for depression establishes AG ¶ 28(c).

Security concerns under this guideline may be mitigated if "the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan." AG ¶ 29(a). The first prong of this mitigating condition is established, because the psychologist's evaluation in 2001 indicated that Applicant was responding to treatment. However, the second prong is not established because Applicant has no ongoing treatment plan.

Security concerns also may be mitigated if "the individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional." AG ¶ 29(b). This mitigating condition is not established, because Applicant's initial counseling was involuntary, she has never voluntarily sought or received counseling, and she is not currently receiving counseling or treatment.

Security concerns may be mitigated by a "recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by the U.S. Government that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation." AG ¶ 29(c). This mitigating condition is not established because the one qualified mental health professional engaged by the U.S. Government expressed doubt that her previous condition is under control and expressed reservations about placing Applicant in a position of trust.

Security concerns may be mitigated if "the past emotional instability was a temporary condition (e.g., one caused by death, illness, or marital breakup), the situation has been resolved, and the individual no longer shows indications of emotional instability. AG ¶ 29(d). This mitigating condition is not established because Applicant's

psychological problems were not a temporary condition and it is not clear whether her previous problems have been resolved.

Finally, security concerns may be mitigated if “there is no indication of a current problem.” AG ¶ 29(e). The evidence is conflicting on this point. A psychologist, a psychiatrist, and Applicant’s supervisors describe her as fully rehabilitated and an exemplary employee. On the other hand, the 2001 diagnosis found severe disorders and gave a “guarded” prognosis. The DOHA-selected psychologist described Applicant as a person who minimizes or cloaks her psychological issues, lacks insight into her emotional complexities, and denies or downplays her inner turmoil or weakness. None of the medical professionals except the DOHA-selected psychologist appear to have considered Applicant’s entire medical record. The psychological and psychiatric assessments from May 2009, November 2010, and December 2010 are conclusory and lacking in detail. None of the medical professionals who provided evidence testified in person, making it impossible to ask them which diagnostic criteria, if any, they found applicable to Applicant and what they relied on to conclude that each of the criteria was or was not applicable. Applicant has the burden of proving a mitigating condition, and she has not met her burden of establishing AG ¶ 29(e).

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for access to sensitive information 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 access to sensitive information must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline I in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is an intelligent, articulate, intensely driven young adult. She has been very successful in her current job. Her employers believe she has overcome her past. While it is possible that she has overcome her psychological problems without professional help since 2001, some of the psychological evidence, albeit untested by

cross-examination, suggests that she may be simply masking her psychological issues. The psychological evidence that she has overcome her earlier psychological problems is conclusory and untested by cross-examination. The inconclusive state of the evidence requires me to resolve the doubt in favor of national security.

After weighing the disqualifying and mitigating conditions under Guideline I, evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the trustworthiness concerns based on psychological conditions. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with the national interest to grant her eligibility for access to sensitive information.

Formal Findings

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

Paragraph 1, Guideline I (Psychological Conditions): **AGAINST APPLICANT**

Subparagraphs 1.a-1.e: **Against Applicant**

Conclusion

I conclude that it is not clearly consistent with the national security to grant Applicant eligibility for assignment to a sensitive position. Eligibility for access to sensitive information is denied.

LeRoy F. Foreman
Administrative Judge