



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



In the matter of:)	
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SSN: -----)	ADP Case No. 08-09734
)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: Pro Se

October 26, 2009

Decision

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's request for eligibility for a public trust position is denied.

On September 10, 2007, Applicant submitted a Questionnaire for Public Trust Positions (SF-85P) to request eligibility for an ADP I/II/III position¹ involving access to sensitive information as part of her employment with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant two sets of interrogatories² regarding potentially adverse information in her background. Based on the results of the background investigation and her responses to the interrogatories,

¹ As defined in Appendix 10 of DoD Regulation 5220.2-R, as amended.

² Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

DOHA adjudicators were unable to make a preliminary affirmative finding³ that it is clearly consistent with the national interest to grant Applicant's request. On March 27, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the revised Adjudicative Guidelines (AG)⁴ under Guidelines E (personal conduct), F (financial considerations), and J (criminal conduct).

Applicant timely responded to the SOR and requested a hearing. The case was assigned to me on June 18, 2009. Pursuant to a Notice of Hearing issued on July 6, 2009, I convened a hearing on July 30, 2009, at which the parties appeared as scheduled. The government presented five exhibits (Gx. 1 - 5). Applicant testified in her own behalf, and she proffered five documents admitted collectively as Applicant's Exhibit (Ax.) A.⁵ DOHA received the transcript (Tr.) on August 7, 2009. I left the record open after the hearing to allow Applicant time to submit additional relevant information. The record closed on August 17, 2009, when I received Applicant's post-hearing submission via Department Counsel. It has been admitted without objection as Ax. B.

Findings of Fact

Under Guideline F, the government alleged Applicant owed approximately \$24,695 for six delinquent debts (SOR ¶¶ 1.a - 1.f) referred for collection between February 2003 and December 2008. It was also alleged that, in March 2002, she was charged with conspiracy to commit bank fraud, was placed in a 12-month pre-trial diversion program, and ordered to pay restitution (SOR ¶ 1.g). In response, Applicant admitted the allegations at SOR ¶¶ 1.b and 1.g. She also admitted SOR ¶ 1.f, but provided information with her answer showing she had paid that debt in February 2009. Applicant admitted she was aware of the debts alleged in SOR ¶ 1.a and ¶¶ 1.c - 1.e, but denied she is responsible for those debts. (Tr. 12 - 14)

Under Guideline J, the government cross-alleged as criminal conduct, Applicant's 2002 arrest for conspiracy to commit bank fraud (SOR ¶2.a). Applicant admitted to this allegation as well. She further stated that she complied "with all laws and regulations given which lead [sic] to early termination" of her pre-trial diversion.

Under Guideline E, the government alleged that, by answering "no" to SF-85P question 12 (Employment Record), she deliberately omitted the fact that she was fired from a job in 2003 (SOR ¶ 3.a). The government also alleged that, by answering "no" to SF-85P question 22 (Debts more than 180 days past due), she deliberately omitted the

³ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

⁴ Adjudication of this case is controlled by the revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, these guidelines take precedence over the guidelines contained in Enclosure 2 to the Directive.

⁵ Identified in the transcript at page 26.

fact that she was delinquent on the debts alleged in SOR ¶¶ 1.a - 1.e (SOR ¶ 3.b).⁶ Applicant denied both SOR ¶¶ 3.a and 3.b. As to SOR ¶ 3.a, she averred that all of the jobs she held in 2003 were either temporary or ended when the employer downsized. As to SOR ¶ 3.b, she claimed her omission of her debts was an oversight. In addition to the facts admitted through her response to the SOR, I make the following findings of fact based on my review of the pleadings, transcript, and exhibits.

Applicant is a 33-year-old single mother of two (ages 10 and 14), who works as a Beneficiary Service Representative for a large healthcare and medical insurance company contracted to manage medical insurance claims and information for TRICARE, the Department of Defense (DoD) medical insurance system for military personnel and their families. She has held her current position since September 2007. She was unemployed between April 2007 and September 2007, after having worked in a similar capacity for a different medical benefits firm for two years. Since November 2003, her only other period of unemployment was in December 2004 and January 2005. (Gx. 1)

Applicant is studying for her Associate's degree in Health Administration, which she expects to obtain in May 2010. Her work performance with her current employer has been exemplary. As recently as June 2009, she received a Letter of Appreciation from the commanding officer of the facility where she works. A co-worker lauds Applicant for her reliability, dedication, honesty, and integrity. (Gx. 1; Ax. A; Tr. 37 - 38)

Applicant claimed that the debts listed at SOR ¶¶ 1.a and 1.e are not her responsibility, as they were the result of fraud. She explained that she was twice the victim of identity theft, first through a theft of her purse and credit cards while she was riding public transportation, then through a burglary of her father's house while Applicant was living there. Applicant claimed she had police reports and other records to corroborate this claim, but has not produced that information despite being given extra time after the hearing. (Answer to SOR; Ax. B; Tr. 39 - 45, 61 - 64) She claimed the debts were due to be removed from her credit history. These debts appeared on the first credit report obtained in Applicant's background investigation (Gx. 5) and in a December 2008 credit report Applicant provided in response to DOHA interrogatories (Gx. 3). However, they do not appear in an October 2008 credit report obtained by DOHA adjudicators (Gx. 4). That report also reflects fraud alerts reported in September and November 2007.

Applicant owes approximately \$8,352 for the balance due on a loan for a used car she bought in February 2002 (SOR 1.b). She was able to pay this note for about 18 months, but defaulted on the loan when she was terminated from her job in 2003 after her arrest for conspiracy to commit bank fraud. Also contributing to her inability to pay her car note was the death of her father around the same time, which left her with funeral expenses and the obligation to make his mortgage payments. Applicant still has possession of the car, which is no longer operable, but she cannot get clear title until she resolves the remainder of the car note. (Gx. 2 - 5; Tr. 46 - 48)

⁶ The debt alleged in SOR ¶ 1.f was not delinquent at the time she completed the SF-85P.

Applicant also owes about \$5,869 for another delinquent car loan (SOR ¶ 1.c). In late 2001, she traded in a car she originally bought in October 1998. The terms of her purchase required her to pay \$1,000 down and add the balance due on the trade-in to the financing for the new car. About two or three months later, Applicant was told she had to return the new car because there were irregularities (not otherwise specified) in the way the dealer had handled the title (it was a used car). Applicant was refunded her \$1,000 down payment, but the trade-in was not returned. Her understanding at the time was that the loan for the trade-in had been satisfied with the financing of the new car. This debt appears only on the first credit report obtained during her investigation. (Gx. 2 - 5; Tr. 49 - 55)

Applicant paid the debt listed at SOR ¶ 1.f in February 2009. (Answer to SOR) This debt was apparently related to a tax payment deficiency. She borrowed against an anticipated tax refund, but the actual refund was less than what she borrowed. (Tr. 64 - 66) The debt listed at SOR ¶ 1.d is for an unpaid medical bill for the treatment of one of her children at an emergency room around 2003. Applicant insists she had medical insurance at the time that should have covered the bill. She has been aware of this debt since 2003, but has been unable to verify the status of this debt, which still appears on her credit report as of December 2008. (Gx. 2; Gx. 3; Tr. 56 - 61)

In 2000, Applicant was at a family reunion at a location which was about eight hours away by car to the north of where she lives. At some point during the reunion, Applicant and two distant cousins drove to another city about 110 miles farther north, where one of the cousins went into a bank and cashed a fraudulent check for \$29,000. Applicant later received a \$1,100 check from one of the cousins.

In testifying about this event, Applicant has claimed (1) that she did not know that they had actually gone to another state when the relative went into the bank; (2) that she did not know what the relative was doing; (3) that, although she grew up with one of the relatives, she did not know her real name until the FBI started investigating the bank fraud scheme; and (4) that she was only joking when she told her relative that she could use some money. (Tr. 66 - 72, 75 - 76) As alleged in SOR ¶¶ 1.g and 2.a, Applicant was arrested and charged with conspiracy to commit bank fraud in March 2002. She completed a pre-trial diversion program and made restitution. On completion of the pre-trial diversion program in May 2004, the charge was dismissed. (Gx. 2)

After she was arrested, Applicant was required to travel several times to the city where her relative had cashed the check. Applicant lost her job as a result of having to be gone frequently, but she insists she left the job by mutual agreement with her employer. (Tr. 72 - 75) On November 16, 2007, Applicant was interviewed by a government investigator during her background investigation. She stated during the interview that she could not make payments on a car note (SOR ¶ 1.b), because "she was terminated from her employment due to required travel...relative to [her] federal arrest..." (Gx. 2)

When Applicant submitted her SF-85P, she listed her federal arrest, but she did not disclose that she was terminated from her job after she was arrested (SOR ¶ 3.a) or that she owed any of the delinquent debts listed in the SOR (SOR ¶ 3.b). As to her

negative answer to SF-85P question 12, Applicant claimed she left her job by mutual agreement with her employer, because of frequent travel required in connection with her arrest. Question 12 asked if, in the previous seven years, Applicant had been fired, quit after being told she would be fired, left a job by mutual agreement following allegations of misconduct or following allegations of unsatisfactory performance, or for other reasons under unfavorable circumstances. (Gx. 1)

As to her negative answer to SF-85P question 22, Applicant asserted she was focused on the disclosure of her arrest and forgot to list her debts. (Answer to SOR) At the time she completed the SF-85P, Applicant was aware she had delinquent debts within the meaning of question 22. (Tr. 78 - 79) That question asked whether, in the previous seven years, Applicant had any debts more than 180 days past due, or whether she was currently more than 90 days past due on any debt(s). She explained at the hearing that she “failed to mark [the questions] on the form. I missed them.” (Tr. 79)

However, the SF-85P submitted as Gx. 1 was completed by hand. At questions 12 and 22, as with several other questions, Applicant took the time to put an “X” in the “No” box, and she entered “N/A” in boxes for entering details of an affirmative response. In response to Department Counsel’s cross-examination, Applicant offered that, because she disclosed her 2002 federal conspiracy charge, she had nothing to gain by withholding other adverse information. (Tr. 79 - 80)

Other than the tax-related debt listed at SOR ¶ 1.f, Applicant has not paid or taken other steps to resolve any of her debts. She makes about \$2,000 net each month, which she estimates leaves her about \$100 after monthly expenses. (Tr. 89 - 92) After she was hired for her current job in 2007, Applicant contacted a financial counseling and debt management company. But she has not actually enrolled in any debt repayment program or received any financial management counseling. (Tr. 92 - 93)

I was able to assess Applicant’s demeanor and her credibility at the hearing. I did not find credible her explanations of the circumstances which led to her arrest for conspiracy to commit bank fraud. For example, it is implausible that she would grow up with a relative but not know her name, or that she did not know where she and her cousins were going the day the \$29,000 check was cashed. I also did not believe her explanation of the car financing transaction that resulted in the debt at SOR ¶ 1.c. Her failure to document such an unusual circumstance further undercuts her credibility.

Policies

Each trustworthiness decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG).⁷ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole person” concept, those factor are:

⁷ Directive. 6.3.

(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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to sensitive information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline E (personal conduct), at AG ¶ 15, Guideline F (financial considerations), at AG ¶ 18, and Guideline J (criminal conduct), at AG ¶ 30.

A trustworthiness determination is intended to resolve whether it is clearly consistent with the national interest⁸ for an applicant to either receive or continue to have access to automated sensitive information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a position of trust for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the government's case. A person who has access to sensitive information enters into a fiduciary relationship with the government based on trust and confidence. Thus, the government has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.⁹

Analysis

Financial Considerations.

The security concern about Applicant's finances, as stated in AG ¶ 18, is that

[f]ailure 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

⁸ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁹ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

By admitting to SOR ¶¶ 1.b and 1.g, the government was relieved of its burden of proving those allegations as fact. By denying ¶ 1.a and ¶¶ 1.c - 1.e, the burden remained with the government to prove those allegations.¹⁰ The record evidence (the government's exhibits, Applicant's various SOR admissions, and her testimony at the hearing) is sufficient to support all of the SOR allegations. The facts established show that Applicant accrued significant delinquent debt between February 2003 and December 2008. All of the debts, except for the tax-related debt at SOR ¶ 1.f, remain unresolved and Applicant is not able to resolve her debts given her current financial condition. Available information also shows that Applicant participated in a conspiracy to commit bank fraud, from which she personally profited. The foregoing requires application of the disqualifying conditions listed at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*), AG ¶ 19(c) (*a history of not meeting financial obligations*), and AG ¶ 19(d) (*deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust*).

In response to the government's information, Applicant has claimed that all of her debts arose due to unforeseen events, such as unemployment, a death in the family, insurance mistake, theft, and fraud. However, despite being given ample opportunity to produce information that would support what are essentially affirmative defenses to the government's information, she has not provided anything that supports her claims. As to the allegation in SOR ¶ 1.b, the record warrants consideration of the mitigating condition at AG ¶ 20 (b) (*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 it pertains to her father's passing and her brief period of unemployment in 2003. However, Applicant's loss of that job was due to her criminal conduct. Further, there is no information showing she has acted responsibly in the face of her delinquent debts regardless of the cause. Because all but one of her debts remain unresolved, because she has not acted on her intentions to seek financial counseling, because she has not documented her claimed disputes of debts in her credit history, and because her current finances are not sufficient to resolve her debts, none of the other mitigating conditions under AG ¶ 20 apply. Applicant has failed to meet her burden of persuasion in response to the adverse information about her finances.

Personal Conduct

Applicant denied the allegations that she deliberately falsified her SF-85P when she omitted the fact that she was terminated from her job after she was arrested in 2002, and omitted the fact she is more than 180 days past due on debts over the past seven years. However, the government's information (Gx. 1, Gx. 2, Applicant's

¹⁰ Directive, E3.1.14.

response to the SOR, and her testimony) was sufficient to support the SOR allegations about her personal conduct. As stated at AG ¶ 15:

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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The summary of Applicant's November 16, 2007, subject interview represents that she told the government investigator she was terminated from her job due to her 2002 arrest for conspiracy to commit bank fraud. Applicant was presented with the summary before her hearing and had the opportunity to correct the summary. She acknowledged that the summary was accurate. She testified that she and her employer at the time of her arrest agreed she should leave her job given the requirement she travel frequently in response to her arrest. I do not accept Applicant's benign characterization of what happened, as she was obligated to disclose her termination because of the associated allegation of wrongdoing.

As to her omission of her debts, there is no question she was aware of her debts at the time she completed the SF-85P. However, Applicant's claim that she overlooked this part of her SF-85P makes no sense in view of the fact that she handwrote her responses and decided to enter "N/A" in parts of the form. The fact that she disclosed her arrest did not relieve her of the basic obligation to fully and accurately disclose all relevant information in her background. All of the information bearing on SOR ¶¶ 3.a and 3.b supports a conclusion that Applicant intentionally withheld the information in question. Accordingly, the disqualifying condition at AG ¶ 16(a) (*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 clearance eligibility or trustworthiness, or award fiduciary responsibilities*) applies. By contrast, Applicant's lack of credibility at the hearing, precludes application of any of the available mitigating conditions at AG ¶ 17. On balance, Applicant has not mitigated the security concerns raised by her deliberate omissions from her SF-85P.

Criminal Conduct

Applicant admitted the allegation that she was arrested in 2002 on federal charges of conspiracy to commit bank fraud. This information raises a security concern, addressed in AG ¶ 30; that is, 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." More specifically, available information requires application of the disqualifying conditions at AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*), and AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*).

By contrast, Applicant's arrest is not recent and she has not been involved in any such conduct since then. This requires consideration of the mitigating conditions at AG ¶ 32(a) (*so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment*), and AG ¶ 32(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*).

However, the passage of time without further adverse conduct is not sufficient here. In assessing the applicability of the mitigating conditions, I have considered Applicant's lack of credibility in discussing the events surrounding her arrest, as well as her deliberate falsification of her SF-85P. These aspects of her conduct preclude a conclusion that she is not likely to disregard laws or regulations in the future, that she is successfully rehabilitated, or that her past conduct does not currently cast doubt on her judgment and reliability. On balance, I conclude she has not mitigated the security concerns about her past criminal conduct.

Whole Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E, F, and J. I have also reviewed the record before me in the context of the whole person factors listed in AG ¶ 2(a). Applicant is a 33-year-old single mother of two and is presumed to be a mature responsible adult. She is a reliable worker and has been recognized for her work in support of the military's health care system. However, the favorable information in her background is insufficient to overcome the security concerns about her lengthy history of bad debt, her criminal conduct, and her deliberate falsification of her SF-85P. These facts and circumstances present an unacceptable risk were she to be granted access to sensitive information. A fair and commonsense assessment¹¹ of all available information about the Applicant's background shows there are still doubts about her ability or willingness to protect the government's interests as her own. Because protection of the national interest is paramount in these determinations, such doubts must be resolved for the government.¹²

Formal Findings

Formal findings 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
Subparagraphs 1.a - 1.e, 1.g:	Against Applicant
Subparagraph 1.f:	For Applicant

¹¹ See footnote 7, *supra*.

¹² See footnote 9, *supra*.

Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3: Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a - 3.b:	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to grant Applicant eligibility for a position of trust. Eligibility for access to sensitive information is denied.

MATTHEW E. MALONE
Administrative Judge