



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



In the matter of:)
)
) ADP Case No. 09-02666
)
)
Applicant for Public Trust Position)

Appearances

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

February 22, 2010

Decision

ANTHONY, Joan Caton, Administrative Judge:

I have carefully reviewed the administrative file, pleadings, and exhibits in this case and conclude that Applicant failed to mitigate security concerns under the Financial Considerations adjudicative guideline. Eligibility for access to sensitive information is denied.

Applicant submitted her Questionnaire for Public Trust Positions (SF 85P) on February 6, 2008. On August 27, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) alleging trustworthiness concerns under Guideline F for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), 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 September 22, 2009, Applicant answered the SOR in writing. She requested that her case be determined on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) on October 15, 2009. The FORM contained documents identified as Items 1 through 12. By letter dated October 19, 2009, a copy of the Form was forwarded to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received the file on October 29, 2009. Her response to the FORM was due on November 28, 2009. She did not file any additional information or objections within the required time period. The case was assigned to me for a decision on February 4, 2010.

Findings of Fact

The SOR is comprised of 20 allegations that raise trustworthiness concerns under AG F, Financial Considerations. Nineteen allegations raised financial delinquency concerns totaling \$35,576, and one allegation raised a fraudulent check conviction in 1998. (Item 1.)

In her Answer to the SOR, Applicant admitted 15 delinquent debts (SOR ¶¶ 1.b., 1.d., 1.f., 1.g., 1.h., 1.i., 1.j., 1.k., 1.m., 1.n., 1.o., 1.p., 1.q., 1.r., and 1.s.); she denied four debts and documented that they had been paid in full (SOR ¶¶ 1.a., 1.c., 1.e., and 1.l.). She admitted that, in 1998, she was convicted of Fraudulent Check Under \$500 and was sentenced to a \$45 fine or 30 days in jail. (SOR ¶ 1.t.) She provided documentation that she had made partial payments on the delinquent debts alleged at SOR ¶¶ 1.b. and 1.d., and she also offered additional information to support her request for eligibility for a public trust position. Her admissions are incorporated herein as findings of fact. (Item 4 at 9-14; Ex. 11.)

Applicant is 44 years old, divorced, and the mother of a son, aged 14, and a daughter, aged 18. In September 2009, Applicant's ex-husband stopped paying child support and tuition for their daughter, who is a college student. (Item 4 at 7; Item 5.)

In 2003, Applicant earned a Bachelor of Science degree in Business Administration. In August 2005, she enrolled in a graduate program to acquire a master's degree in Business Administration. She expected to receive her graduate degree in May 2008. She is employed as a provider relations representative by a government contractor. (Item 5.)

In April 2009, Applicant suffered chest pains, went to the emergency room of her local hospital, and was diagnosed with a condition that required a heart catheterization. Applicant's children also had medical concerns that required expensive treatments. In August 2008, Applicant told an authorized investigator from the Office of Personnel Management that her three siblings had agreed to pay some of her children's medical expenses. However, Applicant's siblings were subsequently affected by the downturn in the economy and were unable to help as they had earlier agreed. Applicant has worked for her present employer since about 1989. Her gross annual salary is approximately \$37,000. (Item 4 at 3; Item 5 at 3; Item 6 at 6; Item 7 at 9; Item 12.)

Applicant has a history of financial delinquencies. She believes her financial delinquencies began in 2003, when she suffered emotional distress at the death of her mother. The SOR identified approximately \$35,576 in delinquent debt. Applicant admitted owing listed debts totaling at least \$34,350. (Item 1; Item 4; Item 7 at 10; Item 8; Item 9; Item 10.)

In response to DOHA interrogatories, Applicant provided a personal financial statement. Her net monthly income is \$2,272.56. Her fixed monthly living expenses total \$2,137 and are as follows: mortgage, \$738; groceries, \$300; clothing, \$50; utilities, \$300; car expenses, \$500; medical expenses, \$99; miscellaneous, \$150. Additionally, she makes two monthly payments of \$180.65 on her vehicle, and she has a cell phone payment of \$129 each month. Applicant's financial statement indicates that her monthly expenses exceed her monthly income by approximately \$355. (Item 7 at 8.)

In her Answer to the SOR, Applicant argued that she should not be treated more harshly than certain government officials who were responsible for questionable financial conduct. Nothing in the record suggests that Applicant has received financial credit counseling. (Ex. 4 at 1,15-25.)

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. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge must apply the guidelines 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 in seeking to obtain 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 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 trustworthiness concerns. Additional trustworthiness concerns are raised under AG 19(d), when an applicant has engaged in “deceptive or illegal financial practices such as . . . check fraud. . . .” Since about 2003, Applicant accumulated considerable delinquent debt and was unable to pay or satisfy her financial obligations.

In 1998, she was convicted of Fraudulent Check Under \$500. The evidence is sufficient to raise these potentially disqualifying conditions.

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition 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 trustworthiness, or good judgment.” Applicant’s financial delinquencies began in about 2003, when she suffered emotional distress at the death of her mother. Applicant has been steadily employed by her current employer since about 1989. While her financially delinquent behavior began several years ago, it continues unresolved at the present time, is likely to recur, and casts doubt on her current reliability, trustworthiness, and good judgment. Accordingly, I conclude that AG ¶20(a) does not apply to the facts of Applicant’s case.

Under AG ¶ 20(b), mitigation can occur 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 above, some of Applicant’s financial problems arose when she suffered distress at the loss of her mother and apparently neglected her financial responsibilities. Applicant’s admitted financial delinquencies began in 2003 and continue to the present, during a time when she was steadily employed. While her mother’s death and its impact upon her were beyond her control, Applicant offered no explanation for her failure to resolve or settle her financial delinquencies over the subsequent six years when she was employed. I conclude that she failed to act responsibly in identifying and resolving her substantial debts. I find that AG ¶ 20(b) applies only in part as a factor for consideration in this case.

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 control” is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Applicant has not received financial counseling. While she provided evidence of full payment of four debts and partial payment of two debts alleged on the SOR, her current monthly budget shows a deficit of approximately \$355, making consistent future payments unlikely. Accordingly, I conclude that AG ¶¶ 20(c) and 20(d) do not apply to the facts of Applicant’s case. AG ¶¶ 20 (e) and 20 (f) are not raised by the facts of this case.

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 relevant 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 is well-educated. She has a bachelor's degree in Business Administration and is pursuing a master's degree. She has had a steady job with the same employer for over 20 years. Her financial problems began at least six years ago and have continued to the present time. While she encountered a sad personal loss when her mother died, she failed to budget her resources over the last six years to satisfy her many debts, which now total over \$34,000. She has failed to demonstrate that her financial problems will not continue to be a trustworthiness concern in the future.

In her answer to the SOR, Applicant cited examples of others, including national officials and politicians, who had engaged in questionable financial conduct and had escaped negative consequences. She argued that her conduct was no worse than theirs and she should also escape any negative consequences. Applicant's argument is without merit.

DOHA's Appeal Board has previously addressed the argument that an applicant's disqualifying conduct was "ameliorated by the more substantial misconduct of others." The Appeal Board concluded: "At issue in this case is the security significance of Applicant's conduct, not the conduct of others. Therefore, the conduct of others and how management might have viewed that conduct in contrast to Applicant's conduct are not relevant factors for the Judge's consideration." ISCR Case No. 01-02677 at 7 (App. Bd. Oct. 17, 2002.)

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 failed to mitigate the trustworthiness concerns arising from her financial delinquencies.

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.: For Applicant
Subparagraph 1.b.: Against Applicant
Subparagraph 1.c.: For Applicant
Subparagraph 1.d.: Against Applicant
Subparagraph 1.e.: For Applicant
Subparagraphs 1.f. – 1.k.: Against Applicant
Subparagraph 1.l.: For Applicant
Subparagraphs 1.m. – 1.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 security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Joan Caton Anthony
Administrative Judge