



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



In the matter of:)
)
) ADP Case No. 09-04512
)
)
Applicant for Public Trust Position)

Appearances

For Government: Nichole Noel, Esquire, Department Counsel
For Applicant: *Pro se*

June 11, 2010

Decision

CREAN, THOMAS M., Administrative Judge:

On July 31, 2008, Applicant submitted a Questionnaire for Public Trust Position (SF 85P), as part of her employment with a defense contractor. On January 26, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns for financial considerations (Guideline F), and personal conduct (Guideline E). 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 adjudicative guidelines (AG) effective in the Department of Defense on September 1, 2006.

Applicant answered the SOR on February 15, 2010. She admitted eight and denied one of the nine allegations under Guideline F. She denied the one allegation under Guideline E. She requested a hearing before an administrative judge. Department Counsel was prepared to proceed on March 12, 2010, and the case was assigned to me on March 17, 2010. DOHA issued a Notice of Hearing on March 22, 2010, for a hearing on April 8, 2010. Applicant signed for the Notice of Hearing on March 30, 2010. I convened the hearing as scheduled. The government offered six exhibits, marked

Government Exhibits (Gov. Ex.) 1 through 6, which were received without objection. Applicant submitted six exhibits, marked Applicant Exhibits (App. Ex.) A through F, which were received without objection. I left the record open for Applicant to submit additional documents. Applicant timely submitted three additional documents marked App. Ex. G through I. Department Counsel had no objection to admission of the additional documents. (Gov. Ex. 7, Memorandum, dated April 26, 2010) DOHA received the transcript (Tr.) of the hearing on April 15, 2010. Based on a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is granted.

Procedural Issues

Applicant signed for the Notice of Hearing on March 30, 2010. Applicant is entitled to 15 days notice of hearing (Directive E3.1.8.). Applicant discussed with Department Counsel the hearing date of April 8, 2010, prior to the Notice of Hearing being mailed on March 22, 2010. Actual notice was therefore given more than 15 days prior to the hearing. However, Applicant signed for the Notice of Hearing only eight days prior to the hearing. If there was an issue on notice, Applicant waived the 15 days notice requirement. (Tr. 6-7)

Findings of Fact

Applicant admitted eight of the nine allegations under Guideline F in the SOR. Her answer to the one allegation under Guideline E was ambiguous, but it was determined at the hearing that she denied the allegation. After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is 41 years old, and has been a medical benefits representative for a defense contractor for approximately nine months. She has been married three times and has three sons that live with their father. She pays child support for them of \$350 per month. Her third marriage was on September 23, 2006, and she has a step-son from this marriage living independently. She is a high school graduate with some college and technical school credit. Her employer is paying for her to attend school part-time to become more proficient in her field. (Tr. 21-23; Gov. Ex. 1, Questionnaire for Public Trust Position, dated July 31, 2008; App. Ex. D, Technical College Letter, dated December 17, 2009) Applicant has been placed in charge of her unit's operations when her supervisor is unable to be in the office. (Tr. 19, App. Ex. E, E-mails, dated March 30, 2010, and April 5, 2010)

Applicant worked as an administrative assistant for an automobile dealer for approximately eight years until the dealership closed in August 2007. Her husband was employed as an automobile mechanic for another dealer and was paid on commission. Both were earning a good salary and their combined yearly gross income prior to the dealership closing was approximately \$57,000. Up until that time, they were current with their bills and living within their means. At the same time that Applicant lost her job in August 2007, the economic downturn affected the number of repairs and commissions that her husband received. The automobile repair assignments were cut and his income

was reduced considerably. Their combined yearly salary was reduced to approximately \$36,000 in 2008. After the dealership closed, Applicant was unemployed for approximately a month until September 2007, when she started a temporary job that paid four dollars less an hour than she made at the automobile dealership. During this time, Applicant had small medical issues that placed her on leave without pay for a few weeks. She worked at this new job for about nine months before leaving for medical reasons. She started working after being on sick leave for two months at her present employer as a benefits representative under a temporary agency contract. She received a permanent position with the contractor in December 2009. Applicant's husband switched jobs so he could do more automobile repairs and receive more commissions. During this time of unemployment and underemployment, Applicant and her husband used credit cards and loans for their basic living expenses. They tried as best they could to live within their limited income and to stay current with their bills. (Tr. 23-30)

Applicant's present yearly salary is \$28,000, and her husband's yearly salary is \$40,000, for a total yearly income of \$68,000. Applicant's monthly income is budgeted at \$1,278, and her husband's monthly income is budgeted at \$2,677. In March 2010, both earned more money than budgeted, Applicant earned \$1,925, and her husband \$3,309 for a combined monthly total of \$5,235, against the budgeted amount of \$3,955. This now seems to be a trend in their salary levels. (Tr. 30-31; App. Ex. C, Budget, March 2010)

Credit reports (Gov. Ex. 4, dated November 1, 2009; Gov. Ex. 5, dated July 10, 2009; and Gov. Ex. 6, dated August 28, 2008), as well as Applicant's answers to Interrogatories (Gov. Ex. 2, dated August 26, 2009, and October 1, 2009) listed delinquent debts for Applicant totaling approximately \$31,326. The debts include a telephone account placed for collection for \$135 (SOR 1.a); a loan charged off for \$8,247 (SOR 1.b); a credit card in collection for \$2,130 (SOR 1.c); another credit card charged off for \$2,255 (SOR 1.d); a student loan account charged off for \$6,205 (SOR 1.e); two accounts to the same bank charged off for \$2,338 (SOR 1.f), and \$5,981 (SOR 1.g); a mail order account charged off for \$1,340 (SOR 1.h); and another credit card account in collection for \$2,693. Most of the debts are attributed to using the cards to pay for normal living expenses.

Applicant paid some of her debts not alleged in the SOR to free funds to pay debts alleged in the SOR. She recently completed payment on her car loan freeing \$230 monthly to pay other debts. She also completed payment on a loan used for living expenses freeing another \$110 for debt payments. Applicant and her husband established a budget which included payments on delinquent debts. Applicant provided information to show that she made payments on her delinquent debts as reflected in her budget. (Tr. 16-20; App. Ex. A, Car Loan Release, dated February 17, 2010; App. Ex. B, Cancelled Checks, dated January 15, 2010; App. Ex. C, Budget, March 2010; App. Ex. F, Payments, March 2010) Applicant also paid medical bills associated with a recent surgery. (Gov. Ex. 3, Answers to Interrogatories, dated October 1, 2009, at I-24) She paid other small debts. These debt payments have freed over \$300 monthly for payment on other delinquent debts. (Gov. Ex. 3, Answers to Interrogatories, dated October 1, 2009, at I-9).

Applicant made many efforts both before and after the hearing to contact the original creditor and the collection agency in regard to the telephone debt alleged at SOR 1.a., but the creditor and collection agency could not verify a debt owed by Applicant. She is willing to pay the debt if it is verified as her debt. (Tr. 36-38; App. Ex. E, Letter, dated April 15, 2010) After the hearing, Applicant provided the last telephone company statement she received when she terminated the cell phone service in March 2001. It reflects a balance of \$63.47, but it also shows payment of that amount on April 10, 2001. She provided a copy of her credit report showing that the last action on the account listed by the telephone company with the credit reporting agency was in May 2002. (App. Ex. I, Credit Report, dated August 28, 2008; App. Ex. G, Bill, dated March 2, 2001, App. Ex. H, Statement, undated)

The delinquent debt at SOR 1.b is for a consolidation loan used to pay other debts. The delinquent debts at SOR 1.c, 1.d, 1.f, 1.g, and 1.i arose when Applicant used credit cards to meet her living expenses when she was unemployed or underemployed. The delinquent debt at SOR 1.e is a student loan Applicant used to pay for schooling while unemployed. The delinquent debt at SOR 1.h is from a catalog sales company Applicant used to purchase household items needed when she was unemployed. Applicant's budget and information reflect small payments on all of these debts. Applicant's plan is to pay small debts first and then use the funds freed from payment of these debts to pay or increase payment of the larger debts. Attached to her budget are either cancelled checks or receipts reflecting that these payments are being made according to her budget. Since Applicant has paid other debts freeing additional funds, she will be increasing the amount she pays on these debts. (Tr. 39-60; App. Ex. C, budget, March 2010)

Applicant completed her application for a position of public trust on July 31, 2008. She was pleased that she had received the job offer. She was asked to complete the application immediately so she could get a date to start work. She quickly completed that application without thinking through all of the questions. She knew that her background would be investigated and that she would be questioned about her finances. Her mother worked for the government for over 25 years so she was familiar with background checks. She checked "no" concerning debts over 180 days in error and not to deliberately mislead any investigations concerning her background. (Tr. 61-63)

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." 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." Trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. (See, The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004) 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 or a sensitive 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 commonsense decision. 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. (AG ¶ 2(c))

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, an 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.

Analysis

Guideline F, Financial Considerations

There is a public trust concern for a failure or inability to live within one's means, satisfy debts, and meet financial obligations because such actions 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. (AG ¶ 18) Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in his or her obligation to protect sensitive information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with her creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a situation of risk inconsistent with the holding of a public trust position. An applicant is not required to be debt free, but is required to manage her finances in such a way as to meet her financial obligations. Applicant's delinquent debts, as established by credit reports and Applicant's statements and testimony, show delinquent debts are a security concern raising Financial Consideration Disqualifying Conditions (FC DC) ¶ 19(a) (inability or unwillingness to satisfy debts), and FC DC ¶ 19(c) (a history of not meeting financial obligations). Applicant incurred delinquent debt when she lost employment in August 2007 and was either unemployed or underemployed until December 2008. Her husband also lost significant income because of the economic downturn which affected the amount of work and commissions he received. Applicant had to rely on credit cards and loans to meet living expenses. This shows a history of not meeting financial obligations because of an inability, and not unwillingness, to satisfy debt.

I considered Financial Considerations Mitigating Conditions (FC MC) ¶ 20(a) (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), and FC MC ¶ 20(b) (the conditions that resulted in the financial problems were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce, or separations and the individual acted responsibly under the circumstances). Both of these mitigating conditions apply to Applicant's financial problems. The debts became delinquent because Applicant and her husband lost good-paying jobs they had for many years which permitted them to stay current on their debts. Her financial problems were caused by job loss and the economic downturn, both conditions beyond Applicant's control. Applicant continued to seek employment and work in a job that paid significantly less than her old position after losing her well-paying job. She went back to school at her employers' expense so she could better perform her job for the employer. Since the position provides support needed by military personnel, it is unlikely that she will experience more periods of unemployment. Her husband also lost significant income because of the economic downturn. He switched employers and is in a better position to manage his economic conditions. Both Applicant and her husband changed jobs and are now gainfully employed. They paid some of their smaller debts to free funds to pay larger debts. They are making payments, even though small at this time, on all of their delinquent debts. They have a plan to increase their payments as other debts are paid, freeing funds to make larger debt payments. Applicant's financial problems were caused by conditions beyond her control. She acted responsibly by aggressively seeking employment, although at a lower pay, and not incurring any additional financial obligations. The conditions causing the loss of her employment are unlikely to recur, and she acted reasonably under the circumstances. Her past-due debts do not cast doubt on her reliability, trustworthiness, and good judgment under these circumstances,

I have considered FC MC ¶ 20(c) (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) and it only partially applies. There is no indication Applicant received financial counseling. However, her financial problems are being resolved or are under control.

I considered FC MC ¶ 20(d) (the individual has initiated a good-faith effort to repay the overdue creditors or otherwise resolve debts) and it does apply. For FC MC ¶ 20(d) to apply, there must be an "ability" to repay the debts, the "desire" to repay, and "evidence" of a good-faith effort to repay. A systematic method of handling debts is needed. Applicant must establish a "meaningful track record" of debt payment. A "meaningful track record" of debt payment can be established by evidence of actual debt payments or reduction of debt through payment of debts. The entirety of an Applicant's financial situation and her actions can reasonably be considered in evaluating the extent to which that Applicant's plan for the reduction of her outstanding indebtedness is credible and realistic. All that is required is that Applicant demonstrates she has established a plan to resolve her financial problems and has taken significant actions to implement that plan. Applicant has a plan to resolve her past due financial obligations. She paid off some of her debts, thereby freeing funds to make payments on her large debts. She is making monthly payments on all of her outstanding delinquent debts. She established a meaningful track record of debt reduction.

Applicant has acted responsibly towards her debts caused by conditions beyond her control. Applicant has presented sufficient information to mitigate security concerns for financial considerations because she took aggressive and reasonable action to find employment after being laid-off, paying debts as she could, and controlled her future spending. Her finances do not indicate a public trust concern.

Personal Conduct

A trustworthiness concern is raised because conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect sensitive information. Of special interest is any failure to provide truthful and candid answers during the trustworthiness clearance process or any other failure to cooperate with the trustworthiness clearance process. (AG ¶ 15) Personal conduct is always a trustworthiness concern because it asks the central question does the person's past conduct justify confidence the person can be entrusted to properly safeguard sensitive information. The trustworthiness clearance system depends on the individual providing correct and accurate information. If a person conceals or provides false information, the trustworthiness clearance process cannot function properly to ensure that granting access to sensitive information is in the best interest of the United States Government.

Applicant's incomplete answers to a questions on her public trust application concerning her finances raises a potential trustworthiness concern under Personal Conduct Disqualifying Condition (PC DC) AG ¶ 16(a) (the deliberate omission,

concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history, or similar form used to conduct investigations, to determine security eligibility or trustworthiness).

Applicant denied intentional falsification. In response to financial questions on the trustworthiness clearance application, Applicant responded that she did not have any debts more than 180 days past due in the last seven years. In fact, Applicant had debts as noted in the SOR more than 180 days past due. A trustworthiness concern may arise for an omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a trustworthiness clearance. But every omission, concealment, or inaccurate statement is not a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully. Applicant was aware of the debts more than 180 days past due, but in her haste to complete the application and start her new job, she carelessly checked the wrong box noting she that she did not have debts more than 180 days past due. The available information shows her failure to list her past due debts was not knowing and willful. Applicant established that she did not deliberately fail to provide full information on the trustworthiness clearance application with intent to deceive. I find for Appellant as to Personal Conduct pertaining to falsification of the trustworthiness clearance application.

Whole-Person Concept

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 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. I considered Applicant and her husband lost well-paying jobs after many years because of conditions beyond their control. I considered that she and her husband aggressively sought employment and that Applicant was only unemployed for a few short periods. However, for a long time, both she and her husband were underemployed at salaries significantly less than

previous salaries. Applicant's financial problems stem from her unemployment followed by underemployment. She is a trusted worker in her new position, and she is highly regarded. Applicant is paying her past and present obligations and living within her means. She has established a meaningful track record of payment of past debts. She took action to aggressively find employment, pay her debts, and live within her means. I considered that she did not deliberately provide false information on her trustworthiness clearance application with intent to deceive. The record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has mitigated the trustworthiness concerns arising from her financial situation and her personal conduct.

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:

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|---------------------------|---------------|
| Paragraph 1, Guideline F: | FOR APPLICANT |
| Subparagraphs 1.a - 1.i: | For Applicant |
| Paragraph 2, Guideline E: | FOR APPLICANT |
| Subparagraph 2.a: | For Applicant |

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

THOMAS M. CREAN
Administrative Judge