



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



In the matter of:)
)
-----) ADP Case No. 09-05709
SSN: -----)
)
Applicant for Public Trust Position)

Appearances

For Government: Paul M. DeLaney, Esq., Department Counsel
For Applicant: *Pro se*

October 5, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves trustworthiness concerns under Guideline F (Financial Considerations). Eligibility for assignment to a public trust position is denied.

Statement of the Case

Applicant submitted her Questionnaire for Public Trust Positions (SF 85P) on July 24, 2008. On April 9, 2010, the Defense Office of Hearings and Appeals (DOHA) sent her a Statement of Reasons (SOR) detailing its trustworthiness concerns under Guideline F. 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 by the Department of Defense on September 1, 2006.

Applicant received the SOR on April 16, 2010; answered it on April 30, 2010; and requested a determination without a hearing. DOHA received her response on May 4, 2010.

Department Counsel submitted the Government's written case on June 14, 2010. On June 15, 2010, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. Applicant received the FORM on June 23, 2010, but she did not respond. The case was assigned to me on September 21, 2010.

Findings of Fact

Applicant is a 45-year-old employee of a contractor providing health services for the Department of Defense. She married in April 1984, and she has two children, ages 21 and 11. She has worked for her current employer since October 2006. She has never held a public trust position or received a security clearance.

Applicant's spouse accumulated medical bills starting in 1992. She and her spouse received a Chapter 7 bankruptcy discharge in September 1999. (Item 8 at 3.) The record contains virtually no information about the circumstances surrounding the bankruptcy. The bankruptcy is alleged in SOR ¶ 1.a.

Applicant incurred medical bills starting in 2000. The record contains no details about the circumstances giving rise to her medical bills. Her spouse was unemployed from May to November 2002, but has been continuously employed since November 2002. (Item 6 at 5.)

The evidence concerning Applicant's employment history is conflicting. Her SF 85P reflects that she was unemployed from July 2002 to March 2003, but it also reflects that she was employed as a pharmacy technician from April 2001 to July 2003, and was employed at another pharmacy from March 2003 to October 2006, when she began her current job. (Item 5 at 3-4.) In May 2009, she told a security investigator she was unemployed from July 2003 to March 2004. (Item 6 at 5.)

Applicant and her husband purchased a home in 2004, and borrowed about \$110,000 to finance the purchase, with monthly payments of about \$1,100. They refinanced their home with an adjustable rate mortgage in 2006, borrowed about \$211,000, used their equity to pay debts, and increased their monthly payments to about \$2,000. They could not afford the increased payments. They obtained the lender's approval for a short sale, and sold the home in July 2007 for about \$90,000. (Item 6 at 5.) The defaulted mortgage and short sale are not alleged in the SOR.

As of the date of the SOR, Applicant had sixteen delinquent debts totaling more than \$18,000. She claimed that she was making payments on the two debts alleged in SOR ¶ 1.b and 1.q, and that she had satisfied the judgment alleged in SOR ¶ 1.c, but she offered no documentary evidence to show payments or payment plans. She disputed the debt alleged in SOR ¶ 1.o, but she provided no documentary evidence substantiating the basis for the dispute. She admitted that the thirteen remaining debts were unresolved.

During an interview with a security investigator in May 2009, Applicant disclosed that she and her spouse have a net family income of \$3,850, expenses of \$3,395, and debt payments of \$645, leaving a shortfall of about \$190 per month. The debt payments do not include the delinquent debts alleged in the SOR. (Item 6 at 10.)

Applicant and her spouse used a debt consolidation company in 1999, but they terminated their contract with the company after learning that no money had yet been paid to their creditors. They also received financial counseling from a state agency in 2003.

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 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 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. 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).

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. An applicant has the

ultimate burden of demonstrating that it is clearly consistent with national security to grant or continue eligibility for access to sensitive information.

Analysis

Guideline F, Financial Considerations

The trustworthiness concern under this guideline 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.

Applicant's financial history raises two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations"), shifting the burden to her to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15.

Trustworthiness concerns under this guideline may be mitigated if "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." AG ¶ 20(a). This mitigating condition is not established because Applicant's delinquent debts are ongoing, numerous, and not the result of circumstances making them unlikely to recur.

Trustworthiness concerns under this guideline also may be mitigated if "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." AG ¶ 20(b). Both prongs, i.e., conditions beyond the person's control and responsible conduct, must be established.

Applicant's spouse incurred medical bills in 1992, but these bills would likely have been discharged in the 1999 bankruptcy. Applicant incurred medical expenses in 2000. Both she and her spouse experienced periods of unemployment, but her husband returned to the workforce in November 2002, and she returned in March 2003 or March 2004, whichever evidence is accurate. However, they have not acted responsibly since returning to the workforce. They refinanced their home, took out equity to pay debts, and could not afford the increased payments. They have done little to adjust their lifestyle to their income or address their delinquent debts, in spite of having two incomes for at least six years. I conclude AG ¶ 20(b) is not established.

Trustworthiness concerns under this guideline also may be mitigated if “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.” AG ¶ 20(c). Applicant and her spouse have received financial counseling, but this mitigating condition is not established because their financial problems are not under control.

Trustworthiness concerns also may be mitigated if “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” AG ¶ 20(d). Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Applicant claimed she paid one debt and was making payments on two others, but she presented no documentary evidence to support her claim. She admitted that the remaining debts are unresolved. I conclude AG ¶ 20(d) is not established.

Finally, trustworthiness concerns may be mitigated if “the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.” AG ¶ 20(e). Applicant disputed the debt alleged in SOR ¶ 1.o, but this mitigating condition is not established because she has not articulated or documented the basis for the dispute.

The defaulted mortgage and short sale of Applicant’s home in 2007 are not alleged in the SOR. Conduct not alleged in the SOR may not be considered as an independent basis for denying a clearance, but it may be considered to assess an applicant’s credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). I have considered the evidence of the delinquent mortgage and short sale for these limited purposes.

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 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 a public trust position 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 F in my whole-person analysis. After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the trustworthiness concerns based on financial considerations. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with the interests of national security to grant eligibility for access to sensitive information.

Formal Findings

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

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

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

Conclusion

In light of all of the circumstances, it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility is denied.

LeRoy F. Foreman
Administrative Judge