



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



In the matter of:)
)
) ADP Case No. 10-00503
)
)
Applicant for Public Trust Position)

Appearances

For Government: Gregg A. Cervi, Esquire, Department Counsel
For Applicant: *Pro se*

October 27, 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 Personal Conduct adjudicative guideline. Eligibility for access to sensitive information is denied.

Applicant submitted a Questionnaire for Public Trust Positions (SF 85P) on July 17, 2009. She also completed an SF-85P in December 2003. On June 24, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) alleging trustworthiness concerns under Guideline E 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On July 28, 2010, 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 September 3, 2010. The FORM contained documents identified as Items 1 through 7. Additionally, the Government provided a statute, identified as Item 8, for administrative notice. By letter dated September 8, 2010, DOHA forwarded a copy of the FORM to Applicant, with instructions to submit any additional information and objections within 30 days of receipt. Applicant received the file on October 4, 2010. Her response to the FORM was due on November 3, 2010. Applicant complied with the time limitation and filed additional information. Department Counsel did not object to Applicant's submission. The case was assigned to me for a decision on October 18, 2010. I marked the information provided by Applicant in response to the FORM as Applicant's Exhibit (AE) A and admitted it to the record.

Procedural Matters

As Item 8 of the FORM, the Government provided a copy of 8 U.S.C. § 1324. Additionally, the Government provided, in footnote 13 of the FORM, a summary of judicial interpretations of the term "harbor," as used in the statute. The Government moved that I take administrative notice of the statute. Applicant did not object, and the Government's motion is granted.

Findings of Fact

The SOR consists of a single allegation that raises trustworthiness concerns under Guideline E, Personal Conduct. Applicant admitted the allegation but denied it was a security concern under Guideline E. Applicant's admission of the allegation is entered as a finding of fact. (Item 1; Item 4.)

Applicant is 31 years old, married, and the mother of two young children. She has a high school diploma and is employed as an administrative clerk by a government contractor. She has worked for her present employer for eight years. (Item 5.)

On the SF-85P that Applicant completed in 2003, she indicated her background had been investigated by the Government, but the record does not show that a clearance determination was made at that time. She now seeks access to sensitive information. (Item 5; Item 6.)

Applicant was interviewed by an authorized investigator from the U.S. Office of Personnel Management (OPM) on November 18, 2009. On March 5, 2010, in response to DOHA interrogatories, Applicant signed a notarized statement affirming that she had read the summary of the interview and found it to be true and correct. She made no changes, corrections, or revisions to the investigator's summaries. (Item 7.)

Applicant is a native-born citizen of the United States. She and her husband, who is unemployed, have been married for nine years. Applicant's husband was born in Mexico, and he is a citizen of Mexico. Applicant's husband is neither a U.S. registered alien nor a naturalized United States citizen. He resides with Applicant in the home they

share in the United States. Applicant's husband has no legal documents that verify or permit his residency in the United States.¹ (Item 5; Item 7.)

I take administrative notice of section 1324 of Title 8 of the United States Code, a federal statute that makes it a felony crime to harbor an illegal alien. The statute reads, in pertinent part:

Sec. 1324. Bringing in and harboring certain aliens

(1) (A) Any person who –

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs –

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under title 18, imprisoned not more than 5 years, or both.

(Item 8.)

I also take administrative notice of the facts in footnote 13 of the FORM, which reads as follows:

Item 8. See, 8 U.S.C. § 1324 (2006). The word “harbor” as used in this section is intended to encompass conduct tending to substantially facilitate the alien's remaining in the U.S. illegally, provided the person charged has knowledge of the alien's unlawful status. *United States v. Lopez*, 521 F. 2d 437 (2nd Cir. 1975), *cert. denied*, 423 U.S. 995 (1975). The term “harbor” also means to afford shelter to and is not limited to clandestine sheltering. *United States v. Acosta De Evans*, 531 F. 2d 428 (9th Cir. 1976), *cert. denied*, 429 U.S. 836 (1976).

When she filed her answer to the SOR, Applicant included a letter to the administrative judge. Applicant's letter reads, in pertinent part:

¹ When Applicant completed her SF-85P in December 2003, she wrote: “My husband is illegal [and] does not have a [Social Security number]. I am soon to start the process of his immigration papers.” In her interview with the OPM investigator, Applicant stated that she did not know if her husband intended to become a U.S. citizen. (Item 6; Item 7.)

I honestly don't feel that my husband's status in this country has affected or will affect the way I do my job now or in the future. If you believe so let me know how. I am a US citizen of this country and I have proudly and honestly served the DOD client. I don't believe my husband's status in this country should be a reason for revoking my current employment position. I have done nothing for the DOD to feel I am not trustworthy.

(Item 4 at 4.)

Applicant provided three letters of character reference from co-workers and one letter of character reference from her supervisor. Her co-workers described Applicant as honest, efficient, and compassionate. Her supervisor described Applicant as principled, ethical, a hard worker, and a valued member of her office team. (Item 4 at 5-6; AE A.)

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.

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 *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

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.

Applicant and her husband have been married for nine years and reside together in the United States. The record supports a conclusion that Applicant has known since at least 2003 that her husband, a citizen of Mexico, lacks legal documentation for his residence in the United States and is an illegal alien. From at least 2003 to the present time, Applicant has knowingly sheltered and harbored her husband, who resides with her as an illegal alien. Applicant’s actions violate section 1324 of Title 8 of the United States Code and raise security concerns under Guideline E.

Disqualifying conditions AG ¶¶ 16(d), 16(e), and 16(g) apply to the facts of Applicant’s case. AG ¶ 16(d) reads: “credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other

characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of . . . (3) a pattern of dishonesty or rule violations.”

Disqualifying condition AG ¶ 16(e) reads, in pertinent part: “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional or community standing”

Disqualifying condition AG ¶ 16(g) reads: “association with persons involved in criminal activity.”

Several mitigating conditions might apply to the facts of this case. Applicant’s disqualifying personal conduct might be mitigated under AG ¶ 17(c) if “the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.” AG ¶ 17(e) might apply if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(g) might apply if “association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual’s reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.”

Applicant continues to knowingly provide shelter to an illegal alien. Her husband’s illegal residence in the United States is an ongoing crime, as is her sheltering of him, while knowing that he is in the United States illegally. Nothing in the record establishes that Applicant has taken steps to eliminate the vulnerability, manipulation or duress that she could be subject to as a result of her husband’s illegal status or her harboring of him. After considering all applicable Guideline E mitigating conditions, I conclude that none applies.

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 a mature adult who has been recognized by her co-workers as honest and hard-working. Her supervisor considers her to be a valued employee. However, as a U.S. citizen, she has, for many years, harbored and provided shelter to her husband, an illegal alien. Applicant's actions raise concerns under 8 U.S.C. §1324, which defines harboring an illegal alien as a felony crime. Her actions also raise serious concerns about her reliability and trustworthiness. Applicant continues to associate with an individual who is involved in criminal activity, and she herself continues to harbor him, thereby raising serious security concerns about her willingness to abide by rules, regulations, and laws.

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 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:

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraph 1.a.:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Joan Caton Anthony
Administrative Judge