



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



In the matter of:)	
)	
1)	ADP Case No. 10-04169
)	
Applicant for Public Trust Position)	

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

March 7, 2011

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated Financial Considerations trustworthiness concerns, but she has not mitigated Personal Conduct trustworthiness concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

On October 13, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing trustworthiness concerns under Guidelines E (Personal Conduct) and F (Financial Considerations). The action was taken under Executive Order (EO) 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* (January 1987), as amended (Regulation); and the adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

¹ Applicant's divorce was final on February 8, 2011. The Court ordered her name restored to what it was before the marriage. I have included her restored name in the caption as "AKA" (also known as).

Applicant answered the SOR in writing on November 15, 2010, and requested a hearing before an administrative judge. The case was assigned to me on December 14, 2010. DOHA issued a notice of hearing on January 11, 2011, and the hearing was convened as scheduled on February 3, 2011. The Government offered exhibits (GE) 1 through 8, which were admitted without objection. Applicant testified and submitted exhibits (AE) A through C, which were admitted without objection. The record was held open for Applicant to submit additional information. Applicant submitted documents that were marked AE D and E and admitted without objection. Department Counsel's memorandum forwarding AE D and E is marked Hearing Exhibit (HE) I. DOHA received the hearing transcript (Tr.) on February 10, 2011.

Findings of Fact

Applicant is a 33-year-old employee of a defense contractor. She has worked for her current employer since 1998. She seeks to retain her eligibility for a public trust position. She is a high school graduate. She was married from 2005 until her divorce became final on February 8, 2011. She has four children, ages 18, 14, 9, and 7.²

Applicant and her husband separated in 2008. She has custody of the three minor children. Despite a court order, he did not pay child support after they separated. He was also supposed to pay his share of the marital debt, but did not. She was unable to pay all their debts, and a number of debts became delinquent.³

The SOR alleges 16 delinquent debts with balances totaling about \$14,275, and a car loan that was past due \$699 with a balance of \$17,141. Applicant admitted all the allegations. She has brought the past-due car loan, as alleged in SOR 1.n, current. She has not paid any of the other debts. She filed Chapter 7 bankruptcy on February 4, 2011. She took financial counseling, as required by the bankruptcy court. Her ex-husband is employed. She testified that she was going to ask the court to garnish his wages for current and delinquent child support. She stated that her finances will be in good condition after her debts are discharged and she starts receiving child support. The court date for her divorce was on February 7, 2011. The petition for divorce was granted. Applicant's ex-husband was ordered to pay child support of \$815 per month through a wage withholding order.⁴

Applicant and her husband were involved in a domestic dispute on May 4, 2009. Her husband told a police officer that she chased him out the door with a knife. He got in his sports utility vehicle (SUV), and she began to slash and stab at the SUV with the knife, causing scratches to the SUV. She slashed at the passenger side window and injured her arm when she reached in the window. The police officer interviewed their child, who was 13 years old at the time. The child stated she saw the entire incident and verified her father's account. The police officer found a knife in the SUV. He also

² Tr. at 49, 67; GE 1.

³ Tr. at 21-23; GE 4; AE D.

⁴ Tr. at 23-25, 36-38, 50-66; Applicant's response to SOR; AE A, C, D, F.

photographed scratches on the hood, fender, and passenger side window. I find the incident happened essentially as described in the police report.⁵

On May 11, 2009, Applicant was charged with the felony offense of aggravated assault against a household member. A criminal summons was issued on May 19, 2009, and she appeared in court with a public defender on June 29, 2009. The charge was dismissed on September 29, 2009, when the police officer failed to appear in court.⁶

Applicant submitted a Questionnaire for Public Trust Positions (SF 85P) on July 23, 2009. She answered "No" to Question 20 of the SF 85P, which asked "In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s)? (Leave out traffic fines of less than \$150.)" She also answered "No" to Question 22b, which asked "Are you now over 180 days delinquent on any loan or financial obligation? Include loans or obligations funded or guaranteed by the Federal Government."⁷

Applicant was interviewed about the criminal charge by an investigator from the Office of Personnel Management (OPM) in November 2009. She told the investigator that that she never had a knife. She said that she injured her arm while she was reaching in the SUV window for her purse, her husband put the window up, and he drove off with her arm stuck in the window. Her testimony at the hearing was consistent with her statement to the OPM investigator.⁸ She wrote in her response to the SOR:

I never attacked anyone with a knife, I was in the kitchen cooking and did have a knife in my hand, which I was using to prepare the meal but at no point did I threaten anyone with a knife or any kind of weapon. All this was the sayings of my husband whom I am currently in the proceedings of a divorce with since June of 2009.

Applicant was interviewed by an OPM investigator about her finances on February 26, 2010. She fully discussed her delinquent debts. She stated that she stopped paying many of the accounts in February 2008, after she and her husband separated. She stated that she and her husband went to a bankruptcy company in April 2009 to seek assistance in filing bankruptcy. She took the bankruptcy counselling course on February 3, 2010. She did not have the money at that time to complete the bankruptcy filing.⁹

Applicant denied intentionally providing false answers on the SF 85P and to the OPM investigator. She provided inconsistent reasons why she did not list her charge of

⁵ Tr. at 25, 39; GE 7.

⁶ Tr. at 29; GE 6, 7; AE B.

⁷ GE1.

⁸ Tr. at 25-29, 39-45; GE 4; AE D.

⁹ GE 4; AE C.

aggravated assault on the SF 85P. In November 2009, she told the OPM investigator that the incident occurred after she submitted her security paperwork (SF 85P). She testified that she was not arrested and she did not receive notice that she had been charged until after she submitted the SF 85P. When confronted that her first court hearing on the charge was before the SF 85P was submitted, she stated that she must not have listed the charge on the SF 85P because she thought the word “charged” meant that she was sentenced by the judge.¹⁰

Applicant testified that she did not list her delinquent debts on the SF 85P because she misread the question. She thought the question asked her to only list “loans or obligations funded or guaranteed by the Federal Government.” She did not have any, so she answered in the negative.¹¹

After considering all the evidence, I find that Applicant intentionally falsified the SF 85P by not listing her delinquent debts and her aggravated assault charge. I also find that she intentionally provided false information to the OPM investigator when she stated that she never had a knife during the incident and when she stated that the incident happened after she submitted the SF 85P. I further find that her response to the SOR and her testimony at the hearing were also intentionally false.

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. 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. 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.

¹⁰ Tr. at 31-34, 45-49; GE 4; AE D.

¹¹ Tr. at 35-36.

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 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 safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Section 7 of 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 E, Personal Conduct

The security concern for Personal Conduct is set out in 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(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; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant intentionally falsified her SF 85P in 2009 when she failed to list her delinquent debts and her aggravated assault charge. She intentionally provided false information to the OPM investigator when she stated that she never had a knife during the incident and when she stated that the incident happened after she submitted the SF 85P. AG ¶¶ 16(a) and 16(b) are applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) 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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant provided intentionally false information on her SF 85P, to the OPM investigator, in her response to the SOR, and during her testimony at the hearing. There are no applicable mitigating conditions.

Guideline F, Financial Considerations

The security concern 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 classified 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 security concerns under AG ¶ 19. Two are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant accumulated a number of delinquent debts and was unable or unwilling to pay her obligations for a period. The evidence is sufficient to raise the above disqualifying conditions.

Four Financial Considerations Mitigating Conditions under AG ¶ 20 are potentially applicable:

- (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;
- (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;
- (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
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant still owes the debts alleged in the SOR. Her financial issues are recent and ongoing. AG ¶ 20(a) is not applicable.

Applicant and her husband separated in 2008. She had custody of their four children. He did not pay child support or his share of the marital debt. Those events qualify as conditions that were outside her control. To be fully applicable, AG ¶ 20(b) also requires that the individual act responsibly under the circumstances. Applicant brought her past-due car loan current. She filed Chapter 7 bankruptcy. Her debts should be discharged within a reasonable period. Her divorce is now final, and the court ordered her ex-husband to pay child support of \$815 per month through a wage garnishment. Under the circumstances of this case, I find that seeking the legal remedy of bankruptcy does not constitute irresponsible action. AG ¶ 20(b) is partially applicable.

Applicant received financial counseling as part of her bankruptcy. Applicant's financial problems have not yet been resolved. However, the bankruptcy provides a clear indication that the problem is in the process of being resolved and is under control. AG ¶ 20(c) is applicable.

Applicant's actions do not qualify as a good-faith effort to repay overdue creditors or otherwise resolve debts.¹² AG ¶ 20(d) is not applicable.

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. I have incorporated my comments under Guidelines E and F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

I considered Applicant's stable employment record. Her finances are in the process of being resolved. However, she provided intentionally false answers

¹² The Appeal Board has previously explained what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [good-faith mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [good-faith mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. Jun. 4, 2001)).

throughout this process. I have significant concerns about her truthfulness, honesty, judgment, and reliability.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant mitigated Financial Considerations trustworthiness concerns, but she has not mitigated Personal Conduct trustworthiness concerns.

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
Subparagraphs 1.a-1.d:	Against Applicant
Paragraph 2, Guideline F:	FOR APPLICANT
Subparagraphs 2.a-2.q:	For Applicant

Conclusion

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

Edward W. Loughran
Administrative Judge