



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ADP Case No. 10-04782
)
Applicant for Public Trust Position)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

April 15, 2011

Decision

DUFFY, James F., Administrative Judge:

Applicant owes over \$37,000 in delinquent debts and failed to mitigate the Guideline F, Financial Considerations, trustworthiness concerns. The Government failed to establish that Applicant deliberately falsified a Public Trust Position Application (SF 85P) under Guideline E, Personal Conduct. Eligibility for access to sensitive information is denied.

On October 18, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline F, Financial Considerations, and Guideline E, Personal Conduct. 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) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR in writing on November 12, 2010, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on January 30, 2011. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant responded to the FORM on March 9, 2011. I received the case on April 4, 2011.

Findings of Fact

Applicant is a 43-year-old employee of a Federal Government contractor. She has worked for her current employer since November 2009. She is applying for a public trust position for the first time. Her SF 85P, submitted in December 2009, reflected that she has never been married and has two children, ages 7 and 17. Her SF 85P also reflected that she has no arrests or convictions in the last seven years. In responding to Question 19 on that application, she disclosed that she had a judgment against her¹

The SOR alleges 15 delinquent debts with balances totaling about \$37,026. These debts include a returned check, overdrawn checking account, defaulted payday loan, and credit card accounts and phone bills placed for collection. She also had three vehicles repossessed, one in 2003, another in 2008, and the latest in 2009. In her Answer to the SOR, Applicant admitted each delinquent debt and stated she was "looking into bankruptcy options at this time." The SOR also alleges that Applicant falsified her SF 85P by responding "No" to Question 20, which asked whether she was over 180 days delinquent on any loan or financial obligation. In her Answer to the SOR, Applicant did not respond to the falsification allegation.²

During an interview with an Office of Personnel Management (OPM) investigator on April 5, 2010, Applicant attributed her financial problems to low-paying jobs and a period of unemployment from January to November 2009. Her SF 85P also reflected that she was unemployed from April 1, 2003 to April 18, 2005. The summary of her OPM interview indicated, "In about 2001 or 2002, [she], along with her children's father, purchased cars and furniture, then they split up and he was not helping pay the bills or paying any child support, and [her] bill became delinquent." Additionally, she stated she has been unable to pay any of her old debts and described her current financial situation as struggling, but making ends meet. She reported that her net monthly income was \$1,820 and her monthly expenses were \$1,606, leaving a net monthly remainder of about \$214. She also receives \$323 per month in food stamps. She has not received any financial counseling. During her OPM interview, she admitted to her financial delinquencies, stated she planned to start the process of filing bankruptcy in May 2010, but was not asked why she answered "No" to Question 20 on her SF 85P.³

¹ Item 4.

² Items 1, 2, 4, 5, 6. One of the repossessed vehicles involved a loan Applicant cosigned with her sister and her sister defaulted on that loan.

³ Item 4, 6.

Applicant also acknowledged her financial problems in responding to interrogatories. In doing so, she noted “none” on the Date Last Payment block for each delinquent debt. Since responding to the interrogatories in July 2010, she has not presented proof of any payments on the delinquent debts. In commenting on Department Counsel’s FORM, she stated, “I am still seeking/looking into bankruptcy at this time.”⁴

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.

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.

⁴ Items 2, 6, 7, response to FORM.

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 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 of time. 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 was unemployed for about 2 years between 2003 and 2005 and again for about 11 months in 2009. The termination of her relationship with the father of her children also caused her financial problems. These events were conditions beyond her control. To qualify for full credit under AG ¶ 20(b), however, the applicant must act responsibly under the circumstances. Applicant has 15 delinquent debts totaling over \$37,000. Her financial problems are recent, ongoing, and significant. She has not obtained financial counseling. She presented no evidence that she sought any other type of financial assistance and stated she is unable to pay any of her old debts. She indicated that she has been looking into bankruptcy for over the past year, but still has not filed for bankruptcy protection. There is insufficient evidence to determine that Applicant acted responsibly under these circumstances. At present, her financial problems are not under control and there is no clear indication when they will be brought under control. I am unable to determine that they are unlikely to recur. They continue to cast doubt on her current reliability. AG ¶¶ 20(a), 20(c), and 20(d) are not applicable. AG ¶ 20(b) is partially applicable. In summary, I find that financial concerns remain despite the presence of some mitigation.

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.

In responding to Question 20 on her SF 85P, Applicant did not disclose her debts that were over 180 days delinquent. On that application, however, she did disclose a judgment against her. By disclosing that judgment, she showed that she was not attempting to hide her financial problems. In her interview with an OPM investigator and in responding to interrogatories, she was open and forthcoming about her financial problems, but was not asked specifically about her omissions regarding Question 20. Based on this evidence, I find that her omissions were not deliberate. No Personal Conduct disqualifying condition is raised by the evidence.

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 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 have incorporated my comments under Guideline F in my whole-person analysis. Furthermore, I note that Applicant had no reportable arrests or convictions. The limited information in the record, however, has not convinced me that Applicant's finances are sufficiently in order to warrant a public trust position.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a public trust position. I conclude Applicant has not mitigated Financial Considerations security 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 F:	AGAINST APPLICANT
Subparagraphs 1.a-1.o:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a:	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.

James F. Duffy
Administrative Judge