



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ADP Case No. 10-08876
)
Applicant for Public Trust Position)

Appearances

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

August 5, 2011

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns under Guidelines F (financial considerations) and E (personal conduct). Eligibility for access to sensitive information is granted.

Statement of the Case

On September 10, 2009, Applicant submitted a public trust position application (SF-85P). On December 9, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing trustworthiness concerns under Guidelines F (financial considerations) and E (personal conduct).

The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in an undated response, and DOHA received her answer on January 24, 2011. Department Counsel was prepared to proceed on May 3,

2011. The case was assigned to me on May 20, 2011. DOHA issued a notice of hearing on June 3, 2011, scheduling the hearing for June 21, 2011. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 7, which were received without objection. The list of Government Exhibits was marked as Exhibit (Ex.) I. Applicant testified on her own behalf, and offered Applicant Exhibits (AE) A through C, which were received without objection.

I held the record open until June 30, 2011, to afford the Applicant an opportunity to submit additional material. Applicant did not submit any additional material. By memorandum dated July 7, 2011, Department Counsel forwarded a letter from Applicant's employer dated June 17, 2011, advising that she no longer was in a position that requires an ADP public trust determination. That letter along with Department Counsel's forwarding memorandum was marked Ex. II. DOHA received the hearing transcript (Tr.) on July 1, 2011.

Findings of Fact

Applicant admitted all of the SOR allegations with explanations. Her answers with explanations are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 33-year-old research analyst, who has been employed by a defense contractor since January 2002. She seeks to gain access to sensitive information in conjunction with a public trust position. (GE 1, Tr. 19-24.)

Applicant graduated from high school in June 1996. She has not pursued education beyond high school. Applicant married in May 2001, separated in July 2005, and divorced in March 2006. She has no dependents. Applicant has a boyfriend with whom she lives and shares expenses. In 2008, she became pregnant and went on maternity leave. While on maternity leave, she encountered a pay problem and was not paid for "two or three months." Her child was stillborn. Applicant did not serve in the armed forces. (GE 1, Tr. 24-27.)

Financial Considerations

Applicant's SOR alleges 17 debts totalling approximately \$23,200. (Tr. 10.) These debts consist of one judgment and various collection, past-due, and charged-off accounts. In March 2010, Applicant was interviewed by an Office of Personnel Management (OPM) investigator and during that interview, the investigator reviewed Applicant's debts with her in detail. Applicant stated during that interview that her financial problems began about two years before, that she had been unemployed due to medical problems, and that the disability pay she eventually received did not cover her bills. She relied on her boyfriend for support, but he also experienced periods of

unemployment. She also mentioned that her financial problems were caused in part by poor money management and overextending herself on credit cards. Applicant also stated during that interview that she intended to file bankruptcy. (GE 2.) Applicant added during her hearing testimony that her financial situation began to deteriorate after she separated from her husband in July 2005. She explained that her mail was not being forwarded to her and reiterated what she told the OPM investigator in March 2010. (Tr. 27-29.)

In approximately June 2010, Applicant began consulting bankruptcy attorneys, but was unable to file bankruptcy until she had enough money to pay upfront attorney and filing fees. (Tr. 29-30.) On November 16, 2010, Appellant filed Chapter 13 bankruptcy. All of her SOR debts are included among the creditors listed in her bankruptcy pleadings. Applicant also completed the required financial counselling in conjunction with filing bankruptcy. (GE 7, AE A.) She is on a 36-month payment plan, which became effective in December 2010. Initially, she was paying \$485; however, her monthly payments were increased to \$540 in June 2011. At the time of her hearing, Applicant had established a six-month track record of timely payments. These payments are remitted to the trustee by employer payroll deductions. (AE B, AE C, Tr. 31-33, 71.) Applicant's annual income is approximately \$35,000. Her net monthly remainder is "about \$150." (Tr. 33-35.)

In conclusion, Applicant is making a good-faith effort to repay all of her overdue creditors. She remains current on the rest of her monthly bills. Her budget further demonstrates that she maintains a modest lifestyle and is living within her means. (GE 7, Tr. 35-36, 41-42.)

Personal Conduct

When Applicant completed her September 2009 SF-85P, she failed to disclose a March 2009 judgment and failed to disclose any loans or financial obligations currently over 180 days delinquent. These failures to fully disclose her financial situation were alleged as deliberate falsifications. Applicant explained in her SOR response, "I was truthful to my knowledge of my debts when I submitted all paperwork. I was continually having problems running my credit report." (SOR response.) Applicant added during her hearing testimony that her former husband was not cooperative in forwarding her mail. Applicant credibly testified that she was not attempting to be misleading or deceptive when completing her SF-85P. Knowing what she knows today, she would have answered the questions differently. (Tr. 12, 37-40, 43-48, 52-53, 80.)

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 over-arching adjudicative goal is a fair, impartial and common sense 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. 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, 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 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.

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

Analysis

Guideline F, Financial Considerations

The trustworthiness concern relating to the guideline 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 [sensitive] 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 trustworthiness concerns. Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly under AG ¶ 19(c), "a history of not meeting financial obligations" may raise security concerns. Applicant accumulated 17 delinquent accounts, totaling approximately \$23,200. Her indebtedness began in 2005 following her separation and was ongoing until she filed Chapter 13 bankruptcy in November 2010. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from financial difficulties. Applicant experienced a separation and divorce, a period of unemployment, and a payroll error that resulted in her receiving no pay while on maternity leave. Although she eventually received her disability pay, the lack of income during this critical time adversely impacted her financial situation. Three potential mitigating conditions apply under this concern.

Under AG ¶ 20(b), it may be mitigating where "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." As noted, Applicant was involved in a separation and divorce, a period of unemployment, a pregnancy that ended in a stillborn birth, and payroll problems. It was not until June 2010 that Applicant began seeking professional help through a bankruptcy attorney. While Applicant stated that she found herself overwhelmed, she did very little, if anything, to address her financial situation from July 2005 to June 2010. It is for that reason that I am unable to give her full credit under this mitigating condition.

AG ¶ 20(c) applies where "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." Applicant participated in mandatory financial counseling in conjunction with her bankruptcy filing. She is doing everything required of her and is current in her monthly payments to her bankruptcy trustee. Her creditors are being repaid under the

bankruptcy plan. Applicant's budget reflects that she is living within her means. Full credit under this mitigating condition is appropriate.

AG ¶ 20(d) applies where the evidence shows "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." I note Applicant's financial problems are not recent, and she has been employed since January 2002, albeit not without interruption or challenges.

While it took some time for Applicant to address her indebtedness, I note that her financial situation during this timeframe was precarious given her limited income and obligations. To her credit, she recognized that she needed to address her financial situation and did so when able beginning in 2010. Rather than file Chapter 7 bankruptcy and receive a complete discharge of her debts, she opted to file Chapter 13 and as such is paying all of her creditors. At the time of her hearing, she had established a six-month track record of steady payments. Applicant is also making her monthly bankruptcy payments through payroll deductions. Full credit under this mitigating condition is warranted.

Guideline E, Personal Conduct

The trustworthiness concern relating to this guideline pertains to 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 sensitive 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 ¶ 15.

AG ¶ 16 indicates two conditions that could raise a trustworthiness concern and may be disqualifying in this case, including:

(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

(e) personal conduct, or concealment of information about one's conduct, that creates 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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Posing potential trustworthiness concerns are Applicant's documented omissions of her March 2009 judgment and debts past due over 180 days on her September 2009

SF-85P. Her omissions are attributable to her misunderstanding and oversight. I found Applicant's explanation credible in light of her belief that she was unaware that a judgment had been entered against her and that her credit had deteriorated to the point that it had. The transitory lifestyle she maintained following her separation in 2005 until recently and uncertainty over her debts clearly contributed to her limited knowledge of the true state of her financial situation. As noted, Applicant's former husband was not forwarding bills that may have been her responsibility.

I found Applicant's explanation that her omissions were not intentional to be credible. She remained steadfast in her position despite thorough cross-examination by Department Counsel. While Applicant could reasonably have been expected to be more diligent and thorough when responding to questions regarding her past financial situation, her judgment lapses and confusion are not enough to impute knowing and willful falsification under Guideline E. Applicant's explanation of her omissions is persuasive enough to avert inferences of knowing and willful omission. There being no misconduct substantiated, discussion of personal conduct mitigating conditions is not warranted. I also took into account Applicant's age, temperament, demeanor, educational background, financial experience, and life experience.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for access to sensitive information 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) 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 access to sensitive information must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

The comments in the Analysis section of this decision are incorporated in this whole-person concept analysis. Applicant is taking the steps needed to achieve financial responsibility. Her creditors are being repaid. Applicant lives a modest lifestyle and does not spend extravagantly. She is doing her level best to recover from the financial fallout following a failed relationship, unemployment, and unplanned loss of income following maternity leave. While Applicant's financial state is not where she would like it to be, it is clear that she takes this process seriously and is determined to regain financial responsibility. Considering her demeanor and testimony, I believe

Applicant has learned from her mistakes, and it is unlikely she will incur future debt that she is unable to pay. She seeks the honorable route of repaying her creditors. Applicant is an individual who was caught up in a bad situation and is doing her level best to regain a sense of normalcy. She enjoys her job and emphasized she would not do anything inappropriate to net an unlawful gain. Her modest income in this current economy is her lifeline to achieving and maintaining financial responsibility.

I also considered the facts of the case and nine adjudicative process factors listed at AG ¶ 2(a) *supra* relating to personal conduct concerns. Falsifications are a core security concern. Inasmuch as Applicant's behavior was not deliberate or willful, no misconduct was established precluding the applicability of further discussion under the whole-person concept.

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the trustworthiness concerns raised. Applicant met her ultimate burden of persuasion to obtain a favorable Public Trust Position determination. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors¹ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude she is eligible for access to a public trust position.

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:	FOR APPLICANT
Subparagraphs 1a – q:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2a – 2b:	For Applicant

Conclusion

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

ROBERT J. TUIDER
Administrative Judge

¹ See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

