



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



In the matter of:)
)
) ADP Case No. 17-02048
)
Applicant for Public Trust Position)

Appearances

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

01/24/2019

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant did not mitigate the financial considerations trustworthiness concerns. Applicant's eligibility for access to sensitive information in a public trust position is denied.

Statement of the Case

On January 25, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline F, financial considerations. The action was taken under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the adjudicative guidelines (AG's) effective within the DOD for SORs issued after June 8, 2017.

Applicant timely answered the SOR on February 16, 2018, and elected to have a hearing before an administrative judge. The case was assigned to me on November 16, 2018.

The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on November 20, 2018, scheduling the hearing on December 4, 2018. I conducted the

hearing as scheduled and Government's Exhibits (GE) 1 – 5 were admitted without objection. Applicant's Exhibits (AE) A - O were also admitted without objection. I left the record open until January 14, 2019, for the parties to submit supplemental documentation. (Tr. 71) Department Counsel submitted a supplemental credit report dated January 15, 2019. This was marked as GE 6 and admitted without objection. Applicant did not submit post-hearing documents during this period. DOHA received the transcript of the hearing (Tr.) on January 2, 2019.

Applicant is 41 years old. She obtained a general equivalency diploma (GED) in 2003 and had some college courses. She was married in 2010, and she has four children, ages 16, 18, 20, and 27. (Tr. 64-66) The three youngest children reside with Applicant and she also provides for her 1 ½ year-old grandson. Applicant's husband is incarcerated and has provided no child support. She reports no military service. She has been working as a customer-service advocate in a position of trust at a federal health-care provider since December 2016, with no problems. (Tr. 64, 99) Applicant was unemployed for a period of eight or nine months when she had two back surgeries in 2014-2016. (Tr. 80) After she submitted a worker's compensation claim to a previous employer, she was terminated. (Tr. 95)

In her Answer to the SOR, Applicant denied most of the alleged delinquent debts placed for collections, including SOR ¶¶ 1.c, 1.d, 1.e, 1.f, and 1.h through 1.i. The alleged delinquent debts total \$29,221. In addition to the judgment in SOR ¶ 1.a, Applicant has three charged-off delinquencies, and eight consumer or medical debts placed for collection. She claims in her answer that the debt alleged at SOR ¶ 1.f is disputed.

Applicant testified that she used a template obtained on the internet and sent several letters to creditors by certified mail requesting validation of her various debts pursuant to the Fair Debt Collections Procedure Act (FDCPA). (Tr. 15, AE N) She sent certified letters to the creditor corporation in SOR ¶¶ 1.f and 1.g requesting validations regarding two accounts placed for collection. (AE C and D) The creditor responded with a June 14, 2018, letter that said Applicant's request for validation was not specific enough and it was frivolous. (AE E) Applicant also sent three letters requesting validation to the medical creditor at SOR ¶¶ 1.h, 1.j, and 1.k. (Tr. 30-31) That creditor responded with a letter validating the debts and confirming the amounts owed. (AE H)

Applicant testified she had a telephone conversation August 10, 2018, with Constance, who assured her that all of the accounts for medical debts with the creditor at SOR ¶¶ 1.j and 1.k would be removed within 30 days. The creditor was supposedly unable to validate these debts as requested by Applicant. (Tr. 36-38, AE I) The letter from this creditor to Applicant concerning a debt for \$159 contains a handwritten annotation by Applicant about the conversation with Constance. (AE I) That conversation followed Applicant's June 30, 2018 letter to the medical creditor requesting validation. Another similar letter referred to a \$22 debt owed to the same creditor. (Tr.

45-47) SOR ¶¶1.j and 1.k are for medical debts, which the creditor validated and confirmed in a response to Applicant's letter. (Tr. 74, AE M)

Applicant waived her requisite 15-days' notice at the outset of the hearing as the notice of hearing was dated November 20, 2018, for a December 4, 2018 hearing. (Tr. 7-8, 39) The record was left open until January 14, 2019, specifically so that Applicant could provide follow-up documentation showing that these medical debts were removed from her credit report. (Tr. 39, 42) She also expressed an interest in consulting with an attorney during the interim. (Tr. 42) She produced no supplemental documentation or notice of appearance from an attorney. However, department counsel produced an updated credit report dated January 15, 2019, post-hearing. This was admitted without objection. The medical debts alleged in the SOR do not appear on this updated credit report. (GE 6)

Applicant testified that the judgment alleged at SOR ¶ 1.a in the amount of \$6,079 is the result of her eviction from her home in 2013. (Tr. 55) The judgment was entered against Applicant in June 2013. (GE 2, 4) Applicant testified that she called the property-management company in an effort to compromise this judgment, to no avail. (Tr. 56) She also claims that she called the court where the judgment was entered, but she produced no documentation addressing her efforts to compromise this judgment or pay it off.

The charged-off debt in the amount of \$8,294 alleged in SOR ¶1.b was for an automobile loan, which Applicant co-signed with her daughter. Applicant admits it is a valid debt. (Tr. 56) Her daughter stopped making payments and the vehicle was repossessed after the daughter's boyfriend used it in a high-speed chase while fleeing from police. (Tr. 57-58) SOR ¶1.c is also for an automobile repossession in March 2018. (Tr. 59) This account was opened in August 2015. (GE 3) Applicant's husband bought her a car for her birthday. Then, he lost his job and stopped making payments. Applicant disputed this debt and the creditor has removed this debt from her credit report by a June 2, 2018 letter. (AE J)

Applicant testified that she also purchased a used car, which turned out to be a lemon, and this resulted in the debt placed for collection in the amount of \$4,010 at SOR ¶ 1.d. (Tr. 60) The vehicle had a cracked engine block that the dealer refused to fix. So, she stopped making payments and it was also repossessed. (Tr. 60) SOR ¶ 1.e and 1.f arose from Applicant's supposedly fraudulent personal loans, in the amount of \$1,740 and \$589, obtained from the same lender. (Tr. 61) Applicant never received the money promised from these personal loans and she has requested validation. (Tr. 91) She has contacted somebody named "Baby" who is supposed to validate these debts. (Tr. 62) The debt alleged in SOR ¶1.e was sold to the creditor in SOR ¶ 1.f. Her most recent credit report reflect a zero balance owed on these accounts and states "paid and sold." (GE 6)

Applicant testified she has not reached out to contact the creditor in SOR 1.g concerning the past-due debt in the amount of \$79. (Tr. 61-63) She simply has no extra

money as a single mother feeding and housing four children and a grandson on her salary of \$11.78 per hour. (Tr. 95) SOR ¶1.h is a delinquent medical debt in the amount of \$545. Again, Applicant testified that she asked the creditor for validation. (Tr. 68) The creditor produced a letter in response dated August 28, 2018, which validated the debt and confirmed the amount. (AE H) SOR ¶1.i is a delinquent debt in the amount of \$538 resulting from Applicant's cancelled automobile insurance. She testified that she has not reached out to the creditor or taken any action to resolve this debt. (Tr. 73) She does not know anything about the medical debt for \$18 in SOR ¶1.l. (Tr. 75)

Appellant testified that she earns \$1,600 a month after taxes and she does have some semblance of a budget. (Tr. 82) She has no residuary income after paying expenses. Her rent is \$560 per month and she receives no general assistance except for her subsidized housing. (Tr. 86-87) She had no financial counseling beyond the credit-builder's information publicly available on the internet. (Tr. 81) Applicant also owes over \$100,000 in student loans for which she received a hardship deferral, according to her most recent credit report. (GE 6) It is unclear how she will ever repay them. She provided no evidence of any repayment plans with her remaining creditors or performance evaluations from her employer. She provided two very positive character references from co-workers attesting to her work ethic, trustworthiness and honesty. (AE A – B) One noted that Applicant turned in approximately \$10,000 dollars that was apparently stolen in a robbery and hidden in a commode in their workplace.

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See Code of Federal Regulations Title 32 – National Defense, part 154.13 and part 154, Appendix J – ADP Position Categories and Criteria for Designating Positions) "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." 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 DOD Directive 5220.6 before any final unfavorable access determination may be made.

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(a), 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.”

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.

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 classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

This concern is broader than the possibility that an individual might knowingly compromise sensitive information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting sensitive information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handing and safeguarding information.

Applicant's admissions and the government's exhibits support the following AG ¶ 19 disqualifying conditions:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so; and
- (c) a history of not meeting financial obligations.

Applicant's delinquent debts alleged in the SOR total approximately \$29,221. The government exhibits admitted at the hearing, and post-hearing supplemental documents, together with Applicant's admissions and testimony substantiate these debts. There is sufficient evidence to support the application of the above disqualifying conditions.

Conditions that could mitigate trustworthiness concerns arising from financial difficulties are provided under AG ¶ 20. The following 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
- (c) the individual has received, or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and
- (e) the individual has a reasonable basis to dispute the legitimacy of 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.

Applicant provided testimony and documentation to show that she successfully disputed or satisfied SOR ¶¶ 1.c, 1.e, and 1.f.

Intentions to pay debts in the future are not a substitute for a track record of debt repayment or other responsible approaches. See ISCR Case No. 11-14570 at 3 (App. Bd. Oct 23, 2013). Applicant sought a financial hardship deferral of her substantial

student loan debts. They have not been removed from her credit report. Otherwise, she produced limited documentation sent to her creditors, requesting validation of her various delinquencies. While Applicant did not deny that she incurred these debts, she did not provide documentation to show payments or progress on resolving any delinquent debts alleged in the SOR.

The delinquencies alleged in the SOR are longstanding and ongoing. Applicant's surgeries and period of unemployment were conditions beyond Applicant's control, but short-lived. She has not demonstrated that she acted responsibly under the circumstances. She provided no evidence of financial counseling (beyond the internet), or good-faith efforts to repay a judgment, student loans, or other creditors to show that her financial problems have been resolved and are under control. The mitigating conditions enumerated above apply only partially except for ¶ 20(e) in connection with SOR ¶¶ 1.c, 1.e, and 1.f.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a position of trust 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(d):

(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.

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. Some of the factors in AG ¶ 2(d) were addressed under those guidelines. Applicant is the mother of four children and she cares for her grandson. She has endured medical setbacks and a brief period of unemployment and struggled to raise a family as a single mother.

Applicant's finances remain a trustworthiness concern. She has not met her burden of persuasion. The record evidence leaves me with questions and doubts as to Applicant's suitability for a public trust position. For all these reasons, I conclude Applicant failed to mitigate the financial considerations 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 F:	AGAINST APPLICANT
Subparagraphs 1.c, 1.e, and 1.f:	For Applicant
Subparagraphs 1.a,1.b,1.d,1.g -1.l:	Against 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 grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Robert J. Kilmartin
Administrative Judge