



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



In the matter of:)
)
) ADP Case No. 17-03975
)
Applicant for Public Trust Position)

Appearances

For Government: Andrew H. Henderson, Department Counsel
For Applicant: Pro se

04/30/2018

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 December 12, 2017, 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 December 27, 2017, and elected to have a hearing before an administrative judge. The case was assigned to me on January 24, 2018.

The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing (NOH) on March 22, 2018, scheduling the hearing on April 10, 2018. However,

Applicant did not receive either the physical copy or e-mail copy of the NOH because she moved recently. (Tr. 12) So, Applicant was contacted telephonically and agreed to have her hearing on April 11, 2018. (Tr. 15) Applicant affirmatively waived her right to wait 15 days from the NOH to the date of her hearing. (Tr. 13) Also, since Department Counsel's luggage was sidetracked in route to the hearing, he did not have the Government's Exhibits (GE) for the hearing. I left the record open until April 25, 2018 for department counsel to mail the GE's to Applicant and give her an opportunity to object. She had no objections and submitted post-hearing documents during this period.¹ I conducted the hearing on April 11, 2018. DOHA received the transcript of the hearing (Tr.) on April 20, 2018.

Applicant is 25 years old. She graduated from high school in 2010. She was never married, but has a two-year old daughter. Applicant lives with the child's father, who is her fiancé. Applicant took some college courses, and she intends to return to college in the future to pursue a nursing degree. (Tr.19) She has been working in a position of trust at a health care corporation for one year, with no problems. (Tr. 11) Applicant testified that she was attending college full-time when she incurred three of the debts from rental arrearages. She was working, oftentimes at two jobs; she was 18-19 years old; and she conceded her financial mismanagement at that time in her life. (Tr. 22) She was laid-off from her job as certified nursing assistant (CNA) in December 2010 and could not make rental payments. (Tr. 23)

In her Answer to the SOR, Applicant admitted the alleged delinquent debts placed for collections at SOR ¶¶ 1.a, 1.b and 1.d, and the charged-off debt at SOR ¶ 1.c. She also stated she was looking for a second job to pay off these debts. She denied the medical debt alleged at SOR ¶ 1.e and disputed it because she had health insurance, which should have covered it. After she disputed it, this debt was removed from her credit report. (GE 4) She testified that the delinquencies alleged at SOR ¶¶ 1.a, 1.b and 1.d, resulted from her inability to pay her rent when she was in college from 2010 to 2012. (Tr. 24-25) She provided a transcript of her college courses. She did not obtain a degree. (AE A) Her credit reports reflect that these debts first became delinquent in 2012. (GE 2, 3, 4) Applicant provided post-hearing documents showing that she reached out to the creditor in SOR ¶ 1.d and established a payment plan, making an initial payment of \$107 toward that \$982 debt. (AE B) Her five delinquent debts alleged in the SOR total just over \$13,000.

Applicant testified that the charged-off debt for \$2,725 at SOR ¶ 1.c was for a bank-credit card that she opened in 2015. (Tr. 27) She and her live-in fiancé used it to pay living expenses. When he lost his job in 2015, and she became pregnant, they could not keep up with the payments on this credit card. She had to give up her CNA job due to the pregnancy. (Tr. 27-28) Applicant stated her intent to pay all of her delinquent debts. (Tr. 29) Applicant testified that she is current on payments of \$400 per month on \$52,000 in student loans, which are outstanding. (Tr. 31) She is looking for a

¹ E-mail from Applicant to Department Counsel dated April 23, 2018 stating that she had no objection.

second job to help with expenses, and she is exploring an income-based repayment plan for her student loans.⁴

Applicant claims to have disputed the debt at SOR ¶ 1.e for \$172. The record was left open for two weeks specifically so that she could produce some documentary evidence of this dispute, along with a budget and other substantiation of any correspondence with creditors. (Tr. 29-30, 43) She did not provide the requested documents. She testified that she did have some semblance of a budget, and usually had approximately \$300 left over each month, after paying expenses. (Tr. 43) She had no financial counseling. (Tr. 38) Applicant presently earns \$34,000 per year, and her fiancé earns \$30,000. She stated that now that they have two incomes, she plans to start a repayment plan with her creditors and buy a home. (Tr. 46) She provided no evidence of any correspondence or repayment plans with her creditors.

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.”

⁴ The SOR does not allege delinquencies on the student loans.

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 handling 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 admitted four of the five delinquent debts alleged in the SOR totaling approximately \$13,000. She provided a post-hearing document to show a payment pursuant to a plan on SOR ¶ 1.d. These longstanding debts are evidenced by her most recent credit bureau report. She has endured periods of unemployment. In her Answer to the SOR, Applicant claimed that she disputed the debt in SOR ¶ 1.e (medical) but provided no evidence. Applicant produced no documents to show that she corresponded with, or established repayment plans with the bank in SOR ¶ 1.c, or the creditors in SOR ¶¶ 1.a and 1.b. 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 stated that she intended to pay her debts. 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). She testified credibly that she disputed the \$172 medical debt at SOR ¶ 1.e, and it was removed from her credit report. Otherwise, she produced no documentation to show payments or progress on any of her delinquent debts alleged in the SOR. The delinquencies alleged in the SOR are longstanding and ongoing. Her periods 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, good-faith efforts to repay creditors, or a budget to show that her financial problems have been resolved and are under control. None of the mitigating conditions enumerated above apply except for ¶ 20 (e) in connection with SOR ¶ 1.e.

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 a two-year old child. She has endured brief periods of unemployment and struggled through a downturn in the economy.

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. a – 1.d:	Against Applicant
Subparagraph 1.e:	For 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.

Robert J. Kilmartin
Administrative Judge