



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



In the matter of:)	
)	
-----)	ADP Case No. 06-20216
SSN: -----)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

March 12, 2009

Decision

MOGUL, Martin H., Administrative Judge:

On August 13, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F for Applicant. 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); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant responded to the SOR (RSOR) in writing on September 1, 2008, and requested a hearing before an Administrative Judge. The case was originally set for hearing before another Administrative Judge on December 5, 2008, but because of a potential conflict of interest, it was reassigned to me on December 12, 2008. DOHA issued a second notice of hearing on December 16, 2008, and I convened the hearing as scheduled on January 27, 2009, in Sacramento, California. The Government offered

Exhibits 1 through 10, which were received without objection. Applicant testified on her own behalf and submitted Exhibits A through C, which were admitted without objection. Her fiancée also testified on her behalf.

DOHA received the transcript of the hearing (Tr.) on February 4, 2009. Upon a request by Applicant, I allowed the record to remain open until February 27, 2009, so that Applicant could offer documentation to show that her debts were discharged in bankruptcy. An additional document was timely received and has been identified and entered into evidence as Exhibit D, but it only was an indication of the opinion of Applicant's attorney regarding the status of the bankruptcy. Nothing definitive concerning the bankruptcy status was offered. The record also was open to allow Applicant to offer positive character letters or employment evaluations, but none were received. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is granted.

Findings of Fact

In the SOR, the Government alleges concern under Adjudicative Guideline F (Financial Considerations) of the Directive. The SOR contains 14 allegations, 1.a., through 1.n., of overdue debt under Guideline F. After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the live testimony, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 52 years old. She is currently separated from her husband, and she has three daughters. She received a Bachelor of Science Degree in Accounting. Applicant is an Internal Auditor for a defense contractor, who seeks an ADP-I/II/III position on behalf of the Applicant.

In her RSOR, Applicant admitted all of the SOR allegations. She testified that while these debts are now owed, she believes they will be discharged in bankruptcy. The admitted allegations are incorporated herein as findings of fact, and they will be reviewed in the same order as they were listed in the SOR:

- 1.a. This overdue debt to Creditor 1 is cited in the SOR in the amount of \$2,343.
- 1.b. This overdue debt to Creditor 2 is cited in the SOR in the amount of \$12,972.
- 1.c. This overdue debt to Creditor 3 is cited in the SOR in the amount of \$51.
- 1.d. This overdue debt to Creditor 4 is cited in the SOR in the amount of \$202.
- 1.e. This overdue debt to Creditor 5 is cited in the SOR in the amount of \$671.
- 1.f. This overdue debt to Creditor 6 is cited in the SOR in the amount of \$3,296.36.

1.g. This overdue debt to Creditor 7 is cited in the SOR in the amount of \$1,501.07.

1.h. This overdue debt to Creditor 8 is cited in the SOR in the amount of \$849.

1.i. This overdue debt to Creditor 9 is cited in the SOR in the amount of \$97.

1.j. This overdue debt to Creditor 10 is cited in the SOR in the amount of \$256.

1.k. This overdue debt to Creditor 11 is cited in the SOR in the amount of \$698.

1.l. This overdue debt to Creditor 12 is cited in the SOR in the amount of \$3,149.

1.m. This overdue debt to Creditor 13 is cited in the SOR in the amount of \$1,029.24.

1.n. This overdue debt to Creditor 14 is cited in the SOR in the amount of \$110.

Applicant testified that in 2006, she consulted with a debt counselor and then she consulted with an attorney in 2007. They both recommended to her that based on the size of her debt and her income that her best course of action was to file for bankruptcy. She finally filed the Petition for Bankruptcy on December 3, 2008 (Exhibits A and B), showing the amount of claims from unsecured creditors in the amount of \$64,315, and indicating that there would be a meeting of creditors on January 6, 2009. Exhibit C established that February 6, 2009, was the last date for any creditor to file an objection.

The post hearing document offered by Applicant is an email from Applicant's bankruptcy attorney to her (Exhibit D), indicating that he anticipated that the Bankruptcy Court should issue her discharge after March 9, 2009, and while he did not anticipate any issues, it was possible that a creditor could raise one. The list of creditors on the Bankruptcy Petition does not correspond completely to the list of debts on the SOR, but it appears that all or most of the SOR debts would be resolved if they are discharged in bankruptcy. However, as indicated above, even though the record was kept open until February 27, 2009, no definitive evidence was introduced to show that these debts have been discharged in bankruptcy.

Applicant testified that even if all of the debts listed in the bankruptcy are discharged, she still has some additional debts. These include approximately \$22,000 for her student loans, \$5,000 for a new student loan for her daughter, which she will start owing in September 2009, and \$14,000 for a car loan for a vehicle that she purchased in 2008, and for which she pays \$363 a month. All of these debts are³ being resolved responsibly.

Applicant contended during her testimony that her primary financial problems occurred during the years between 2003 and 2005, when she was unemployed or underemployed. However, in her responses to interrogatories on November 22, 2007,

(Exhibit 3), she stated that the majority of her debt was incurred from 4 to 10 years before her response, or from 1997 to 2003.

Applicant's fiancée testified that he and Applicant plan to marry after the bankruptcy is filed and she can divorce her current husband, from whom she has been long separated. He believes that Applicant can handle her finances now and will not be in financial trouble in the future.

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. Disqualifying Condition (DC) 19 (a), an Inability or unwillingness to satisfy debts is potentially disqualifying. Similarly (c), a history of not meeting financial obligations may raise security concerns. Applicant accumulated significant delinquent debt and was unable to pay some obligations for a period of time. 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.

Under Mitigating Condition 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 above, most of the financial problems arose from Applicant’s loss of employment and underemployment. Applicant acted responsibly in continuing to take care of her minor

daughter and more recently identifying and attempting to resolve these debts. I find this potentially mitigating condition is a factor for consideration in this case.

Similarly, MC 20 (d) applies where the evidence shows the individual initiated a good-faith effort to resolve debts. Applicant has been attempting to resolve all the delinquent debts, through bankruptcy, and based on the court documents and the representation from the attorney for Applicant, the bankruptcy appears to be in the final stages. She is now more financially sound and better prepared for future contingencies. I conclude these potentially mitigating conditions apply.

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) 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. Applicant's financial problems largely resulted because she was a single parent for a number of years with a limited income, and she accumulated debt due to circumstances largely beyond her control. Significantly, she has taken affirmative action to resolve her delinquent debts.

Overall, the record evidence is favorable as to Applicant's eligibility and suitability for a public trust position under the whole person concept. For all these reasons, I conclude Applicant has mitigated the trustworthiness concerns arising from her financial considerations.

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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e.:	For Applicant
Subparagraph 1.f.:	For Applicant
Subparagraph 1.g.:	For Applicant
Subparagraph 1.h.:	For Applicant
Subparagraph 1.i.:	For Applicant
Subparagraph 1.j.:	For Applicant
Subparagraph 1.k.:	For Applicant
Subparagraph 1.l.:	For Applicant
Subparagraph 1.m.:	For Applicant
Subparagraph 1.n.:	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.

Martin H. Mogul
Administrative Judge