



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



In the matter of:)	
)	
[NAME REDACTED])	ADP Case No. 12-05715
)	
Applicant for Position of Trust)	

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: Michael H. Montgomery, Esq.

03/19/2015

Decision

MALONE, Matthew E., Administrative Judge:

Applicant has always managed her finances responsibly; however, she recently experienced significant financial problems that were caused by circumstances beyond her control. Nonetheless, she is acting in a prompt and good-faith manner to resolve her past-due debts. In so doing, she has demonstrated good judgment, integrity, and reliability. Her request for eligibility to occupy a position of trust is granted.

Statement of the Case

On August 30, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to obtain eligibility for an ADP I/II/III position¹ for her

¹ As defined in Chapter 3 and Appendix 10 of DOD Regulation 5200.2-R, as amended (Regulation).

job with a defense contractor. After reviewing the results of the ensuing background investigation, DOD adjudicators were unable to determine that it is clearly consistent with the interests of national security to grant Applicant's request for a position of trust.²

On September 29, 2014, DOD issued Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise trustworthiness concerns addressed through the adjudicative guideline (AG)³ for financial considerations (Guideline F). Applicant timely responded to the SOR (Answer) and requested a hearing. The case was assigned to me on January 19, 2015, and I convened a hearing on February 11, 2015. Department Counsel for the Defense Office of Hearings and Appeals (DOHA) presented Government Exhibits (Gx.) 1 - 4. Applicant and one other witness testified. Applicant also presented Applicant's Exhibits (Ax.) A - M. The record closed on February 23, 2015, when I received Applicant's post-hearing submission, which is included in the record as Ax. N. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on March 2, 2015.

Findings of Fact

Under Guideline F, the Government alleged that Applicant owes \$52,875 for 35 delinquent or past-due debts (SOR 1.a - 1.ii). All but two (SOR 1.a and 1.b) of the debts alleged are for unpaid medical bills. Applicant admitted all of the allegations. In addition to the facts established by Applicant's admissions, and based on all available information, I make the following findings of fact.

Applicant is 52 years old and is employed by a defense contractor as a project leader in a position that requires eligibility for a position of trust. Her employer supports management of the health care system used by members of the military, and Applicant must be found suitable to be entrusted with personally identifiable information (PII) associated with the health care system's constituents. From 1999 until 2003, Applicant worked as a human resources specialist for another company involved in this work, and she first received eligibility for a position of trust for that job. She then left that employment for a few years to help her husband run a small business. Applicant was hired by her current employer in March 2007. From then until about July 2009, Applicant earned about \$125,000 annually as a project leader. (Gx. 1; Gx. 2; Ax A; Ax. B)

In about February 2009, Applicant developed serious health issues and was told she would have to undergo major surgery. Applicant and her husband then started saving for the expenses involved with such an operation. Applicant's health insurance only partially covered her required surgical and other medical services. Additionally, her employer offered very little paid time off regardless of the reason given. Thus, she knew she would be out of work without pay for about two months while she recovered from

² Required by the Regulation, as amended, and by DOD Directive 5220.6, as amended (Directive).

³ The adjudicative guidelines were implemented by DOD on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

surgery. Applicant and her husband decided to delay the surgery long enough to draw on their retirement savings, and reduced expenses to cover what they thought would be a predictable period of lost income. After her surgery, some debts remained; however, Applicant and her husband were in regular contact with those creditors and were arranging repayment plans. (Gx. 2; Ax. A; Tr. 23 - 24)

Applicant underwent surgery in July 2009. However, severe complications developed because the surgeon severed Applicant's ureter. She underwent emergency surgery in late July, but was told she would have to undergo another surgery to correct the damage caused during the initial surgery. Applicant did not have insurance to cover this unexpected procedure, and she and her husband had already depleted their savings to pay for the first operation and to cover her lost income. It was not until December 2010, when Applicant qualified for medical insurance coverage under the new Affordable Care Act (ACA) despite a pre-existing condition, that Applicant was able to schedule the corrective surgery. She underwent a successful procedure in May 2011, and she was fully recovered about two months later. However, the ACA did not cover all of her expenses. The medical debts alleged in SOR 1.c - 1.ii represent the uncovered costs of her care. (Gx. 2; Ax. A; Tr. 24 - 29)

Applicant was unable to work from July 2009 until August 2011. She and her husband subsisted on income from his small business and her disability benefits. Her lack of income caused her and her husband, at times, to be unable to timely pay their obligations. However, available information shows they were proactive in dealing with their creditors to resolve any past-due amounts. For example, in 2009 and 2010, they fell behind on their mortgage, but were able to work with their lender to bring their mortgage current. (Gx. 2; Gx. 4; Ax. A; Tr. 43)

When Applicant returned to work, she was physically unable to work in the same position she had held before July 2009. From August 2011 until August 2014, Applicant worked as a project coordinator. Her annual income in that position was about \$40,000 less than she was earning before July 2009. However, in August 2014, she was promoted back to a project leader position that pays almost as much as she made before July 2009. Applicant has been corresponding with her medical creditors since the time of her corrective surgery. She anticipates being able to make regular payments now that she has more income. (Gx. 1; Gx. 2; Ax. B; Ax. D; Ax. H; Tr. 74 - 76)

Applicant and her husband filed a malpractice suit against her surgeon and related medical providers. A trial resulted in a hung jury, and Applicant has negotiated a nominal settlement. The lawyer who represented Applicant in her malpractice action is also assisting Applicant and her husband as they negotiate with her creditors. With his assistance, Applicant has also been able to identify several medical debts that are not accurate because they are not attributable to Applicant; they have been resolved; or they are duplicates being reported by multiple collection agencies. To date, Applicant has paid about \$25,000 toward her medical costs. (Ax. D - G; Ax. H; Ax. J; Ax. L; Tr. 54 - 58)

The debt alleged at SOR 1.a is for a delinquent credit card account. The debt at SOR 1.b is for a delinquent personal loan. Applicant was current on both accounts until 2011. She is now repaying both debts at a rate of \$200 per month each under agreements with the collection firms who currently hold those accounts. (Gx. 1 - 4; Ax. A; Ax. G - I; Tr. 43 - 47)

Applicant and her husband have been married since 1985 and have three adult children. Applicant's husband has always earned income as a self-employed small businessman. Together, they have always managed their finances in a prudent and responsible manner. Their credit before her 2009 operation was excellent. Updated information about their monthly income and expenses shows that they have not incurred any new debts since 2011. After meeting their regular monthly expenses, including the debt payment agreements documented in their exhibits, they now have about \$1,100 remaining. (Gx. 2 - 4; Ax. A; Ax. B; Ax. M; Tr. 23 - 24, 63 - 86)

Applicant is an excellent employee. Performance evaluations since 2009 reflect a superior work ethic, and outstanding reliability and professionalism. Applicant and her husband are active in their church and have lived a modest lifestyle that is conducive to stability and responsibility. When Applicant was trying to figure out how she would pay for her corrective surgery, members of her church raised several thousand dollars to help defray her expenses. (Ax. A; Ax. K - M; Tr. 83 - 89)

Policies

Positions designated as ADP I/II/III are classified as "sensitive positions."⁴ In deciding whether a person should be assigned to an ADP position, it must be determined that his or her loyalty, reliability, and trustworthiness are such that it is "clearly consistent with the interests of national security" to do so.⁵ The Regulation also requires that DOD contractor personnel are entitled to the procedural protections in the Directive before any adverse determination may be made.⁶

The Directive requires that each decision be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁷ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole-person" concept, those factors are:

- (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

⁴ Regulation, ¶ C3.6.15.

⁵ Regulation, ¶ C6.1.1.1.

⁶ Regulation, ¶ C8.2.1.

⁷ Directive. 6.3.

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 presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of eligibility for a position of trust.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a position of trust for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government's case. Because no one is entitled to a position of trust, an applicant bears a heavy burden of persuasion. A person who has access to sensitive information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring applicants possess the requisite judgment, reliability, and trustworthiness of one who will protect sensitive information as his or her own. Any reasonable doubt about an applicant's suitability for access should be resolved in favor of the Government.

Analysis

Financial Considerations

Available information is sufficient to support all of the SOR allegations. The facts established raise a trustworthiness concern about Applicant's finances that is addressed at AG ¶ 18, as follows:

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. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

More specifically, available information requires application of the disqualifying conditions at AG ¶¶ 19(a) (*inability or unwillingness to satisfy debts*); and 19(c) (*a history of not meeting financial obligations*). As to AG ¶ 19(a), the record shows Applicant has been unable, not unwilling, to repay her past-due debts.

I have also considered the following pertinent AG ¶ 20 mitigating conditions:

(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; and

(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.

All of these mitigating conditions apply. Applicant's financial problems were entirely caused by unexpected medical problems, and arose in spite of her best efforts to plan for her medical care. After a prolonged period of unemployment, during which she and her husband successfully endured several financial difficulties, including resolving late payments on their mortgage, Applicant now is able to make progress in repaying or otherwise resolving her remaining debts. With the help of legal counsel, Applicant has been in regular, constructive contact with her creditors to negotiate mutually agreeable repayment plans. With her recently increased annual income, her monthly finances are sound and she has significant cash flow. The circumstances giving rise to her debts are unlikely to recur, and she has demonstrated good judgment and reliability through the responsible way she and her husband have responded to financial adversity. The record shows her financial problems are under control, and supports application of the mitigating conditions at AG ¶¶ 20(a) - (c). The trustworthiness concerns raised by Applicant's financial problems are mitigated.

I have evaluated the facts and have applied the appropriate adjudicative factors under Guideline F. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Specifically, I note Applicant's response to her financial problems, her complete candor about those problems, and her record of properly protecting sensitive information. A fair and commonsense assessment of all available information shows that the Government's concerns about Applicant's trustworthiness have been satisfied.

Formal Findings

Formal findings 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 1.a - 1.ii:	For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the interests of national security for Applicant to occupy a position of trust. Applicant's request for ADP eligibility is granted.

MATTHEW E. MALONE
Administrative Judge