



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



In the matter of:)	
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)	
[NAME REDACTED])	ADP Case No. 12-09928
)	
)	
Applicant for a Position of Public Trust)	

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

08/31/2015

Decision

MALONE, Matthew E., Administrative Judge:

Applicant incurred significant unpaid debt as a result of unforeseen events. Her personal and financial circumstances are now improved and most of her past-due debts have been resolved or are being constructively addressed. The trustworthiness concerns about her financial problems are mitigated, and her request for eligibility to occupy a public trust position is granted.

Statement of the Case

On September 26, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to obtain eligibility for an ADP I/II/III position¹ for her job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Department of Defense (DOD) were unable to

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

determine that it is clearly consistent with the interests of national security to grant Applicant's request for a position of trust.²

On April 1, 2015, DOD issued a Statement of Reasons (SOR) alleging facts that raise trustworthiness concerns addressed under Guideline F (Financial Considerations).³ Applicant timely responded to the SOR and requested a decision without a hearing. On June 3, 2015, Department Counsel issued a File of Relevant Material (FORM)⁴ in support of the SOR. Applicant received the FORM on June 22, 2015. The record closed on July 28, 2015, when Department Counsel waived objection to Applicant's timely response to the FORM. The case was assigned to me on July 31, 2015.

Findings of Fact

Under Guideline F, the Government alleged that Applicant owes \$168,686 for 14 delinquent or past-due debts (SOR 1.a - 1.n). All of the debts are documented in the credit reports included with the FORM as Items 5 and 6. Of those debts, SOR 1.k, a \$21,655 student loan account, and SOR 1.m, a \$115,692 delinquent mortgage account comprise about eighty percent of the total debt at issue. Applicant denied, with explanations, SOR 1.a - 1.d, 1.k, 1.m, and 1.n. She admitted, with explanations, the remaining allegations (FORM, Items 1 and 2). In addition to her admissions, I make the following findings of fact.

Applicant is 39 years old and works 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. She has held that job since late 2011. Applicant has an associate's degree and is studying for her bachelor's degree. This is her first application for a public trust position. (FORM, Items 2 and 4)

Applicant was married from 1995 until divorcing in 2002. She remarried in June 2005. From about 2002 to 2008, Applicant worked as a business manager in State A. In October 2008, she and her husband moved to State B where she had accepted an offer of employment for at least five years as a business manager. Her husband left his job in State A and thought he could find work in State B. Applicant would be earning about \$70,000 annually in her new job, which was enough to support them. (FORM, Items 2 - 4; Response to FORM)

Applicant and her husband owned a home in State A, which they put up for sale in 2008 when they moved. Around that time, the housing market in State A crashed and

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

³ See Directive, Enclosure 2. See also 32 C.F.R. § 154, Appendix H (2006).

⁴ See Directive, Enclosure 3, Section E3.1.7. The FORM included six documents (Items 1 - 6) proffered in support of the Government's case.

they could not sell it. At the same time, they were renting a place in State B and Applicant's husband could not find work there. In October 2009, Applicant was fired from her job because she had challenged the improper and unethical business practices of one of her supervisors. Her annual income fell to about \$22,000 in unemployment benefits as she tried, unsuccessfully, to find new work. (FORM, Items 2 and 4; Response to FORM)

After Applicant lost her job, she and her husband could not keep up with the mortgage payments on their house in State A. They tried to resolve the mortgage through a short sale, but their plan was rejected. The mortgage was foreclosed and the house sold at auction for \$110,000. Applicant was still liable for the unpaid portion of the mortgage, but the debt was written off by the lender for \$99,473. Applicant received an IRS Form 1099 and declared that amount as income on her 2010 taxes. She has no further obligation on this debt, which was alleged at SOR 1.m. (FORM, Items 2 - 5; Response to FORM)

In 2009, Applicant and her husband enrolled in a debt management plan (DMP) with a credit counseling company. They paid \$421 each month on a plan that listed numerous creditors for repayment. However, in late 2010, Applicant and her husband decided to move back to State A to be closer to their families for support. They stopped paying into the DMP because they needed the cash for moving expenses. (FORM, Items 2 and 4; Response to FORM)

In 2012, Applicant had to have a series of surgical procedures to correct a problem with her foot. The debts at SOR 1.f - 1.h reflect medical costs not covered by her health insurance. (FORM, Items 2 and 4)

Applicant was hired for her current job a year after returning to State A, but it was not until 2013 that her husband became gainfully employed. Their finances are now stable. They have a positive monthly cash flow that, depending on her husband's fluctuating income (he is self-employed), is as much as \$2,000. They are able to meet all of their regular expenses, which includes payments to various creditors. (FORM, Items 2 - 4; Response to FORM)

Applicant and her husband are now enrolled in another DMP. In addition to the medical debts at SOR 1.f - 1.h, their plan addresses the debts alleged at SOR 1.b, SOR 1.e, and SOR 1.i. She paid the SOR 1.i debt in May 2015. (Response to FORM)

Other debts have been resolved over the past few years as the creditors have written them off as business losses. In addition to the SOR 1.m debt, discussed above, Applicant received IRS Form 1099s for the debts at SOR 1.a, 1.c, and 1.k. She declared as income the amounts forgiven on timely-submitted income tax returns in 2011, 2014, and 2013, respectively. (FORM, Items 2 and 6; Response to FORM)

Policies

Positions designated as ADP I/II/III are classified as “sensitive positions.”⁵ 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.⁶ The Regulation also requires that DOD contractor personnel are entitled to the procedural protections in the Directive before any adverse determination may be made.⁷

The Directive requires that each decision be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁸ 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 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

⁵ Regulation, ¶ C3.6.15.

⁶ Regulation, ¶ C6.1.1.1.

⁷ Regulation, ¶ C8.2.1.

⁸ Directive. 6.3.

about an applicant's suitability for access should be resolved in favor of the Government.

Analysis

Financial Considerations

Available information, including Applicant's admissions, supports all of the SOR allegations. Adverse information about Applicant's finances raises a trustworthiness concern addressed, in relevant part, 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.

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 this to be a case of inability, not unwillingness to pay.

The Government established a *prima facie* case for disqualification by supporting the SOR allegations and raising trustworthiness concerns under Guideline F. The burden of persuasion then shifted to Applicant to mitigate, extenuate, or refute the SOR allegations. In response to the SOR, Applicant did not present any information to support her claims regarding resolution of her debts. However, in response to the FORM, Applicant presented information that supports the following 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;
- (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;
- (d) the individual initiated 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 the 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 started trying to resolve her past-due debts in 2009, while still unemployed and living in State B. There is no indication that any of her debts are due to misconduct or irresponsible spending. The loss of her job in State B appears to be the result of her attempt to do the right thing and being punished for it. As soon as she and her husband started earning sufficient steady income, they renewed their repayment efforts. On balance, the trustworthiness concerns established under this guideline are mitigated.

In addition to my evaluation of the facts and application of the appropriate adjudicative factors under Guideline F, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). A fair and commonsense assessment of all available information supports a reasonable conclusion that Applicant's past financial problems no longer present a disqualifying trustworthiness concern.

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.n:	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 eligibility is granted.

MATTHEW E. MALONE
Administrative Judge