



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



In the matter of:)	
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)	
[NAME REDACTED])	ADP Case No. 14-00898
)	
)	
Applicant for Position of Trust)	

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

11/13/2014

Decision

MALONE, Matthew E., Administrative Judge:

Applicant demonstrated good judgment in addressing her past-due debts. Concerns about her personal conduct raised by her involvement in three instances of criminal conduct are mitigated by her lack of culpability and by her improved personal and professional circumstances. Her request for eligibility to occupy a position of trust is granted.

Statement of the Case

On June 12, 2013, 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 5220.2-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 April 30, 2014, DOD issued to Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise trustworthiness concerns addressed through the adjudicative guidelines (AG)³ for financial considerations (Guideline F) and personal conduct (Guideline E). On May 23, 2014, Applicant responded to the SOR (Answer) and requested a hearing.

The case was assigned to me on August 12, 2014, and I convened a hearing on September 12, 2014. Department Counsel for the Defense Office of Hearings and Appeals (DOHA) presented Government Exhibits (Gx.) 1 - 3. Applicant presented an amended answer, which is included in the record as Hearing Exhibit (Hx.) 1. She also testified and presented Applicant's Exhibits (Ax.) A and B. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on September 23, 2014.

Findings of Fact

Under Guideline F, the Government alleged that Applicant owes \$17,400 for ten delinquent or past-due debts (SOR 1.a - 1.j). The debt at SOR 1.a is for \$1,318 past-due on a car loan with a balance of \$18,836. Applicant admitted, with explanations, all of the SOR allegations except for SOR 1.i, which she denied.

Under Guideline E, the Government alleged that in July 2009, Applicant was arrested and charged with possession of cocaine and cannabis, both third degree felonies, and that those charges were nolle prosequi in January 2010 (SOR 2.a); that in August 2009, Applicant allowed her aunt to use Applicant's debit card and PIN to deposit a forged U.S. Treasury check for \$8,000 into Applicant's checking account. It was also alleged that in September 2009, Applicant again gave access to her checking account to her aunt, who attempted to deposit a counterfeit cashier's check (SOR 2.b); and that in July 2010, Applicant was cited for misdemeanor possession of cannabis. The citation was later dismissed (SOR 2.c). Applicant admitted with explanations all of the SOR 2 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 26 years old and was hired by her current employer in August 2013. Her duties require that she have access to the personally identifiable information (PII) of her DOD health care customers. Applicant started working there as an employee of a

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).

temporary agency, but was offered full-time employment as a regular employee in November 2013. The job offer is a direct result of her demonstrated value to the company and the excellent work she performs there.

Applicant is a high school graduate. She enrolled in a community college for one semester before deciding to pursue cosmetology training through two different vocational institutes. She completed her training and earns money part-time as a hair dresser in addition to her regular employment. Since January 2006, she has held several different, often temporary jobs in data entry, clerical, and customer service positions. She was unemployed between December 2006 and February 2007; between November 2008 and February 2009; and between June 2010 and October 2011. (Answer; Hx. 1; Gx. 1; Gx. 2)

Applicant was raised by a great aunt on her mother's side, because Applicant's mother was a drug user and apparently unable to care for Applicant. Applicant's next closest relative was one of her mother's sisters, who herself turned out to be a poor role model. Nonetheless, Applicant stayed in touch with her aunt until recently because Applicant wanted to maintain a family connection. On two occasions in 2009, when Applicant was 21 years old, her aunt convinced Applicant to let her use Applicant's debit card and personal identification number (PIN) to make deposits in Applicant's bank account. Both deposits turned out to be fraudulent instruments, but Applicant did not know at the time what her aunt was doing was illegal. No one was prosecuted for these actions and Applicant no longer associates with her aunt. (Gx. 2; Hx. 1; Tr. 25, 31 - 32, 55 - 71)

Applicant accrued the debt at SOR 1.a, the past-due amount for a car loan after voluntary repossession, when she was laid off from her job in June 2010. She has not yet been able to resolve this debt. The debt alleged at SOR 1.b was accrued because Applicant financed the purchase of a motorcycle for a former boyfriend, who agreed to make the payments. When they broke up, he stopped making payments. Applicant's ex-boyfriend retained possession of the motorcycle, which Applicant believes was rendered useless in an accident. She has not yet attempted to resolve this debt. The debt at SOR 1.c is the past-due amount for a different car loan after a voluntary repossession. Applicant had paid the loan as required for over a year. But the car developed significant mechanical problems, and she eventually could not afford the repair bills as well as the monthly payment. She decided to return the car, but has not yet arranged for repayments. Applicant recently paid off the used car loan for her current automobile. As discussed below, the \$300 she was paying each month is now being used to repay other debts. When she has finished paying those, she will be able to start repaying the debt at SOR 1.a. (Answer; Hx. 1; Gx. 2; Tr. 38 - 40, 82 - 84)

The debt at SOR 1.d is a past-due student loan from Applicant's vocational training. She has not resolved this debt, in part, because she has been unable to identify the current collection creditor holding the account. (Answer; Hx. 1; Gx. 2; Tr. 40)

Applicant is currently repaying, through automatic withdrawals from her bank account, the delinquent cell phone account alleged at SOR 1.f and the past-due retail account alleged at SOR 1.j. When those debts are repaid, automatic payments will be made on the past-due cable television debt alleged at SOR 1.e and the medical debts alleged at SOR 1.g and 1.h. The cable television and internet debt alleged at SOR 1.i has been resolved. (Answer; Ax. B; Tr. 40 - 41)

Applicant's current job pays her \$41,500 annually. She occasionally makes more money from overtime work, and she earns additional income on weekends through her cosmetology work. With the help of a finance professional, she has established a structured budget through which she manages her personal finances. Her listed monthly expenses include her debt payments, after which she has an estimated \$300 remaining. Applicant also has about \$4,000 saved in a retirement account. Applicant would have started her repayment efforts sooner had she not incurred unexpected moving expenses while she was still paying off her car loan. She has always filed her tax returns on time and she has not incurred any new delinquent or past-due debts. (Ax. B; Tr. 71 - 86)

As to the allegations at SOR 2.a and 2.c, Applicant was not culpable in either event. In July 2009, she was riding in a car with the same ex-boyfriend for whom she financed the purchase of a motorcycle. The car was stopped by police for a traffic violation and drugs were found in the car. The charges were not prosecuted because her ex-boyfriend admitted the drugs were his and that Applicant had no prior knowledge the drugs were in the car. In July 2010, Applicant let another ex-boyfriend use her car while she was at work. Later in the day, he picked her up and they were stopped by police for a traffic violation. Her ex-boyfriend was arrested for driving with a suspended driver's license and both of them were cited for misdemeanor marijuana possession after a small amount was found in her car. Applicant's citation was dismissed after her ex-boyfriend took responsibility for the marijuana. (Answer; Hx. 1; Gx. 2; Tr. 31, 43 - 55)

Applicant no longer associates with either ex-boyfriend or with anyone who uses drugs. She has never used drugs. Applicant also maintains a distant relationship with her aunt. Applicant has established an excellent reputation at work and has been recognized for her diligence and professionalism. She has a reputation in the workplace and among her other associates for honesty and reliability. (Ax. A)

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

⁴ Regulation, ¶ C3.6.15.

⁵ Regulation, ¶ C6.1.1.1.

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 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:

⁶ Regulation, ¶ C8.2.1.

⁷ Directive. 6.3.

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;

(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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

The mitigating condition at AG ¶ 20(a) applies only in part. Applicant's financial problems are recent, in that many of her debts remain unpaid. However, her current employment is characterized by excellent work and professionalism, and she has a good reputation for reliability and honesty. Combined with her efforts to resolve her debt, the circumstances that led to her financial problems – immaturity, unemployment, and bad personal relationships – are not likely to recur.

The mitigating condition at AG ¶ 20(b) applies because Applicant's circumstances have changed for the better. She has a steady job at which she excels, and she has removed herself from past associations that have led her to incur financial and other problems. Further, Applicant has embarked on organized repayment efforts based on available resources. But for unexpected moving expenses, she would have begun making payments sooner.

Finally, the mitigating conditions at AG ¶¶ 20(c) and (d) apply because Applicant began repaying her debts as soon as she had the means to do so. She also sought professional advice in establishing a viable monthly budget that encompasses her debt resolution efforts. Although she still has several debts to repay, the presence of unpaid debts is not necessarily disqualifying. Equally as important is an individual's judgment and initiative in responding to adverse financial conditions. Applicant has demonstrated that she will continue to resolve her past debts while improving her current and future financial prospects. On balance, she showed that she is acting in good faith and that her finances are under control. Applicant has mitigated the trustworthiness concerns raised by her financial problems.

Personal Conduct

Available information is sufficient to support the SOR 2 allegations and raise a concern under this guideline. That concern is addressed through Guideline E at AG ¶ 15 as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

On two occasions, Applicant was charged with drug-related offenses because the boyfriend she was with each time possessed marijuana and/or cocaine. Applicant was not aware before each arrest that her boyfriend possessed drugs. Each time, however, her boyfriend did the right thing and accepted responsibility for the drugs and the charges against her were dropped. Also, Applicant's aunt, the one family member with whom Applicant had a continuing relationship, used Applicant's personal information to commit bank fraud involving several thousands of dollars. Again, Applicant was not aware of her aunt's intentions and was not charged with any criminal offense.

These events raise concerns, not about Applicant's drug use or criminal conduct, but about her associations and the likelihood she will again be involved in inappropriate conduct. Specifically, available information requires application of the following AG ¶ 16 disqualifying conditions:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(g) association with persons involved in criminal activity.

By contrast, Applicant's personal and professional circumstances have changed for the better. She no longer sees either ex-boyfriend and she does not associate with anyone who uses illegal drugs. Also, she and her aunt no longer have a close relationship. Applicant now realizes her aunt deceived her and does not have Applicant's best interests at heart. There is little likelihood Applicant will be involved in similar conduct or circumstances. The mitigating condition at AG ¶ 17(f) (*association with persons involved in criminal activities has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations*) applies here. On balance, Applicant has mitigated the trustworthiness concerns raised by the Government's information.

Whole-Person Concept

I have evaluated the facts and have applied the appropriate adjudicative factors under Guidelines E and F. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant has demonstrated she is more mature and responsible than she was when the incidents at issue here occurred. She is now gainfully employed with a salary sufficient to allow her to start resolving her past-due debts. She also has made changes in her personal life to ensure she will avoid being involved in further inappropriate conduct. 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.j:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a - 2.c:	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