



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



In the matter of:)	
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)	ADP Case No. 14-02273
)	
Applicant for Public Trust Position)	

Appearances

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

March 4, 2015

Decision

ROSS, Wilford H., Administrative Judge:

On July 18, 2014, the DoD 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, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense after September 1, 2006.

She answered the SOR in writing on August 22, 2014 (Answer), and requested a hearing before an Administrative Judge. The Defense Office of Hearings and Appeals (DOHA) received the request soon thereafter, and I received the case assignment on September 30, 2014. DOHA issued a notice of hearing on October 15, 2014, and I convened the hearing as scheduled on November 18, 2014. The Government offered Government Exhibits 1 through 5, which were received without objection. Applicant testified on her own behalf, as did her financial adviser, and submitted Applicant Exhibits A through E, which were also received without objection. DOHA received the transcript of the hearing (Tr.) on December 3, 2014. I granted Applicant's request to

keep the record open until December 5, 2014, to submit additional matters. No additional documentation was submitted. Based upon a review of the pleadings, exhibits, and testimony, eligibility to occupy a sensitive position is denied.

Findings of Fact

Applicant is 62 years old. She is employed by a healthcare provider, and she seeks access to sensitive information in connection with her employment.

Guideline F, Financial Considerations

The SOR lists six delinquent debts, totaling approximately \$283,222. The existence and amount of these debts is supported by credit reports dated January 4, 2014; September 22, 2014; and November 16, 2014. (Government Exhibits 3, 4, and 5.) Applicant admitted subparagraphs 1.b, and 1.c. Those admissions are findings of fact. Her responses to the other four allegations are viewed as denials. She also provided additional information to support her request for access to a sensitive position.

The current status of the SOR-listed debts is as follows. The non-real estate debts will be discussed first:

1.b. It is alleged in this subparagraph that Applicant is indebted to a bank for a credit card debt in the amount of \$755. Applicant testified that she paid this debt off in the past, but does not have records to support her statement. (Tr. 57-63.) The Government's most recent credit report states that this is a "Charged Off Account / Account Transferred or Sold." No other evidence was presented. This debt is unresolved.

1.c. It is alleged in this subparagraph that Applicant is indebted to a credit card company in the amount \$2,139. Applicant testified that she has been making monthly payments of \$100 on this account during the year 2014. (Tr. 63-66.) She submitted a statement from the collection agent stating the amount of the debt is now \$1,326.93. (Applicant Exhibit D.) This allegation is found for Applicant.

1.d. It is alleged in this subparagraph that Applicant is indebted to a cable company in the amount \$74. Applicant stated that she paid this debt off, but submitted nothing further to support her statement. (Tr. 66-68.) This debt is unresolved.

Applicant's financial problems have been in existence for about ten years. The primary reason was the fact that she bought three houses, two of them for rental purposes, and was unable to keep up with the mortgage payments. The discussion that follows concerns Applicant's three houses:

1.a. It is alleged in this subparagraph that Applicant is past due on a first mortgage in the amount of \$160,945; with a total loan balance of \$278,060. House 1 (H1), which was purchased in 1990, was Applicant's personal residence until 2010.

From 2010 until 2014 the house stood vacant. Applicant was able to pay the first mortgage without problem until approximately September 2006, when she refinanced this mortgage in order to make mortgage payments on her other two houses, as discussed below.¹ Her mortgage payments doubled at that point and she was unable to maintain her payments on this mortgage. According to Applicant and her financial adviser, the house was foreclosed upon in October 2014. Applicant presented no documentation to show that the house was sold or that her debt was extinguished. (Tr. 28-30, 68-74.)

1.e. It is alleged in this subparagraph that Applicant is delinquent on a second mortgage in the amount of \$48,309. House 2 (H2) was purchased in September 2005. Applicant states that she purchased this property for about \$270,000. This was a rental property owned by Applicant, which she had great trouble renting out. H2 was not foreclosed upon, but was subject to a short sale in 2010. The second mortgage holder received \$3,000 from the sale, but there is no evidence that amount was in complete satisfaction of the loan.(Tr. 37-43, 74-79, 86; Applicant Exhibit E.)

1.f. It is alleged in this subparagraph that Applicant is delinquent on a second mortgage in the amount of \$71,000. House 3 (H3) was another rental property owned by Applicant. She bought this property in November 2005, paying about \$300,000. This property was subject to a non-judicial foreclosure in 2009, according to Applicant's financial adviser. No information was provided as to the current status of this debt, or whether it has been extinguished. (Tr. 43-49, 79-83, 86.)

Once she bought the third property Applicant was carrying over \$900,000 of secured debt, with monthly mortgage payments of about \$5,000. At that time in 2005 her monthly salary was about \$3,000. (Tr. 80-82, 87.) Applicant's current financial situation is basically stable. She makes about \$48,000 a year. With her regular monthly expenses she runs about even.(Tr. 54-56.) Applicant submitted documentary evidence showing that she has paid off one debt not alleged in the SOR (Applicant Exhibit B), and is making regular payments on another debt (Applicant Exhibit C).

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See DoD Regulation 5200.2-R (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 the DoD and DOHA by

¹Applicant was often vague throughout her testimony about the timing of particular events, including the years she purchased her three houses, the dates she refinanced them, how much she refinanced them for, and what her mortgage payments were.

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 access to a sensitive position, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to a sensitive position.

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 AG ¶ 2(a) describing the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and commonsense 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 [a sensitive position] 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 access decision.

A person who seeks access to a sensitive position 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 that 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 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 and could potentially apply in this case. Under AG ¶ 19(a), “an inability or unwillingness to satisfy debts,” is potentially disqualifying. Similarly, under AG ¶ 19(c), “a history of not meeting financial obligations,” and AG ¶ 19(e), “consistent spending beyond one’s means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis,” may raise trustworthiness concerns. I find that all of these disqualifying conditions apply to Applicant in this case. The evidence has established that Applicant accumulated significant delinquent debt over the past decade, which she has been unable or unwilling to pay.

AG ¶ 20 provides conditions that could mitigate trustworthiness concerns from financial difficulties. AG ¶ 20(a) states it may be mitigating when, “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.” Applicant states that she is not going to buy three houses she cannot afford again. However, as stated, during the hearing she was often unsure of her current financial situation, her past financial responsibilities, and whether she had a clear path forward. She submitted no documentation after the hearing, which could have cleared up the questions concerning her financial situation.

Under AG ¶ 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.” There is no evidence that Applicant’s personal situation fits this mitigating condition. The last two houses were purchased just prior to the severe slump in the global economy, which affected her

ability to rent them. However, as stated, her own personal conduct showed a severe lack of responsible action.

Since there is no evidence that Applicant has undertaken any kind of counseling to better manage her finances, I do not find that AG ¶ 20(c) is applicable. Additionally, I do not find that AG ¶ 20(d) is fully applicable, since Applicant has not “initiated a good-faith effort to repay overdue creditors or otherwise resolve debts,” except for subparagraph 1.c. Finally, I do not find any other mitigating condition applies to this case since no evidence was introduced to establish that Applicant’s current financial status is stable and that she is able to resolve her past debts or stay current with her recent debts. Therefore, I find Guideline F against Applicant.

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) 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.

Under AG ¶ 2 (c), the ultimate determination of whether to grant eligibility for access to a sensitive 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 elected not to submit sufficient information to show her ability to safeguard sensitive information. Based on the lack of evidence to establish that Applicant has successfully resolved the past-due debts listed on the SOR, I find that the record evidence leaves me with significant questions and doubts as to Applicant’s eligibility and suitability for a sensitive position, under the whole-person concept. For all these reasons, I conclude Applicant has not mitigated the trustworthiness concerns under the whole-person concept.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a:	Against Applicant
Subparagraphs 1.b:	Against Applicant
Subparagraphs 1.c:	For Applicant
Subparagraphs 1.d:	Against Applicant
Subparagraphs 1.e:	Against Applicant
Subparagraphs 1.f:	Against 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 to occupy a designated ADP I/II/III sensitive position. Eligibility for access to sensitive information is denied.

Wilford H. Ross
Administrative Judge