



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



In the matter of:

Applicant for Position of Trust

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ADP Case No. 14-03711

Appearances

For Government: Candace Le'I Garcia, Esquire

For Applicant: *Pro se*

08/27/2015

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant failed to submit sufficient documentary evidence to mitigate Guideline F trustworthiness concerns. Applicant's eligibility to occupy a position of trust is denied.

Statement of the Case

On November 7, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing concerns under Guideline F (Financial Considerations) regarding his eligibility to occupy an automated data processing (ADP) position designated ADP-I/II/III. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006. Applicant responded to the SOR on April 1, 2015, and requested a determination based on the written record.

On May 7, 2015, the Government issued a File of Relevant Material (FORM) that contained eight attachments. Applicant did not respond to the FORM. The case was assigned to me on August 11, 2015. Based on my review of the file and submissions, I find Applicant failed to mitigate financial considerations trustworthiness concerns.

Findings of Fact

Applicant is 40 years old and applying for a position of trust. She has been a customer service employee for the past two years. She attended a vocational school in 2004. She is divorced with three children. Applicant admitted all the SOR allegations except 1.e-1.f, 1.r, 1.w-1.x, 1.aa-1.ee (Financial Considerations), 2.a, and 2.c-2.d (Criminal Conduct). She did not respond to the sole allegation raised at 3.a (Personal Conduct). The debts at issue amount to approximately \$22,840, of which she denies \$3,600.

Applicant provides scant facts about her life and circumstances. She is a single mother raising three children and managing her household alone. She has experienced multiple periods of unemployment (March 2005 to March 2006, June 2007 to October 2008; February 2009 to October 2009, and December 2012 to May 2013) and had periods of time when she could not afford health insurance coverage. Facts regarding these periods are vague. This makes it difficult to determine whether she acted reasonably at those times and whether the debts at issue were generated by such hard times. With regard to the multiple medical debts at issue, Applicant repeatedly writes that she is unsure when the debts were acquired, but stresses she did have periods of time without health insurance.

Applicant makes promises to soon pay some debts (ie. 1.p-q; 1.s-u, 1.cc-1.dd, 1.ff), but no evidence of payment was submitted before the record was closed. She also disputes a couple of debts, but provides no evidence that she has formally disputed them with the creditor or a credit reporting agency. No evidence of a plan to approach her delinquent debts is described, nor is evidence that such a plan has been successfully implemented offered. She writes that she has been considering various debt relief programs, but notes that her current budget precludes her from making "too many payments to the debts [she] owes at this time" (SOR Response)

In 2001, Applicant was implicated in the theft of mail that resulted in the theft of an ATM card belonging to a third party. Applicant indicated this was her first charge while in the military, denying an allegation of a poorly documented 2000 criminal charge. She denied stealing the 2001 mail containing the ATM card, but admitted to lying about the incident in sworn statements. In December 2002, she was found guilty by a military tribunal of conspiracy, false official statements, larceny, uttering a forged instrument, and postal theft. She served approximately 25 days in the brig, was reduced in rank, and given a Bad Conduct discharge.

Policies

When evaluating an applicant's suitability for a position of trust, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

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 overarching 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable decision."

A person who seeks a public trust 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. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard 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."

Analysis

Guideline F, Financial Considerations

Under Guideline F, AG ¶ 18 sets forth the applicable trustworthiness concern: 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.

Here, the Government introduced credible evidence showing Applicant was delinquent on multiple accounts, amounting to a total debt balance of approximately \$22,840. This is sufficient to invoke financial considerations disqualifying conditions:

AG ¶ 19(a) inability or unwillingness to satisfy debts, and

AG ¶ 19(c) a history of not meeting financial obligations.

Five conditions could mitigate these financial concerns:

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(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;

AG ¶ 20(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(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.

Multiple delinquent debts remain unpaid. Applicant attributes many of her delinquent debts to her periods of unemployment. While those periods are notable, insufficient facts were presented to determine whether her behavior and conduct at the time were reasonable. Applicant provided no evidence she has received financial counseling or that progress is being made on her debts. Insufficient facts are given as to why she disagrees that some debts attributed to her are, in fact, hers; no evidence is provided showing those accounts have been disputed appropriately. Finally, her own comments and her current budget make it seem unlikely that notable progress will soon be made. In light of such facts, none of the available mitigating conditions apply.

Guideline J, Criminal Conduct

The trustworthiness concern regarding criminal conduct is explained at AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Applicant's past criminal conduct, as determined by a military tribunal in 2002, raises this concern. It also triggers application of the following disqualifying conditions:

AG ¶ 31(a): a single serious crime or multiple lesser offenses; and

AG ¶ 31(c): allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

The guideline also sets forth a number of conditions that may mitigate the criminal conduct concerns. The evidence raised the following mitigating conditions:

AG ¶ 31(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 31(d): there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Applicant's past criminal conduct first occurred in 2001, not 2000 as initially alleged. Regardless, that was nearly 15 years ago. There is no record of any subsequent criminal conduct. She is no longer in the military. She has endured through tight economic times. She has reentered the private sector, attended vocational school, and raised three children as a single mother. AG ¶¶ 31(a) and (d) apply.

Guideline E, Personal Conduct

The personal conduct concern is set forth at AG ¶ 15:

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 eligibility for a position of trust process or any other failure to cooperate with the security clearance process.

The exact same behavior and issues raised under Guideline J are again cited here. AG ¶ 16 describes conditions that could raise a trustworthiness concern and may be disqualifying. The following disqualifying condition is potentially applicable:

AG ¶ 16 (e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing, and

Applicant may mitigate the serious trustworthiness concern raised by her conduct by establishing one or more of the mitigating conditions listed at AG ¶ 17. I have considered all the mitigating conditions and find that, for the same reasons set forth under Guideline J, the following conditions warrant application:

AG ¶ 17(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 17 (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a position of trust by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a position of trust 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. I incorporated my comments under the guideline at issue in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a 40-year-old woman who has matured and moved on following a criminal conviction in the military nearly 15 years ago. Since then she has married, divorced, attended some post-secondary coursework, raise three children on her own, and struggled to maintain a household while acting as the family's wage earner. On the way, she acquired delinquent debt.

This process does not require an applicant to address all debts at issue. It does, however, demand that an applicant articulate a workable plan to address their delinquent debts, show that their plan has been successfully implemented, and document that their financial outlook has improved. Here, Applicant provided insufficient documentary evidence to establish that progress is being made on her delinquent debts. Lacking such proof, financial considerations concerns remain unmitigated.

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:	AGAINST APPLICANT
Subparagraphs 1.a-1.ff	Against Applicant
Paragraph 2, Guideline J:	FOR APPLICANT

Subparagraphs 1.a-1.d	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 1.a	For 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 permit Applicant to maintain a public trust position. Eligibility for a public trust position is denied.

Arthur E. Marshall, Jr.
Administrative Judge