

DATE: February 21, 2007

In re:

SSN: -----

Applicant for Trustworthiness Determination

ADP Case No. 06-05123

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Ray T. Blank Jr., Esq., Department Counsel

FOR APPLICANT

David W. Keller, Esq.

SYNOPSIS

Applicant did not give a deliberately false answer in response to a question about her financial record. Also, she mitigated her history of financial problems based on: (1) circumstances largely beyond her control that contributed to her financial problems; and (2) her good-faith efforts to pay or otherwise resolve her bad debts. Eligibility is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) reviewed Applicant's eligibility to occupy an information systems position designated as an ADP I, II, or III position to support a contract with the Defense Department. As a result of the review, the agency recommended Applicant's case be submitted to an administrative judge for a determination whether Applicant is eligible to occupy such a position. Acting under Department of Defense Directive 5220.6 (Jan. 2, 1992), as amended (Directive), and DoD Regulation 5200.2-R (Jan. 1987), as amended (Regulation), DOHA issued a statement of reasons (SOR) to Applicant on April 3, 2006. The SOR--which is in essence the administrative complaint--details the factual basis for its action and alleges concerns under Guideline F for Financial Considerations, Guideline E for Personal Conduct (falsification), and Guideline J for Criminal Conduct (making a false statement within the jurisdiction of a federal agency in violation of 18 U.S.C. § 1001). Under Guideline F, the SOR alleges that Applicant is indebted to eight creditors for a total of more than \$15,000. Applicant answered the SOR in writing on April 18, 2006. Thereafter, on July 28, 2006, Applicant requested a hearing.

The case was assigned to another administrative judge on August 24, 2006. It was reassigned to me on November 20, 2006, due to caseload considerations. A notice of hearing was issued scheduling the case for December 14, 2006. Applicant appeared and the hearing took place as scheduled. DOHA received the hearing transcript on January 4, 2007.

The record was kept open until January 15, 2007, to allow Applicant to submit additional documentary information. Applicant's counsel submitted matters in a timely manner and those matters were forwarded to me by letter from department counsel who voiced no objections. The nine-page submission is admitted as Applicant's Exhibit I.

RULINGS ON PROCEDURE

The government moved to amend the SOR by deleting reference to DoD Regulation 5200.2-R, as mentioned in the preamble of the SOR (R. 9-10; Appellate Exhibit I). The result of the amendment would be to rely exclusively on DoD Directive 5220.6, which is also mentioned in the preamble. I took the motion under advisement and indicated that I would address it in the written decision. The motion to amend is denied because the government did not provide a sufficient legal argument or analysis why such an amendment was proper and necessary to adjudicate this case. In addition, the motion is likely contrary to agency case law that says in deciding these ADP cases we follow the procedures in the Directive and we apply the adjudicative guidelines in the Regulation.⁽¹⁾ And in any event, the provisions of the Regulation and the Directive under Guidelines E, F, and J are substantially the same.

Exhibit A is a record of judgments from a county clerk of court's web site. It was admitted, but some of the contents on the right side of the one-page document were cut off. After the hearing, I was able to obtain a complete copy of the record from the court's web site. On February 5 and 6, 2007, I spoke with counsel for each party separately and they said that they had no objections to supplementing Exhibit A by attaching the complete copy to the exhibit.

FINDINGS OF FACT

1. Applicant is a 46-year-old claims analyst for a company that provides healthcare services to the Defense Department. She has worked for this company for many years. She currently earns a gross annual income of about \$34,000. She has never married and has no children.

2. Applicant has a history of financial problems (Exhibits 3 and 4-credit reports containing unfavorable information). She attributes some of her financial problems to a series of life events, to include the death of her mother in 1998, her father's depression and major surgery in 1998, her own surgery in 2001 resulting in one month of unpaid work, and maxing out at her level at work resulting in no pay raises in 2003, 2004, and 2005 (Exhibit H). More recently in 2006, she was out of work for 8 to 12 weeks, at 60% of salary, due to back surgery (R. 41-44, Exhibit G). The individual debts, as alleged in the SOR, are addressed below.

3. The \$2,495 debt in SOR subparagraph 1.a is for a credit card account placed for collection.

To resolve this account, Applicant paid \$2,217 in April 2005 (Exhibit B).

4. The \$6,395 debt in SOR subparagraph 1.b is for a credit card account placed for collection.

Applicant has been paying on this debt periodically. As of October 2005, the balance was about \$4,181 (Exhibit C).

5. The \$3,467 debt in SOR subparagraph 1.c is a collection account based on a deficiency balance after a car repossession. Applicant explained that she voluntarily surrendered the car when she could no longer make the loan payments. The car was then sold for an amount that she believes was less than the fair market value. She has not made any payments on the deficiency balance, and the creditor has not been in contact with her for some time.

6. The \$1,054 debt in SOR subparagraph 1.d is for a credit card account placed for collection. Applicant believes the debt has been paid, but she did not present documentary proof-of-payment.

7. The \$355 debt in SOR subparagraph 1.e is for a judgment taken against Applicant in 2003 due to nonpayment of condo fees. Applicant paid \$4,144 to resolve this debt, along with additional debt to the same creditor, in July 2005.

8. The \$83 debt in SOR subparagraph 1.f is for a medical bill placed for collection in about December 2003. Applicant paid this debt in December 2006 (Exhibits E and I).

9. The \$587 debt in SOR subparagraph 1.g is for a credit card account placed for collection in about October 2005. This debt remains unpaid, although Applicant indicated that she is willing to pay it. She has not received correspondence from the creditor in months.

10. The \$855 debt in SOR subparagraph 1.h is for a credit card account placed for collection in about October 2005. To resolve this account, Applicant paid \$922 in October 2006 (Exhibit F).

11. Concerning Applicant's overall financial situation, Applicant's condo has an estimated market value of about \$65,000. There is not a first mortgage against the property, but Applicant did take a \$30,000 home-equity loan against the property in October 2006 (Exhibit F). After settlement charges and disbursements (to include paying the debt in SOR subparagraph 1.h), she received about \$25,765. Of that amount, she used about \$20,000 to repay a family loan she owed to her brother. He had previously lent her money so she could pay off her condo and her car (R. 60). She estimates she now has about \$2,100 left from the home-equity loan (R. 60). Other than the \$2,100, she has no other money in the bank (R. 61). She has a 401(k) retirement account with a balance of about \$7,000 (R. 61-62). Altogether, her total assets (home equity, cash, and 401(k)), are about \$44,000. According to Applicant, the chief factors leading to her financial problems over the years were: (1) poor judgment in managing her credit; (2) not sticking to a budget; and (3) the lack of cost-of-living raises during 2003-2005 (R. 62).

12. On August 15, 2004, Applicant completed a questionnaire for public-trust positions (Exhibit 1). In response to Question 22a--in the last seven years, have you, or a company which you exercised some control, filed for bankruptcy, been declared bankrupt, been subject to a tax lien, or had legal judgment rendered against you for a debt--she replied in the affirmative and disclosed a judgment. In response to Question 22b--are you now over 180 days delinquent on any loan or financial obligation, including loans or obligations funded by the federal government--she replied in the negative. She did not disclose the accounts in subparagraphs 1.a, 1.b, 1.c, 1.d, and 1.f in response to Question 22b or anywhere else on the questionnaire. Concerning the SOR allegation that she deliberately falsified her answer to Question 22b, she explained that she misunderstood the question and that she did not intend to give a false answer.

POLICIES

This case involves an adjudication of Applicant's eligibility to occupy an ADP position, not an adjudication of Applicant's eligibility for a security clearance. In deciding these ADP cases, we follow the procedures contained in the Directive, and we apply the adjudicative guidelines contained in the Regulation.⁽²⁾ Under the Regulation, "[t]he 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." Regulation ¶ C6.1.1.1. Appendix 8 of the Regulation sets forth the adjudicative policy, as well as the disqualifying conditions (DC) and mitigating conditions (MC) associated with each guideline. DoD contractor personnel are afforded the adjudication procedures contained in the Directive. Regulation ¶ C8.2.1.

CONCLUSIONS

1. The Personal Conduct and Criminal Conduct Concerns

Personal conduct under Guideline E addresses issues of questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. In this regard, the deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government in official matters is a concern. It is deliberate if it is done knowingly and willfully. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

Applicant provided a reasonable explanation for why she answered Question 22b in the negative. Having had a chance to listen to her testimony, observe her demeanor, and gauge her level of understanding, I found her explanation credible. After reviewing her testimony on this issue (R. 20-22, 54-56), it's apparent that she did not have a correct understanding of Question 22b. In addition, an intent to falsify her answer to Question 22b is undermined by her disclosure of unfavorable financial information in response to Question 22a. After carefully considering the record evidence, I am not persuaded that her answer to Question 22b was deliberately false. Accordingly, Guideline E will be decided for Applicant.

The criminal conduct at issue here (making a false statement within the jurisdiction of a federal agency in violation of

18 U.S.C. § 1001) is based on the falsification allegation. Because I concluded the falsification allegation was not substantiated, the criminal conduct concern under Guideline J is decided for her as well.

2. The Financial Considerations Concern

Under Guideline F, a concern typically exists for two different types of situations--significant unpaid debts or unexplained affluence. An individual who is financially overextended is at risk of having to engage in illegal or unethical acts to generate funds to meet financial obligations. Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding sensitive information.

Here, based on the record evidence as a whole, a concern is raised by significant unpaid debts. As established above, Applicant has a history of not meeting financial obligations as well as inability to pay just debts. These circumstances raise a concern about Applicant's trustworthiness to occupy an information systems position designated as an ADP I, II, or III position.

I reviewed the mitigating conditions (MC) under the guideline and conclude she receives credit in mitigation. Each MC is discussed below.

The first MC--the behavior was not recent--does not apply. Her financial problems are not matters from the distant past.

The second MC--it was an isolated incident--does not apply. The record evidence shows multiple unpaid debts, establishing a pattern of Applicant being unable to fulfill her financial obligations.

The third MC--the conditions that resulted in the behavior were largely beyond the person's control--applies in her favor. Her surgery in 2001 resulting in one month of unpaid work, the lack of cost-of-living pay raises in 2003, 2004, and 2005, and more recently in 2006, her back surgery causing a 40% reduction in income are circumstances largely beyond her control that had a negative effect on her overall financial situation.

The fourth MC--the person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control--does not apply. There is no evidence that Applicant has received financial or credit counseling.

The fifth MC--the affluence resulted from a legal source--is not applicable here.

The sixth MC--the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts--applies in her favor. The SOR concerns more than \$15,000 in bad debt. As established above, Applicant spent \$8,420 to pay or settle five of the eight debts (subparagraphs 1.a, 1.d, 1.e, 1.f, and 1.h). In addition, she paid down the \$6,395 debt in subparagraph 1.b to about \$4,181. Unaddressed by Applicant are the debts in subparagraphs 1.c and 1.g for a total of about \$4,054. In total, Applicant has paid off about \$8,420 and owes about \$8,235, which is a substantial improvement, and it is enough to fall within the meaning of good-faith efforts.

Viewing the record evidence as a whole in conjunction with the whole-person concept, here we have a 46-year-old woman who has a history of financial problems as well as some circumstances largely beyond her control that contributed to her financial problems. She has paid or settled five of the eight accounts in question. Of course, this does not include the \$20,000 loan she repaid to her brother, which deserves favorable consideration as well. In addition, the remaining accounts are within her means to resolve based on her annual salary, her estimated total assets of \$44,000, and her steady employment. This is especially true considering that she may be able to settle the remaining accounts for lesser amounts, which is a common practice in the collection business. Based on her efforts to get control of her financial situation, I'm persuaded that she is serious about cleaning up her financial house and she will continue to do so with the remaining accounts.

Although she did not present a perfect case in mitigation, given the particular facts and circumstances of this case, she has provided sufficient information to mitigate the financial considerations concern. Accordingly, I conclude Applicant has established that it is in the interests of national security to grant her eligibility for an ADP I/II/III position.

FORMAL FINDINGS

Here are my conclusions for each allegation in the SOR:

SOR Paragraph 1-Guideline F: For Applicant

Subparagraphs a-h: For Applicant

SOR Paragraph 2-Guideline E: For Applicant

Subparagraph a: For Applicant

SOR Paragraph 3-Guideline J: For Applicant

Subparagraph a: For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the interests of national security to grant or continue Applicant's eligibility for an ADP I/II/III position. Eligibility is granted.

Michael H. Leonard

Administrative Judge

1. ADP Case No. 03-21205, 2005 DOHA LEXIS 289 (App. Bd. Dec. 23, 2005).
2. ADP Case No. 03-21205, 2005 DOHA LEXIS 289 (App. Bd. Dec. 23, 2005).