

DATE: December 29, 2006

In re:

SSN: -----

Applicant for Trustworthiness Determination

ADP Case No. 06-10683

DECISION OF ADMINISTRATIVE JUDGE

MARK W. HARVEY

APPEARANCES

FOR GOVERNMENT

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

FOR APPLICANT

Pro Se

SYNOPSIS

Twenty-nine-year-old Applicant had five alleged debts listed in the statement of reasons (SOR). The delinquent debts totaled \$26,510. She and her husband had \$15,000 in their savings account, but did not pay, settle, or otherwise resolve any of the five SOR debts. She has not mitigated concerns about financial considerations. Eligibility for an ADP I/II/III position is denied.

PROCEDURAL RULING

On November 1, 2006, Department Counsel made a motion to amend the Statement of Reasons (SOR), changing the reference from Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended to DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. ⁽¹⁾ Applicant did not object to the amendment. I granted Department Counsel's motion (Record of Hearing (R.) 13).

At her hearing on November 1, 2006, I granted Applicant's request to hold the hearing open until December 1, 2006, so that she could submit additional evidence (R. 68-69). I directed her to submit her documentary evidence through Department Counsel to me. *Id.* On December 21, 2006, I received an email from Mr. Blank stating he had not received any additional evidence from her (Exhibit 10). The record is now closed.

STATEMENT OF THE CASE

On August 27, 2004, Applicant applied for a public trust position and submitted a Questionnaire for Public Trust Positions, Standard Form (SF) 85P. ⁽²⁾ On August 16, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a SOR to her, pursuant to the Directive and the Regulation. ⁽³⁾ The SOR alleges trustworthiness concerns under Guideline F (Financial Considerations) and details reasons why DOHA recommends that Applicant's case be submitted to an administrative judge for a determination that she is not eligible for occupying an ADP I/II/III position.

In a notarized answer, received at DOHA on September 5, 2006, Applicant responded to the SOR allegations, and elected to have her case decided at a hearing.⁽⁴⁾ On October 13, 2006, the case was assigned to me. The hearing was held on November 1, 2006. DOHA received the transcript of the hearing on November 28, 2006, and I received it on December 4, 2006.

FINDINGS OF FACT

As to the factual allegations under Guideline F, Applicant admitted that she was responsible for the five debts and that she filed for bankruptcy twice, as listed on the SOR.⁽⁵⁾ Her admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 29 years old.⁽⁶⁾ For the last nine years, she has been employed by a United States government contractor and is involved with processing sensitive medical records.⁽⁷⁾ Her employee evaluations reveal a hard-working, reliable, outstanding employee.⁽⁸⁾ She has no prior military service.⁽⁹⁾ She received her high school diploma in 1995.⁽¹⁰⁾ She was married on November 6, 2002.⁽¹¹⁾ She has two children (born in 1997 and 2003) and one stepchild (born in 1990).⁽¹²⁾

In October 2002, Applicant's husband became unemployed, and he remained unemployed except for odd jobs for two years (R. 29-30). The family income decreased from about \$44,000 per year to about \$20,000 per year (R. 34). In January 2005, he obtained employment (R. 30). However, in the summer of 2005, he was diagnosed with cancer, and suffered an amputation, which resulted in a brief period of unemployment (R. 31, 38). Applicant was sometimes unable to earn much money because her infant children required her care (R. 31). Her husband has returned to work and expects to earn about \$43,000 to \$45,000 in 2006 (R. 38, 46). She and her husband have not made any payments on the delinquent debts in SOR ¶¶ 1.a to 1.e for the last two years (R. 39, 43).

The three debts in SOR ¶¶ 1.a (\$919), 1.b (\$6,078), and 1.c (\$5,347) are credit card debts that were charged off in October 2004, October 2003, and May 2004, respectively (R. 34). The debts in SOR ¶¶ 1.b (\$6,078) and 1.c (\$5,347), totaling \$11,425 resulted from dental work (R. 34-35). Applicant provided documentation showing her dental bills in 2006 alone cost the family \$5,899 (R. 50-51, 57, 61; Exhibit E).

The debt in SOR ¶ 1.d (\$7,412) resulted from purchase of a mobile home in 2001.⁽¹³⁾ Applicant and her husband lived in the mobile home for about nine months, and then moved to another residence. The mobile home was rented for awhile, and then Applicant and her husband decided not to re-rent it when a tenant left. The mobile home was subsequently repossessed by the creditor, who held a lien on the mobile home.

The debt in SOR ¶ 1.e (\$6,754) resulted from purchase of a vehicle (R. 37). The vehicle was repossessed and sold. After a credit was applied for the proceeds from the sale of the truck at auction, a debt of \$6,754 remained (R. 37).

Applicant and her husband filed for bankruptcy under Chapter 13 twice as alleged in SOR ¶¶ 1.f and 1.g. The first bankruptcy was dismissed on December 15, 2004, because she was medically unable to attend the hearing (R. 30). The second bankruptcy was dismissed on December 28, 2004, because the funds were not properly processed by the trustee (R. 30-31, 44). After the second bankruptcy was dismissed, their money was returned, and they placed the funds received in their savings account (R. 43-44). They currently have about \$15,000 in their savings account, but have chosen not to pay their creditors until they discuss the situation in detail with their attorney and decide whether or not to file again for bankruptcy (R. 39, 42, 44-47).

Applicant provided a personal financial statement (PFS) on August 1, 2005, to a security investigator.⁽¹⁴⁾ In 2005, her gross salary was \$1,871 per month, and her net salary was \$1,572 per month. Her husband's net salary was \$3,157. Their expenses totaled \$2,132 per month. She listed monthly household expenses as follows: rent (\$942⁽¹⁵⁾), groceries (\$400), clothing (\$50), utilities (\$350), car expenses (\$130), medical (\$60), child support (\$200), and miscellaneous (\$0). She did not list any debts. After deducting all expenses she and her husband had a positive cash flow of \$2,597 per

month.⁽¹⁶⁾ The PFS lists savings of \$10,000 and a car or boat valued at \$2,000. Since 2005, Applicant and her husband have reduced their total debt load, and have made some lifestyle changes to improve their financial status (R. 45). For example, since 2005 they have not accepted additional credit cards, and pay for purchases with cash (R. 48-49). The credit card debts listed on the SOR were actually larger before 2005, and they have paid them down to the SOR levels (R. 61). The earlier debt levels were presented in their bankruptcy filings (R. 62).

Applicant and her husband went to financial counseling in 2004, prior to filing the bankruptcy (R. 42). They have not consulted any debt consolidation companies and did not know whether their attorney contacted the creditors in SOR ¶¶ 1.a to 1.e (R. 49). They indicated they would contact their bankruptcy attorney and determine what can be done to resolve the debts (R. 68). The record was held open until December 1, 2006 to permit Applicant time to provide information about debt consolidation, settlement or other resolution (R. 65-68), but no such evidence was provided (Exhibit 10).

POLICIES

In the evaluation of an Applicant's trustworthiness suitability for a public trust position, an administrative judge must consider Appendix 8 of the Regulation, which sets forth brief introductory explanations for each guideline, and the adjudicative guidelines, which are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC).

These adjudicative guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the adjudicative process provision at Appendix 8 of the Regulation. An administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision.

To be eligible for a public trust position, an applicant must meet the trustworthiness or security guidelines contained in the Regulation. "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." Regulation ¶ C6.1.1.1.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk." Regulation, Appendix 8. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision. Specifically, an administrative judge should consider the nine adjudicative process factors listed in the Regulation, Appendix 8, at 132: (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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.

Conditions that could raise a trustworthiness concern and may be disqualifying, as well as those which could mitigate trustworthiness concerns, pertaining to this adjudicative guideline are set forth and discussed in the Conclusions section below.

Since the protection of sensitive information is the paramount consideration, the final decision in each case is arrived at by applying the standard that eligibility for a public trust position is "clearly consistent with the interests 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.

In the decision-making process, facts must be established by "substantial evidence."⁽¹⁷⁾ The government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with Regulation, Appendix 8, that it is not clearly consistent with national security to approve eligibility for a public trust position. Directive ¶ E3.1.14. If

the government meets its initial burden, the Applicant then has the burden of persuasion, that is to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. These same burdens of proof apply to trustworthiness determinations for ADP positions.

A person who seeks eligibility for a public trust position enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants eligibility for a public trust position. Decisions include, by necessity, consideration of the possible risk an 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 classified or sensitive information. The scope of an administrative judge's decision is limited. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

Guideline F (Financial Considerations)

The government has met its initial burden under Guideline F. Applicant's failure to pay her debts is of concern, especially in light of her desire to have access to sensitive government information. Regulation, Appendix 8, clearly expresses the government's concern regarding financial considerations, stating, "an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." A person who fails or refuses to pay long-standing debts or is financially irresponsible may also be irresponsible or careless in his or her duty to protect sensitive information.

Applicant's actions in failing to satisfy her outstanding financial obligations give rise to Financial Considerations Disqualifying Condition (FC DC) 1, "a history of not meeting financial obligations," and FC DC 3, "inability or unwillingness to satisfy debts." FC DCs 1 and 3 apply to her five failures to meet her financial obligations, and her admission that she was unable or unwilling to pay her debts. The five SOR debts remained delinquent for several years, and continued to be delinquent at the time of her hearing. The government produced substantial evidence of these two disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. The burden of disproving a mitigating condition never shifts to the government. ⁽¹⁸⁾

I considered Financial Considerations Mitigating Condition (FC MC) 1, "the behavior was not recent;" FC MC 2, "it was an isolated incident;" FC MC 3, "conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation;" FC MC 4, "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;" and FC MC 6, "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."

The Regulation does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. Based on my evaluation of the record evidence as a whole, ⁽¹⁹⁾ I conclude FC Cs 1 and 2 do not apply because Applicant had multiple (five) delinquent SOR debts that were not paid, settled or otherwise resolved at the time of her hearing.

FC MCs 3 and 4 partially apply to all five SOR debts at issue because the debts became delinquent several years ago and were the result of her husband's unemployment and underemployment, as well as their medical and dental problems.

These changes in family circumstances are good examples of the unforeseen problems that trigger application of FC MC 3, causing financial problems that may be "largely beyond the person's control." I conclude that Applicant's statement about how her debts became delinquent is credible and sufficient to provide some credit under FC MC 3 in regard to her debts. Applicant, however, does not receive full credit for FC MC 3 because she is still unable or unwilling to pay all of her debts. There is a paucity of evidence showing how she endeavored to pay or resolve her five delinquent SOR debts over the last two years. However, she and her husband's filing for bankruptcy as alleged in SOR ¶¶ 1.f and 1.g does not show a lack of trustworthiness. Based on the sincerity of her testimony, and the other record indicia of improved financial self-discipline, I have some confidence that she is on the right track now towards correction of her financial problems. She also receives partial credit under FC MC 4 because there is sufficient evidence that she received financial counseling in 2004, however, she was unable to apply the financial counseling to resolve her five delinquent SOR debts. Accordingly, I will apply some credit for FC MCs 3 and 4 under the whole person analysis, *infra*.

FC MC 6 does not apply because there is insufficient information to establish that Applicant showed good faith in the resolution of her debts.⁽²⁰⁾ She has not provided sufficient information about how she attempted to resolve or repay her debts from 2005 until November 1, 2006. Even though the record was held open an extra month, she did not provide evidence showing how she was resolving the five delinquent SOR debts.

"Whole Person" Analysis

In addition to the enumerated disqualifying and mitigating conditions, I have considered the general adjudicative guidelines related to the whole person concept under the Regulation, Appendix 8, at 132. As noted above, Applicant's lengthy history of failing to meet her financial obligations, and inability or unwillingness to satisfy her debts raise serious trustworthiness concerns. She is currently 29 years old. She was sufficiently mature to be fully responsible for her conduct. Her actions in generating or failing to resolve her debts in a timely fashion were knowing and resulted from voluntary choices to purchase items or to obtain services. However, her inability to repay her debts resulted from her husband's unemployment or underemployment and their medical and dental problems. Applicant and her husband have \$15,000 in savings and have decided not to use their money to pay their creditors or to otherwise resolve five currently delinquent SOR debts. There is some evidence of rehabilitation, positive behavior changes, receipt of financial counseling in 2004, reduction of overall debt and improved circumstances as indicated by self-discipline and the complete absence of new delinquent debt over the last two years. The potential for pressure, coercion, exploitation, or duress is low. Applicant is current on her recent debts, and her very positive employment history supports a determination of trustworthiness. Changes resulting from counseling and greater awareness of financial responsibilities will result in a continuously improving trend of improved financial circumstances.

In sum, the likelihood of new debt problems is low because more than two years have elapsed since any new debt has accrued. However Applicant's financial case shows unwillingness to resolve her delinquent debts. Five SOR debts are not paid or resolved. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude she has not mitigated the trustworthiness concerns pertaining to financial considerations.

Substantial evidence supports a continuing trustworthiness concern. I take this position based on the law, my "careful consideration of the whole person factors"⁽²¹⁾ and supporting evidence, as well as my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities. For the reasons stated, I conclude Applicant is not eligible for a public trust position.

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 to 1.e: Against Applicant

Subparagraphs 1.f to 1.g: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a public trust position. Eligibility for an ADP I/II/III position is denied.

Mark W. Harvey

Administrative Judge

1. Department Counsel's motion is at R. 12-13. A memorandum from the Deputy Under Secretary of Defense (Counterintelligence and Security) to Director, Defense Office of Hearings and Appeals (DOHA), dated November 19, 2004 states DOHA shall utilize provisions of the Directive to resolve contractor cases involving trustworthiness determinations. Accordingly, in this decision I will follow the procedural rules of the Directive but apply the adjudicative guidelines in the Regulation.
2. Exhibit 1, Questionnaire for Public Trust Positions, Standard Form (SF) 85P, is dated August 27, 2004 on the last page. There is no allegation of falsification of the SF 85P.
3. Exhibit 8 (Statement of Reasons (SOR), dated August 16, 2006) is the source for all the factual assertions in the remainder of this paragraph.
4. Exhibit 9 (Applicant's response to SOR was notarized on September 1, 2006. It is date stamped as received at DOHA on September 5, 2006).
5. The source for all factual assertions in this paragraph is Exhibit 9, *supra* note 4.
6. Exhibit 1, *supra* note 2, at 1 (date of birth)
7. *Id.*, at 3 (employment).
8. Exhibits B-D and F-I (seven Performance Reviews).
9. Exhibit 1, *supra* note 2, question 16, at 6 (military service).
10. *Id.*, question 10, at 2 (where you went to school).
11. *Id.*, question 14, at 5 (marriage).
12. *Id.*, question 15, at 5 (your relatives).
13. R. 35-37 is the source for the facts in this paragraph.
14. Exhibit 5 (summary of interview of Applicant on August 1, 2005), at 3. The remainder of this paragraph is derived from Applicant's PFS.
15. At the hearing, her husband said their rent for their trailer is currently \$850 per month (R. 40).
16. Applicant's husband said after paying their bills about \$600 per month remains (R. 41).
17. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a

scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

18. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

19. *See* ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). When making a recency analysis for FC MC 1, all debts are considered as a whole.

20. The Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of Financial Considerations Mitigating Condition 6, an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of Financial Considerations Mitigating Condition 6.

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

21. *See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).