



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



In the matter of:)
)
) ADP Case No. 07-16327
)
)
Applicant for Public Trust Position)

Appearances

For Government: Ray T. Blank, Jr., Esquire, Department Counsel
For Applicant: *Pro Se*

October 15, 2008

Decision

ANTHONY, Joan Caton, Administrative Judge:

I have carefully reviewed the administrative file, pleadings, and exhibits in this case and conclude that Applicant failed to mitigate security concerns under the Financial Considerations adjudicative guideline. Eligibility for access to sensitive information is denied.

Applicant submitted her Questionnaires for Public Trust Position (SF 85P) on June 11, 2007. On May 28, 2008, the Defense Office of Hearings and Appeals (DOHA) 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; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

On June 25, 2008, Applicant answered the SOR in writing. She requested that her case be determined on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) on August 14, 2008. The FORM contained documents identified as Items 1 through 8. By letter dated August 18, 2008, a copy of the Form was forwarded to Applicant, with instructions to submit any additional information and/or objections with 30 days of receipt. Applicant received the file on August 27, 2008. She timely filed a response. Department Counsel did not object to Applicant's response to the FORM, and I have admitted it to the record of this case. The case was assigned to me for a decision on September 26, 2008.

Procedural and Evidentiary Rulings

Motion to Amend SOR

In the FORM, Department Counsel moved to amend the SOR by revising ¶ 1.d. to read as follows: "You are indebted to [a creditor] on an account that has been placed for collections with [a collection agent] in the approximate amount of \$287.00. As of May 8, 2008, this debt had not been paid."¹ In her response to the FORM, Applicant did not object to the Government's motion to amend the SOR and observed that the proposed amendment reflected the true amount of the debt. (Response to FORM at 1.) Accordingly, I granted the Government's motion to amend the SOR.

Findings of Fact

The SOR alleged Applicant was responsible for eight financial delinquencies. (Item 1.) In her Answer to the SOR, Applicant admitted four factual allegations and denied four factual allegations. She also provided additional information to support her request for eligibility for a public trust position. (Item 2.) In her response to the FORM, Applicant admitted the additional factual allegation in revised ¶1.d of the SOR. Her admissions are incorporated herein as findings of fact.

Applicant is 34 years old, married, and the mother of a young child. She is employed by a government contractor as a claims associate. (Item 4.)

Applicant graduated from college with a bachelor of science degree in 1997. On her SF-85, she did not list employment for the period 1997 to 1999. From October 1999 to November 2004, Applicant was steadily employed as a customer service representative and a customer service trainer. From November 2004 to February 2006, she was unemployed. On her SF-85, she indicated she was unemployed because she was pregnant. In May 2006, Applicant accepted a position with a government contractor. In May 2008, her employer let her go in a reduction in force. She was rehired approximately six weeks later in mid-June 2008. (Item 4; Applicant's response to FORM at 1.)

¹ The SOR originally read: "You are indebted to [a creditor] on an account that has been placed for collections with [a collection agent] in the approximate amount of \$1,387.00. As of May 8, 2008, this debt had not been paid."

Applicant has a history of financial delinquencies. The SOR identified approximately \$55,456 in delinquent debt. Applicant admitted owing listed debts totaling \$54,249. (Item 2; Response to FORM.)

Applicant followed bad advice and failed to file her federal income tax returns for tax years 2001 and 2003. In 2005, a tax lien of \$15,352 was filed against her. In an interview with an authorized investigator in September 2007, Applicant admitted the debt. She reported she had negotiated a payment schedule with the Internal Revenue Service and was making payments of \$40 per month. She also reported that the balance on the federal tax lien had grown to approximately \$18,000. In her response to DOHA financial interrogatories, Applicant reported that her 2006 and 2007 federal income tax refunds had been applied to the debt. She failed to provide documentation to corroborate that her refunds had been applied to her federal tax debt or that she was consistently making monthly payments on the tax debt. (SOR ¶1.a; Item 4; Item 5.)

In her response to the FORM, Applicant provided documentation showing a wage garnishment every two weeks of \$76.23 for a state tax delinquency for tax year 2004 and a wage garnishment every two weeks of \$78.14 for a state tax delinquency for tax year 2003. The state tax delinquencies were not alleged on the SOR. (Applicant's response to the FORM.)

In 1992, Applicant took out loans to finance her higher education. Her loan payments were \$285 per month. After she graduated from college in 1997, Applicant was able to find only low-paying jobs that permitted her to support her basic needs, and she became delinquent in repaying her education loans. In about 1999, she received notice that her education loans were in collection status. She was unable to reach a payment agreement with the creditor, but she made some payments of \$100 to the creditor when she had additional money available. As of May 2008, the student loan debt totaled approximately \$31,197 and had not been satisfied.² (SOR ¶1.h; Item 2; Item 4; Item 6.)

In July 2008, Applicant entered a program to rehabilitate her student loan account, and she agreed to make nine monthly payments of \$300. In July 2008, she made one payment of \$300. She stated that she intended to make another payment at the end of September 2008. (Applicant's response to FORM.)

Applicant admitted she owed the following additional debts alleged in the SOR: a \$463 debt in collection status (SOR ¶1.c); a \$287 debt in collection status to a communications creditor (SOR revised ¶1.d); and a charged-off unpaid automobile debt of \$7,237 (SOR ¶ 1.g). The Government also alleged in the SOR that Applicant owed the following debts: a medical debt of \$135 (SOR ¶1.b); a debt of \$212 on a charged off account (SOR ¶ 1.e); and a debt of \$573 on a charged off account (SOR ¶1.f). The basis for the Government's allegations was Applicant's credit report of May 8, 2008.

² In an attachment to Item 6, Applicant provided a statement, dated February 2008, from the student loan creditor showing her education debt to consist of \$27,086.38 in principal, \$3,904.26 in interest, and \$7,437.75 in fees, for a total debt of \$38,428.39.

Applicant denied owing the debts alleged at SOR ¶¶1.b, 1.e, and 1.f. In the face of Applicant's denial, the medical debt alleged at ¶1.b is not sufficiently identified on her credit report to establish *prima facie* that she owed the debt. However, the debts alleged at ¶¶ 1.e. and 1.f. are identified on the credit report with specific account numbers and, as business records, establish *prima facie* that she owed the debts. Applicant provided no documentation to corroborate her denial that the debts were not hers. Accordingly, the allegation at SOR ¶ 1.b is concluded for Applicant, and the allegations at SOR ¶¶ 1.e and 1.f are concluded against her. (Item 1; Item 8.)

Applicant's employer appreciates her competence and leadership abilities. (Response to FORM.)

Applicant's husband had a recurrence of a health problem and lost his job in November 2007. Applicant intends to find a part-time job to help with family living expenses. She has no savings. She earns approximately \$10 per hour at her present job. After paying her fixed expenses each month, Applicant has a deficit of \$166.70. She has not met with a credit counselor. (Item 6.)

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See 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 DOHA by 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 a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. 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 over-arching adjudicative goal is a fair, impartial and common sense 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 [sensitive] information 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 trustworthiness decision.

A person who seeks access to sensitive information 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 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 (EO) 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. 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” may raise security concerns. Applicant accumulated considerable delinquent debt and was unable to pay some obligations for a period of time. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where “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’s financial worries arose in about 1997, when she graduated from college and earned insufficient income to repay her student loan debts. She did not list employment between 1997 and 1999. Even though she held steady employment between 1999 and 2004, she continued to accumulate debt. She failed to file her federal income tax returns for tax years 2001 and 2003. A federal tax lien was filed against her in 2005. Her student loan debt and her federal tax lien remain unresolved. While Applicant’s financially delinquent behavior occurred several years ago, it remains unresolved at the present time, is likely to recur, and casts doubt on her current reliability, trustworthiness, and good judgment. Accordingly, I conclude that AG ¶20(a) does not apply to the facts of Applicant’s case.

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.” As noted above, some of Applicant’s financial problems arose from her early post-college under-employment and her husband’s recent unemployment and medical problems. Applicant admitted financial delinquencies that spanned an eleven year period, from 1997 to 2008. Her husband’s unemployment and health problems occurred recently in November 2007. During a substantial part of the time she had financial delinquencies, Applicant was steadily employed. While her early underemployment and her husband’s unemployment and health problems were beyond her control, Applicant offered no explanation for her failure to resolve or settle her financial delinquencies over a period of many years when she was employed. I conclude that she failed to act responsibly in identifying and resolving her substantial debts. I find that AG ¶ 20(b) applies only in part as a factor for consideration in this case.

Evidence that “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” is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Applicant has not received financial counseling. While she has recently worked out a payment plan for her delinquent student loans and has made some payments to satisfy her federal tax lien, her current monthly budget shows a deficit of approximately \$166, making consistent payments unlikely. Accordingly, I conclude that AG ¶ 20 (c) does not apply to the facts of Applicant’s case. Her good-faith efforts to pay or resolve her delinquent debts, however, even though impracticable, merit the partial application of AG ¶20 (d).

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 a public trust position must be an overall common sense 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. When these problems first began, Applicant was a young woman, recently graduated from college. She failed to pay her college student loans and did not file her federal income tax returns for tax years 2001 and 2003. She was steadily employed between 1999 and 2004. After the birth of her child, she returned to the workforce in 2006. She has encountered unfortunate hardship and setbacks. However, despite a steady income for several years, she failed to budget her resources to satisfy her many debts, which now total over \$54,000. She has failed to demonstrate that her financial problems will not continue to be security concerns in the future.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant failed to mitigate the trustworthiness concerns arising from her financial delinquencies.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant

Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

JOAN CATON ANTHONY
Administrative Judge