



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



In the matter of:)
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Applicant for Position of Public Trust)

ADP Case No. 08-00801

Appearances

For Government: Julie Mendez, Esquire, Department Counsel

For Applicant: *Pro se*

August 31, 2009

Decision

O'BRIEN, Rita C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the concerns raised under the guideline for Financial Considerations. Accordingly, her request for a position of public trust is denied.

Applicant signed and submitted a Public Trust Position Application (SF 85P) on August 3, 2006. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request.

¹ Required by Executive Order 10865, as amended, and DoD Directive 5220.6 (Directive), as amended.

On April 10, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) specifying that its decision was based on concerns addressed in the Directive under Guideline F (Financial Considerations) of the Revised Adjudicative Guidelines (AG).² In her Answer to the SOR, signed and notarized on April 30, 2009, Applicant admitted all SOR allegations except the following: 1.d., 1.e., 1.i., 1.l., 1.p., 1.q., 1.aa., 1.ff., 1.gg., and 1.ii. She also requested a hearing before an administrative judge.

Department Counsel was prepared to proceed on May 28, 2009, and the case was assigned to me the following day. DOHA issued a Notice of Hearing on June 5, 2009, and I convened the hearing as scheduled on June 25, 2009. During the hearing, Government Exhibits (GE) 1 through 8 were admitted without objection. Applicant testified and did not present witnesses. She also offered one exhibit, which was marked as Applicant's Exhibit (AE) A and admitted without objection. I held the record open to allow Applicant to submit additional documentation. She timely submitted two documents, which Department Counsel forwarded without objection. I admitted them as AE B and C. DOHA received the transcript on July 6, 2009.

Procedural Matters

During the hearing, Department Counsel moved to amend the SOR to conform to the evidence by deleting two allegations. The following allegations are struck from the SOR:

1.i. duplicate of 1.f.

1.i.i. This debt was included in Applicant's 2002 discharged bankruptcy.

The remaining allegations retain their original numbering.

Findings of Fact

After a thorough review of the pleadings, Applicant's response to the Statement of Reasons, and the record evidence, I make the following additional findings of fact.

Applicant, 41 years old, married in 2005, and separated the same year. She has been unable to complete the divorce process as she cannot locate her husband. Applicant has four children, who are 7, 15, 19 and 21 years of age. The three youngest

² Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. The Revised Adjudicative Guidelines supersede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications of trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

children live with her, and she receives no child support. Applicant is currently working part-time toward a bachelor's degree in business administration, specializing in information technology. She has been employed by a defense contractor since August 2006. She began as an administrative assistant, and after two promotions, she currently holds the position of operations and support analyst. (GE 1; Tr. 18-22).

Applicant has had medical issues over the past several years. In 1988, her first child was born with a birth defect. He had surgeries and frequent hospital stays until his treatment ended in 2002. She was unable to pay the resulting medical bills. During her last pregnancy in 2001, she was unemployed for approximately five months because she was required to be on bed rest. Applicant received some funds from the Temporary Assistance for Needy Families (TANF) program, as well as short-term disability payments that began approximately four months after she started bed rest and covered the last two months of her confinement. The income was insufficient and she relied on credit cards and help from friends to pay her expenses. In June 2002, Applicant filed a Chapter 7 bankruptcy petition, with liabilities of approximately \$120,000. The bankruptcy was discharged in October of the same year. In March 2006,³ Applicant was diagnosed with cancer, and underwent surgery in July 2006. Between March and June, she worked part-time, 10 to 15 hours per week. She did not receive unemployment compensation or disability payments during this period (GE 2; Tr. 22-25, 63).

The SOR alleges approximately \$30,000 in delinquent debt. Applicant denies the following allegations:

1.d. - \$11,511 – voluntary repossession. Applicant appeared in court about one year ago and reached an agreement with the creditor to pay \$150 per month. She provided a document showing a November 2008 payment. She estimates the current balance is approximately \$8,550 (GE 2; Tr. 26-27).

1.e. - \$1,540 – unemployment compensation. Applicant applied for and received compensation after she was fired. Her employer informed the state unemployment commission that she left the job. The compensation was found to be unwarranted. She states that she has been making payments of \$50 per month, and estimates the current balance is approximately \$900. She did not provide supporting documentation (GE 3, 4; Tr. 27-29).

1.i. – Deleted by the government.

³ Applicant was initially confused and testified that her diagnosis occurred in 2005; she later corrected the date to 2006.

1.i. - \$440 owed to a collection agency – Applicant cannot find the company that currently holds the debt, or the original creditor. She has not received any correspondence concerning this debt (GE 6; Tr. 34-35).

1.p. - \$204 owed to a collection agency – Applicant testified that she has made payments on the debt, the last payment being about one year ago, and that she now owes \$40. She did not provide supporting documentation (GE 6; Tr. 37-38).

1.q. - \$203 owed to a retail store – Applicant stated that she paid this bill in full two years ago. She contacted the store to have it removed from her credit bureau report and was told it would be. She filed a dispute with the credit reporting agency approximately 1 ½ years ago. She did not provide supporting documentation (GE 2, 4; Tr. 39-40).

1.aa. - \$2,085. Applicant testified that this debt was originally owed to a bank for an overdraft on her checking account and that it is a duplicate of the debt alleged in 1.z., which lists the same original creditor and collection agency. When Applicant reviewed her records, however, she discovered that allegations 1.aa. and 1.z. relate, instead, to student loans, and she believes that they are duplicates of the debts alleged at 1.ff. and 1.gg. Applicant provided evidence to support her claim that she paid the two student loans, 1.ff. and 1.gg., in March 2009 (AE B; Tr. 45-47; 50).

1.ii. – Deleted by the government.

Among the debts Applicant admits are several that she states she has paid or are duplicates of other allegations:

1.g. - \$439. Applicant believes that this unpaid debt is a duplicate of the \$158 debt alleged at 1.y., which is owed to the same creditor. She has not contacted any of the listed creditors to determine if they are duplicates (Tr. 44-45).

1.n. - \$350, owed to a payday loan company. Applicant testified that she paid this debt around December 2008. Applicant provided no documentation to support her claim (Tr. 36).

1.w. - \$528. Applicant believes that this is a duplicate of the unpaid debt alleged at 1.k., a debt owed for a class for which her son registered. The amounts owed are the same, and the debt at 1.w. refers to an education-related debt (GE 4; Tr. 43-44).

1.ee. - \$25 owed to a tax preparation service. Applicant testified that she paid it in 2007, and that she contacted the creditor about it. She provided no documentation to support her claim (Tr. 49-50).

The remaining 20 delinquencies include two judgments and debts owed for credit cards; telephone, cell phone and electric bills; child care; and medical debts. These debts are unpaid, with no arrangements or payment plans in place. Applicant sought financial counseling in 2007, but was informed that, with her large amount of debt, she should try to pay off a few of the debts at a time on her own rather than put them in a consolidation program (Tr. 57-58).

Applicant's monthly net income is \$2,684. Her rent, including utilities, is \$859; home phone/cable/internet services \$129; cell phone \$50; car payment plus insurance is \$527; groceries \$300; gas about \$70; entertainment \$15 per month; and after-school care \$279 per month. She pays \$200 per month for two delinquent debts (allegations 1.d. and 1.e.). She contributes to a 401(k) and has a balance of approximately \$3,000. Now that she has finished paying her student loans, she plans to use the money she had paid on those debts to start paying on a few other debts. Applicant estimates that she has about \$20 monthly net remainder after paying her expenses and debts (Tr. 51-57).

Applicant was arrested twice on fraud charges. In October 2003, she was arrested in relation to a May 2003 felony charge of credit card theft. The charge was dismissed. In February 2004, Applicant was arrested again related to a March 2003 incident. She was charged with two felonies: credit card theft and credit card fraud. On the advice of her attorney, Applicant signed a plea agreement. In exchange for pleading guilty to credit card fraud, the charge was reduced to a misdemeanor and the felony credit card theft charge was not prosecuted. Applicant was sentenced to 12 months in jail, suspended; and ordered to serve three years supervised probation, pay restitution of \$162 and costs of \$207; and complete community service. Applicant believes her probation ended approximately three months after sentencing, when she completed her community service, because the probation officer told her that she did not have to return any more (GE 7, 8; AE C; Tr. 58-62).

Applicant testified that the offenses charged in March 2003 and May 2003 actually relate to only one incident. She and a few co-workers bought season passes for an amusement park. The monthly payments of approximately \$50 were to be charged automatically on Applicant's credit card account. Two payments for Applicant's pass were charged to another person's credit card. Applicant believes that the amusement park company mistakenly charged the two payments to her card. The company accused Applicant of fraudulently using the other person's card to pay for her pass. Applicant and the other card holder did not know each other, and initially the charge was dismissed for lack of evidence. (Tr. 58-60).

At the hearing, Applicant testified that she did not plead guilty to the charge of credit card fraud. She explained that she signed a statement saying she was not guilty but was only taking the plea based on circumstances and on the advice of her attorney:

Q: And then the thing I wanted to clarify then about the credit card fraud charge, you said that you signed a statement that you were not guilty?

A: Yes. It was a statement you sign stating that you're not pleading guilty to the charges, that you had done anything but you're taking a plea because of circumstances, I'm trying to remember this statement, I'm sure my lawyer has it. But you're taking the plea because of being advised by your lawyer that it is to your best interest. (Tr. 66-67).

Applicant provided a copy of the statement that she signed. She hand-wrote "Yes" or "No" responses to a number of statements. Among the statements are the following:

5. Have you discussed with your lawyer whether you should plead guilty or not guilty?

[Applicant answered "Yes"]

6. After the discussion, did you decide for yourself that you should plead guilty?

[Applicant answered "Yes"]

8. Are you entering the plea of guilty because you are, in fact, guilty of the crime(s) charged?

[Applicant answered "No"]

[If the Defendant answers "No,"]

[A] Have the Commonwealth summarize the evidence on the record.

[B] Ask the defendant, "Are you pleading guilty because this is the Commonwealth's evidence and you do not wish to take the risk that you will be found guilty beyond a reasonable doubt?"

[Applicant answered "Yes"]

Although Applicant testified that she did not plead guilty, Applicant's plea agreement indicates that she did enter a guilty plea. Although she asserted her innocence, she accepted the plea because evidence existed that could have resulted in her being found guilty at a trial (AE C; Tr. 66-67).

Applicant listed on her security clearance application that she left her job after the fraud charges, "...because I did not want to work for a company that did not trust me."

At the hearing, when asked if she was “laid off” as a result of the charges, she testified, “Yes, because they came to my job and arrested me” and “I was actually pretty much fired.” Nevertheless, Applicant applied for and received unemployment compensation after she left the job. The state unemployment commission found that she was not entitled to compensation and Applicant was required to return the money she received. I find that she left the job by her own choice, and therefore, was not entitled to unemployment compensation (see allegation 1.e.) (GE 1; Tr. 27-28, 59-61).

Applicant submitted a performance evaluation covering the first half of 2009. She was rated as Outstanding in one category and Exceeds Expectations in 8 of 14 other categories (AE A; Tr. 16).

Policies

Each trustworthiness decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG).⁴ Decisions must also reflect consideration of the “whole person” factors listed in ¶ 2(a) of the Guidelines.

The presence or absence of a disqualifying or mitigating condition under any guideline does not determine a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them, as they represent policy guidance governing the grant or denial of access to sensitive information.

A trustworthiness decision is intended only to resolve the question of whether it is clearly consistent with the national interest⁵ for an Applicant to either receive or continue to have access to sensitive information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke an Applicant’s access to sensitive information. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the Applicant to refute, extenuate or mitigate the government’s case.

A person who has access to sensitive information enters into a fiduciary relationship with the government based on trust and confidence. Therefore, the

⁶ Directive. 6.3.

⁷ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

government has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability and trustworthiness to protect the national interests as hers or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an Applicant’s suitability for access in favor of the government.⁶

Analysis

Guideline F, Financial Considerations

AG ¶18 expresses the concern pertaining to financial considerations:

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. An individual who is financially over-extended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

The facts presented support application of the following disqualifying conditions: AG ¶19(a) (*inability or unwillingness to satisfy debts*), AG ¶19(c) (*a history of not meeting financial obligations*), and AG ¶19(d) (*deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust*). Applicant started with a clean financial slate after the discharge of her Chapter 7 bankruptcy in 2002. However, she accumulated a substantial amount of new debt since that time, as shown in her credit bureau reports, her interrogatory responses, and her admissions to the SOR allegations. In addition, Applicant pled guilty to credit card fraud, and applied for and received unemployment compensation to which she was not entitled. AG ¶19(a), (c) and (d) apply.

The financial considerations guideline includes factors that can mitigate disqualifying conditions. The following mitigating conditions are relevant:

AG ¶20(a): the behavior happened so long ago, was so infrequent, or occurred

⁸ See *Egan*; Revised Adjudicative Guidelines, §2(b).

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;

AG ¶(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;

Although Applicant's current delinquencies began approximately seven years ago, most remain unresolved. Given that Applicant does not have the resources to resolve her significant debt load, her indebtedness will likely continue into the future. Moreover, Applicant's guilty plea to a charge of credit card fraud, and her application for unemployment compensation after she had left a job by her own choice, raise questions as to her trustworthiness. AG ¶ 20(a) cannot be applied.

AG ¶ 20(b) partially applies. Several events occurred that affected Applicant's finances and were beyond her control: her own serious illness, two periods of unemployment since 2002, and lack of child support. Applicant provided evidence that she has paid two debts, and is paying on another. However, to be applicable, this mitigating condition requires that the person act responsibly under the circumstances. Beyond these few efforts, Applicant has not contacted creditors, reported perceived duplicate debts to the credit reporting agencies, or established a plan to resolve her many remaining debts. Without such a plan, Applicant's finances are not under control and AG ¶ 20(c) and AG ¶ 20(d) are unavailable. The partial mitigation available under AG ¶ 20(b) is insufficient to mitigate Applicant's conduct. I find against the Applicant on Guideline F.

Whole Person Analysis

Under the whole person concept, an administrative judge must evaluate the Applicant's eligibility by considering the totality of the Applicant's conduct and all the relevant circumstances. An 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant access to sensitive information must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. Under the appropriate guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant is a single parent with significant debt. She does not receive child support, and has experienced medical problems and some unemployment. In 2002, she discharged approximately \$120,000 in debt through a Chapter 7 bankruptcy. Despite starting with a clean financial slate, delinquencies began to accrue in that same year. Applicant has paid two of the debts alleged in the SOR, and provided some evidence of a payment plan for another debt. She provided no evidence to support her claim that she has paid several other debts, and has a second payment plan in place. In addition, she has no plan to deal with the substantial remaining debt. Moreover, Applicant pled guilty to a charge of credit card fraud, and applied for unwarranted unemployment compensation. Her conduct raises questions as to her trustworthiness and good judgment. A fair and commonsense assessment of the available information bearing on Applicant's suitability for a position of public trust shows she has not satisfied the doubts about her ability or willingness to protect the government's interests. Such doubts must be resolved in favor of the government.⁷

Overall, the record evidence does not satisfy the doubts raised about Applicant's suitability for access to sensitive information. For all these reasons, I conclude Applicant has not mitigated the concerns arising from the cited adjudicative guideline.

Formal Findings

Paragraph 1, Guideline F	AGAINST APPLICANT
Subparagraph 1.a. - 1.c.:	Against Applicant

⁸ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

Subparagraph 1.d.:	For Applicant
Subparagraph 1.e. – 1.h.:	Against Applicant
Subparagraph 1.i.:	For Applicant (withdrawn by the government)
Subparagraph 1.j. - 1.y.:	Against Applicant
Subparagraph 1.z. - 1.aa.:	For Applicant
Subparagraph 1.bb. - 1.ee.:	Against Applicant
Subparagraph 1.ff. - 1.gg.:	For Applicant
Subparagraph 1.hh.:	Against Applicant
Subparagraph 1.ii.:	For Applicant (withdrawn by the government)

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 access to sensitive information. Applicant’s request for a position of public trust is denied.

RITA C. O'BRIEN
Administrative Judge