



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



In the matter of:)
)
-----, -----) ADP Case No. 08-00826
SSN: -----)
)
Applicant for Public Trust Position)

Appearances

For Government: Tom Coale, Esquire, Department Counsel
For Applicant: *Pro Se*

December 31, 2009

Decision

WHITE, David M., Administrative Judge:

Applicant still has more than \$30,000 in delinquent debt despite reporting more than \$3,000 per month in excess income since her 2006 marriage and 2007 employment. She also has a substantial history of domestic violence offenses spanning multiple relationships and court-ordered treatment programs. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to ADP I/II/III sensitive information is denied.

On April 9, 1993, the Composite Health Care Systems Program Office (CHCSPO), the Defense Office of Hearings and Appeals (DOHA), and the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASD C3I) entered into a memorandum of agreement for DOHA to provide trustworthiness determinations for contractor personnel employed in Sensitive Information Systems Positions (ADP I/II/III), as defined in DoD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation).

Applicant submitted her Public Trust Position Application (SF 85P), on May 24, 2007. On May 5, 2009, DOHA issued a Statement of Reasons (SOR) to Applicant detailing the trustworthiness concerns under Guideline F (Financial Considerations) and

Guideline J (Criminal Conduct). 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); the Regulation (*supra*); 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.

Applicant acknowledged receipt of the SOR on May 18, 2009. She answered the SOR in writing on June 4, 2009, and requested that her case be decided by an administrative judge on the written record without a hearing.¹ Department Counsel submitted the Government's written case on July 7, 2009. A complete copy of the file of relevant material (FORM)² was provided to Applicant on July 8, 2009, and she was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant signed the document acknowledging receipt of her copy of the FORM on July 20, 2009, and returned it to DOHA. She provided no further response to the FORM within the 30-day period she was given to do so, did not request additional time to respond, and made no objection to consideration of any evidence submitted by Department Counsel. The case was assigned to me on October 9, 2009.

Findings of Fact

Applicant is a 31-year-old employee of a defense contractor. She has four children, ages 12, 7, 6, and 5. Only the eldest child lives with Applicant and her husband, who she married in September 2006.³

In her answer to the SOR, dated June 4, 2009, Applicant admitted the financial allegations in ¶¶ 1.h., 1.i., 1.k., and 1.o. of the SOR, with explanations. These non-medical debts total \$13,063. She denied the allegation in ¶ 1.a. concerning a \$429 judgment for past-due child support because it has been satisfied through garnishment. She also denied the allegations of delinquent medical debts in ¶¶ 1.b. through 1.g., 1.j., 1.l., 1.m., 1.n., and 1.p., totaling \$17,777. Finally, she admitted the criminal allegations in SOR ¶¶ 2.a through 2.f., with some explanations. Applicant's admissions are incorporated herein as findings of fact.

Concerning the four debts to which Applicant admitted, she said she was working with a financial counselor on a budget plan to begin making payment arrangements to satisfy those creditors. The only evidence she provided in support of this assertion was a printout of a website page showing the name and contact

¹Item 3.

²The government submitted ten Items in support of the allegations.

³Item 4 at 1, 5, 6.

information for a person at a financial counseling company in a distant state.⁴ She provided no evidence of any financial education, progress toward establishing a budget, or attempts to resolve any delinquent debts in response to the SOR or the FORM.

Applicant was interviewed by an investigator from the Office of Personnel Management (OPM) on October 17, 2007, and again on November 7, 2007. She discussed her delinquent debts and the resulting potential security concerns with the investigator, and said that her life was becoming more stable and she hoped to improve her credit by paying off her bills as she could. She claimed, without corroboration, that she and her husband had a combined monthly net remainder of more than \$3,000 after meeting their living expenses and current debt payments. She attested to the accuracy of these statements on October 22, 2008, as part of her response to DOHA interrogatories.⁵ She provided no explanation for the absence of any progress toward resolving her admitted delinquent debts during the more than two years since her OPM interviews, while claiming to have more than \$36,000 per year available for that purpose.

As noted above concerning SOR ¶ 1.a., Applicant documented her satisfaction of the \$429 judgment against her for past-due child support through wage garnishment.⁶ She claimed that all of the alleged delinquent medical debts were erroneously reported on her credit reports because she was covered by Medicaid when she incurred them. In support of this claim, she provided a “Medicaid Management Information System Certificate of Coverage” from her state Department of Health. This document shows that she was entitled to Medicaid or her state’s Medical Assistance Program during the periods from August 1, 2003, to January 31, 2004, and from September 1, 2004, to February 28, 2005.⁷ The record credit reports indicate that all of the delinquent medical debts that Applicant denied accrued during times that were outside these two windows of Medicaid coverage.⁸

The largest of these debts is for \$15,023 (¶ 1.j.), which was placed for collection in May 2004. In her OPM interview and her answer to the SOR, Applicant claimed that this debt was for hospital expenses incurred during the birth of her son in November 2003. That was a month during which she was eligible for Medicaid coverage, but she provided no evidence from which a link between this debt and that event could be confirmed. Applicant also forwarded copies of dispute letters to each SOR-listed

⁴Item 3 at 19.

⁵Item 8 at 6, 7, 9.

⁶Item 3 at 1, 16, 17.

⁷Item 3 at 18.

⁸Items 5, 6, and 7 show the following dates for the debts in the corresponding SOR paragraphs: 1.b. 3/05; 1/c. 4/03; 1.d. 3/06; 1.e. 12/05; 1.f. 3/05; 1.g. 3/04; 1.j. 5/04; 1.l. 2001; 1.m. 1/03; 1.n. 2006; 1.p. 5/04.

medical creditor, all dated June 4, 2009, with her answer to the SOR of the same date.⁹ She provided no further evidence concerning the status of any of these disputed accounts by her August 20, 2009, deadline to respond to the FORM.¹⁰

Applicant's admissions and record evidence establish the following facts concerning her criminal conduct.¹¹ She was arrested in March 2001 and charged with Disorderly Conduct. During the fall of 2002, she and the father of her eldest child had a fight in the presence of the then-5-year-old. Based on the son's description of events to the police, Applicant was arrested and charged with Domestic Violence in Presence of Child and Assault. Applicant pled guilty to the charge of Simple Assault and was fined. In her OPM interview and answer to the SOR, Applicant claimed she was actually the victim in the incident, contrary to her guilty plea. She offered no evidence to corroborate this version of events.

During February 2003, Applicant had a fight with the man who became the father of her two youngest children, with whom she was then living, when she caught him kissing another woman. She left the scene of the fight, but was arrested shortly thereafter and charged with Domestic Violence Assault, Disorderly Conduct, and Criminal Trespass. She entered into a plea-in-abeyance agreement, under which the court accepted her guilty pleas but agreed not to enter convictions on the charges if she complied with the stipulated probationary conditions. These included her successful completion of a domestic violence class.

Applicant admitted that she was arrested for Simple Assault in about July 2003 in her answer to ¶ 2.d of the SOR, and said it was dismissed because she was found not to be the guilty party. On her SF 85P, she listed a conviction and fine for Disorderly Conduct in July 2003 in response to question 16. Her FBI Identification Record lists an arrest for Assault on October 14, 2003, but none during July 2003. During her OPM interview, she said that she did not recall being arrested in October 2003, but did not deny that it occurred. She also said that she and the man involved in the February 2003 incident lived together until May 2006, and "verbally fought" all the time. I find that the arrest for Assault alleged in SOR ¶ 2.d. actually occurred in October 2003.

Applicant was arrested again in October 2005, and charged with Simple Assault and Criminal Mischief. At the time, she and her boyfriend were living apart and he was under a restraining order not to be in her presence. When both arrived at the home of a mutual friend, they fought over who should leave. Applicant wound up throwing a rock

⁹Item 3 at 5 through 15.

¹⁰

In her October 22, 2008, response to DOHA interrogatories, Applicant wrote, "All medical bills showing a balance are not necessarily true and correct. I was covered by Medicaid during the time of treatment, especially the one of \$15,023. I will start doing what I need to, to remedy these debts reflected on my report." Applicant did not explain why she waited until the day she responded to the SOR to begin disputing those debts with the creditors.

¹¹See Item 3 at 3; Item 4 at 7; Item 8 at 3-5; Item 10 at 2.

at her boyfriend's truck and caused \$400 in damage. She pled guilty to the Criminal Mischief charge and was sentenced to a fine, 30 days in jail (all suspended), one year of supervised probation, and ordered to complete another domestic violence program and pay restitution. Applicant was arrested for Assault a final time in either November 2005 or January 2006. This charge was dismissed after she again completed domestic violence counseling.

Three supervisors with whom Applicant has worked during the two years in her present position wrote letters praising her work performance, initiative, and dedication. They also expressed high opinions of her trustworthiness and good character.¹² I was unable to evaluate her credibility, demeanor, or character in person since she elected to have her case decided without a hearing.

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 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. 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.

¹²Item 3 at 20-22.

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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable [trustworthiness] decision.”

A person who applies for access to sensitive information seeks to enter 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 10865 provides that “[a]ny determination under this order adverse to an applicant shall be a determination 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 concerns relating to the guideline for Financial Considerations are 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 \$31,269 in delinquent debts between 2001 and 2006. She only repaid one \$429 judgment, through a wage garnishment, despite claiming to have sufficient excess income to have paid them all. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes 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 history of inability or unwillingness to pay her debts spans more than eight years, and continues to date. She provided no evidence this would not continue or recur, so this mitigating condition is not supported by the record.

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." Applicant's financial problems arose before her present employment because she spent more to support herself and her children than she earned. In 2006 she married a man who reportedly has a good income, and in 2007 she began working for her current employer. For more than the past two years, she reports having over \$3,000 per month in discretionary income after paying living expenses. However, she did not provide an explanation for her failure to make payments, or documentation supporting an attempt to resolve her substantial delinquent debt. She has not met her burden to establish that this potentially mitigating condition is 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). Her effort to document counseling by submitting a printout of a financial counselor's web site is insufficient to support application of this provision, particularly absent evidence of resolution of more than \$30,000 in delinquent debt. Similarly, AG ¶ 20(d) applies where the evidence shows "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." The only resolution of an SOR-alleged debt took place because the judgment creditor garnished her wages for past-due child support. This does not constitute a good-faith effort to resolve her debts. AG ¶ 20(e) pertains to documentation of a legitimate basis to dispute the debts in question. Applicant submitted copies of dispute letters purportedly mailed to her medical creditors on the day she responded to the SOR, but failed to demonstrate any legitimate basis for the dispute since the debts were incurred during periods outside the times for which she documented her eligibility for Medicaid.

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct:

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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The conditions supported by this record are, ¶ 31(a) "a single serious crime or multiple lesser offenses;" and ¶ 31(c) "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted,

or convicted.” Applicant was arrested six times between 2001 and 2006 for Disorderly Conduct, Assault, and Criminal Mischief related to multiple incidents of domestic violence. None of these incidents was particularly serious, and some charges were later dismissed, but the pattern and recidivism, despite attending numerous domestic violence treatment programs, support significant concerns about her judgment and her ability or willingness to comply with laws, rules, and regulations.

AG ¶ 32 provides conditions that could mitigate criminal conduct security concerns. These are:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; and
- (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.

AG ¶¶ 32(a) and (b) provide minimal, if any, mitigation in this case. Applicant is no longer in relationships with the fathers of her first child, or her third and fourth children, who were the victims of her domestic violence offenses. There is no evidence she was pressured or coerced into those crimes, however. She has not had any such incidents with her husband to date, but the repeated crimes following court-ordered treatment and the relative recency of the last offenses preclude a finding that such conduct is unlikely to recur or that it does not cast doubt on her good judgment.

Applicant provided no evidence to corroborate her assertions that she was wrongly accused in some of these incidents, and her convictions after pleading guilty collaterally estop a finding that she did not commit those offenses. Accordingly, AG ¶ 32(c) does not provide substantial mitigation. Applicant did provide some evidence of a recent good employment record, and has not committed additional offenses during the past three years. She has thus proven some mitigation under AG ¶ 32(d). The weight of this evidence does not yet meet her burden of persuasion, however, when considered in light of the length and repetitive pattern of her offenses spanning multiple years, relationships, and treatment programs.

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 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 pertinent facts and circumstances surrounding this case. Applicant is a mature and experienced individual who is accountable for her choices. She incurred more than \$30,000 in delinquent debts over a six year period by spending more than she earned. Over the past two years, she claims to have more than \$36,000 per year in excess income over her living expenses, yet only resolved one small delinquent debt as a result of wage garnishment. She made no effective effort to arrange resolution of the remaining debts, however, demonstrating neither rehabilitation nor permanent behavioral changes. The potential for pressure or duress from her creditors leading to exploitation or misuse of sensitive information remains substantial. Her pattern of significant financial delinquency makes continuation or recurrence of financial irresponsibility more likely than not.

Her history and repetitive pattern of domestic violence offenses are similarly serious, frequent, and recent when viewed as a whole. She is now, apparently, in a better relationship with her husband and has begun to demonstrate rehabilitation. It is too soon, however, to reach a reasonable finding that the judgment and reliability issues raised by Applicant's financial and criminal history are sufficiently in the past to alleviate resulting trustworthiness concerns.

Overall, the record evidence leaves me with substantial doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant did not mitigate the trustworthiness concerns arising from her financial considerations and criminal conduct.

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.:	For Applicant
Subparagraph 1.b.:	Against 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
Subparagraph 1.i.:	Against Applicant
Subparagraph 1.j.:	Against Applicant
Subparagraph 1.k.:	Against Applicant
Subparagraph 1.l.:	Against Applicant
Subparagraph 1.m.:	Against Applicant
Subparagraph 1.n.:	Against Applicant
Subparagraph 1.o.:	Against Applicant
Subparagraph 1.p.:	Against Applicant

Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Subparagraph 2.b.:	Against Applicant
Subparagraph 2.c.:	Against Applicant
Subparagraph 2.d.:	Against Applicant
Subparagraph 2.e.:	Against Applicant
Subparagraph 2.f.:	Against Applicant

Conclusion

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

DAVID M. WHITE
Administrative Judge