



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



In the matter of:)
)
) ADP Case No. 08-03350
)
)
Applicant for Public Trust Position)

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: *Pro Se*

July 13, 2009

Decision

HEINY, Claude R., Administrative Judge:

Applicant has one unpaid judgment and 12 unpaid accounts, which have been charged off or have been placed for collection and total in excess of \$16,000. Applicant rebutted the personal conduct security concerns related to her answers on her Questionnaire for Public Trust Positions. However, she has failed to rebut or mitigate the government’s security concerns about her finances. Applicant’s eligibility for access to sensitive information and eligibility for a public trust position is denied.

Statement of the Case

On August 13, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing trustworthiness concerns under financial considerations and personal 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);

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 August 25, 2008, Applicant answered the SOR and requested a hearing. On March 10, 2009, I was assigned the case. On March 26, 2009, DOHA issued a notice of hearing scheduling the hearing which was held on April 21, 2009. The government offered Exhibits (Ex.) 1 through 5, which were admitted into evidence. Applicant testified and submitted Exhibits A through F, which were admitted into evidence.

The record was kept open to allow Applicant to submit additional matters. On April 28, 2009 and May 14, 2009, additional documents were received. There being no objection, the material was admitted into evidence as Ex. G and Ex. H. On April 29, 2009, the transcript (Tr.) was received.

Findings of Fact

In Applicant's Answer to the SOR, she denied the debts listed in SOR ¶¶ 1.a, 1.h, 1.i, 1.l, and 1.p. She also denied falsifying her Questionnaire for Public Trust Positions, SOR ¶¶ 2.a and 2.b. She admitted the remaining debts. Applicant's admissions to the SOR allegations are incorporated herein. After a thorough review of the record, pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 35-year old beneficiary service representative who has worked for a health care provider since April 2007, and is seeking to obtain a public trust position. A coworker and friend states that Applicant is efficient, competent, and maintains excellent rapport with people. Applicant's communication and customer service skills are excellent. (Ex. A) Applicant's December 2008 appraisal review states she is an outstanding employee and an asset to the company. (Ex. E)

Applicant is married and has two children, ages 13 and 18, and additionally is raising her sister's children, twins age four. (Tr. 34, 36) Day care for the four-year olds is \$360 per month. (Tr. 46) Prior to 1999, the jobs held by Applicant were temporary positions. (Tr. 27) In May 1999, she started what she described as a "solid" job. In December 1999, she, then age 23, and her husband purchased a home. (Tr. 32) She describes the purchase as "the worst thing I could have ever did because I wasn't really prepared for all what goes in it. I was young, dumb, basically, so we made a lot of mistakes." (Tr. 27, 32) They purchased the home for \$63,000 with \$624 monthly payments. In 2006, they sold the home.

In 2006, her husband joined the U.S. Army. From October 2006 until April 2007, Applicant was unemployed due to her relocation when her husband was transferred to his current duty assignment. (Tr. 35) In April 2007, she obtained her current job.

In September 2005, an \$11,554 judgment (SOR ¶ 1a) was entered against Applicant for payment of a water treatment program. In October 2006, when the home was sold, the water treatment judgment was paid and the judgment satisfied. (Ex. B, Ex. C) At the time of sale, the mortgage payments were delinquent. Applicant had been unaware of any judgments or liens on the house until settlement. (Tr. 37)

In April 2007, Applicant completed a Questionnaire for Public Trust Positions (SF 85P). Question 22(a) asked if she or a company over which she exercised some control had filed for bankruptcy, been subject to a tax lien, or had a judgment rendered against her. Applicant answered "no" because she did not own or have control over a company. (Tr. 33)

Question 22(b) asked if she was 180 days delinquent on any loan or financial obligation at the time she completed her questionnaire. She thought question 22(b) was connected to question 22(a) and did not see them as separate questions. (Tr. 33) She again marked "no" because she did not own or control a company. She asserted she marked the question wrong. At the hearing, Applicant admitted she had debts more than 180 days delinquent when her SF 85P was completed. (Answer to SOR)

In May 2008, Applicant answered written interrogatories concerning her judgments and delinquent accounts. (Ex. 2) She asserted the judgment listed in SOR ¶ 1.a (\$11,554) was paid when she sold her home. She stated she had made no payments on the following accounts: \$2,849 judgment (SOR ¶ 1.b); \$15,057 repossession (SOR ¶ 1.c); \$304 telephone bill (SOR ¶ 1.e); \$368 bank account placed for collection (SOR ¶ 1.f); three medical bills placed for collection in the amounts of \$265 (SOR ¶ 1.i), \$141 (SOR ¶ 1.h), \$50 (SOR ¶ 1.j); \$78 water bill placed for collection (SOR ¶ 1.m); \$212 returned check placed for collection (SOR ¶ 1.n); \$60 returned check placed for collection (SOR ¶ 1.o); and \$264 telephone service account placed for collection (SOR ¶ 1.p). (Ex. 2)

In her May 2008 answer to interrogatories, Applicant stated she had two interviews concerning her debts. She has worked in the same field for nine years and her prior employer was another government medical program. (Ex. 2)

Following the hearing, Applicant attempted to contact a number of her creditors to verify her obligations, but has been unable to verify the debts. (Ex. G). She contacted the following creditors: the collection agency collecting for a past due water bill (SOR ¶ 1.m, \$78); charged off bank account (SOR ¶ 1.d, \$1,049); collection agency collecting for account placed for collection (SOR ¶ 1.g, \$203); telephone bill (SOR ¶ 1.e, \$304); bank account placed for collection (SOR ¶ 1.f, \$368); and a vacuum cleaner judgment (SOR ¶ 1.b, \$2,849). (Ex. G) Of these creditors, the only payment made was \$85 to the collection agency collecting a past due water bill (SOR ¶ 1.m, \$78). (Ex. H)

Applicant's salary is \$900 every two weeks. (Tr. 42) Her husband's monthly take home pay is \$1,200. (Tr. 42) Their combined monthly gross income is \$3,000. Applicant would like to pay her creditors. (Tr. 32) She acknowledges some of the debts are not

large. She has attended some financial classes. (Tr. 33) She now checks her credit report annually. Lately, she has not had any checks returned for insufficient funds. (Tr. 48) She is current on all of her debts except those listed in the SOR and is not being contacted by creditors about her debts. (Tr. 34) She is working on establishing a monthly budget. She has \$85 automatically deducted from per pay check which goes to her 401(k) retirement fund. (Tr. 47) She has no savings.

A current summary of her debts follows:

	Creditor	Amount	Current Status
a	Judgment for water treatment.	\$11,554	Paid. (Ex. B, Ex. C)
b	Judgment on a vaccum cleaner debt. (Tr. 29)	\$2,849	Unpaid. Following the hearing, Applicant was unable to locate the creditor. (Ex. G)
c	Amount due following an involuntary repossession.	\$10,299	Unpaid. The van, purchased in November 2006 was returned in August/September 2007. (Tr. 30) Applicant's last contact with this creditor had been in 2007. (Tr. 38, 41)
d	A charged-off bank debt.	\$1,049	Unpaid. Applicant's last contact with this creditor had been in 2005. (Tr. 39) Following the hearing, Applicant obtained an address where to send payment. (Ex. G) There is no evidence payment was sent or received.
e	Telephone service account placed for collection.	\$304	Unpaid. Following the hearing, Applicant contacted the creditor in an attempt to determine who has the account. (Ex. G) Applicant's last contact with this creditor was in 2006. (Tr. 39)
f	A bank debt placed for collection.	\$368	Unpaid. At the hearing, Applicant was uncertain of this creditor or debt. Last contact with creditor was in February 2006. (Tr. 40) Following the hearing, Applicant attempted to contact the creditor, but has been unable to verify the debt. (Ex. G)
g	Collection agency collecting for a former catalog retailer, now an online retailer.	\$203	Unpaid. Applicant's last contact with creditor was in 2000. (Tr. 40) Following the hearing, Applicant has obtained the creditor's fax number, but has not been able to make contact. (Ex. G)

h	Medical account placed for collection.	\$141	Unpaid. Applicant denies this debt. She states she knows nothing about this medical debt or the following two medical debts. (Tr. 31)
i	Medical account placed for collection.	\$265	Unpaid.
j	Medical account placed for collection.	\$50	Unpaid. Applicant states this might be a co-payment on a medical bill.
k	Past due amount owed on debt to buy a car. (Tr. 31)	\$583	Unpaid. Last contact with creditor was in 2007. (Tr. 41) Applicant asserts creditor does not answer calls.
l	Past due amount owed creditor in SOR ¶ 1.a.	\$974	Paid when home was sold.
m	Collection agency collecting for a water bill.	\$78	Paid. Applicant states she paid \$85 on this debt by credit card and she would receive proof of payment within 15 days of paying this bill. (Ex. G, Ex. H) No evidence of payment has been provided.
n	Returned check.	\$212	Unpaid.
o	Returned check.	\$60	Unpaid. Applicant uncertain of this debt. (Tr. 32)
p	Collection agency collecting for a telephone provider.	\$264	Unpaid. Applicant disputes the amount claimed, but acknowledges she owes some amount. (Tr. 32) Applicant's last contact with creditor was in 2005. (Tr. 42)
	Total SOR debt listed.	\$29,253	

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 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.

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

Revised Adjudicative Guideline (AG) ¶ 18 articulates the trustworthiness concerns relating to financial problems:

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 overextended is at risk of having to engage in illegal acts to generate funds.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding sensitive information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with her creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed upon terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a public trust position. An applicant is not required to be debt free, but is required to manage her finances so as to meet her financial obligations.

The record evidence supports a conclusion Applicant has a history of financial problems. Applicant has one unpaid judgment and 12 unpaid accounts which were charged-off or placed for collection, which total in excess of \$16,000. Ten of the debts are under \$400 each, which together total less than \$2,000. Disqualifying Conditions AG ¶ 19(a), "inability or unwillingness to satisfy debts" and AG ¶19(c), "a history of not meeting financial obligations," apply.

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20(a) – (e) are potentially applicable:

(a) 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;

(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;

(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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;

(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.

In 2006, when Applicant sold her home, the judgment listed in SOR ¶ 1.a (\$11,554) and the past due amount owed on this account (SOR ¶ 1.l, \$974) were paid. Following the hearing, Applicant paid the debt listed in SOR ¶ 1.m, (\$78). The remaining judgment and 12 accounts, which have been charged off or placed for collection, remain unpaid. She had not contacted a number of these creditors for years.

AG ¶ 20(a) does not apply. The debts are numerous and remain unpaid. The debts do not appear to have been incurred under unusual circumstances or circumstances that are unlikely to recur.

AG ¶ 20(b) partially applies. Applicant experienced periods of unemployment. She was unemployed for six months before obtaining her current job in April 2007. Applicant has been employed full-time for more than two years. Her husband has been employed full-time since 2006. She has been aware of the government's concern over her finances since May 2008 when she received the written interrogatories. In the past year, she has been able to pay one \$78 debt. She has not acted reasonably under the circumstances.

AG ¶ 20(c) does not apply. Applicant has received counseling and is current on her debts other than those listed in the SOR. However, she has more than \$16,000 in unpaid obligations. There are no clear indications that the problem is being resolved or is under control.

AG ¶ 20(d) applies to the two debts paid with the sale of her home in 2006 and the small debt paid following the hearing. The payment of these three debts represents a good-faith effort to repay these overdue creditors or otherwise resolve these debts.

Applicant disputes the amount of debt listed in SOR ¶ 1.p (\$264), but acknowledges she owes the creditor some amount. Applicant stated she had last contacted this creditor in 2005. For AG ¶ 20(e) to apply there must be a reasonable basis to dispute the debt and there must be documented proof to substantiate the basis of the dispute. There is no documentation showing Applicant has disputed the debt with the creditor. AG ¶ 20(e) does not apply.

Personal Conduct

The Government has shown Applicant's answers to questions 22(a) and 22(b) on her SF 85P were incorrect, but this does not prove Applicant deliberately failed to disclose information about her finances. Applicant denied any intentional falsification. Deliberate omission, concealment, or falsification of a material fact in any written

document or oral statement to the Government, when applying for a public trust position, is a security concern. But every inaccurate statement is not a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully.

At the hearing, Applicant impressed me as somewhat unsophisticated in financial matters. She testified she thought the questions related to her as exercising control over a company and so she answered “no” to the questions. Having observed Applicant’s demeanor and listened to her testimony, Applicant’s explanation of her negative answers on her SF 85P is plausible and credible. Her answers were not deliberate omissions, concealments, or falsifications.

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.

Applicant has been able to keep up with her current debts, but has been unable to address past due debts totaling in excess of \$16,000. Applicant and her husband appear to be living paycheck to paycheck, with limited reserve funds for emergencies or temporary periods of unemployment.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to justify the award of a public trust position. The awarding of eligibility for a public trust position is not a once in a lifetime occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under the Applicant’s current circumstances a position of public trust is not clearly consistent with national security, but should the Applicant be afforded an opportunity to reapply for a public trust position in the future, having paid the delinquent obligations, established compliance with a repayment plan,

or otherwise addressed the obligations, she may well demonstrate persuasive evidence of her eligibility for a public trust position.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from her financial considerations.

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, Financial Considerations: **AGAINST APPLICANT**

Subparagraph 1.a:	For Applicant
Subparagraphs 1.b – 1.k:	Against Applicant
Subparagraphs 1.l and 1.m:	For Applicant
Subparagraphs 1.n – 1.p:	Against Applicant

Paragraph 2, Personal Conduct: **FOR APPLICANT**

Subparagraphs 2.a and 2.b:	For Applicant
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Conclusion

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

CLAUDE R. HEINY II
Administrative Judge