



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



In the matter of:)	
)	
-----)	ADP Case No. 08-03447
SSN: -----)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Richard A Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

June 23, 2009

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant submitted Questionnaires for Public Trust Position (SF 85P), dated August 21 2007 and amended on September 11, 2007. On October 17, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns regarding Applicant arising under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), 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.

In an undated response, Applicant answered the SOR. She admitted 5 of 10 allegations under Guideline F and declined to address the single allegation raised under Guideline E. She also requested a hearing before an Administrative Judge. DOHA received the request and assigned the case to me on March 4, 2009. Applicant and

Department Counsel agreed to an April 1, 2009, hearing date. On March 16, 2009, a Notice of Hearing was issued scheduling the hearing for that date. The hearing was convened as scheduled. Department Counsel submitted four documents, admitted as Exhibits (Exs.) A-D without objection. Applicant introduced no exhibits, but gave testimony. Applicant was given through April 16, 2009, to submit any documents for consideration. An extension was later provided through April 22, 2009. The transcript (Tr.) was received on April 15, 2009. Applicant's attempt to send materials by facsimile transmission was unsuccessful on April 20, 2009 due to an erroneous contact number, but Department Counsel ultimately received it on April 27, 2009. Noting no objections, Department Counsel forwarded two submissions that same day. I received the submissions on April 28, 2009, and they were accepted into the record as Exs. 1-2. The record was then closed. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

Procedural and Evidentiary Rulings

Notice and Amendment of SOR

At the hearing, it was unclear as to when Applicant received the Notice of Hearing. I advised Applicant of her right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant effectively waived her right to 15 days notice.¹ Additionally, Department Counsel moved to amend ¶ 2.a of the SOR to conform to the evidence. Without objection, that allegation was amended to read, in part: "You falsified material facts on a questionnaire for public trust positions executed by you on or about August 21, 2007, *and later amended by you on September 11, 2007. . . .*" (Amended language in italics).

Findings of Fact

Applicant is a 39-year-old operational clerk working for a defense contractor. She has worked for her current employer since the summer of 2007. Applicant completed high school and completed two years of post-secondary education. Currently separated from her husband, she has three teenage children.

From December 1999 through February 2002, Applicant worked as a machine operator. In February 2002, she was laid off, commencing a year of unemployment. After several months of unemployment, she pursued college courses to prepare her for alternative employment. During her unemployment period, the couple subsisted solely on her husband's earnings.² It was during this time Applicant acquired much of the delinquent debt at issue.

At issue are the following debts, as noted in the October 17, 2008, SOR as allegations ¶¶ 1.a through 1.j.

¹ Tr. 8.

² Tr. 20.

1.a – **Medical Debt** (\$146) – UNPAID – Applicant admits this account remains delinquent.³ This amount represents a co-pay incurred by Applicant for dental work performed between 1999 and 2002.

1.b – **Auto Repossession** (\$10,760) – UNPAID – Applicant denies this allegation. She purchased a 1998 vehicle for about \$16,000 which was voluntarily repossessed sometime around late 2002. She testified that she paid the balance down to about \$10,000 at the time of repossession and that the auto was to be auctioned, but Applicant offered no evidence to substantiate these assertions.⁴

1.c – **Financial Loan** (\$3,346) – UNPAID – Applicant denies this allegation, which was charged off as bad debt in 2002. The loan originated in 2000 as a \$600 loan for vehicle repairs. It was renewed with a high credit noted as \$684 before she was laid off in late 2002.⁵ Interest and fees have increased the balance owed considerably.

1.d – **Bank Debt** (\$2533.45) – IN DISPUTE – Applicant denies this allegation, which was referred for collection around March 2003. Applicant disputed this account with TransUnion and/or Experian.⁶

1.e – **Utility Bill** (\$676) – UNPAID – Applicant denies this allegation, stating the account belongs to her estranged husband.⁷ No evidence to that effect was introduced.

1.f – **Communications Bill** (\$175) – UNPAID – Applicant denies this allegation, noting she has no recollection of using this service provider.⁸

1.g – **Communications Bill** (\$488) – UNPAID – Applicant admits this allegation and acknowledges the balance owed.⁹

1.h – **Medical Debt** (\$600) – PAID – Applicant admits this allegation, regarding a debt incurred for medical treatment after a car accident between 2003 and 2005.¹⁰ Applicant provided evidence that her balance was paid and currently has a zero balance.¹¹

³ Tr. 22-23.

⁴ Tr. 23-25.

⁵ Tr. 26; Ex. D (Credit report, dated Aug. 8, 2009).

⁶ Tr. 28; Ex. C (Credit report, dated Sep. 18, 2007).

⁷ Tr. 28-30.

⁸ Tr. 34-35.

⁹ Tr. 35-36.

¹⁰ Tr. 37.

¹¹ Ex. 2 (Hospital statements).

1.i – **Credit Card** (\$1,369) – UNPAID – Applicant admits this allegation, noting it was a card kept on hand between about 1998 and 1992 for the purchase of larger items.¹²

1.j – **Bank Financed Purchase** (\$292) – UNPAID – Applicant admits this allegation, noting that it was incurred in the purchase of a correspondence course designed to learn new skills.¹³ She was unaware the course would continue to bill her account after receipt of its initial mailings.¹⁴

On August 21, 2007, Applicant completed and certified her SF-85P. On September 11, 2007, her employer’s human resources staff returned it to her to amend an answer.¹⁵ Specifically, she scratched out her “Yes” designation in favor of an answer of “No” regarding Question 22(b) (“Are you now over 180 days delinquent on any loan or obligation? Include loans or obligations funded or guaranteed by the Federal Government”). She changed her answer because “when [she] read it, [she] didn’t understand it at the time. . . . – – it seemed like a tricky question to [her].”¹⁶ She was confused by the reference to “obligations funded or guaranteed by the Federal Government” and did not equate her past due bills with the “delinquent” loans and obligations referenced.¹⁷ This belief was apparently reinforced by the fact she received few calls or letters regarding her past due accounts.¹⁸

Currently separated from her husband, Applicant’s 18-year-old child lives with her. The two younger children reside in another town with Applicant’s mother. They remained with their grandmother so they did not have to change school when Applicant moved. When she can, she sends her mother money for their care.¹⁹ Applicant’s husband provides no financial assistance, but buys things for the children at times.²⁰

Applicant drives a truck, which she purchased last year and has approximately 157,000 miles on its odometer. It is currently not insured. She lives in a house she bought last year for about \$69,000, on which she pays a mortgage of about \$500 a month. She spends about \$250 on utilities, \$200 on groceries, and \$80 on gasoline per month. She does not have a cell phone. She now earns \$8.75 an hour, making about

¹² Tr. 37-38.

¹³ Tr. 38.

¹⁴ Tr. 39.

¹⁵ Tr. 42.

¹⁶ Tr. 41.

¹⁷ Tr. 42-43.

¹⁸ Tr. 43-44.

¹⁹ Tr. 45.

²⁰ Tr. 46.

\$17,000 per year. She has a net monthly income of about \$1,100. She is not eligible for overtime pay. Although not at issue in the SOR, the student loans incurred while Applicant returned to school in the 2002-2003 period have been repaid in full.²¹

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 a position of trust enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal

²¹ Ex. 1 (Student loan statement).

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 delinquent debt, mostly between 2002 and 2003 while unemployed. Thus far she has been unable to pay most of her delinquent obligations. The evidence is sufficient to raise these potentially disqualifying conditions.

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.” Most of Applicant’s debts became delinquent around the time of her 2002-2003 period of unemployment. While it is clear that it is an inability, not an unwillingness, to pay her debts, the fact remains progress has only been made on 2 of 10 obligations. Consequently, this mitigating condition does not apply.

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.” Inasmuch as the majority of debts at issue became delinquent during Applicant’s period of unemployment or shortly thereafter, this mitigating condition applies and is a factor for consideration.

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), but Applicant introduced no evidence that she has received such counseling or that any professionals have aided her in addressing her delinquent debt. She has, however, formally disputed one account at issue, paid her medical bill, and repaid her student loans. Therefore, AG ¶ 20(d), “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts,” applies to a limited extent.

Guideline E, Personal Conduct

The trustworthiness concern relating to the guideline for Personal Conduct is set out in AG ¶ 15: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. Here, Applicant initially indicated she had obligations delinquent over 180 days, then scratched out her affirmative answer in favor of a “No.” She credibly testified that, upon reflection, she was confused by the terms used to define past due bills (delinquent loans and financial obligations), especially as it is followed directly by the instruction to “(i)nclude obligations funded or guaranteed by the Federal Government.” While the question seems relatively straightforward, it could be honestly misconstrued, particularly by someone financially unsavvy, an individual instructed to change her answer as a corrective measure, or one suspicious of the “tricky” application. For example, the mandate to “Include loans or obligations funded or guaranteed by the Federal Government” could be read to specifically depict the type of loans and obligations to be noted on the application to the exclusion of any other type of debt. Similarly, a failure to equate past due bills with financial obligations could result in an incorrect answer.

Applicant’s own direct testimony and that elicited by Department Counsel demonstrate her discomfort with regard to financial terminology. Given her credible testimony throughout the proceeding, there is no indication of falsity. Having reviewed the potentially disqualifying conditions under this guideline, I find that consideration of this issue is best reserved for analysis under the “Whole Person” concept.

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 facts and circumstances surrounding this case. Applicant is a mature woman who has raised three children, pursued higher education, and struggled to maintain a household without financial assistance from her estranged husband. She is also a woman who endured a protracted period of unemployment after being laid off. During that 2002-2003 period of unemployment, she acquired some new debt and older debt became delinquent.

In her favor, Applicant is a modest woman who lives simply and without extravagance. Her income, too, is modest. She paid one medical debt and formally disputed one obligation. She also satisfied her student loan obligation. Regardless, she has made little progress on her remaining delinquent debts over the past six to seven years. A debt for \$175 she does not recognize has neither been disputed or addressed. Another obligation for \$292 is acknowledged, but remains unpaid. A loan in the \$600-range has grown to an unwieldy balance in excess of \$3,500, while no inquiries have been made with regard to a repossessed automobile. There is no evidence she has tried to settle, consolidate, or repay any of the larger delinquent debts. Overall, the record evidence leaves questions and doubts unresolved with regard to Applicant's financial condition. As noted above, 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." Consequently, I conclude Applicant failed to meet her burden and mitigate the trustworthiness concerns arising from her finances. Access is denied.

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:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant

Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For 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.

ARTHUR E. MARSHALL, JR.
Administrative Judge