



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



In the matter of:

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SSN: -----

Applicant for Public Trust Position

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ADP Case No. 08-03995

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

April 16, 2009

Decision

WHITE, David M., Administrative Judge:

Applicant has four delinquent student loans and three other small delinquent debts resulting from about a year of unemployment. She is following a loan rehabilitation repayment agreement, will pay the other debts from her tax refund, and is living within her means. Based upon a thorough review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is granted.

Applicant submitted her Public Trust Position Application (SF 85P), on January 22, 2008. On August 13, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F. 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 Regulation 5200.2-R, *Personnel Security Program*, dated January 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 (DoD) for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on August 20, 2008. She answered the SOR in writing on September 8, 2008, and requested a decision without a hearing before an administrative judge. Department Counsel requested a hearing pursuant to Directive ¶ E3.1.7, on December 11, 2008, and was ready to proceed on December 17, 2008. DOHA assigned the case to me on December 18, 2008.

DOHA issued a notice of hearing on December 19, 2008, and I convened the hearing as scheduled on January 9, 2009. Department Counsel offered Government Exhibits (GE) 1 through 6, which were admitted without objection. Applicant testified on her own behalf, and offered Applicant's Exhibits (AE) A through C, which were also admitted without objection. DOHA received the transcript of the hearing (Tr.) on January 26, 2009.

Findings of Fact

Applicant is a 25-year-old employee of a federal contractor, where she has worked for more than a year as a customer service representative. She is a single mother of a 3-year-old daughter. In her answer to the SOR, she admitted to all of the allegations in SOR ¶¶ 1.a through 1.g, describing seven delinquent debts totaling \$13,254. Four of these debts, totaling \$11,382, involved student loans. Those admissions are incorporated in the following findings.

Applicant took out the student loans to pay costs associated with earning her Associate's degree from a business college while also working to support herself after high school. Shortly after earning her degree, she experienced an unplanned pregnancy and had to stop working for almost a year after her daughter was born. She then started working again, but had to leave that job after a year due to missing work to care for her daughter. She began her present job in January 2008. She has a good child-care arrangement now, and has been very successful at work, earning two promotions and anticipating another one in the near future. She is engaged to marry the father of her daughter, and he provides some assistance toward paying their \$400 per month in child-care expenses. (Tr. at 35-38, 46-47, 53-55.)

In November 2007, around the time she lost her last job, Applicant and her daughter moved into a bedroom that she rents for \$400 per month from her fiancé's mother in order to reduce living expenses. Other than the four student loans, Applicant's only delinquent debts are two relatively small cell phone bills dating from May 2005 (\$165) and July 2006 (\$321), and a \$1,386 debt to a jewelry store. This latter loan was for her engagement ring, and was charged off by the creditor in August 2006, toward the end of her year-long unemployment period. She was unaware of the residual telephone debts until asked about them in connection with her security investigation. She has confirmed owing these debts, and her intention is to repay them upon receipt of her income tax refund. (GE 1 at 1, 2; GE 3 at 7; GE 4 at 4; Tr. at 36-39.)

Applicant entered a student loan rehabilitation agreement with the company assigned to collect those loans in August 2008. Under the agreement, she has been

paying \$170 per month via direct debits from her bank account, and the loans will return to current status in June 2009. She also purchased a used car in July 2008, and will finish paying off that purchase loan with her April 2009 monthly \$306 payment. She pays \$91 per month in auto insurance. Her net take-home pay is \$900 every two weeks, which averages \$1,950 per month. Deducting her rent, child-care, car loan, insurance costs, and loan rehabilitation payments leaves her with about \$590 for food, clothing, gas, utilities, medical and other miscellaneous expenses. She is able to live without incurring further debt on this budget, and is on track to repay her existing debts. (AE C; GE 6 at 2; GE 3 at 7; Tr. at 41-44, 50-51.)

Applicant testified credibly and convincingly that she never intends to incur delinquent debt again, and will continue the responsible budgeting and spending pattern she has followed over the past year and a half. Her excellent performance at work has demonstrated her integrity and trustworthiness around sensitive information. She also highly values her present employment opportunity, is very aware of security issues and requirements, and understands that future financial responsibility will be required. (AE A; AE B; Tr. at 27, 31-32, 43-44.)

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 the applicant or proven by Department Counsel.” The applicant 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 “Any 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

AG ¶ 18 expresses the security 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.

AG ¶ 19 describes conditions that could raise a security concern and may be disqualifying. Department Counsel argued that the evidence raised three of these potentially disqualifying conditions: “(a) inability or unwillingness to satisfy debts;” “(b)

indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt;" and "(c) a history of not meeting financial obligations." There was neither any allegation nor proof of compulsive, addictive, or problem gambling. Nor was there any evidence of drug abuse, alcoholism, tax evasion, or illegal financial practices.

Applicant went through two periods, totaling about a year during her daughter's infancy, when she was out of work in order to care for her. As a result, she was unable to remain current on her student loan payments, and also fell behind on three other bills totaling \$1,872. She changed her living arrangements to minimize expenses and ensure that her income could cover those expenses going forward. She has always been willing and intended to satisfy her debts, but was temporarily unable to do so because of some unemployment. When she resumed working, her income was sufficient to avoid new debts but too low to afford substantial debt repayments. She has since followed an agreed program with her student loan creditor to bring those loans back into current status by May 2009, and will repay the three small debts out of her income tax refund. AG ¶ 19(a) no longer applies to Applicant, leaving only potential concerns under AG ¶¶ 19(b) or (c). There is no evidence of frivolous or irresponsible spending, and she demonstrated her intent to repay existing debts, so AG ¶ 19(b) was not established. Only if her history of not meeting financial obligations indicates current poor self-control, lack of judgment, or unwillingness to abide by rules and regulations should that history support present security concerns under AG ¶ 19(c). Since the circumstances giving rise to those debts no longer exist, and she has arranged to resolve them, such concerns are minimal.

AG ¶ 20 provides conditions that could mitigate security concerns arising from a history of unpaid debt. Since Applicant did not dispute the legitimacy of any SOR-listed debt, the four potentially pertinent conditions are:

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

Applicant's delinquent debts arose relatively recently, but were the result of her unemployment following an unplanned pregnancy. Her daughter is now old enough to be doing well in child-care, and Applicant's performance in her current employment has been excellent for over a year. She has taken all possible measures to minimize her regular living expenses and maintained gainful employment to remain self-supporting. She has been making regular payments under her student loan rehabilitation agreement since August 2008, and those loans will return to current status in a few months. These actions by Applicant establish mitigation under AG ¶ 20(a), since the debts arose under circumstances that have changed, and are unlikely to recur. She has incurred no newly delinquent debt for several years, reflecting her good judgment and trustworthiness.

Applicant had to stop working for almost a year after becoming a mother, and fell behind on non-essential expenses. She resumed work as soon as she could, and has arranged to resolve her delinquent debts. She accordingly established mitigation under AG ¶ 20(b). She has regularly made student loan rehabilitation payments under an agreement with the creditor, and will pay off her other three delinquent debts with her income tax refund. This establishes substantial additional mitigation and resolves remaining security concern under AG ¶ 20(d).

As the Appeal Board recently ruled:

In evaluating Guideline F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts." See, e.g., ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 2007). However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. See, e.g., ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). All that is required is that an applicant demonstrate that he has " . . . established a plan to resolve his financial problems and taken significant actions to implement that plan." See, e.g., ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) ("Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.") There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008).

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's conduct of potential concern involves her delinquent student loans and three other relatively small debts for which she accepted responsibility. She made difficult but mature and responsible choices to resume working and change her living arrangements to remain within her means while recovering from her temporary unemployment.

Applicant has reasonable and achievable plans to resolve these debts in the near future. There is little likelihood of recurrence of this problem, based on her actions to minimize living expenses and arrange repayment of her current delinquencies. She has alleviated the potential for pressure, coercion, exploitation or duress from her financial situation by arranging repayment. Her enthusiastic desire to maintain eligibility for her present job provides very strong motivation for continued responsibility.

On balance, Applicant presented sufficient evidence to fully mitigate reliability and trustworthiness concerns arising from her failure to satisfy some of her debts, and history of not meeting financial obligations. Overall, the record evidence leaves no doubts as to Applicant's present eligibility and suitability for a public trust position. For all these reasons, Applicant has 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, Guideline F:

FOR APPLICANT

Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for access to ADP I/II/III sensitive information is granted.

DAVID M. WHITE
Administrative Judge