



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



In the matter of:)	
)	
)	ADP Case No. 08-04999
SSN:)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Paul M. DeLaney, Esquire, Department Counsel
For Applicant: *Pro Se*

June 22, 2009

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to sensitive information is denied.

Applicant submitted her Questionnaires for Public Trust Position (SF 85P), on April 13, 2007. On October 28, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guidelines F and E for Applicant. 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.

Applicant acknowledged receipt of the SOR on October 30, 2008. She submitted a notarized, written response to the SOR allegations on November 16, 2008, and requested a decision on the written record in lieu of a hearing.

Department Counsel prepared a File of Relevant Material (FORM) and mailed Applicant a complete copy on March 24, 2009. Applicant received the FORM on March 30, 2009. She had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. She did not submit a response or additional evidence. DOHA assigned this case to me on June 11, 2009. The government submitted 11 exhibits, which have been marked as Item 1-11 and admitted into the record. Applicant's response to the SOR has been marked and admitted as Item 4.

Findings of Fact

In her Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a through 1.kk and 1.mm through 1.oo of the SOR. She denied the factual allegations in ¶¶ 1.ll and 2.a of the SOR.

Applicant, who is 31 years old, works as a claims analyst for a Department of Defense contractor, a position she has held for two years. She graduated from high school in 1997. She married in 1998 and separated in 2004. She has three children, ages 12, 9 and 5, who live with her.¹

Following her separation, Applicant worked less than full time at one job and had significant periods of unemployment until April 2007, when she obtained her present employment. She also lacked health insurance for several years. Her parents provided financial support during this period of time.²

In February 2002, Applicant and her then husband filed for Chapter 13 Bankruptcy protection. Their bankruptcy debts included the debts listed SOR allegations 1.b, 1.c, 1.d, and 1.ee (mortgage). The bankruptcy records reflect that payments, totaling \$730, were made on two accounts with the creditor in allegation 1.d. and payments were made to the creditor in 1.ee. Payments are not shown for the two remaining debts. The court dismissed the bankruptcy action in August 2005 after Applicant's husband stopped making the required payments.³

The SOR lists 17 debts, totaling \$3,557, for medical bills with the local governmental authority. Applicant indicates that her state income taxes are garnished each year to pay these debts. She has not provided documentation which supports her

¹Item 5, Item 6.

²*Id.*

³Item 10.

statements. Applicant incurred these debts between 2001 and 2003. She also incurred three other medical debts, totaling \$910, in the same period of time.⁴

Applicant incurred five other unpaid medical bills, totaling \$1,009, between 2005 and 2007. With the exception of the mortgage foreclosure and the debt in allegation 1.d, Applicant incurred additional unpaid debts totaling \$5,885 between 2001 and December 2006. During the investigative interview, Applicant indicated she reached a settlement with the creditor in allegation 1.aa. She agreed to pay \$25 a month and anticipated the debt would be paid by early 2008. She has not provided proof of this payment plan and her compliance.⁵

Applicant and her husband defaulted on their mortgage after they separated. Applicant does not know if the property was sold at foreclosure or the current status of the property. She paid her mortgage during the bankruptcy. She has not provided further documentation about this debt.⁶

Applicant states that her financial situation is much improved. The most recent credit report indicates that in the last 15 months, she has not incurred new unpaid debts and that since about 2006, her unpaid debt accumulation has slowed considerably. She has not provided documentation showing her current income and expenses nor has she prepared and submitted a budget.⁷

When she completed her SF-85P, Applicant answered “no” to the following question:

Question 22: Your financial Record

b. Are you now over 180 days delinquent on any loan or financial obligation? Include loans or obligations funded or guaranteed by the federal government,

Applicant denies intentional falsification of her answer. She listed her 2002 bankruptcy filing in response to Question 22, subpart a. She also indicated that she had not received any bills from creditors.⁸

⁴Item 1; Item 6; Item 7; Item 8; Item 9.

⁵*Id.*

⁶Item 6; Item 8; Item 10.

⁷Item 7; Item 8; Item 9.

⁸Item 4; Item 5; Item 6.

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 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

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 significant delinquent debt during her marriage and has been unable to pay these obligations. The evidence is sufficient to raise these disqualifying conditions, requiring a closer examination.

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.” Applicant’s financial worries arose during her marriage and resulted in a Chapter 13 bankruptcy filing. She and her husband made payments under the wage earners plan for a period of time, but then stopped. Applicant and her husband are no longer together and her finances appear to be improving. Even with these facts, I do not find this mitigating condition applicable because her financial problems did not arise under unusual circumstances.

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. As noted above, Applicant’s financial problems arose during her marriage and increased once she and her husband separated. She had erratic employment for several years and no medical insurance. There is no indication her husband provides her with financial support or is

helping to resolve these debts. Her current finances are managed, but her past debts are still unpaid. I find this mitigating condition has some applicability 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). Similarly, AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Applicant has not received financial counseling nor has she provided evidence that these debts are resolved. Her current bills are being paid, but not her past bills. These mitigating conditions are not applicable. Likewise, AG ¶¶ 20(e) and 20(f) are not applicable as Applicant has not challenged the validity of her debts with the creditors or received a sudden influx of income.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16(a) describes conditions that could raise a security concern and may be disqualifying:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

For AG ¶ 16(A) to apply, Applicant's omission must be deliberate. The government established that Applicant omitted a material fact from her SF-85P when she answered “no” to Question 22b about past due debts. This information is material to the evaluation of Applicant's trustworthiness to hold a security clearance and to her honesty. In her response to the FORM, she denies, however, that she had an intent to hide information about past finances. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.⁹ For DC ¶ 16 (a) to apply, the

⁹See ISCR Case No. 03-09483 at 4 (App. Bd. Nov.17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

government must establish that Applicant's omission, concealment or falsification in his answer was deliberate.

When she completed her SF-85P, Applicant listed her 2002 bankruptcy filing, which indicated a past debt problem. She denied any other old debts because she had not received any bills from her old creditors. Based on this information, the government has not established Applicant had an intent to conceal financial information. Guideline E is found in favor of Applicant.¹⁰

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) 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 married very young. She and her husband quickly incurred significant debts. They filed for Chapter 13 bankruptcy protection and participated in the wage earners repayment plan for a period of time. They, however, did not complete the repayment plan. Many of the debts listed in the SOR are for medical treatment and are not included in the bankruptcy action. Following her separation, Applicant encountered difficulty in finding employment. She worked sporadically and relied on her parents to provide financial support until she finally obtained steady employment in 2007. She has managed to pay her current bills, but has not provided any proof that she has resolved any of the debts listed in the SOR. Without a financial statement, I am unable to determine if she has sufficient additional

¹⁰Even if I were to find the government had established disqualifying condition AG ¶ 16(a), mitigating condition AG 18(f), *the information was unsubstantiated or from a source of questionable reliability* would apply as the allegation of intentional falsification was unsubstantiated.

income to pay her debts as she has three children to raise. In light of the information on her SF-85P, she has not intentionally falsified her trustworthiness application.¹¹

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 trustworthiness concerns arising from her financial considerations, but has mitigated trustworthiness concerns related to her personal 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 -1.00:	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.

MARY E. HENRY
Administrative Judge

¹¹I note that the debts listed in SOR allegations 1.a through 1.gg are barred from collection under state law. Because Applicant continued to incur unpaid debt until January 2008, she has shown a pattern of poor debt payment for a long period of time, not just a window of time.