



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



In the matter of:)
)
) ADP Case No. 08-05959
)
)
Applicant for Public Trust Position)

Appearances

For Government: Francisco Menedez, Esquire, Department Counsel
For Applicant: *Pro Se*

June 15, 2009

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline F, Financial Considerations. Applicant’s eligibility for access to sensitive information is denied.

On February 27, 2009 the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F for Applicant. 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.

Applicant answered the SOR in writing March 20, 2009, and requested a hearing before an Administrative Judge. I was assigned the case on May 7, 2009. Applicant was notified by email on May 18, 2009 that her hearing was scheduled for June 3, 2009 by

video-teleconference. DOHA issued a formal Notice of Hearing on May 21, 2009, and I convened the hearing on the scheduled date. Applicant affirmed receipt of the email notice and was ready to proceed, waiving any potential delay. The Government offered Exhibits (GE) 1 through 9, which were admitted without objection. Applicant testified on her own behalf and offered Exhibits (AE) A through L, which were admitted without objection.¹ DOHA received the transcript of the hearing (Tr.) on June 11, 2009.

Findings of Fact

In her Answer to the SOR Applicant admitted the factual allegations in SOR ¶¶ 1.e, 1.h, 1.i, and 1.j and denied the remaining allegations. Her admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 38 years old and works for a federal contractor in administrative support. She married in 2005 and her husband is in the military. They have no children, but she has a six-year-old stepdaughter. Applicant earned a Bachelor of Science degree in 1994 and a master of business administration in 2000.²

Applicant has accumulated approximately \$30,770 in delinquent debts. She accumulated approximately \$200,000 in student loan debt that she stated was either deferred or in forbearance. She has only made some small payments towards the interest of these debts sometime between 2000 and 2003. A couple of months ago she made another request for forbearance that extends to approximately August or September of 2009. She believes her monthly payment will be more than \$1,000 a month. She plans on using her income to pay this debt. The debts listed in SOR ¶¶ 1.e (\$5,846), 1.f (\$6,023) and 1.g (\$5,761) are student loan debts that are alleged to be in collection status that Applicant stated are now in forbearance. It is difficult to determine what the current status of these debts are as the credit report has contradictory information, showing both deferral and collection. In any event, Applicant did not provide documentation to confirm the status of these debts.³

The debts listed in SOR ¶¶ 1.a (\$945) and 1.b (\$1,044) are to the same creditor. In February 2008 Applicant was interviewed by an Office of Personnel Management (OPM) investigator regarding these delinquent debts. She advised the investigator she disputed the accounts because she did not believe she held accounts with the creditor. She indicated she believed these were fraudulent accounts opened in her name and was not going to pay them. She planned on contacting the creditors and credit bureaus as soon as possible to dispute the accounts and have them removed from her credit report. At her hearing she testified she had contacted the creditor, but the account was not removed from her credit report. She provided a copy of the creditor's demand for

¹ Many of Applicant's exhibits were unintelligible and had handwritten notes on them that were illegible and were impossible to determine which debt she was referring to. I consider the documents to the best of my ability, but without specific clarification they were, in most cases, unhelpful.

² Tr. 109.

³ Tr. 32, 65-74; GE 6.

payment letter which included her handwritten notes on the letter that she faxed back to the creditor telling them not to contact her. She has not taken any other action regarding these debts since June 2008. She stated she believed these debts are a result of identity theft because she never had an account with the creditor. She did not file a police report or dispute them with the credit bureau. She said she would file a report when she returns to the U.S.⁴

Applicant stated she believes the debt in SOR ¶ 1.c. (\$1,221) is the same as the debt in ¶ 1.k (\$614). She failed to provide substantiation for why she believes they are the same. She also stated she believes these debts are fraudulent and she “needs to file a police report.” In her OPM interview she believed there was a different debt that was the same as the one in ¶ 1.k. She has now retracted that and believes it is ¶1.c and ¶ 1.k that are the same creditors. She acknowledged in her OPM interview the debt in ¶ 1.k is a credit card debt. She now believes that because it is not the debt she originally thought it was, but that these are fraudulent entries and she plans on filing a police report when she returns to the U.S. for vacation in several weeks. She has been aware of her dispute since August 2008 and has not disputed the debts with the credit bureau.⁵

The debt in SOR ¶ 1.d (\$168) Applicant stated she paid but did not retain any documents. She admitted she was delinquent on paying the debt for about a year and she has been disputing the debt. The debt was for phone services. Applicant did not provide documented proof regarding her position.⁶

The debt in SOR ¶ 1.h (\$474) is a credit card debt that Applicant stopped paying sometime in 2006. She knows she owes the money, but did not have the money to pay it at the time. She acknowledged the debt at her OPM interview in February 2008 and agreed to pay the debt in full. She planned on making payment arrangements and settling the account no later than October 2008. She has not made any payments on the debt, but stated she contacted the creditor in February 2009. She plans on paying the debt in a couple of months.⁷

The debt in SOR ¶1.i (\$7,538) is for a repossessed car. In her OPM interview she agreed her vehicle was repossessed, but disputed that she owed any money to the creditor. She acknowledged she got behind in her payments on the loan when she and her husband moved. She received a letter from the finance company advising her she owed the alleged amount. However, she did not believe she owed anything after the vehicle was repossessed because she no longer had the vehicle. In her interview she felt she owed the creditor nothing and had no intention of ever paying anything further on this account at any time in the future. At her hearing she stated she was two months behind on payments when the vehicle was repossessed. She stated she contacted the

⁴Tr. 33-38, 49-58; GE 3, 4, 5, 6, 8 and 9; AE B.

⁵ Tr. 58-62; GE 3, 4, 5, and 6.

⁶ Tr. 62-65.

⁷ Tr. 74-81; GE 3, 4 and 6

creditor, but has not resolved the debt. She stated she would pay the debt when she could get to it. She stated she needed to contact the creditor and see if they sold the vehicle and how much she owed.⁸

The debt in SOR ¶ 1.j (\$1,131) is a state tax lien. In her OPM interview Applicant believed the lien was for taxes owed on a vehicle purchase. She admitted that she was behind in paying her state income taxes at one point and paid \$300 toward the back taxes and believes she owes a remainder of \$500. She did not believe the tax lien on the SOR was for state income taxes, but thought it was for the vehicle. She stated she planned on contacting the state within a couple of months of her interview to follow up and to pay the lien in full via a payment arrangement. She was not sure when it would be paid in full. At her hearing she stated she believed the tax was a city income tax. The tax lien was filed in March 2004. She believed that the tax was being withheld from her pay until she moved to a new job and the new employer did not withhold the tax. She was unaware the new employer was not withholding the taxes. She stated she became aware of the tax lien in 2007 and made an arrangement to pay \$150 a month. She stated she made a \$75 payment in August 2008 and has not made any other payments. She stated she has contacted the state and advised them she will pay the amount in full in July 2009.⁹

Applicant does not have a budget. She handles the money in the family. She has not had any financial counseling. She has no savings and about \$400 in cash at home. Her husband's rank is E-4. She believes at the end of the month, they have approximately \$300 to \$500 in expendable income. Her husband was deployed during the past year. While deployed he earned tax-free income and special pay. She experienced periods of unemployment. She stated she was unemployed during 2007 and began her current job in January 2008. She was unemployed for about a year in 2002 to 2003. She worked for Company A from 2003 or 2004 to 2005 and left because of her husband's military move.¹⁰ She experienced periods of unemployment from December 2005 to April 2007, but did work July 2006 to December 2006. She stated she has a plan to work on her debts and has cleared up things on her credit report.¹¹

Applicant testified she had retrieved credit bureau reports from 2005, 2006 and 2007 and was provided a credit report from the Government in 2008. Applicant is returning to the U.S. for leave in June 2009. She and her husband will fund their trip from their income. She has a small amount of money in an IRA (\$400) and a 401K account (\$1,000). Applicant earns approximately \$3,800 a month after taxes are withheld.¹²

⁸ Tr. 32-33, 74-81; GE 3, 4 and 6.

⁹ Tr. 32-33, 81-92; GE 3, 7, 8 and 9.

¹⁰ Tr. 112-115; Applicant had a difficult time remembering what periods of time she was unemployed.

¹¹ Tr. 96-107, 113-115.

¹² Tr. 60-61, 94-96, 117-120.

Applicant provided numerous character letters that I considered. Those writing letters believe her to be trustworthy, dependable, and loyal. She is considered a good person with a strong work ethic, reliable and hardworking. Applicant completed over 211 hours of volunteer service from May 2007 to February 2009 and provided a letter from the volunteer coordinator who considers her a true team player.¹³

Applicant's testimony was often convoluted and confusing and lacked candor. I did not find her testimony regarding her disputes with creditors or her actions to resolve her debts as credible.

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

¹³ AE K and L.

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 security concerns. I have considered all of them under AG ¶ 19 and especially considered the following:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and

Applicant has been aware of her delinquent debts for a significant period of time and although she made promises to contact creditors, pay the debts, dispute the debts, and file police reports about some of them, she has not taken action on them. I find the above disqualifying conditions have been raised.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. I have considered all of the mitigating conditions under AG ¶ 20 and especially considered the following:

- (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 individual 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; and
- (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.

At Applicant's OPM interview she made promises to address her delinquent debts. She failed to follow through on her promises. She continues to owe the debts alleged. She testified that some of the delinquent debts are the result of identity theft, but failed to show she filed police reports about them or formally researched the debts and disputed them with the creditors or credit bureaus. The most she did was make a handwritten notation on a payment demand letter telling the creditor to not contact her. Applicant has neglected to follow through on addressing her delinquent debts and instead at her hearing made new promises to take care of her debts. She has not received financial counseling. She has not made a good-faith effort to resolve her debts. There are not clear indications the problem is being resolved. Applicant may have legitimate disputes with certain creditors, but despite having adequate time since her OPM interview to formally dispute the debts, she has not. I find mitigating conditions (a), (c), (d) and (e) do not apply. Applicant experienced some periods of unemployment. However for mitigating condition (b) to be fully applicable she must have acted responsibly under the circumstances. There is no evidence she acted responsibly in addressing her delinquencies. I find mitigating condition (b) only partially applies.

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). They are:

- (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 receives high praise from those who provided character letters. Applicant has been aware of her delinquent debts for a long period of time. She has done very little to resolve them. She made promises to contact creditors, research and dispute different debts, but has not. She does not have a budget and has not gone to any financial counseling. In the next few months she will have to start repaying her student loans totaling approximately \$200,000, with monthly payments of \$1,000. Based on her financial situation it is likely she will be unable to make the total monthly payments. Applicant owes a significant amount of debt and has failed to take action to resolve it. She made many promises in her OPM interview, but did not follow through. Overall, the record evidence leaves me with serious questions and 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.

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
Subparagraphs 1.a-1.k:	Against 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.

Carol G. Ricciardello
Administrative Judge