



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----, -----) ADP Case No. 08-09465
SSN: -----)
)
Applicant for Public Trust Position)

Appearances

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

January 12, 2010

Decision

WHITE, David M., Administrative Judge:

Applicant incurred around \$20,000 in delinquent debt over the past six years due to periods of unemployment. She discharged these debts through recent Chapter 7 bankruptcy proceedings, and has sufficient income to remain solvent in the future. Financial security concerns were mitigated. Based upon a thorough review of the case file, pleadings, exhibits, and testimony, eligibility for access to ADP I/II/III sensitive information is granted.

On April 9, 1993, the Composite Health Care Systems Program Office (CHCSPO), the Defense Office of Hearings and Appeals (DOHA), and the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASD C3I), entered into a memorandum of agreement for DOHA to provide trustworthiness determinations for contractor personnel employed in Sensitive Information Systems Positions (ADP I/II/III), as defined in Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation).

Applicant submitted her Public Trust Position Application (SF 85P), on April 15, 2008. On June 19, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guideline F (Financial Considerations). 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); the Regulation (*supra*); 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 June 30, 2009. She answered the SOR in writing on July 15, 2009, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on September 4, 2009, and DOHA assigned the case to me on September 10, 2009.

DOHA issued a notice of hearing on October 1, 2009, and I convened the hearing as scheduled on October 27, 2009. Department Counsel offered Government Exhibits (GE) 1 through 9, which were admitted without objection. Applicant testified on her own behalf, and offered Applicant's Exhibits (AE) A and B, which were also admitted without objection. I granted Applicant's request to leave the record open until November 15, 2009, to permit submission of additional evidence. DOHA received the transcript of the hearing (Tr.) on November 4, 2009. On November 14, 2009, Applicant forwarded this evidence to Department Counsel, who forwarded it without objection the following day. The evidence was marked AE C through F and admitted.

Findings of Fact

Applicant is a 37-year-old employee of a federal contractor, where she has worked for almost two years as a customer service representative. She is married to a member of the National Guard, who has been mobilized and deployed to Iraq five times since 2003. They have three children, ages 16, 14, and 11. Both she and her husband, between his mobilization periods, have endured multiple periods of unemployment over the past six years. (GE 1 at 1-5; Tr. at 28-29, 37.) In her answer, she admitted to all of the allegations in the SOR. Those admissions are incorporated in the following findings.

Applicant's 44 delinquent debts alleged in the SOR total \$33,044. Most of them are for relatively minor amounts, and many are for medical services incurred during periods when her family was not covered by health insurance. The largest alleged debt is \$13,664 for a vehicle that was voluntarily repossessed when it developed mechanical problems shortly after she bought it. The seller refused to cover the necessary repairs under warranty, and she returned the vehicle because she could not afford to pay for them. It is not clear where the \$13,664 balance is substantiated, since all record credit reports show a zero balance due on this account. The remaining 43 delinquent debts to which Applicant admitted total \$19,380. (GE 2 at 10; GE 3 at 3; GE 5 at 4; GE 6 at 4; GE 7 at 3; Tr. at 46-50.)

Applicant filed for Chapter 7 bankruptcy relief in July 2009, and her debts were discharged in November 2009. The schedule of creditors holding unsecured nonpriority claims listed \$25,395 in debts. (AE C.) Applicant completed the required financial counseling in March 2009, and the debtor education course on personal financial management in September 2009. (AE A.) Her budget projections reflect a monthly surplus of income over expenses ranging from \$92 to \$1,379. (AE C at Schedules I and J; AE D; AE E.) She has received numerous written commendations for her excellent customer service. (AE B.) Her supervisor's summary comments in her annual performance evaluation state that, "[she] has shown a steady improvement this year and is very dependable. She is extremely patient and a great customer service rep. She is a great asset to the team." (AE F at 6.) During the hearing, Applicant displayed a full understanding of her previous financial problems, and a sincere determination to take advantage of the fresh start from bankruptcy and avoid incurring delinquent debt in the future.

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." (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." (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. (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 overarching 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, “[t]he 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, and 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 persuasively that the evidence raised two of these potentially disqualifying conditions: “(a) inability or unwillingness to satisfy debts;” and “(c) a history of not meeting financial obligations.” Applicant admitted owing more than 40 SOR-listed delinquent debts totaling almost \$20,000, and cited more than \$25,000 in debt on her bankruptcy petition. The record shows a six-year history during which Applicant was frequently unable to satisfy some of her debts.

Department Counsel also mentioned the potential applicability of AG ¶ 19(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.” (Tr. at 18.) Having evaluated the nature, quantity, and amounts involved in Applicant’s debts, I find no evidence of irresponsible or frivolous spending. Given her unemployment problems, and the expenses inherent in supporting a family with three teenagers, the relatively small amount of delinquent debt shows careful management of available, albeit insufficient, financial resources. There was neither any allegation nor proof of compulsive, addictive, or problem gambling. Nor was there any evidence of drug abuse, alcoholism, or deceptive financial practices. Accordingly, no other Guideline F disqualifying condition was established.

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 delinquencies arose frequently and continued until very recently. However, she has now secured steady employment, and all prior debt was discharged in her 2009 Chapter 7 bankruptcy proceeding. Her current income is more than sufficient to cover living expenses, so recurrence of financial problems is unlikely. Her financial problems arose largely due to involuntary unemployment and her husband’s frequent mobilization for overseas deployment with the National Guard. These causes do not reflect poor reliability, trustworthiness, or judgment on Applicant’s part. Accordingly, she established some mitigation under AG ¶ 20(a).

I also find some mitigation under AG ¶ 20(b). Applicant’s, and her husband’s, periods of unemployment were involuntary and are now resolved. Many of the debts were for necessary medical expenses incurred during periods when they did not have health insurance. The relatively small amount of total debt under the circumstances

reflects Applicant's responsible efforts to minimize expenses, and her bankruptcy filing is a recognized and lawful way to finally resolve outstanding indebtedness and relieve any ongoing pressure therefrom.

Applicant obtained financial counseling and debtor education in connection with her bankruptcy filing, and the Chapter 7 discharge resolved her previously outstanding debts in a good-faith manner. Her demonstrated solvency going forward, together with this bankruptcy relief from prior debt, indicate that her financial situation is under control. Remaining security concerns are therefor mitigated under AG ¶¶ 20(c) and (d).

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 relevant facts and circumstances surrounding this case. Applicant's conduct of concern involves her delinquent debts incurred over the past six years, during periods of involuntary unemployment of herself and her husband. Considering the expenses inherent in supporting a family of five, including three teenagers, the total amount of this debt was relatively modest, and did not reflect irresponsible spending.

Applicant demonstrated her maturity and responsibility by acknowledging these debts and taking proper legal action to resolve them through bankruptcy proceedings. She now has steady employment and sufficient income to meet her living expenses without incurring further delinquencies, making continuation or recurrence of financial problems unlikely. The final discharge of her former debts through bankruptcy eliminates their potential for creating pressure, coercion, exploitation, or duress that could tempt Applicant to abuse her public trust position.

On balance, Applicant presented sufficient evidence to fully mitigate reliability and trustworthiness concerns arising from financial considerations, including her failure to pay some of her debts over the past six years. Overall, the record evidence leaves no doubt as to Applicant's present eligibility and suitability for a public trust position.

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
Subparagraphs 1.a. to 1.rr.:	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