



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



In the matter of:)
)
) ADP Case No. 09-00212
SSN:)
)
Applicant for Public Trust Position)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

October 29, 2010

Decision

COACHER, Robert E., Administrative Judge:

Applicant has not mitigated the Financial Considerations trustworthiness concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

On March 26, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F, Financial Considerations. DOHA acted under Executive Order (EO) 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 January 1987, as amended (Regulation); and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR in writing on May 3, 2010. The case was assigned to me on June 29, 2010. DOHA issued a notice of hearing on July 12, 2010, and the hearing was convened as scheduled on August 3, 2010. The Government offered

Exhibits (GE) 1 through 9, which were received without objection. An index for the government exhibits and a demonstrative exhibit were marked Hearing Exhibits (HE) I and II. Applicant testified, called two witnesses, and submitted Exhibits (AE) A through Q which were received without objection. Applicant's exhibit list was marked as HE III. I granted Applicant's request to keep the record open to submit additional information. Applicant submitted AE R-W (note: these exhibits were originally marked as AE L-Q, however, those letters had previously been assigned to exhibits) which were admitted without objection. Appellant's post-hearing correspondence and supplemental exhibit list were marked as HE IV, V, and VI, and Department Counsel's memo is marked HE VII. DOHA received the transcript of the hearing (Tr.) on August 10, 2010.

Findings of Fact

Applicant is a 39-year-old employee of a government contractor. She has worked for her current employer since 2008. She was divorced in 2002 and remarried in 2003. She has three children from her first marriage, ages 19, 16, and 9. She does not receive any child support from the children's father who is currently incarcerated. Her yearly salary is currently \$92,000 and her husband's is \$50,000.¹

The SOR lists 36 delinquent debts (including one duplicative debt) totaling about \$85,651. Applicant admitted that she owed the delinquent debts listed at SOR ¶¶ 1.c. 1.n, 1.x, 1.cc, 1.hh, and 1.ii, but denied the rest of the listed debts.²

Applicant's financial troubles began back in 2002, when she divorced her first husband. Several of the larger balance debts were from joint accounts during their marriage. She did not receive child support from her husband and had to provide for her three children on her own. As of May 2009, she was owed about \$32,000 in child support. During this time she worked low-paying jobs and experienced periods of unemployment. Consequently, she was unable to make payments on her debts. She attempted to resolve her debts with the assistance of a debt consolidation agency that she hired in April 2009. She stopped making payments under this plan after a few months because she was dissatisfied with the results.³

In July 2010, Applicant purchased an internet financial plan from a nationally known financial advisor to assist her in paying off these delinquent debts. Under the plan, Applicant is to make monthly payments of \$1,280 for almost five years and then she will be debt free. The plan does not cover the \$33,442 foreclosure deficiency listed at SOR ¶ 1.n. Applicant has not made any payments under this plan.⁴

¹ Tr. at 28-30, 45; GE 1.

² Applicant's response to SOR.

³ Tr. at 30-32, 69-71; GE 8.

⁴ AE K; Tr. at 86-87.

The status of the debts is described in the table below and all the debts are listed in credit reports dated November 24, 2009, January 20, 2009, and May 1, 2008.⁵

DEBT SOR ¶	AMOUNT	STATUS	EVIDENCE
1.a	\$105	Included in internet payment plan. No payments made so far.	GE 2 at 1.
1.b	\$475	Included in internet payment plan. No payments made so far.	GE 2 at 1.
1.c.	\$207	Included in internet payment plan. No payments made so far.	GE 2 at 1.
1.d	\$50	Included in internet payment plan. No payments made so far.	GE 2 at 1.
1.e	\$626	Included in internet payment plan. No payments made so far.	GE 2 at 1.
1.f	\$237	Included in internet payment plan. No payments made so far.	GE 2 at 2.
1.g	\$25	Applicant claims paid off, but no documentation supporting claim.	GE 2 at 2.
1.h	\$87	Included in internet payment plan. No payments made so far.	GE 2 at 2.
1.i	\$7,836	Included in internet payment plan. No payments made so far.	GE 2 at 2.
1.j	\$489	Included in internet payment plan. No payments made so far.	GE 2 at 2.
1.k	\$25	Included in internet payment plan. No payments made so far.	GE 2 at 2; GE 4 at 7.
1.l	\$395	Included in internet payment plan. No payments made so far.	GE 2 at 2.
1.m	\$6,045	Included in internet payment plan. No payments made so far.	GE 2 at 3.
1.n	\$33,442	Unresolved	GE 3 at 1; GE 5
1.o	\$315	Included in internet payment plan. No payments made so far.	GE 3 at 1.
1.p	\$686	Included in internet payment plan. Payment of \$172 on Aug 17, 2009.	GE 3 at 1. AE R.
1.q	\$1,435	Applicant claims paid off, but no documentation supporting claim.	GE 3 at 1.
1.r	\$458	Included in internet payment plan. No payments made so far.	GE 3 at 2.
1.s	\$444	Included in internet payment plan. No payments made so far.	GE 3 at 2.
1.t	\$41	Included in internet payment plan. No payments made so far.	GE 3 at 2.

⁵ GE 2-4.

DEBT SOR ¶	AMOUNT	STATUS	EVIDENCE
1.u	\$33,442	Duplicate debt (1.n)	
1.v	\$689	Disputes, but admits it was a joint debt with ex-husband	GE 4 at 4.
1.w	\$7,342	Included in internet payment plan. No payments made so far.	GE 4 at 12; GE 8 at 42.
1.x	\$3,092	Included in internet payment plan. No payments made so far.	GE 4 at 13.
1.y	\$499	Included in internet payment plan. Payment of \$40 on April 6, 2010.	GE 4 at 13. AE T.
1.z	\$409	Included in internet payment plan. No payments made so far.	GE 4 at 14.
1.aa	\$403	Included in internet payment plan. No payments made so far.	GE 4 at 14.
1.bb	\$200	Paid	AE U.
1.cc	\$167	Proposed payment plan or settlement. Unresolved	GE 4 at 15.
1.dd	\$130	Included in internet payment plan. No payments made so far.	GE 4 at 16.
1.ee	\$14,623	Included in internet payment plan. No payments made so far.	GE 9 at 4.
1.ff	\$85	Included in internet payment plan. No payments made so far.	GE 9 at 9.
1.gg	\$81	Included in internet payment plan. No payments made so far.	GE 9 at 9.
1.hh	\$1,670	Included in internet payment plan. No payments made so far.	GE 6.
1.ii	\$2,831	Included in internet payment plan. No payments made so far.	GE 7.

Applicant sent letters to several creditors offering to pay a small monthly payments or alternatively to make a lump sum settlement of the debt. Applicant offered no responses to these letters into the record. Applicant made partial payments on two debts (1.p and 1.y) and one total payment (1.bb). All of the debts are delinquent and Applicant has made no other payments.⁶

Applicant submitted numerous favourable character letters. Additionally she had two character witnesses testify. She is praised by all for her complete honesty, integrity, and trustworthiness. She also received certificates of achievement for taking courses in, “Setting financial goals and creating a budget” and “Your banking relationship”.⁷

⁶ AE Q, S, V.

⁷ AE A-H, J, K, L, M; Tr. at 18-26.

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 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, 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 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).

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. Two are potentially applicable in this case:

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

Applicant accumulated a number of delinquent debts and was unable or unwilling to pay her obligations for a period. The evidence is sufficient to raise AG ¶¶ 19(a) and 19(c).

Several Financial Considerations mitigating conditions under AG ¶ 20(a) are potentially applicable:

- (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;
- (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.

Although some of Applicant's debts occurred several years ago, they are still owed and they are numerous. AG ¶ 20(a) is not applicable at this time.

Applicant's divorce, failure to receive child support, and periods of unemployment contributed to her financial distress. Those are conditions that were largely beyond her control. To be fully applicable, AG ¶ 20(b) also requires that the individual act responsibly under the circumstances. Applicant failed to act timely dealing with her debts. Even though she contacted a debt consolidation service in April 2009 and bought a self-help debt relief program, no substantive debt reduction has happened. AG ¶ 20 (b) does not apply.

Applicant did take some financial management courses, but there is no indication her debts are being resolved or under control. Applicant receives partial consideration under AG 20(c). Her actions do not qualify as a good-faith effort to repay overdue creditors or otherwise resolve debts.⁸ AG ¶ 20(d) is not applicable. Her disputed joint debts with her ex-husband are not supported by any documented proof absolving her of liability. AG ¶ 20(e) is not applicable.

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

⁸ The Appeal Board has previously explained what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of Financial Considerations Mitigating Condition 6, an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of Financial Considerations Mitigating Condition 6.

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. Jun. 4, 2001)).

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. I have incorporated my comments under Guidelines F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment. Applicant is 39 years old. She is well thought of in her community and at work. She is considered an honest and trustworthy person. She and her current husband make a combined annual income of over \$140,000. Applicant struggled during and after her divorce from her first husband, particularly since he failed to pay child support. Despite those circumstances, Applicant has had sufficient time to develop a plan of action to deal with her debts, yet she failed to do so. Applicant's financial track record does not persuade me that she will satisfy the delinquent debts.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the Financial Considerations trustworthiness concerns.

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.t:	AGAINST Applicant
Subparagraph 1.u:	FOR APPLICANT
Subparagraphs 1.v-1.aa:	AGAINST Applicant
Subparagraph 1.bb:	FOR APPLICANT
Subparagraphs 1.cc-1.ii:	AGAINST Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Robert E. Coacher
Administrative Judge