



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



In the matter of:)
)
) ADP Case No. 09-00258
)
)
Applicant for Public Trust Position)

Appearances

For Government: Ray T. Blank, Jr., Esquire, Department Counsel
For Applicant: *Pro Se*

January 15, 2010

Decision

CREAN, THOMAS M., Administrative Judge:

Applicant submitted a Questionnaire for Public Trust Position (SF 85P), on June 9, 2007, as part of her employment with a defense contractor. On May 5, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns for financial considerations 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 (DoD) 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 for SORs issued after September 1, 2006. Applicant acknowledged receipt of the SOR on August 7, 2009.

Applicant answered the SOR in writing on August 11, 2009. She admitted 15 and denied 5 allegations under Guideline F. She requested a hearing before an administrative judge. Department Counsel was prepared to proceed on August 28, 2009, and the case was assigned to me on September 4, 2009. DOHA issued a Notice of Hearing on October 8, 2009, for a hearing on October 21, 2009. Applicant signed for

the Notice of Hearing on October 13, 2009. I convened the hearing as scheduled. The government offered five exhibits, marked Government Exhibits (Gov. Ex.) 1 through 5, which were received without objection. Applicant submitted three exhibits, marked Applicant Exhibits (App. Ex.) A through C, which were received without objection. Applicant and one witness testified on her behalf. DOHA received the transcript (Tr.) of the hearing on November 5, 2009. Based on a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is granted.

Procedural Issues

Applicant signed for the Notice of Hearing on October 13, 2009. Applicant is entitled to 15 days notice of hearing (Directive E3.1.8.). Applicant discussed with Department Counsel the hearing date of October 21, 2009, prior to the Notice of Hearing being mailed, so actual notice was given more than 15 days prior to the hearing. However, Applicant signed for the Notice of Hearing only eight days prior to the hearing. If there was an issue on notice, Applicant waived the 15 days notice requirement (Tr. 4-6).

Findings of Fact

Applicant admitted five and denied 15 of the 20 allegations under Guideline F in the SOR. After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is 50 years old, and has been a claims analyst for a defense contractor for over three years. She is married with an adult son and an adult step-son, both living independently of Applicant and her husband (Tr. 17-18; Gov. Ex. 1, Questionnaire for Public Trust Position, dated June 9, 2007).

Applicant worked for 26 years for a manufacturer. The plant closed in April 2005, and Applicant lost her job. In 2004, her last full year of employment, her pay was \$51,555. After being laid-off, Applicant was unemployed for three months before she found temporary employment with another manufacturer for seven months. Her pay for 2005 (including from the first employer, her severance package, and from the second employer) was \$62,606. After the temporary employment ended, Applicant and her husband moved to another part of the state for better employment opportunities. Applicant was unemployed for one month before she started working for the defense contractor in March 2006. Her monthly salary is now about \$1,050. Her husband has been unable to find steady work as an electrician. On a good month, he only contributes about \$500 to the family income. Their combined monthly income is approximately \$1,550. Their monthly expenses are the same as their income, \$1,550. Applicant and her husband admit that they financially live month-to-month. Applicant also takes a large number of medications, which account for some of her normal current expenses (Tr. 17-21, 36-37; App. Ex. A, Social Security earnings record, dated July 8, 2008; App. Ex. B, Medical Expenses, date October 19, 2009).

Applicant has been a productive worker for the defense contractor. The normal goal for her unit is 100% to 110% of target. Applicant has averaged a productivity percentage of 197% of the goal since she has worked for the defense contractor (App. Ex. C, Productivity report, dated November 2009).

Credit reports (Gov. Ex. 3, dated April 15, 2009; Gov. Ex. 4, dated December 23, 2008; Gov. Ex. 5, Credit report, dated September 11, 2007) listed 20 delinquent debts totaling approximately \$17,824 for Applicant. The debts include the following 15 collection accounts: \$69 on a medical account (SOR 1.a); \$9,246 on a car repossession (SOR 1.b); \$111 on a utility account (SOR 1.c); \$328 on a telephone account (SOR 1.d); \$1,178 for apartment rent (SOR 1.e); \$147 on a medical account (SOR 1.f); \$45 for a returned check (SOR 1.g); \$880 for a credit card account (SOR 1.h); \$1,138 for a credit card account (SOR 1.k); \$636 for another telephone account (SOR 1.l); \$1,503 for another utility account (SOR 1.m); \$815 for a credit card account (SOR 1.q); \$140 for a television service account (SOR 1.r); and \$80 (SOR 1.s) and \$57 (SOR 1.t) for two computer service accounts for the same creditor. Also listed are five charged-off accounts including: \$105 for a mail catalog company (SOR 1.i); \$271 for a clothing store (SOR 1.j); \$126 on a telephone account (SOR 1.n); and \$294 (SOR 1.o), and \$655 (SOR 1.p) for unknown accounts for the same creditor.

All of the debts, except one, became delinquent after Applicant was laid off from her original job with the manufacturer in April 2005. The one debt that arose before the lay off was for apartment rent listed at SOR 1.e. While Applicant admitted the debt in response to the SOR, she disputed the debt at the hearing. She was charged for a month's rent when she vacated the apartment. She claims she vacated the apartment at the end of the lease and should not have been charged with another month's rent. In her previous discussions with the landlord, there was no agreement so she has not been in contact with them in recent years (Tr. 32-35).

The largest debt for \$9,246 at SOR 1.b is for the remainder after a car repossession. Before Applicant was laid off, she and her husband purchased two cars in 2004. After she was laid off, they could not continue to make two car payments. She finished paying for one, and the other car was repossessed, causing the debt at SOR 1.b (Tr. 32-34).

She admitted 15 of the debts but denied five. She denied the medical debt of \$147 at SOR 1.f because she did not have information on the account. She has not contacted any creditor or the credit reporting agencies to get information on the account. She denied the \$880 credit card debt at SOR 1.h. She admitted she had a credit card with the creditor and had no reason to question the validity of the account. She initially denied the \$105 account to a catalog store at SOR 1.i. After learning that she made a purchase from the company, Applicant noted the item she purchased was placed in storage when she moved. The item was sold when she could not pay the storage fee. Applicant denied purchasing an item for \$271 from the store or catalog of the creditor list at SOR 1.j. Applicant denied that she had a credit card with the creditor listed for the debt of \$1,503 at SOR 1.m. Applicant has not contacted any of the creditors listed for debts in the SOR because she is unable to pay any of the debts. She

has no funds left after paying her living expenses to make any payments to the creditors (Tr. 24-31).

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” 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.” Trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management (See, The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004). 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 or a sensitive 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. 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 (AG ¶ 2(c)).

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, an 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.

Analysis

Guideline F, Financial Considerations

There is a public trust concern for a failure or inability to live within one's means, satisfy debts, and meet financial obligations indicating 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 (AG ¶ 18). Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in their obligation to protect sensitive information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with her creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a situation of risk inconsistent with the holding of a public trust position. An applicant is not required to be debt free, but is required to manage her finances in such a way as to meet her financial obligations. Applicant's delinquent debts, as established by credit reports and Applicant's statements and testimony, are a security concern raising Financial Consideration Disqualifying Conditions (FC DC) ¶ 19(a) (inability or unwillingness to satisfy debts), and FC DC ¶ 19(c) (a history of not meeting financial obligations). Applicant has approximately 20 delinquent debts from medical bills, credit cards, utility and telephone service and car repossession that became delinquent after Applicant lost her long term job. Because the debts became delinquent as early as 2005, she has a history of not meeting financial obligations. Since she now lives from paycheck-to-paycheck, she has an inability to satisfy her past debts.

I considered Financial Considerations Mitigating Conditions (FC MC) ¶ 20(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), and FC MC ¶ 20(b) (the conditions that resulted in the financial problems were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce, or separations) and the individual acted responsibly under the circumstances). Both of these mitigating conditions apply to Applicant's financial problems. The debts, except one, became delinquent because the plant where Applicant worked for many years closed, and she lost her good paying job. After the lay-off, she was unable to meet her financial obligations. She did seek work, and was only unemployed for a few months. She and her husband even moved to find employment. She is now working for a defense contractor, but her salary is less than a third of her past salary. She is current with her present debts, and lives within the means of her present income. However, she has no funds to make payments on her past obligations. Applicant's financial problems were caused by conditions beyond her control. She acted responsibly by aggressively seeking employment, although at a lower pay, and not

incurring any additional financial obligations. The conditions causing the loss of her employment are unlikely to recur, and she acted reasonably under the circumstances. Her past-due debts do not cast doubt on her reliability, trustworthiness, and good judgment under these circumstances,

I have considered FC MC ¶ 20(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 it does not apply. There is no indication Applicant received financial counseling.

I considered FC MC ¶ 20(d) (the individual has initiated a good-faith effort to repay the overdue creditors or otherwise resolve debts) and it does not apply. For FC MC ¶ 20(d) to apply, there must be an "ability" to repay the debts, the "desire" to repay, and "evidence" of a good-faith effort to repay. A systematic method of handling debts is needed. Applicant must establish a "meaningful track record" of debt payment. A "meaningful track record" of debt payment can be established by evidence of actual debt payments or reduction of debt through payment of debts. The entirety of an Applicant's financial situation and her actions can reasonably be considered in evaluating the extent to which that Applicant's plan for the reduction of her outstanding indebtedness is credible and realistic. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. All that is required is that Applicant demonstrates she has established a plan to resolve her financial problems and taken significant actions to implement that plan. Applicant has no plan to resolve her past due financial obligations because she does not have the ability to repay the debts. She lost her lucrative employment through no fault of her own, and out of necessity took a job paying a third of her former salary. This new position provided only sufficient funds to meet her present financial obligations, and no funds to pay past-due debts. She and her husband live paycheck-to-paycheck and do not have the ability to pay past obligations.

I considered FC MC ¶ 20(e) (the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provided documented proof to substantiate the basis of the dispute or provides evidence of action to resolve the issue) and it applies in part. Applicant disputes the one debt for an apartment rent that preceded her loss of employment. While she contests the charge, she has taken no action since initially being rebuffed by the landlord to resolve the issue because of her feeling that the landlord was not reasonable in resolving the dispute. She has no documentation to show she made any attempts initially to resolve the dispute with the landlord.

Applicant has acted responsibly towards her debts caused by conditions beyond her control. Applicant has presented sufficient information to mitigate security concerns for financial considerations because she took aggressive and reasonable action to find employment after being laid-off, and controlled her future spending. Her finances do not indicate a public trust concern.

Whole Person Concept

Under the whole person concept, an 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 the facts and circumstances surrounding this case. I considered Applicant lost a well-paying job after many years because of conditions beyond her control when the plant she worked at for over 26 years closed. I considered she aggressively sought employment and was only unemployed for a total of four months after losing her job. She and her husband did not sit still, but moved to find better employment opportunities. She is now underemployed based on her new salary. Applicant's financial problems stem from her unemployment followed by underemployment. She is a good worker in her new position with a productivity rating almost twice what is required.

Applicant is paying her present obligations and living within the means of her new lower salary level. However, she has not been able to establish a meaningful track record of debt payment of past debts. Her inability to establish such a meaningful track record is because of a loss of employment because of conditions beyond her control and her continued underemployment. Because of her actions in aggressively finding employment and living within her new salary, the record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has mitigated the trustworthiness concerns arising from her financial situation.

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 - 1.t: For Applicant

Conclusion

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

THOMAS M. CREAN
Administrative Judge