



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ADP Case No. 09-00950
)
)
Applicant for Public Trust Position)

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro se*

May 28, 2010

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the record evidence as a whole, 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 (ASDC3I), 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 the Department of Defense (DoD) Regulation 5200.2-r, *Personnel Security Program* (January 1987), as amended (Regulation).

On November 1, 2006, Applicant completed her Public Trust Position Application (SF 85P) and re-certified it on March 11, 2008. On July 24, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security 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); and the Adjudicative Guidelines effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on August 3, 2009, and requested a hearing before an administrative judge. On October 6, 2009, DOHA assigned the case to another administrative judge. On December 4, 2009, DOHA re-assigned the case to me. On February 25, 2010, DOHA issued a Notice of Hearing setting the case for March 30, 2010. The case was heard as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 7 into evidence without objection. Applicant testified. She offered Applicant Exhibits (AE) 1 through 10 into evidence without objection. The record remained open until April 16, 2010, to give Applicant an opportunity to submit additional information. On April 8, 2010, Applicant submitted three documents that I marked as AE 11, 12, and 13. On April 13, 2010, she submitted three documents that I marked as AE 14, 15, and 16. All additional exhibits were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on April 9, 2010.

Findings of Fact

In her Answer to the SOR, Applicant admitted the nine allegations contained in SOR ¶ 1, and provided information in support of her answers.

Applicant is 49-years-old and never married. In spring 1985, she completed a bachelor's degree. In fall 1987, she entered medical school. In October 1989, she withdrew from medical school after being diagnosed with severe depression. By that time, she had accumulated \$50,000 in student loans. (Tr. 34.)

In 1996, Applicant moved to another state to work as an administrative assistant for a not-for-profit organization with an annual salary of \$37,000. She remained there until 2001 at which time the person that hired her died. She was then laid off and used her savings for living expenses. (Answer at 3.) At the time of the layoff, she was earning \$57,000 annually. She remained unemployed for almost a year. In 2003, she returned to her hometown and a \$22,000 position. Sometime later, she suffered a severe depressive episode and was forced to take a reduction in hours and pay. Subsequently, she lost her position. She was unemployed for approximately four months until finding a position at a social services center. (Tr. 31.) In 2004, she earned \$14,000. In 2005, she earned \$25,300. For most of 2006, she was again unemployed and received unemployment benefits of \$6,800. (AE 6.) In November 2006, she began her current position as an administrative assistant with a federal contractor in a department that handles medical records. Her hourly rate is \$12.72, with a current annual salary of around \$24,000. (Answer at 3; AE 5.)

Sometime in the late 1990s, Applicant's physician diagnosed her with Type II Bipolar disorder. As a consequence of that disorder, Applicant has incurred significant

psychotherapy and medication expenses. Currently, she pays \$140 monthly for medication and physician's office visits. Periodic psychotherapy increases her monthly expenses. The combination of medication and psychotherapy stabilize her mood disorder. (Answer at 4.)

Applicant did not have financial difficulties or delinquent debts until she lost her job in 2001. Up to that point, she was paying her debts and making payments on her student loan. She had reduced her student loan balance to \$35,000.

Based on credit bureau reports (CBR) dated March 2008, January 2009, and March 2010, the SOR alleged that Applicant accumulated eight delinquent debts totaling \$59,465 and a wage garnishment for delinquent student loans. (GE 2, 3, and 7.) The debts started to accrue in 2003, when she began using credit cards for medical and household expenses after exhausting her savings. The status of each debt is listed below:

1. (¶ 1.a) The \$982 judgment is unpaid.
2. (¶ 1.b) The \$3,282 debt is owed to a credit card company. It is unpaid.
3. (¶ 1.c) The \$1,252 debt is owed to a credit card company. It is unpaid.
4. (¶ 1.d) The \$4,945 debt is owed to a credit card company. It is unpaid.
5. (¶ 1.e) The \$6,477 debt is owed to a credit card company for a loan. It is unpaid.
6. (¶ 1.f) The \$22,910 is owed to a credit card company. Applicant thinks the principal balance was around \$4,000 when she stopped making payments. It is unpaid.
7. (¶ 1.g) The \$954 debt is owed to a department store. It is unpaid.
8. (¶ 1.h) The \$18,663 debt is owed a credit card company. She settled the account for \$3,000. After receiving her tax refund, she made a \$1,000 payment and has been making monthly payments of \$50 since September 2009. The balance is \$1,750. (AE 1, 2, 3, and 9.)
9. (¶ 1.i) Since late 2008, Applicant has made monthly payments of \$142 on her student loan through a garnishment order. (AE 4.) The balance on the loan is \$98,764, of which about \$62,000 is interest and penalties. (AE 14.)

Applicant submitted her budget. Her monthly gross income is around \$1,454 and expenses are \$1,290. After paying her student loan, she has little money left for other debt reduction payments. (GE 4 at 18.) She no longer uses credit cards. (Tr. 47.) She is not accumulating new debt. About five years ago, she took a budgeting class as part of

credit counseling. She repeated the class a year and a half ago. Subsequently, she spoke to a debt consolidation company and learned that she does not earn enough money to establish a debt consolidation plan. (Tr. 44-45.)

Applicant submitted copies of her 2008 and 2009 performance evaluations. She received a "Meets Expectation" in 2008 and an "Exceeds Expectations" in 2009. (AE 12, 13.) The Director of Applicant's department wrote a letter stating that since meeting her in November 2006, he has found Applicant to be a reliable and motivated employee. (AE 15.) A manager in her office stated that Applicant "is accomplished in all areas of her job description and serves a mentor for others during their learning process and seeks ways to continuously challenge herself." (AE 16.)

Applicant's psychiatrist and therapist submitted a letter. They commend her for persistently pursuing good health and complying with her treatment plan. They stated, "We both know this individual very well and attest to her honesty, her sense of responsibility and integrity and her high moral character. She currently lives a productive and satisfying life. We see her as posing no security risk whatsoever." (AE 10.)

Applicant testified candidly and forthrightly. She exhibited an in-depth knowledge about her financial situation and delinquent debts. She presented her case in an organized manner. She consistently asserted that she would like to pay her delinquent debts, but does not earn enough money. She testified that "I own these debts. I was put in this situation that was a very tough situation, but yes, they are my debts and I will try to resolve them however I can. My last resort would be bankruptcy." (Tr. 49.)

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 Adjudicative Guidelines (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.

According to 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 “[a]ny 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

The security concern 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 classified information. An individual who is financially

overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 describes two conditions that could raise a security concern and may be disqualifying:

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

Applicant started accumulating delinquent debt in 2003 after losing her job and depleting her savings. She had insufficient money to pay them. Seven of the SOR allegations remain unpaid or unresolved. The evidence is sufficient to raise these potentially disqualifying conditions.

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 or the garnishment, 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;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's started accumulating debts seven years ago as a result of periods of unemployment, underemployment, and large medical expenses, which causes do not reflect on her current reliability, trustworthiness, or judgment. Her debts are on-going because she has not earned sufficient money since 2001 to resolve them. Accordingly, she established some mitigation under AG ¶ 20(a).

Similarly, AG ¶ 20(b) has application due to the unforeseen circumstances mentioned above. However, this mitigating condition has limited application because Applicant did not present sufficient documentation to demonstrate that she attempted to manage the debts while they were accumulating.

Applicant participated in financial counseling five years ago and again a year and a half ago. As a consequence, she established a budget, which based on her income, leaves little discretionary money at the end of the month to make payments on more than two debts. She no longer uses credit cards and has not assumed new debt. There are some indications that her problems are slowly coming under control, warranting a limited application of AG ¶ 20(c). She is resolving an \$18,663 debt for \$3,000 through a repayment plan and has been paying her student loan since 2008, albeit slowly and through a garnishment. Her negotiation and settlement of one debt demonstrated a good-faith effort to repay her creditors, and trigger the application of AG ¶ 20(d) as to that debt (¶ 1.h).

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 applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). They include the following:

- (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 include 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 is a hard-working, intelligent 49-year-old woman, who is successfully working for a federal contractor as documented by her supervisors. Applicant's conduct of concern involves delinquent debts incurred over seven years and during periods of involuntary unemployment, underemployment, and ongoing medical expenses. Her unresolved delinquent debt includes about \$40,000 in old credit card debt and \$98,000 in student loans, of which more than 60% is interest and penalties. Applicant credibly accepts responsibility for the debts and would like to pay them. Her commitment to resolving them diminishes any potential for coercion or duress, as does her monthly repayments. She now has steady employment and sufficient income to meet her living expenses without incurring further delinquencies; however, she has little money available at the end of the month to pay more than the \$200 she has budgeted for one debt and her student loan.

In evaluating guideline F cases, the Appeal Board has previously noted that the Administrative Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) ("Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.") There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). In this case, Applicant does not earn enough money to pay more than one or two debts at a time.

On balance, Applicant presented sufficient evidence to fully mitigate reliability and trustworthiness concerns arising from financial considerations, including her failure to pay or resolve all of her financial obligations since 2001. 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 ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraphs 1.a through 1.h:	For Applicant

Conclusion

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

SHARI DAM
Administrative Judge