



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



In the matter of:)
)
) ADP Case No. 09-04253
)
)
Applicant for Public Trust Position)

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

September 23, 2010

Decision

RICCIARDELLO, Carol G., Administrative Judge:

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

On March 26, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns 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); and the adjudicative guidelines (AG), effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant’s answered the SOR in writing on May 12, 2010, and requested a hearing before an administrative judge. I was assigned the case on July 6, 2010. DOHA

issued the Notice of Appearance on July 20, 2010. I convened the hearing as scheduled on August 24, 2010. The Government offered Exhibits (GE) 1 through 11, which were admitted without objection. The Government also offered Hearing Exhibit (HE) I for demonstrative purposes. Applicant testified on her own behalf and offered Exhibits (AE) A through D, which were admitted without objection. DOHA received the hearing transcript (Tr.) on September 1, 2010.

Findings of Fact

In Applicant's answer to the SOR, she admitted all of the allegations. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 46 years old and has worked as an analyst for her present employer since June 2009. She has been steadily employed since 1997. She married in 1993 and has two children that live at home. She has two stepchildren who do not reside with her presently, but did in the past. She is a high school graduate and attended college, but did not earn a degree.¹

In 2003, Applicant's husband lost his job and was unemployed for about a year. He has been steadily employed since 2004. She and her husband presently earn a combined income of approximately \$136,000. She admitted she owes the 32 delinquent debts alleged in the SOR totaling approximately \$48,259.²

Applicant stated that she was aware of her financial problems over the years and at times would begin a program to resolve the debts, but then she would stop due to other circumstances affecting her ability to pay. In 2003, her home almost was foreclosed, due to her husband's unemployment. They were able to sell it, but they were forced to move to places that required large down payments before they could rent the premises. She had to borrow money and they lived paycheck to paycheck. She stated they were always borrowing money and could never catch up. She began working a second job part-time at her church. She finally determined it was too hard to pay her debts so she stopped and gave up. Applicant admitted she also was irresponsible in paying her debts.³

Applicant thought about filing for bankruptcy on two previous occasions but abandoned it because she was worried about what impact it would have on her employment and she could not afford the fees.⁴ She explained:

¹ Tr. 25-28.

² Tr. 40-41.

³ Tr.21-24.

⁴ Tr. 72-75.

I filed bankruptcy so late in the game during this investigation, it was just to the point I figured I had no choice and my credit was already bad, so I need to show something that I need to pay these bills, get them paid off, so I can get my life back together and keep my job so I can provide a decent living for my family.⁵

In August 2009, Applicant contacted a consumer credit management company (CCM) to assist her in consolidating and resolving her delinquent debts. She was going to begin making payments and was advised by CCM to provide them with documents from her creditors. She explained it took a lot of time to get letters. Around the same time she talked to people who told her to consider filing for bankruptcy. She never started the CCM program. She did not pursue bankruptcy until April 2010. She stated she made payments on some debts in the past. She paid a payday loan and a tax lien. She paid the tax lien so her wages would not be garnished. She borrowed approximately \$1,900 from friends to pay the lien. She is presently repaying her friends.⁶

Applicant filed for Chapter 13 bankruptcy in May 2010.⁷ Her husband's debts are not included in the bankruptcy. She admitted in the past year she has been late in paying her rent and her car loan. She began a student loan rehabilitation program in January 2010.⁸ She was to pay \$65 a month for nine months. She provided documentation that she has made payments through May 2010. Her student loans are now part of her bankruptcy plan. She owes approximately \$43,000 in student loans. She owes \$9,787 for taxes (listed on her bankruptcy as an unsecured priority claim). She also owes \$58,810 in unsecured nonpriority claims.⁹

Applicant's Chapter 13 bankruptcy plan was approved on June 11, 2010. It calls for her to pay \$610 a month for six months then \$710 a month for 54 months. The total amount to be paid into the plan is \$42,000. Applicant made two payments into the plan in June 2010 and July 2010.¹⁰

In February 2010 Applicant and her daughter went on a vacation cruise with their church. The vacation included the cost of the cruise, air fare, and incidentals. She estimated the cost at about \$1,200. Applicant paid for the cruise. In March 2009, she went on a mission trip with her church. She paid the nominal expense for the trip. She did not have enough vacation time accrued so she took unpaid leave. She estimated

⁵ Tr. 24.

⁶ Tr. 28-34.

⁷ AE D-2, D-3, D-4.

⁸ AE D-1.

⁹ Tr. 28-30, 36-40; AE D-2, D-3, D-4.

¹⁰ Tr. 41; AE D-5.

that she lost about \$1,100 of income. In 2008, she went on a week long church conference trip to another state. She incurred airfare and hotel expenses. She estimated the cost at about \$900. In October 2008, she went on a vacation cruise with her church. She estimated the cost was about \$700. In 2007, she went on a church convention trip and incurred \$600 in expenses. Applicant paid for all of these expenses.¹¹

Applicant has nominal funds in her checking and savings accounts. She took a \$2,000 loan from her 401(k) retirement account. She estimated the account has about \$5,500 in it and she repays \$46 a pay period.¹²

In 2007, Applicant purchased a new car and makes \$475 monthly payments. She and her husband also own a 1997 vehicle that they make \$536 monthly payments.¹³

Applicant's annual salary is approximately \$81,000 and her husband's is approximately \$55,000. She owes approximately \$6,200 for her 2009 federal income taxes that are not paid. She believes she owes about \$200 for her 2009 state income taxes. She owes \$1,900 for her 2008 federal income taxes and about \$1,600 for her 2005 federal income taxes. Applicant incurred some of her tax debt because when she left her place of employment in June 2009 she withdrew \$3000 from her 401(k) account and incurred the tax liability and the penalty. She also attributes some of her tax debts to her part-time employer not withholding taxes. Applicant's tax liabilities are listed on her bankruptcy documents. Applicant stated that her husband also owes about \$17,000 for income taxes. She is not sure what years are involved. She and her husband filed their taxes separately until 2009. She did not have an explanation why she continues to owe past income taxes.¹⁴

Applicant admitted she has mismanaged her money and was not following a budget. She admitted she was spending beyond her means. The only financial counseling Applicant attended were two sessions required as part of her bankruptcy.¹⁵ She believes she is a trustworthy person and would never do anything illegal to get money. She does not believe she is a risk.¹⁶

Applicant provided character letters from her family who describe her as a responsible and trustworthy person. She is always willing to help others and is active in her church. Her supervisor describes her as dedicated, honest, dependable, and

¹¹ Tr. 56-65.

¹² Tr.65-67.

¹³ Tr. 67-71.

¹⁴ Tr. 31-34, 75-81, 83-85.

¹⁵ Tr. 82; AE D.

¹⁶ Tr. 86.

trustworthy. Her coworkers describe her as friendly and reliable. She is considered a tireless worker, organizer and responsible professional.¹⁷

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 to obtain 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

¹⁷ AE B.

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 safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of 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 *a/so* 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.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 19 and especially considered:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (e) consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, an/or other financial analysis.

Applicant had 32 delinquent debts that she did not take action to resolve until recently when she filed for Chapter 13 bankruptcy. Despite having adequate income, she did not pay her delinquent debts. She used her money to go on vacations or church trips instead of addressing her delinquent debts. I find there is sufficient evidence to raise these disqualifying conditions.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. I have considered the following mitigating conditions under AG ¶ 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;

(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.

Applicant's husband was unemployed in 2004 which caused a hardship for the family. He has been employed since 2005 steadily and they have a combined household income of more than \$130,000. Despite being aware of her delinquent debts and the potential impact it could have on her job, she did not take action on the debts until after she received the SOR. She has since filed for Chapter 13 bankruptcy and made two payments. She admitted she attempted to file in the past but did not follow through. She contacted a debt consolidation company, but did not follow through. She made little effort to pay her debts. Her many delinquent debts and the fact they were not paid and are now part of a bankruptcy raise concerns about her reliability, trustworthiness, and good judgment. Based on her history of not addressing her past debts I am not convinced this behavior is unlikely to recur. To the contrary, Applicant knew how deeply in debt she was but continued to make expenditures on luxury items, such as vacations and a new car. I find AG ¶ 20(a) does not apply.

Applicant's husband lost his job in 2003 and was unemployed for a year. This was a condition that was beyond the family's control and affected their finances. However, for AG ¶ 20(b) to be fully applicable the individual must have acted responsibly under the circumstances. Applicant's husband has been employed for the past six year. Applicant has not shown she has acted responsibly. Rather she has ignored paying her past debts. I find AG ¶ 20(b) only partially applies.

Applicant did not provide evidence that she has received financial counseling beyond what is mandatory to file for bankruptcy. She has spent years accumulating debts and not until she received the SOR did she attempt to resolve them through

bankruptcy. Instead of paying her debts or her income taxes she chose to take her vacation cruise with her daughter. She has made two bankruptcy payments. She has an established pattern of not following through on resolving her debts. I am not convinced the problem is being resolved or is under control at this juncture. With her history, without a long term pattern of consistent payments on her bankruptcy, evidence that she is not incurring new debts and is living within her means, I can not find the matter is under control. Therefore, AG ¶ 20(d) does not apply. I also find that although bankruptcy is a legitimate and legal means to resolve overwhelming delinquent debts, it is not a good-faith effort to repay overdue creditors under these circumstances. I find AG ¶ 20 (d) does not apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for access to sensitive information 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. Applicant is a mature woman who by all accounts is generous with her time and is a committed volunteer to her church and community. She has a significant number of delinquent debts that she has not addressed despite being aware that they could have an impact on her job. Although initially her financial problems were caused when her husband lost his job in 2003, it has been six years since then and they have both been steadily employed. Applicant has ignored her responsibility to pay her creditors, including her taxes. Applicant has spent her money on vacations and trips that she could not afford and did so at the expense of not paying her creditors. She has acted irresponsibly and it was only when the threat of losing her job became evident did she file for bankruptcy. Applicant has no track record of being fiscally responsible. She has only made two payments toward her bankruptcy and it is too early to assume she will remain committed to making consistent monthly payments over the next several years. Overall the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for access to

sensitive information. For all these reasons, I conclude Applicant failed to mitigate the trustworthiness concerns arising under Guideline F, 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.ff: 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