



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



In the matter of:)	
)	
)	ADP Case No. 09-04861
)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Nichole Noel, Esquire, Department Counsel
For Applicant: *Pro se*

January 14, 2011

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, Applicant’s eligibility for access to sensitive information is granted.

Applicant submitted her Questionnaire for Public Trust Position (SF 85P) on January 15, 2008. On May 5, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). 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 revised adjudicative guidelines (AG) effective in the Department of Defense on September 1, 2006.

Applicant acknowledged receipt of the SOR on May 13, 2010. She answered the SOR in writing on May 20, 2010, and requested a hearing before an Administrative Judge. DOHA received the request on May 17, 2010. Applicant submitted a second answer to the SOR on June 16, 2010, which DOHA received on June 24, 2010.

Department Counsel was prepared to proceed on September 28, 2010, and I received the case assignment on October 4, 2010. DOHA issued a notice of hearing on October 26, 2010, and I convened the hearing as scheduled on November 16, 2010. The government offered Exhibits (GE) 1 through 7, which were received without objection. Applicant testified and submitted Exhibits (AE) A through D, without objection. DOHA received the transcript of the hearing (Tr.) on November 28, 2010.

I held the record open until December 16, 2010, for Applicant to submit additional matters. Applicant requested an extension of time to submit the requested information. Department Counsel did not object. On December 9, 2010, I issued an order extending the time for Applicant to submitted additional evidence until December 31, 2010. She timely submitted AE E through AE N, without objection. The record closed on December 31, 2010.

Findings of Fact

In her Answers to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a-1.d, 1.f-1k, and 1.m of the SOR, with explanations. She denied the factual allegations in ¶¶ 1.e, 1.l and 2.a of the SOR. She also provided additional information to support her request for eligibility for a public trust position.

Applicant, who is 38 years old, works as a dispatcher in customer support for a Department of Defense contractor in a position of public trust. She began this position in December 2007. A co-worker describes her as a loyal and dependable hard worker. Applicant has impeccable communications skills. She received a “meets expectation” on her most recent performance evaluation. She also works part-time in the retail industry.¹

Applicant graduated from college in 1995 with a bachelor of science degree in business administration and earned a master’s degree in business administration in 2003. She paid for her undergraduate education with student loans. She paid her loan payments monthly for a period of time. She stopped her payments when her income became insufficient to pay her loans and living expenses.²

Applicant married in 2003. Her husband worked in the building industry. Since the economic downturn, his work has been sporadic. He receives approximately \$900 a month in unemployment benefits, of which \$485 a month is applied to his child support payments from an earlier relationship. Applicant’s two 17-year-old stepsons are living with her.³

¹GE 1; AE C; AE G; AE M; Tr. 25.

²GE 1; GE 2.

³AE A; Tr. 20, 38.

After college, Applicant worked at various hourly wage jobs until 1999 when she obtained better paying employment in the communications industry. She worked with this company until 2007. When she was working with the communications company, the State garnished Applicant's pay to recover her \$3,000 state education loan debt in 2000. This loan was paid in full in 2002 and is not listed in the SOR.⁴

In July 2010, Applicant and her husband contacted a law firm to discuss how to improve their financial situation. They discussed filing a Chapter 13 bankruptcy. At the same time, she and her husband attended a financial counseling program. Through this program, Applicant learned about debt to income ratios, how to plan her finances, her misuse of money in the past, and poor decisions about money. She decided that she wanted to be financially independent and to achieve this goal, she must improve her finances and money management. She developed a budget, which she follows. She has not incurred significant unpaid debts since 2007. She has no credit cards and her car loan is paid.

Applicant's education loans are problematic. She does not deny that she owes money on her education loans. However, she believes that she paid \$300 each paycheck on her education loans while working at her communications job and that this money was not properly applied to her loan account. On her behalf, the bankruptcy law firm requested a copy of her earnings statement from her employer in the communications industry. The law firm is working to resolve the education loan payment issues.⁵

Applicant filed her income taxes each year. Her 2007 federal tax return reflected that she was to receive a \$450 refund. Her 2007 state tax return indicated that she was to receive a \$2,450 refund. Applicant's 2009 federal tax return showed that she was entitled to a \$1,229 refund and that this money was transferred to an unnamed account. It was not refunded to her. For the last eight or nine years, Applicant has not received her tax refunds, as the Government seized her refund to apply to her education loan debt. The application of these diverted payments to her debt is an issue the law firm was attempting to resolve.⁶

Applicant and her husband filed a Chapter 13 bankruptcy petition on September 3, 2010. They made a \$394 payment to the Bankruptcy Trustee in October 2010. The Trustee directed her employer to withhold \$183 a pay period from Applicant's paycheck beginning November 19, 2010. In December, the Trustee directed her employer to withhold \$316 a pay period from Applicant's pay check. Applicant's November 2010 and December 2010 pay statements reflected that this money is being withheld from her pay. At the hearing, Applicant testified that her Chapter 13 payments would increase

⁴AE L; Tr. 26.

⁵GE 2; Tr. 24-25.

⁶AE I; AE J; AE K; Tr. 50.

when her education loan problems were resolved.⁷ Based on her testimony, I find that the increase in her bankruptcy payment is for payment of her student loan debt.⁸

Applicant's bankruptcy petition includes the SOR debts listed in paragraphs 1.a, 1.b, 1.d, 1.f, 1.g, 1.h, 1.i, and 1.k. The August 30, 2010 credit report shows that Applicant paid the debts in SOR paragraphs 1.k and 1.m. The credit card debt in SOR paragraph 1.c (\$1,341) is listed only in the credit report dated February 1, 2008, which shows a date of last activity as July 2001. Applicant indicated that she had this credit card in college and defaulted on the debt in 2000. The \$1,088 medical debt identified in SOR paragraph 1.e is not listed on the most recent credit report, dated August 30, 2010. That date of last activity on this account was August 2003. Applicant believes her state tax refunds paid this debt, thus, she denied owing it. The \$182 phone debt in SOR paragraph 1.j with a July 2005 date of last activity and the \$89 medical debt in SOR paragraph 1.l with a February 2003 date of last activity are only listed on the February 1, 2008 credit report. These four debts are not included in her bankruptcy petition.⁹

The SOR identified 13 purportedly continuing delinquencies as reflected by credit reports from 2008, 2009, and 2010 totaling approximately \$56,582. Some accounts have been transferred, reassigned, or sold to other creditors or collection agents. Other accounts are referenced repeatedly in both credit reports, in many instances duplicating other accounts listed, either under the same creditor or collection agency name or under a different creditor or collection agency name. Some accounts are identified by complete account numbers, while others are identified by partial account numbers, in some instances eliminating the last four digits and in others eliminating other digits. Three SOR debts (1.c, 1.j, and 1.l) listed on the February 1, 2008 credit report no longer appear on her credit reports for unexplained reasons. Three SOR debts (1.c, 2.e, and 1.l), totaling \$2,518, may have been removed under the requirements of the Fair Credit Reporting Act because these debts are eight or more years old. Applicant believes one of these debts (1.e) has been paid with her state tax refund. Her bankruptcy application lists a medical bill for \$84, but does not contain sufficient information to determine if it is the same as the \$89 medical debt in SOR paragraph 1.l.

Applicant submitted a budget which indicates a net household income of approximately \$3,400 with monthly expenses totaling approximately \$3,278, including her bankruptcy payment. She has sufficient income each month to pay her monthly expenses.¹⁰

After she was hired in her current position, she completed her application for trustworthiness with the help of an employee (employee A) of the company which found

⁷Applicant understands that at the conclusion of her Chapter 13 bankruptcy, she will need continue her education loan payments.

⁸AE A; AE B; AE N; Tr. 29-30.

⁹GE 5-GE 7; AE A; Tr. 30-34.

¹⁰AE F; AE H.

her the job. Employee A filled in the information for her trustworthiness application using the computer. Employee A did not read Applicant the questions, but asked Applicant for information. Employee A asked Applicant if she had any recent debts that were outstanding. Because she did not have recent overdue debts, Applicant said “no” to Question 22B about debts more than 180 days past due. Employee A completed the application on the computer and requested Applicant to sign it. Applicant signed the application a second time, without reading it, when a representative of her employer (employee B) requested her to do so at orientation. Applicant acknowledges that she was careless and relied upon others when completing her SF 85P, but denies any intent to hide her debts from the Government.¹¹

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 over-arching 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,

¹¹Response to SOR; Tr. 35-36, 40-48.

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 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 (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).

Analysis

Guideline F, Financial Considerations

The trustworthiness 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 [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(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Applicant accumulated delinquent debt and was unable to pay her education loans for a period of time. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes conditions that could mitigate trustworthiness concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where “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.” Applicant’s financial worries arose around 2000. Because of her income and her living expenses, she was unable to pay her education loans and allowed smaller accounts to go unpaid.

While her debts occurred long ago, the circumstances are not unusual and could occur again. This mitigating condition is not applicable.

Under AG ¶ 20(b), it may be mitigating where “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.” Applicant has not presented evidence that her financial problems occurred because of circumstances beyond her control. This mitigating condition is not applicable.

Evidence that “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” is potentially mitigating under AG ¶ 20(c). Applicant received financial counseling, which helped her decide to file for Chapter 13 bankruptcy. Most of the debts listed in the SOR, especially her education loans, are included in her bankruptcy payment plan. Her monthly payments are being deducted from her bi-weekly pay. She pays her monthly bills and does not use credit cards to pay for a lifestyle. She developed a budget and now understands how to allocate her income and expenses. She wants financial independence and knows that she must resolve her debts to achieve her goal. Her monthly finances are under control and her past financial problems are being resolved. This mitigating condition applies.

Similarly, AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Applicant paid the debts in SOR paragraphs 1.k and 1.m on her own. This mitigating condition applies to these two debts only.¹²

In sum, under Appellant’s Chapter 13 bankruptcy plan, the Bankruptcy Court has determined that Appellant and her spouse can afford to pay \$632 per month for 60 months. If they fail to complete the bankruptcy plan, all payments are forfeited, and Appellant and her spouse return to their pre-bankruptcy status, except all the interest payments are added onto what they owe. In the last three months, Appellant has made the required payments and have shown sufficient diligence and effort to resolve her delinquent debts. Appellant’s recent financial track record shows she is using good judgment, and she is trustworthy and reliable.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other

¹²AG ¶¶ 20(e) and 20(f) are not applicable in this case.

failure to cooperate with the security clearance process.

AG ¶ 16(a) describes conditions that could raise a security concern and may be disqualifying:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

For AG ¶ 16(a) to apply, Applicant's omission, concealment or falsification in her answer must be deliberate. Applicant's completed SF 85P was initially signed on January 15, 2008 and resigned on January 29, 2008. She answered "no" to Question 22B, denying having any debts more than 180 days past due. Thus, she omitted material facts from her SF 85P about her finances. This information is material to the evaluation of Applicant's trustworthiness to hold a position of trust and to her honesty. In her response to the SOR, she admits that her answer was incorrect, but denies that she had an intent to falsify her answer or to hide this information from the Government. When a falsification allegation is controverted, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.¹³

Applicant provided her answers for her SF 85P to employee A, who had asked Applicant for information, but did not read the specific questions to Applicant. Employee A simply asked if she had any recent debts that were outstanding, which Applicant did not have. Employee A typed in Applicant's responses to the SF 85P. On January 15, 2008, employee A presented Applicant with the application asking her to sign it. Applicant did not read it. At orientation with her new employer, employee B asked Applicant to resign and initial her answer to Question 22B. Applicant did as requested, but did not pay close attention to what she was signing or read it. Her carelessness and inattentiveness to what she was signing does not show that she had an intent to hide information from the Government about her past due debts. She realized that she did not answer this question correctly when she initially heard from DOHA. I find Applicant's explanation credible. Overall, I find the evidence of record failed to show that Applicant intentionally falsified her answers on her SF 85P. The Government has not established intentional falsification under Guideline E. Guideline E is found in favor of Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an

¹³See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

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) 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 security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's financial problems arose when she was young and made poor financial decisions. Her debts are old. In recent years, she has changed her spending habits. She has not incurred significant unpaid debts since 2007. She pays her usual monthly bills. She decided to file a Chapter 13 bankruptcy petition to help her resolve her debts. She received financial counseling and generated a budget. In 57 months, she will complete her Chapter 13 plan and all of her delinquent unsecured, nonpriority debts will be discharged. She will still have to repay her student loans. If she fails to comply with the Chapter 13 bankruptcy payment plan, she will lose all payments made to the bankruptcy trustee, and will be further in debt due to additional interest charges. She agreed to have her monthly bankruptcy payments withheld from her pay check.

Applicant has undergone significant behavioral changes. She has developed a budget and lives within her budget. She works steadily and is respected at her job for her performance. With her husband, she is helping to raise his teenage stepsons. She has focused her attention on providing a stable financial environment for her family, especially with her husband's current sporadic employment situation. Most significantly, she has taken affirmative action to pay or resolve most of the delinquent debts raising security concerns by developing a repayment plan through the bankruptcy court. (See AG ¶ 2(a)(6).) She has not paid four bills totaling \$2,700.00. These debts are no longer on her credit reports. These debts were never reduced to a judgment and the Statute of Limitations has expired, making the debts uncollectible. (See AG ¶ 2(a)(8).) Thus,

these debts cannot be a source of improper pressure or duress. Of course, the issue is not simply whether all her debts are paid—it is whether her financial circumstances raise concerns about her fitness to hold a position of public trust. While some debts remain unpaid, they are insufficient to raise trustworthiness concerns as she has taken control of more than 90% of her debts listed in the SOR. She is not required to be debt free to hold a position of trust; rather she must manage her income, expenses, and debts. She did not intentionally falsify her SF 85P. (See AG ¶ 2(a)(1).)

Overall, the record evidence leaves me without questions or doubts as to Applicant’s eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant mitigated the trustworthiness concerns arising from her finances and personal conduct.

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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	For Applicant
Subparagraph 1.j:	For Applicant
Subparagraph 1.k:	For Applicant
Subparagraph 1.l:	For Applicant
Subparagraph 1.m:	For Applicant
Subparagraph 1.n:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	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.

MARY E. HENRY
Administrative Judge