



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



In the matter of:)
)
) ADP Case No. 10-02651
)
Applicant for Public Trust Position)

Appearances

For Government: Julie Mendez, Esq., Department Counsel
For Applicant: *Pro se*

August 3, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s debts were discharged in a 1998 bankruptcy proceeding. In 2000, she acquired a house and debts beyond her financial means. She sold the house, but retained some of her delinquent debt. Through the years, she continued to acquire additional delinquent debt. She established some circumstances beyond her control that contributed, to some extent, to her inability to pay her debts. Notwithstanding, she failed to establish a track record of financial responsibility in addressing her legal obligations. Moreover, she falsified her 2007 public trust position application. Eligibility to occupy a public trust position is denied.

Statement of the Case

Applicant submitted a Questionnaire for Public Trust Positions (SF 85P) on September 1, 2007. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to

make a preliminary affirmative finding¹ that it is clearly consistent with national security to grant Applicant eligibility to occupy a public trust position.

On January 20, 2011, DOHA issued Applicant a Statement of Reasons (SOR), which specified the basis for its decision. Specifically, trustworthiness concerns were raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the adjudicative guidelines (AG).²

Applicant answered the SOR on February 18, 2011, and requested a hearing before an administrative judge. The case was assigned to me on March 13, 2011, to determine whether Applicant's eligibility for a public trust position should be granted or denied. DOHA issued a notice of hearing on May 12, 2011, convening a hearing on June 1, 2011. At the hearing, the Government offered exhibits (GE) 1 through 9. Applicant testified and presented exhibits (AE) 1 through 13. AE 14 was timely received post-hearing. DOHA received the hearing transcript (Tr.) on June 8, 2011.

Findings of Fact

Applicant admitted the factual allegations in SOR ¶¶ 1.a through 1.e, 1.h, 1.j, and 1.l through 1.pp, with explanations. She did not admit or deny the allegations in SOR ¶¶ 1.f, 1.g, 1.i, and 1.k, and I entered a denial. She denied the allegation in SOR ¶ 2.a. Her admissions are incorporated as findings of fact. After a thorough review of the evidence of record, including Applicant's answer to the SOR, her interview, her answers to DOHA interrogatories, and her demeanor and testimony, I make the following additional findings of fact.

Applicant is a 48-year-old systems administrator working for a defense contractor. She graduated from high school in 1982. She attended college on and off until 2007, and accumulated around 70 credit hours, but she has not completed a degree. Applicant worked for another Government contractor from 1996 until 2001, and received access to classified information at the secret level. When she left that job, her access to classified information was terminated. There is no information to show that she has ever compromised or caused others to compromise classified information.

Applicant divorced her spouse in June 1991. She has a 28-year-old daughter for whom she provides some financial support. Applicant provides \$100 a month to her mother to assist her mother in taking care of her nine-year-old grandchild.

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised; and DoD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation).

² Adjudication of this case is controlled by the AGs implemented by the DOD on September 1, 2006.

Applicant worked two jobs, for the most part, from around 2000 until June 2007. In March 2007, she underwent surgery and was out of work for approximately five weeks. She returned to work and in June 2007, she was laid off by employer A. She continued to work for employer B; however, she was working on an on-call basis, and worked between 20 and 40 hours a week. She started working in her current position (employer C) in October 2007. She has been consistently employed in that position since October 2007, albeit working for two different contractors. She maintained two jobs (employers B and C) until September 2008, when she was laid off by employer B.

In her September 2007 public trust position application, Applicant was asked to disclose whether in the last seven years she had filed for bankruptcy protection, had been subject to a tax lien, or had a legal judgment rendered against her for any debts. She disclosed that in April 2002, she filed for Chapter 13 bankruptcy protection. She later requested the dismissal of the filing to be able to sell her house. Applicant did not disclose any judgments filed against her during the required period. Applicant was also asked to disclose whether she was over 180 days delinquent on any loans or financial obligations. She did not disclose any loans or financial obligations on which she was over 180 days delinquent.

The subsequent background investigation disclosed that in 1998, Applicant was discharged of her financial obligations pursuant to a Chapter 7 bankruptcy proceeding. Moreover, the investigation revealed the 39 delinquent debts alleged in the SOR, totaling over \$41,000, which included a \$394 civil judgment filed against Applicant in April 2001.³ She also had 18 financial accounts that were over 180 days delinquent, including one civil judgment (SOR ¶¶ 1.i through 1.k, 1.s, 1.t, 1.v, 1.w, 1.y, 1.z, 1.aa through 1.gg, and 1.ii through 1.oo).

Applicant explained that her 1998 Chapter 7 bankruptcy filing was the result of her spending beyond her financial means. She attributed her overspending to being young and immature. Concerning her current financial problems, she explained that in 2000, she made the mistake of purchasing a house beyond her financial means. At the time, she was working two jobs and she believed they would provide sufficient income for her to pay the mortgage, her day-to-day living expenses, and her other financial obligations. With the purchase of the home, she incurred additional financial obligations related to it such as furniture (SOR ¶ 1.v), services, and utilities. In 2002, she was forced to file for Chapter 13 bankruptcy protection because she could not meet her financial obligations. In 2003, she requested the dismissal of her 2002 Chapter 13 bankruptcy filing in order for her to sell the house. She sold the house, but many of the related financial obligations remain until today.

In March 2007, Applicant underwent surgery and was out of work for approximately five weeks. After returning to work in June 2007, she was laid off from one of her jobs. Although she had a second job, that job became a part-time job when

³ The same judgment is alleged twice in SOR ¶¶ 1.u and 1.v. I find for Applicant with respect to SOR ¶ 1.u.

she was limited to working between 20 and 40 hours a week. She also had a second operation in 2007 that impacted on her ability to work for two weeks. Applicant attributed most of her financial problems to her medical problems, getting laid off, and being underemployed. Applicant has been consistently employed since October 2007. Notwithstanding, she claimed she did not have the financial means to pay her delinquent obligations, day-to-day living expenses, and current financial obligations.

In October 2007, Applicant was interviewed by a Government investigator concerning her current financial situation and the delinquent accounts alleged in the SOR. During the interview, Applicant acknowledged that most of the delinquent medical accounts were her debts and promised to make arrangements to pay them (SOR ¶¶ 1.c, 1.d, 1.y, 1.aa, 1.dd through 1.gg, and 1.ii through 1.ll). She also promised to investigate the two medical accounts she did not recognize. At her hearing, Applicant testified that in February 2011, she disputed SOR ¶¶ 1.c and 1.d because she did not recognize these two medical debts and there was insufficient information to identify the creditors. Concerning the remaining delinquent medical accounts, Applicant admitted that these were her delinquent accounts, but indicated they were “no longer in collection according to the credit report received 31 January 2011.” (Answer to the SOR.) At her hearing, Applicant confirmed these were her delinquent medical debts, but that they “disappeared” from her credit report without her having to dispute them. (Tr. 77)

Similarly, Applicant admitted the delinquent debts alleged in SOR ¶¶ 1.e, 1.v, 1.w, 1.z, 1.bb, 1.cc, 1.hh, 1.mm, and 1.nn, but testified she had done nothing to resolve them because these debts were “no longer in collection according to the credit report received 31 January 2011.” Applicant presented little or no evidence of any effort to contact her creditors, pay her legal obligations, or otherwise resolve her delinquent debts since she acquired them until early 2011.

SOR ¶¶ 1.f and 1.g alleged the same delinquent debt. I find for Applicant in SOR ¶ 1.g. Applicant testified that her mother signed for cable service and Applicant’s name also was included in the contract. She claimed she disputed the debt because it was her mother’s cable debt and she believed her mother paid it. As of her hearing day, Applicant had not asked her mother whether she paid the debt. Applicant also claimed she disputed the debts alleged in SOR ¶¶ 1.x and 1.oo; however, she presented no documentary evidence to support her claims.

Applicant’s documentary evidence shows she paid SOR ¶ 1.h in April 2007. (GE 5) She contacted the creditor alleged in SOR ¶ 1.i in April 2011, requesting information to settle the account. She did not receive a response. She contacted the creditor alleged in SOR ¶ 1.j in March 2011, established a payment plan, and she made one \$93 payment in April 2011. She contacted the creditor alleged in SOR ¶ 1.k in March 2011, to dispute the total of the debt owed and to establish a payment plan. She testified she is in the process of resolving her dispute.

Applicant owes close to \$11,000 for the seven outstanding student loans alleged in SOR ¶¶ 1.l through 1.r, which were placed for collection between September 2007

and October 2008. In February 2011, Applicant contacted the current collection agencies and established payment plans for the seven loans. She presented documentary evidence of consecutive payments made from February until May 2011. Applicant promised to start making payments sometime in the near future on the debts alleged in SOR ¶¶ 1.s, 1.t, and 1.pp. She presented no evidence of contacts or settlement negotiations with these creditors.

In addition to the debts alleged in the SOR, Applicant owes the Internal Revenue Service (IRS) approximately \$12,000 for tax years 2008 and 2009. She is paying \$100 a month in accordance with her payment arrangement with the IRS. She also filed her federal income tax returns late for a couple of years. (Tr. 87-89) Applicant did not participate in any financial counseling and she did not present documentary evidence of a current working budget.

Applicant expressed remorse for her financial problems. She indicated that with her current steady income she started to address her delinquent obligations. She claimed she has been contacting creditors to make payment arrangements but averred she is having difficulty finding the current debt collectors, getting information on her debts, and receiving responses to her inquiries. She admitted she made several financial mistakes such as buying a home beyond her financial means and cosigning a car loan for a girlfriend.

Applicant testified she has learned her lesson, and promised to resolve her financial situation sometime in the near future. She noted she paid two debts and is making payments on her student loans. She plans to take another job to accelerate her debt payments. She also noted that most of her old delinquent accounts have disappeared from her recent credit reports and she is no longer responsible for them. Applicant has been earning approximately \$61,000 a year since October 2007.

Applicant's supervisors consider her to be an outstanding employee with impressive performance. She is resourceful, creative, and a solutions oriented person. She welcomes new duties and responsibilities. She is diligent, responsible, and dependable, and has proven to be an asset to her employer. Her supervisors strongly endorse her eligibility for a public trust position.

Concerning the allegation that she falsified her public trust position application (she failed to disclose any debts over 180 days delinquent), Applicant explained that she made an honest mistake. She testified that she misunderstood the question. She believed she was required to disclose only delinquent obligations that were guaranteed by the Federal Government. Considering the plain language of the question, Applicant's education, maturity, demeanor while testifying, the number and value of the debts, and the periods during which the debts have been delinquent, her claim of honest mistake is not credible.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The government’s authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. See *Id.* at 527.

Positions designated as ADP I and II are classified as “sensitive positions.” 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.” Regulation ¶ C6.1.1.1. 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, an 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 an evaluation of the whole person. An administrative judge’s controlling adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to sensitive information. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the

criteria listed therein and an applicant's security and trustworthiness suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance [or trustworthiness] determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

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."

Analysis

Guideline F, Financial Considerations

Under Guideline F, the trustworthiness concern is that 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. AG ¶ 18.

Applicant filed for bankruptcy protection in 1998 and was discharged of her financial obligations. She developed further financial problems and again filed for Chapter 13 bankruptcy protection in 2002. The filing was dismissed in 2003, to allow her to sell her house. Thereafter, she accumulated 39 delinquent debts, totaling nearly \$41,000. Her debts became delinquent because she purchased a house and acquired debts beyond her financial means. Later, she was unable to pay the debts, in part because of her periods of underemployment. AG ¶ 19(a): "inability or unwillingness to satisfy debts" and AG ¶ 19(c): "a history of not meeting financial obligations," apply.

AG ¶ 20 lists conditions that could mitigate the financial considerations trustworthiness concerns. AG ¶ 20(a) does not apply because Applicant's financial problems are ongoing. Her periods of unemployment due to her surgeries and her underemployment are considered as circumstances beyond her control that contributed to a certain extent to her inability to pay her debts. Notwithstanding, Applicant failed to establish that she acted responsibly under the totality of her circumstances. She filed for bankruptcy protection in 1998, and did not learn from that experience. She acquired a house beyond her means in 2000, and accumulated significant delinquent debt, most of which remains unresolved. She presented little evidence of contact with creditors, settlements, payments, or of efforts to otherwise resolve her delinquent financial obligations since she acquired them until January 2011. Such behavior is disconcerting

considering that Applicant did not disclose her delinquent debts in her public trust position application. AG ¶ 20(b) does not apply.

Furthermore, she was made aware of the Government's financial considerations concerns during her 2007 interview and through DOHA's June 2010 interrogatories. Notwithstanding, she took little action to resolve even her small debts (under \$100). Instead, she elected to let the passage of time make her delinquent debts "disappear" from her credit report. Applicant should have been more diligent in her efforts to resolve her delinquent financial obligations. On balance, and considering the evidence as a whole, Applicant's financial irresponsibility casts doubt on her current reliability, trustworthiness, and judgment.

AG ¶ 20(c) does not apply. Applicant has not received counseling, her financial problem is ongoing, and there are no clear indications that her financial problems are under control. Applicant receives some credit for her recent efforts to contact creditors to settle and pay her delinquent obligations. Notwithstanding, such last minute efforts cannot be considered as a good-faith effort to resolve her debts. AG ¶ 20(d) partially applies, but does not mitigate the trustworthiness concern. Applicant presented some evidence of recent disputes of her past-due debt. However, considering the record as a whole, she failed to establish that she had a reasonable basis for her disputes. AG ¶ 20(d) does not apply. AG ¶ 20(f) is not raised by the evidence in this case.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a trustworthiness concern stating:

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 failure to cooperate with the security clearance process.

Applicant deliberately failed to disclose in her September 2007 application for a public trust position that she had 18 financial accounts that were over 180 days delinquent, including one civil judgment (SOR ¶¶ 1.i through 1.k, 1.s, 1.t, 1.v, 1.w, 1.y, 1.z, 1.aa through 1.gg, and 1.ii through 1.oo). When confronted by an investigator during her August 2007 interview, she admitted her delinquent debts and acknowledged knowing about them at the time she completed her application.

Applicant claimed that she made an honest mistake when she failed to disclose her delinquent debts. Considering the evidence as a whole, including Applicant's education, maturity, the plain language of the question, the number and value of the debts, the periods during which the debts have been delinquent, and having observed her appearance and demeanor while testifying, I find her explanations and her claim of honest mistake not credible. Applicant's deliberate falsification of her September 2007

application for a public trust position triggers the applicability of disqualifying condition AG ¶ 16

(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.

After considering all the AG ¶ 17 mitigating conditions, I find none apply. Applicant engaged in serious misconduct when she falsified her September 2007 public trust position application. Her falsification is a recent, felony-level offense.⁴ Her overall behavior shows questionable judgment, untrustworthiness, unreliability, lack of candor, and an unwillingness to comply with rules and regulations.

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 relevant 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.

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. AG ¶ 2(c). I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated in my whole-person analysis my comments on the analysis of Guidelines F and E.

Applicant receives credit for her outstanding performance working for Government contractors. She is considered to be a hard-working, dedicated, and valued employee. She is also a good daughter, mother, and grandmother. To a certain extent, her financial problems were due to circumstances beyond her control.

⁴ See 18 U.S.C. 1001.

Notwithstanding, public trust concerns remain. Applicant acquired financial obligations beyond her financial means and then showed disregard for her legal obligation to pay her debts. She failed to establish a track record of financial responsibility. Moreover, Applicant deliberately falsified her 2007 public trust position application. The record evidence fails to convince me of Applicant's suitability for a public trust position. For all these reasons, I conclude Applicant failed to mitigate the trustworthiness concerns arising from her financial considerations 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:	AGAINST APPLICANT
Subparagraphs 1.a, 1.b, 1.e, 1.f, 1.1.i, 1.k, 1.s, 1.t, and 1.v – 1.pp:	Against Applicant
Subparagraphs 1.c, 1.d, 1.g, 1.h, 1.j, 1.l - 1.r, and 1.u:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with national security to grant or continue Applicant's eligibility to occupy a public trust position. Applicant's eligibility to occupy a public trust position is denied.

JUAN J. RIVERA
Administrative Judge