



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



In the matter of:)
)
) ADP Case No. 10-06259
)
Applicant for Public Trust Position)

Appearances

For Government: Paul M. DeLaney, Esquire, Department Counsel
For Applicant: *Pro se*

July 21, 2011

Decision

ANTHONY, Joan Caton, Administrative Judge:

I have carefully reviewed the pleadings and exhibits in this case and conclude that Applicant failed to mitigate trustworthiness concerns under Guideline F, Financial Considerations. Eligibility for access to sensitive information is denied.

Statement of Case

Applicant submitted a Questionnaire for Public Trust Positions (SF 85P) on January 29, 2010. On January 21, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging trustworthiness concerns under Guideline F.¹ DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

¹ The caption on SOR sent to Applicant did not spell her first name correctly. I have corrected the spelling of her first name on the caption of this decision.

On February 23, 2011, Applicant answered the SOR in writing. She requested that her case be determined on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) on April 1, 2011. The FORM contained documents identified as Items 1 through 11. By letter dated April 4, 2011, DOHA sent a copy of the FORM to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received the file on April 22, 2011. Her response to the FORM was due on May 22, 2011. She did not file any additional information or objections within the required time period. The case was assigned to me for a decision on July 11, 2011.

Findings of Fact

The SOR is comprised of 26 allegations of delinquent debt, totaling approximately \$30,000, that raise trustworthiness concerns under Guideline F, Financial Considerations. Sixteen allegations recite delinquent medical debt (SOR ¶¶ 1.a., 1.b., 1.c., 1.d., 1.e., 1.f., 1.o., 1.p., 1.q., 1.r., 1.s., 1.t., 1.u., 1.v., 1.w., and 1.x.). Seven allegations recite delinquent consumer debts in collection status (SOR ¶¶ 1.g., 1.h., 1.i., 1.j., 1.k., 1.m., and 1.x.). Two allegations recite consumer debts in charged-off status (SOR ¶¶ 1.l. and 1.n.). One allegation recites an unpaid judgment (SOR ¶ 1.z.). In her Answer to the SOR, Applicant admitted all 26 allegations of delinquent debt. Applicant's admissions are entered as findings of fact. (Item 1; Item 4.)

The facts in this case are established by the record provided by the Government and by information provided by Applicant. The record evidence includes Applicant's SF 85P; official investigation and agency records; Applicant's responses to DOHA interrogatories; Applicant's credit reports of October 15, 2010, and February 5, 2010; and Applicant's bankruptcy petition filed February 1, 2011. (Items 5 through 10.)

Applicant, who is 32 years old, became a naturalized U.S. citizen in 2005. On her SF 85P, she identified herself as never married and without children. However, in her June 2010 interview with an authorized investigator from the U.S. Office of Personnel Management (OPM), she explained that she was "culturally married"² to an individual from her country of origin and was the mother of five children. Applicant has worked for her current employer since 2002. She seeks a trustworthiness determination for the first time. (Item 5; Item 7.)

Applicant has a history of financial delinquencies. She told the OPM investigator that between 1999 and 2006, her cultural husband used credit cards in her name for his personal expenses and to finance his part-time auto repair business. Applicant was employed during this time and tried to keep up with expenses, but she also found it necessary to use her credit cards for everyday living expenses, such as groceries, gasoline, and clothing for her five children. Applicant fell behind in paying bills for her medical treatments and her children's medical care. In September 2009, Applicant became overwhelmed with her husband's spending and the couple separated. She estimated that her husband was responsible for 80% of their delinquent debt. (Item 7 at 3.)

² Applicant stated that a "cultural marriage" was not recognized under U.S. law. (Item 7 at 3.)

In her OPM interview, Applicant acknowledged responsibility for her delinquent debts. She said she lacked the financial resources to honor this past debt because all of her earnings were used to care for and support her five children and to pay current debts. She said she was seeking financial assistance to file bankruptcy. In response to DOHA interrogatories in November 2010, Applicant reported that she had not satisfied any of her delinquent debts, and she lacked sufficient funds to file for bankruptcy. (Item 6; Item 7.)

In her OPM interview, Applicant reported that her net monthly income was \$1,900. Her fixed monthly expenses were as follows: rent, \$680; food, \$100³; utilities, \$125; car expenses, \$200; and clothing, \$175. (Item 7 at 6.)

Applicant's monthly debt payments included \$330 to her father for an automobile loan with a balance of \$10,000 and \$75 to her sister for a cell phone. She reported \$3,000 in savings. After paying her fixed monthly expenses and her two debt payments, Applicant had a net monthly remainder of \$215. (Item 7 at 6.)

On February 1, 2011, Applicant filed a Chapter 7 bankruptcy petition. On March 11, 2011, Applicant filed an amended Summary of Schedules showing assets valued at \$20,417 and liabilities to creditors of \$28,240. The liabilities listed by Applicant on her Chapter 7 documentation appear to correspond to the delinquent debts alleged at SOR ¶¶ 1.a. through 1.n. and SOR ¶¶ 1.y. and 1.z. (Item 1; Item 10 at 21-25, 46.)

Applicant's amended Schedule I lists her marital status as single with three dependents (daughters aged three, five, and eight years). The amended Schedule I shows Applicant's net monthly take-home pay is \$2,179. Additionally, she receives \$445 in state government food assistance payments, for an average monthly income of \$2,624. Applicant's amended Schedule J shows her average monthly expenses are \$2,282.50, leaving a net remainder of \$341.50. (Item 10 at 48-49.)

The record establishes that Applicant took part in required credit counseling at the time she filed for Chapter 7 bankruptcy. (Item 10 at 1.)

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

³ Applicant told the investigator that she received approximately \$400 a month in free food from her state government. (Item 7 at 6.)

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 AGs. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge must apply the guidelines 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.

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 in seeking 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 relating to the guideline 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 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 trustworthiness concerns. Applicant admitted all 26 allegations of financial delinquency on the SOR. Her history of delinquent debt is documented in her credit reports, her SF 85P, her interview with the OPM investigator, her Chapter 7 bankruptcy petition, and her SOR response. Applicant accumulated considerable delinquent debt and was unable to pay or satisfy her financial obligations. While she asserts that her financial problems arose primarily from the irresponsibility of her estranged husband, she failed to provide documentation corroborating her assertion. The evidence is sufficient to raise financial considerations disqualifying conditions identified at AG ¶¶ 19(a) and 19(c).

The guideline also includes examples of 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 trustworthiness, or good judgment." Applicant's financially delinquent behavior began several years ago, continues unresolved at the present time, is likely to recur, and casts doubt on her current reliability, trustworthiness, and good judgment. Accordingly, I conclude that AG ¶ 20(a) does not apply to the facts of Applicant's case.

Under AG ¶ 20(b), mitigation can occur 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's admitted her financial delinquencies began in about 1999 and continue to the present. While Applicant claimed that her husband's profligate spending was responsible for 80% of her debts and circumstances beyond her control prevented her from satisfying those delinquent debts, she provided no documentation to corroborate her claims. Additionally, she offered no explanation for her failure to contact her creditors to resolve or settle her financial delinquencies during the past nine years when she has been

steadily employed. I conclude that she failed to act responsibly in identifying and resolving her debts. I find that AG ¶ 20(b) applies only in part as a factor for consideration in this case.

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 required credit counseling when she filed her petition for bankruptcy. However, fulfillment of this requirement does not establish that she understands the nature of her financial problems, how to resolve them, or how to prevent them from recurring in the future. I conclude that AG ¶ 20(c) does not fully apply to the facts of this case.

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 attempted to resolve her financial delinquencies by filing a petition for Chapter 7 bankruptcy. While Applicant made use of a legal remedy to resolve her delinquent debts, it nevertheless does not demonstrate good faith in paying the delinquent debts alleged on the SOR. DOHA’s Appeal Board has explained what constitutes a “good faith” effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the “good faith” mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant’s debts. The Directive does not define the term ‘good-faith.’ However, the Board has indicated that the concept of good-faith ‘requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.’ Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy [or statute of limitations]) in order to claim the benefit of [the “good faith” mitigating condition].

(Internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. April 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

Applicant failed to provide documentation to establish that she had pursued resolution of her debts with “reasonableness, prudence, honesty, and adherence to duty or obligation.” Accordingly, I conclude that AG ¶ 20(d) does not fully apply to the facts of Applicant’s case. AG ¶¶ 20 (e) and 20 (f) are not raised by the facts of this case.

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.

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 has had financial difficulties for at least ten years. She asserts that 80% of her financial difficulties arose from the spending habits of her estranged husband, from whom she separated in September 2009. She has known about her financial delinquencies since at least June 2010, when she met with the OPM investigator. In November 2010, in response to DOHA interrogatories, she reported that she had taken no action to resolve her delinquent debt. In February 2011, after receiving the SOR, she filed for Chapter 7 bankruptcy.

Applicant has had a steady job with the same employer for nine years. However, her actions to address her financial delinquencies are recent, and it is unclear at this time that she will be able to prudently manage her financial obligations and satisfy her current debts in a timely manner. She has failed to demonstrate that her financial problems will not continue to be a trustworthiness concern in the future.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant failed to mitigate the trustworthiness concerns arising from her financial delinquencies.

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.z.: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Joan Caton Anthony
Administrative Judge