



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



In the matter of:)
)
) ADP Case No. 10-08051
)
)
 Applicant for Public Trust Position)

Appearances

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

September 16, 2011

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Since January 2011, Applicant has paid \$1,500 toward an \$18,403 credit card judgment debt, and she has satisfied some minor medical debts that were in collection. Yet, she has made no efforts to resolve a \$5,678 charged-off balance owed a jewelry and camera retailer, an investment mortgage loan debt of \$121,157 that is \$47,539 past due and in foreclosure, or a telephone debt of \$3,370 in collection. A second investment property was foreclosed on with \$116,663 due on that loan, although the property was reclaimed to settle that debt. The financial considerations concerns are not fully mitigated. Public trust position denied.

Statement of the Case

On March 1, 2011, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR), detailing the trustworthiness concerns under Guideline F, Financial Considerations, which provided the basis for its preliminary decision to deny her eligibility for a public trust position, and to refer the matter to an administrative judge. DOHA took action 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 Regulation 5200.2-R, *Personnel Security Program* (January 1987) as amended; and the adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant acknowledged receipt of the SOR on March 11, 2011. She answered the SOR on March 16, 2011, and requested a decision without a hearing. On April 29, 2011, the Government submitted a File of Relevant Material (FORM), consisting of nine exhibits (Items 1 through 9). On May 3, 2011, DOHA forwarded a copy of the FORM to Applicant and instructed her to respond within 30 days of receipt. Applicant responded on June 13, 2011. I received the case on June 28, 2011, to determine whether it is clearly consistent with national security to grant or continue a public trust position for Applicant. Noting Department Counsel has no objection to Applicant's rebuttal to the FORM, I admitted Applicant's documents as exhibits (AE) A through D.¹

Findings of Fact

The SOR alleged under Guideline F, Financial Considerations, that Applicant owed an \$18,403 credit card judgment debt (SOR 1.a), \$541 in medical debt in collection (SOR 1.b-1.d, 1.f, 1.l-1.n), \$7,463 in past due telephone services debt, \$5,678 in charged-off debt (SOR 1.h), and mortgage debt in foreclosure (SOR 1.i-1.j) or in collection (SOR 1.k) totaling \$857,619. In her Answer to the SOR, Applicant indicated she did not recognize the \$1.00 medical debt in SOR 1.b and claimed that the medical debts in SOR 1.d, 1.m, and 1.n had been paid. Applicant also denied that the \$620,619 mortgage on her residence (SOR 1.k) was in collection. Her admission to the other debts, including to the defaulted mortgage loans in SOR 1.i and 1.j, are incorporated as findings of fact. After considering the Government's FORM and her rebuttal, including Applicant's detailed explanations of the circumstances that led to her financial problems, I make the following findings of fact.

Applicant is a 51-year-old quality training specialist employed by a TRICARE contractor since April 2010. She seeks continued eligibility for a position of trust, having previously worked in the industry with one employer from January 1984 until November 2009, when she was laid off. (Item 5.) Applicant and her spouse have been married since June 1989 (Items 4, 5), and they apparently have two dependent children. (Item 4.)

Early in their marriage, Applicant and her spouse worked two jobs to save for a home. Around 1991, Applicant became pregnant, and she quit her part-time job. With the money saved to date, they decided to become landlords and purchase investment property. They bought a two-family unit, in part with funds from their 401(k) profit-

¹Applicant's forwarding correspondence was admitted as exhibit (AE) A, her mortgage statement as AE B, her payments on the credit card judgment alleged in SOR 1.a as AE C, and her medical payments as AE D.

sharing. Applicant indicated that they owned over ten rental properties by 1994 (Item 4), although her credit reports show only two mortgage loans opened around that time. She and her spouse took out conventional ten-year mortgage loans of \$25,800 in February 1993 and of \$19,100 in November 1993. Over the next ten years, they continued to finance their investment properties through a succession of first and second mortgages.² They fell behind as much as 60 days on their mortgage loans in 2005,³ when Applicant had high car payments. Applicant's credit reports show that in 2005, she was paying \$1,267 per month on a \$60,818 car loan taken out in March 2002, \$715 per month on a \$33,209 automobile loan opened in March 2004, \$1,435 per month on a \$65,841 car loan taken out in October 2003, and \$506 for another car financed through a \$22,120 loan. (Items 7, 8.)

In October 2005, Applicant and her spouse took out a 30-year mortgage of \$117,800, covering one or more of their investment properties, to be repaid at \$1,479 per month (SOR 1.j). At the time, they had a \$560,000 mortgage on their personal residence, which they were repaying at \$3,714 a month (SOR 1.k) in addition to the car payments totaling almost \$4,000 a month. By early 2007, Applicant had paid off the \$60,818, \$65,841, \$33,209, and \$22,120 car loans. Even with a new automobile loan of \$50,771 taken out in September 2006, she had lowered her total car payment by about \$3,873 per month. She and her spouse also paid off a few smaller mortgages totaling around \$59,697, although Applicant took out a new investment mortgage of \$122,400 in November 2006 (SOR 1.i), so their total mortgage obligation rose by \$708 per month.⁴

Applicant's and her spouse's income suffered from the loss of his employment,⁵ but they managed to pay their debts on her salary and their rental income. When the house prices started to fall, Applicant and her spouse tried unsuccessfully to sell their rental properties. When some of their tenants stopped paying the rent, they began to struggle financially. Accounts were placed for collection well before November 2009

²Applicant's credit report also includes an \$842,551 joint commercial mortgage taken out in July 1999 that was not alleged in the SOR. The loan payments were \$9,705 per month, and it became past due 120 days or more. The account was closed in November 2007 with a zero balance reported, however.

³In November 1997, they took out a joint mortgage loan of \$25,120, to be repaid at \$649 per month. The loan fell past due 60 days in 2005. In June 1999, they took out a mortgage loan of \$48,800. After they paid off their \$25,800 mortgage in April 2000, they took out a new \$25,800 mortgage in June 2000. That loan fell past due 30 days in 2005. In May 2003, they took out a second mortgage of \$8,777, on which they made timely \$240 monthly payments.

⁴Applicant and her spouse had been paying \$1,203 per month total for the three mortgages. They were required to repay the new loan at \$1,911 per month. (Item 7.)

⁵There is discrepant information about when her spouse lost his job. Applicant told an authorized investigator in May 2010 that her spouse lost his engineering position in 2008. In response to DOHA interrogatories, Applicant indicated in December 2010 that she and her spouse started having financial problems in 2008. (Item 6.) Yet, when she responded to the SOR, she averred that her spouse was let go from his engineering position in 2005. (Item 4.) Available credit reports reflect some minor delinquencies in 2005, but they managed to open new accounts and to remain current on their financial obligations for the most part until 2008. (Items 7, 8.)

when she lost her longtime employment (since January 1984) in a corporate downsizing. (Item 5.)

In November 2007, Applicant and her spouse stopped paying for a cellular phone used for their business (SOR 1.e, duplicated in SOR 1.g). A \$2,965 balance was placed for collection in December 2007 with the assignee identified in SOR 1.g. As of May 2008, they owed \$3,733 on the account. In January 2010, the debt was transferred to the assignee in SOR 1.e. (Items 7, 8.)

In early June 2008, the mortgage lender for Applicant's and her spouse's personal residence (SOR 1.k) filed to foreclose on their loan for failure to make their \$3,714 monthly payments. As of March 2010, they owed a collection balance of \$620,619. (Items 4, 8.) They averted foreclosure by resuming monthly payments of \$3,714, which since at least January 2011 have been applied solely to escrow and interest on the loan balance of \$621,837.13. (AE B.) While Applicant maintains that her home loan is current (Item 4), the record of recent transactions on her account does not confirm that her loan is considered up-to-date. (AE B.)

Applicant and her spouse defaulted on their two investment mortgages as well. According to Applicant, it did not make sense to try to maintain two business mortgages "with interest rates that quadrupled from 3% to over 12% in less than 3 years." (Item 4.) In August 2008, Applicant stopped paying on the \$122,400 mortgage loan that was solely in her name. As of March 2010, the loan was \$47,539 past due and in foreclosure (SOR 1.i). (Item 8.) Applicant claims that she tried unsuccessfully to modify the loan (Item 4), although she provided no corroborating evidence. The debt remains unresolved. The mortgage loan identified in SOR 1.j was in foreclosure as of August 2009 for non-payment since December 2008. However, the lender reclaimed the house to settle the defaulted mortgage balance of \$116,663. (Items 7, 8.)

Between September 2008 and February 2010, six medical debts totaling \$454 were placed for collection (SOR 1.b-1.d, 1.f, 1.m-1.n), and she owed a \$112 medical debt in collection since August 2004 (SOR 1.l). In February 2009, she stopped paying on a credit card account (SOR 1.a). In July 2010, the creditor obtained an \$18,403 judgment against her. (Item 7.) In June 2009, Applicant stopped paying on a jewelry and camera store debt (SOR 1.h) that was originally incurred in December 2003 in the amount of \$13,709. A \$5,678 balance was charged off and referred for collection. As of August 2010, this account was \$2,151 past due, and the \$18,403 judgment was also unpaid (Items 7, 8), even though she gained full-time employment in April 2010 with her present employer. (Item 5.)

On April 12, 2010, Applicant completed a Questionnaire for Public Trust Positions (SF 85P). She disclosed pleasure travel to Jamaica in October 2007 and to Mexico in July 2008. Concerning her financial record, she listed only the credit card debt identified in SOR 1.a as being 180 days delinquent. (Item 5.)

On May 13, 2010, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). She discussed the foreclosure action filed against her residence in June 2008, which she claimed she settled. Applicant indicated that the investment mortgage in SOR 1.i had gone to foreclosure when she could no longer afford to make the payments due to her and her spouse's unemployment. She admitted that she was not in contact with the lender. Applicant acknowledged the credit card judgment, the delinquent jewelry store and cellular phone debts, and the medical accounts in collection. She asserted that she would contact the consumer credit lenders to negotiate repayment, and that she was making monthly payments on the medical debts. (Item 6.)

A check of Applicant's credit on August 24, 2010, revealed some progress on satisfying her outstanding medical debt, although she had made no payments on the \$262 debt identified in SOR 1.f, or the \$97 medical debt identified in SOR 1.c. (Item 7.) Applicant asserts that as of March 16, 2011, she had paid the \$19 remaining on the medical debt identified in SOR 1.d, was making payments on the \$97 medical debt in SOR 1.c, and had satisfied the \$25 medical debts in SOR 1.m and 1.n. Given she was making payments on the debt in SOR 1.d by August 2010, and the debts in SOR 1.m and 1.n no longer appeared on her credit record, I accept that those debts were paid. In response to the FORM, Applicant provided evidence of medical payments totaling \$189.48, \$156.14 of which was to a health center. (AE D.) There is no proof those payments were on the debts in SOR 1.c, 1.f, or 1.l, although it does show she is making some medical payments. Since her credit record shows that she had paid \$25 of the \$26 medical debt in SOR 1.b as of June 2010, that debt is likely resolved.

On January 14, 2011, Applicant began making \$300 monthly payments to the collection agency for the judgment creditor identified in SOR 1.a. As of May 20, 2011, she had paid \$1,500 toward the judgment. (AE C.) Should Applicant keep her current employment, she intends to continue making payments on her delinquent debt, with the possible exception of the foreclosed mortgages, which she does not believe she can repay ("I disagree of your findings which are unfounded; once a property is foreclosed you cannot go back and pay on a foreclosed properties."). (AE A.)

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) "The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security." (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

When evaluating an Applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the Adjudicative Guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overall 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 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 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 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. See Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The trustworthiness concern about finances 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 evidence establishes that as of March 1, 2011 (the SOR date), Applicant owed \$17,803 of the credit card judgment in SOR 1.a, the \$3,730 cellular phone debt in SOR 1.e, the \$5,678 jewelry store debt in SOR 1.h, and about \$121,157 on the defaulted investment mortgage in SOR 1.i. Disqualifying conditions AG §§ 19(a), “inability or unwillingness to satisfy debts,” and 19(c), “a history of not meeting financial obligations,” apply. While Applicant and her spouse defaulted on the investment mortgage in SOR 1.j, the lender reclaimed the collateral to settle the debt. Concerning their delinquent home loan in SOR 1.k, it appears that they have come to some agreement with the lender regarding rehabilitation of the loan. Applicant and her spouse are making payments on the loan, and those payments are being applied by the lender to the interest and escrow. Like the medical debts which have been paid after collection, the debts in SOR 1.j and 1.k raise concerns about Applicant’s financial judgment, although the paid medical debts and the investment mortgage in SOR 1.j no longer pose an unacceptable security risk of Applicant engaging in illegal acts to generate funds to resolve those debts.

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,” is difficult to apply when several of her delinquent debts are still outstanding. The downturn in the economy, which led some tenants to not pay their rent, and the job losses for her and her spouse, are circumstances outside of Applicant’s control which could establish mitigating condition AG § 20(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.” However, Applicant failed to provide the financial record information required to meet her burden under AG § 20(b). Certainly, the loss of her spouse’s income would have negatively impacted the household finances, but a meaningful financial analysis cannot be performed without any income or expense figures. She provided discrepant information about the date of her spouse’s job loss, which makes it even more difficult to see the nexus between his unemployment and the delinquencies. If Applicant’s spouse lost his job in 2005, as Applicant indicated in response to the SOR, then one has to question her decisions to take out a \$122,400 investment mortgage (SOR 1.i) in November 2006, and to take out a new car loan of \$50,771 in September 2006. According to her credit report, she had just paid off a \$60,818 automobile loan taken out in March 2002, and was still making payments on a \$65,841 car loan opened in October 2003. A job layoff for her spouse in 2008 could explain the default on her home loan and initiation of foreclosure proceedings in June 2008, but it would not mitigate the poor judgment exhibited in the cellular phone debt going to collection in December 2007, or more recently, the delay in addressing the credit card judgment entered against her in July 2010. There is no evidence of any payments on the judgment before January 2011.

Applicant’s \$300 monthly payments toward the credit card judgment debt since January 2011 are weighed favorably, but her evidence in mitigation is not enough to satisfy either AG 20(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,” or AG ¶ 20(d), “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” She informed an authorized investigator in May 2010 that she would contact her creditors to negotiate repayment of the telephone debt in SOR 1.e, and the jewelry store debt in SOR 1.h. There is no evidence that she had done so by mid-June 2011, when she filed her rebuttal to the FORM. The \$47,539 past-due balance of the investment mortgage in SOR 1.i is yet to be resolved. Promises to act in the future are not a substitute for a track record of documented repayment.

AG ¶ 20(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,” has only very limited applicability in this case. Applicant did not recognize the \$1.00 medical debt alleged in SOR 1.b, and indicated that her home loan should not be in collection since she was making monthly payments. Applicant also disputed the medical debt in SOR 1.d on the basis that it was paid. Equifax reported those debts as being in collection as of August 2010, and Applicant did not disprove her legal responsibility for those debts. AG ¶ 20(e) is pertinent to the debt alleged in SOR 1.j, however, as the creditor does not appear to be pursuing Applicant for a delinquent balance at this point, and to the debt alleged in SOR 1.g, which is a duplicate listing of the debt in SOR 1.e and not an additional debt.

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 conduct and all the relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(a).⁶ Applicant and her spouse took a significant financial risk by investing their savings in real estate. By 1994, only three years after they became landlords, they owned over ten rental properties. Over the next 12 years, Applicant continued to take on significant debt in investment mortgages and in car payments. While her ability to repay her debts was compromised by the loss of her spouse’s employment, she bears considerable responsibility for becoming financially overextended. She apparently took vacations to Jamaica in October 2007 and to Mexico in July 2008 when her cellular phone debt was seriously delinquent. Without evidence of Applicant’s income or whether her spouse is presently employed, I cannot conclude that her financial

⁶The factors under AG ¶ 2(a) are:

- (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.

problems are safely in the past, given she owes more than \$100,000 in delinquent debt. Doubts exist about whether she can be counted on to make the sound decisions that must be demanded of those persons in a public trust position.

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

Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j:	For Applicant
Subparagraph 1.k:	For Applicant
Subparagraph 1.l:	Against Applicant
Subparagraph 1.m:	For Applicant
Subparagraph 1.n:	For Applicant

Conclusion

In light of the record in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Elizabeth M. Matchinski
Administrative Judge