



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



In the matter of:)
)
) ADP Case No. 11-09155
)
Applicant for Public Trust Position)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

02/26/2013

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s financial problems are the result of circumstances beyond her control. There is no evidence of financial irresponsibility, and she established payment plans for the alleged delinquent debts. She presented evidence of efforts to resolve her delinquent debts and is establishing control of her financial situation. Eligibility to occupy a public trust position is granted.

Statement of the Case

Applicant submitted a Questionnaire for Public Trust Position on October 21, 2010. On October 5, 2012, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) listing trustworthiness concerns under Guideline F (Financial Considerations).¹ Applicant answered the SOR (undated), and requested a hearing before an administrative judge.

¹ The DoD acted under Executive Order 12968, *Access to Classified Information* (August 2, 1995), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and DoD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DoD on September 1, 2006.

The case was assigned to me on November 29, 2012. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 3, 2012, scheduling a hearing for January 9, 2013. At the hearing, the Government offered exhibits (GE) 1 through 4. Applicant testified, presented the testimony of one witness, and submitted exhibits (AE) 1 through 14. All exhibits were received without objection. DOHA received the hearing transcript (Tr.) on January 16, 2013.

Findings of Fact

Applicant admitted all the SOR factual allegations, except for SOR ¶ 1.d, which she denied because it is a duplicate allegation of SOR ¶ 1.a. The record evidence confirmed that the same debt was alleged twice. I consolidated both SOR ¶¶ 1.a and 1.d into SOR ¶ 1.a. SOR ¶ 1.d was dismissed. Applicant's admissions are incorporated herein as findings of fact. After a thorough review of all the evidence, including her testimony and demeanor while testifying, I make the following additional findings of fact:

Applicant is a 46-year-old executive assistant employed with a government contractor. She has never been married. She has a 13-year-old daughter who lives with her. Applicant received her bachelor's degree in communications in 1988. Applicant started working shortly after graduating from college, and she was consistently and fully employed until May 2008, when she was laid off. There is no evidence to show that Applicant had any financial problems while she was fully employed.

Applicant lost her job in May 2008 and she was unemployed or underemployed until around October 2010. During that period, Applicant sought employment as a substitute teacher, worked for minimum wages, and received unemployment benefits. On some occasions, she worked at the same time she was receiving unemployment benefits and she had to reimburse her state for receiving unauthorized unemployment benefits.

After losing her job, Applicant contacted her mortgage lender and informed it of her financial problems. Thereafter, she tried several times to modify her mortgage, but the lender refused. In December 2008, Applicant received a Notice of Intent to Foreclose stating her lender's intent to sell her home at a foreclosure sale because she missed some mortgage payments. Applicant sought the assistance of a corporation dedicated to assisting homeowners to modify their mortgages, and her mortgage modification was approved in October 2011.

Applicant admitted the credit card debt alleged in SOR ¶ 1.a. She carried that bank's credit card since 1988, without any financial problems. After losing her job, she used her credit to pay for her day-to-day living expenses, mortgage payments, and other debts. Because she was not fully employed, she did not have the money to repay her debts and the account became delinquent.

In April 2010, the bank obtained a judgment against Applicant for over \$21,000. The collector for this debt contacted Applicant in September 2011, and offered a reduced lump-sum settlement for \$14,452. Applicant did not have the money to take the offer, but she attempted to establish a payment plan within her financial means. The collector refused to establish a payment plan for small monthly payments. In July 2012, a subsequent collector accepted Applicant's offer to make small monthly payments toward her debt. She made her first payment of \$50 in December 2012. (AE 13)

In July 2011, Applicant's homeowner's association obtained a \$2,353 judgment against her for unpaid fees. (SOR ¶ 1.b) She contacted the collecting agency and made \$100 payments in March, July, September, and October 2012, and one payment in January 2013.

Applicant used the credit card alleged in SOR ¶ 1.c to pay for her day-to-day living expenses, mortgage payments, and other debts. The account became delinquent, and it was charged off in the amount of \$10,150. Applicant contacted the credit union and established a payment plan. From August 2011 to March 2012, she made eight consecutive payments of \$100. She failed to make payments from April 2012 until August 2012. She claimed she had car problems and had to use the money to repair her car. She presented additional evidence of \$100 payments in September, October, and December 2012. (AE 9)

Applicant used the credit card alleged in SOR ¶ 1.e to pay for her day-to-day living expenses, mortgage payments, and other debts. The account became delinquent, and the creditor brought a collection action against her. Applicant first attempted to establish a payment plan in April 2012, when she made one payment of \$100. At the time, the collecting agency refused to accept a payment plan for such small payment. After further negotiations with a new collecting agency, Applicant made a \$100 payment in October 2012. And, in November 2012, the collecting agency agreed to establish a payment plan. Applicant agreed to a consent judgment for approximately \$11,000, and established a payment plan of \$100 a month, starting in November 2012. She testified she is current on this debt because she does not want her wages garnished. (AE 10)

Applicant received medical services in August 2009, and acquired a debt of \$687 (SOR ¶ 1.f). At the time, she was unable to pay the debt because she was unemployed. Apparently, she forgot about the debt until September 2012, when she made a \$25 payment. In December 2012, she made a second payment of \$30.

At the hearing, Applicant acknowledged that she has a large amount of debt, but repeatedly emphasized that she never had financial problems until she lost her job. She believes she is doing all that she can do to satisfy her delinquent obligations. Her debts became delinquent because she did not have the income to pay for her and her daughter's day-to-day living expenses and her accrued debts.

Applicant believes that now that she is fully employed she is again in control of her financial situation and her life. Her goal is to continue working to have the financial

means to prepare her daughter for college. She does not consider herself a security risk. She would never engage in any behavior that could jeopardize her country or her daughter's future.

Applicant's two character witnesses observed her performance on a daily basis for approximately one year. In their opinion, Applicant is a dedicated, hardworking employee. She is knowledgeable of her professional responsibilities, dependable, reliable, honest, and trustworthy. In sum, she is a valuable employee. This is Applicant's first application to hold a position of trust. Applicant's witness testified about Applicant's organizational skills, her efforts seeking employment, and the stress Applicant suffered because of her precarious financial situation.

Applicant explained that it took her some time to start making payments on her delinquent debts because the debt collectors did not want to settle the debts or to accept small payments. (Tr. 58-59) Applicant disclosed in her October 2010 application for a position of trust (Section 22 – Your Financial Record), that during the prior seven years, she had financial problems. She also discussed her financial problems with a government investigator during a June 2011 interview.

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 security 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 classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. (AG ¶ 18)

Applicant was unemployed or underemployed from May 2008 until around October 2010. During that period, she used her credit to pay for her and her daughter’s

day-to-day living expenses and her mortgage. Because of her employment situation she was unable to address her debts and they became delinquent. Her financial problems continue to the present as evidenced by the five delinquent debts alleged in the SOR, totaling over \$40,000. Two of the financial considerations disqualifying conditions apply: AG ¶ 19(a): inability or unwillingness to satisfy debts, and AG ¶ 19(c): a history of not meeting financial obligations.

AG ¶ 20 lists six conditions that could mitigate the financial considerations security concerns:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;

(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; and

(f) the affluence resulted from a legal source of income.

Applicant's periods of unemployment and underemployment are circumstances beyond her control that contributed to her financial problems. While unemployed she used her credit to pay for her day-to-day living expenses, and her mortgage. There is no evidence to show Applicant was financially irresponsible before she became unemployed. Nor is there evidence that Applicant was living beyond her financial means.

After losing her job, Applicant consistently sought employment and worked part-time or for minimum wages. She remained in contact with her creditors, informed them of her job situation, and sought to establish payment plans within her financial means, and to modify her mortgage.

Applicant's documentary evidence shows that she modified her mortgage in October 2011. As of the hearing date, she was current on her mortgage payments. Applicant established payment plans with all her creditors, although, some of them are recent. She made her first payment to the creditor alleged in SOR ¶ 1.a in December 2012. She established a payment plan with the creditor alleged in SOR ¶ 1.b, and made \$100 payments in March, July, September, and October 2012, and one payment in January 2013.

Applicant established a payment plan with the creditor alleged in SOR ¶ 1.c, and made \$100 payments in August 2011, September 2011, October 2011, November 2011, December 2011, January 2012, February 2012, and March 2012. She failed to make payments from April through August 2012. She made additional payments in September, October, and December 2012. Applicant explained that she missed some payments because she had car trouble and had to spend the payment money on car repairs.

Applicant attempted to establish a payment plan with the creditor alleged in SOR ¶ 1.e in April 2012, when she made a \$100 payment. The then collecting agency refused to enter into a payment agreement. In October 2012, Applicant established a payment agreement with a new collection agency. She agreed to pay \$100 a month, starting on November 2012. Applicant made payments toward the debt alleged in SOR 1.f in September 2012 (\$25) and in December 2012 (\$30).

Considering the record as a whole, I find that Applicant should have been more aggressive and timely in addressing her delinquent debts after she started working in October 2010. Notwithstanding, I find that Applicant established a viable plan to resolve her financial problems, and she has taken significant actions to implement her plan. Although Applicant's financial problems are ongoing, she has established that she is in control of her financial situation and that her financial problem is being resolved. Applicant is fully aware that she is required to maintain financial responsibility to be eligible for a position of trust.

AG ¶ 20(a) applies, in part, because Applicant's financial problems occurred under such circumstances that it is unlikely to recur, and it does not cast doubt on Applicant's current reliability, trustworthiness, or good judgment. AG ¶¶ 20(b) and 20(d) apply to this case because Applicant made good-faith efforts to pay her creditors, and there are indications that her financial problems are being resolved or under control. AG ¶¶ 20(c), 20(e), and 20(f) are not applicable to the facts of this case.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c).

Applicant is 46 years old. This is her first application for a position of trust. Applicant's financial problems were largely the result of circumstances beyond her control. Because of her limited income she has been slow in addressing her delinquent debts. Applicant understands the importance of maintaining financial responsibility. She was honest and truthful in her answers to the questions in her position of trust application. Considering the record as a whole, Applicant has a viable plan to resolve her delinquent debt, and she is taking control of her financial situation.

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
Subparagraphs 1.a-1.f:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant eligibility for a public trust position to Applicant. Eligibility is granted.

JUAN J. RIVERA
Administrative Judge