



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



In the matter of:)	
)	
-----)	ADP Case No. 11-10329
)	
Applicant for Public Trust Position)	

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro se*

01/02/2013

Decision

HOWE, Philip S., Administrative Judge:

Applicant submitted her Questionnaires for Public Trust Position (SF 85P), on September 20, 2009. On July 27, 2012, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline F (Financial Considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), 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 after September 1, 2006.

Applicant acknowledged receipt of the SOR on August 9, 2012. She answered the SOR in writing on August 17, 2012, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on October 3, 2012, and I received the case assignment on October 11, 2012. DOHA issued a notice of hearing on November 5, 2012, and I convened the hearing as scheduled on November 21, 2012. The Government offered Exhibits 1 through 7 into evidence, which were received without objection. Applicant testified and submitted Exhibits A through H

into evidence, without objection. DOHA received the transcript of the hearing (Tr.) on December 3, 2012. I granted Applicant's request to keep the record open until December 5, 2012, to submit a copy of her bankruptcy discharge order. On November 26, 2012, she submitted Exhibit I, a copy of the bankruptcy order, without objection. The record closed on December 5, 2012. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is granted.

Procedural and Evidentiary Rulings

Notice

At the hearing, Applicant affirmatively waived her right to 15 days' notice. Applicant discussed the hearing date with Department Counsel before the Notice of Hearing was issued and about a month prior to the hearing date. Applicant received copies of the Department's exhibits on September 21, 2012. She had precisely 15 days' notice before the hearing, but if there were any impediments, Applicant decided to waive any objections and proceed with the hearing. (Tr. 7, 8)

Findings of Fact

In her Answer to the SOR, dated August 17, 2012, Applicant admitted all factual allegations of the SOR, with explanations. She also provided additional information to support her request for eligibility for a public trust position.

Applicant is 45 years old, married for 22 years, and has three daughters. She works for a TRICARE subsidiary in the health insurance industry. Applicant worked for the same insurance company for a number of years and was laid off in 2009 for three months. She was rehired at a lower salary at the end of the three-month period. Applicant is the sole support of her family, because her husband injured his back at work several years ago and her daughters (ages 21, 18, and 14) attend high school and college. (Tr. 12, 13, 23, 28, 71, 79; Exhibit 1)

Applicant's husband has been unemployed since 2007. He is 46 years old. He had surgery on his back and hip in 2010 because of an injury he suffered while working for a company after his business closed. He is unable to work. Applicant does the yard and housework, in addition to working at her job. Her husband also had stomach surgery in May 2012. Applicant's medical debts resulted from her husband's medical care and a medical procedure she had in the past few years. Applicant paid the co-pays on each medical charge but for some charges she did not have the money. (Tr. 12, 13, 23, 28, 31, 71, 74, 79, 82)

The SOR alleged 27 monetary debts and four allegations of bankruptcy filings by Applicant. The debts totaled \$16,043. By filing Chapter 13 and Chapter 7 bankruptcies, Applicant resolved her delinquent debts. (Tr. 12-76; Exhibits 2-7, A, G-I)

Applicant filed a Chapter 7 bankruptcy in 2001. It was dismissed in January 2002. She filed another Chapter 7 bankruptcy later in 2002 and it was also dismissed.

Then Applicant filed a Chapter 13 bankruptcy in 2002. She paid \$600 monthly to the bankruptcy trustee to pay her debts. The bankruptcy was discharged in 2005. These bankruptcies were filed to resolve her husband's business debts from his closed business. Applicant's bankruptcy attorneys handled this series of petitions in bankruptcy court. At that time Applicant's husband had \$52,000 in business tax debt. The bankruptcy filings prevented the Internal Revenue Service (IRS) from filing tax liens on Applicant's real estate. Applicant again filed Chapter 13 bankruptcy in 2009. It was dismissed in 2010 when Applicant could not continue to make the \$600 monthly payments. Applicant's most recent bankruptcy is a Chapter 7 petition filed on August 17, 2012. She was discharged in bankruptcy on November 21, 2012. The four SOR allegations concerning the bankruptcies are Subparagraphs 1.a and 1.cc-1.ee. (Tr. 37-54; Exhibits 2-7, A, I)

Applicant marked a copy of the SOR with highlighter to show all but two listed debts are included in the current bankruptcy. They are subparagraph 1.z owed to a medical provider for \$58 and the \$8,000 in IRS debt, which Applicant resolved separately with the sale of her house in 2005. Applicant also marked a copy of the current bankruptcy petition showing several non-SOR debts that are listed in the Schedule F of the petition. Those debts include several medical debts, car repossession, and a gym membership debt. The current Chapter 7 bankruptcy lists \$47,853.99 in liabilities. All of Applicant's debts are resolved by the Chapter 7 bankruptcy action and her payment of the \$8,000 IRS debt. (Tr. 34-47, 52-60, 76; Exhibits G-I)

Applicant and her husband sold their house in 2005 to pay tax debts resulting from his closed business. They purchased the house in 1998. They now live in an apartment. Applicant does not have credit cards. She has no loans outstanding. Her 1998 automobile loan is paid. The \$8,000 payroll tax debt was paid to the IRS (SOR subparagraph 1.bb). (Tr. 51, 63-68)

Applicant attended the mandatory credit and financial counseling required in the bankruptcy process. She has an income of \$2,530 and \$2,586 of expenses each month. Applicant's only savings are in her IRS Code § 401(k). She has no savings account, only a checking account. (Tr. 62, 63, 66-68; Exhibit 6)

Applicant submitted two character statements. The authors state Applicant is hardworking, reliable, and trustworthy. They note Applicant has a good moral character and personal integrity. Applicant also submitted her 2009 to 2011 performance reports. The overall rating she received is "consistently successful." (Tr. 12-28; Exhibits B-F)

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 (AG ¶ 2 (a)). 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 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. 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, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining 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 *a/so* 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 lists nine conditions that could raise trustworthiness concerns. Of these nine conditions, two apply to Applicant's situation:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant had 27 delinquent debts totaling \$16,043 that accumulated between 2002 and 2010 for medical care and because of a failed business in which her husband was involved. She has a history of accumulating delinquent debts that she has been unable to pay that began in 2001 or before then when her husband's business was failing. The evidence is sufficient to raise these potentially disqualifying conditions.

The ¶ 20 guideline includes six conditions that could mitigate trustworthiness concerns arising from financial difficulties. Four conditions apply to Applicant:

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

Under AG ¶ 20(a), Applicant's financial worries arose about 2001. She accumulated delinquent debt due to her husband's medical issues and unemployment, along with the closure of his business. These circumstances are no longer extant. The behavior occurred under such unusual circumstances that it is unlikely to recur, and it does not raise concerns about her current reliability, trustworthiness, or good judgment. The evidence supports this potentially mitigating condition.

Under AG ¶ 20(b), as noted above, some of the financial problems arose from Applicant's husband medical problems and her medical procedure, and her husband's lengthy period of unemployment since 2007 after he was injured. She acted responsibly in identifying and resolving these debts by filing the bankruptcy actions when the debts exceeded her ability to repay them. This potentially mitigating condition is a factor for consideration in this case.

Applicant received financial and debt counseling pursuant to the requirements of the U.S. Bankruptcy Code. Applicant's financial problems are resolved by the bankruptcies and her efforts to reduce their expenses in the face of the declining family income. She has not incurred any new long-term debt. She rents a house instead of owning one, thereby reducing her expenses. She has only one car that does not have a loan on it. Applicant has simplified her life as much as she can to pay her debts and control her financial situation. Therefore, AG ¶ 20(c) applies.

Similarly, Applicant received counseling and resolved all the delinquent debts, either by payment of the IRS debt or through the bankruptcy process. She did not ignore her debts, but worked for over a decade to pay or resolve them through bankruptcy when she realized she could pay all of them, particularly when they included the IRS tax debts. She paid the \$52,000 in IRS debt resulting from her husband's failed business during the first Chapter 13 bankruptcy. Applicant paid the additional \$8,000 in payroll tax debt resulting from the business by selling her family home. AG ¶ 20(d) applies.

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 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 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 facts and circumstances surrounding this case. Applicant worked to resolve her debts. The SOR lists \$16,043 in debt. She also had another \$52,000 in tax debt she paid resulting from her husband's closed business. She paid another \$8,000 in payroll tax debt from the business. The bankruptcy lists liabilities of \$47,853.99. Therefore, her debt load was significant. But she resolved it all over a decade of work. She did not ignore the debts or shun responsibility for them. Bankruptcy is a legitimate method of resolving debts, especially when they exceed a person's reasonable ability to repay the debts.

Applicant's debts were not the result of a frivolous and irresponsible spending pattern over a long period of time. Instead, the debts arose from her husband's work injuries, his failed business, and his long-term unemployment. Applicant also was unemployed for three months in 2009, and was rehired by the same company at a \$12,000 lower salary, thereby adversely affecting her ability to repay her debts. She sold her house in 2005 to pay her tax debt.

Applicant's set of events in the past decade regarding the husband's business, injuries, and tax debts are not likely to recur because he is unable to work. Applicant is the sole support of the family. These are valid reasons why the responsible actions by Applicant under the circumstances are counted in her favor in the whole-person evaluation.

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 financial considerations.

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 to 1.ee:	For Applicant

Conclusion

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

PHILIP S. HOWE
Administrative Judge