



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



In the matter of:)
)
-----) ADP Case 11-11592
)
Applicant for Public Trust Position)

Appearances

For Government: Gregg A. Cervi, Esquire, Department Counsel

For Applicant: *Pro se*

June 21, 2012

Decision

ROSS, Wilford H., Administrative Judge:

On April 9, 1993, the Composite Health Care Systems Program Office (CHCSPO), the Defense Office of Hearings and Appeals (DOHA), and the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASD C3I) entered into a memorandum of agreement for DOHA to provide trustworthiness determinations for contractor personnel employed in Information Systems Positions as defined in DoD Regulation 5200.2-R, Personnel Security Program (Regulation), dated January 1987.

Applicant submitted her Public Trust Position Application (SF 85P) on October 26, 2009. (Item 5.) On December 1, 2011, DOHA issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a determination of trustworthiness, suitability, and eligibility for Applicant to hold a Sensitive Systems Position (ADP-I/II/III). The action was taken 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); and the adjudicative guidelines (AG) effective within the Department of Defense after September 1, 2006.

Applicant submitted an Answer to the SOR on December 20, 2011, and requested a decision without a hearing. (Item 4.) Department Counsel submitted a File of Relevant Material (FORM) to Applicant on January 27, 2012. Applicant received the FORM on February 2, 2012, and was given 30 days to submit any additional information. She submitted additional information on February 29, 2012, which was received into evidence without objection as Applicant Exhibit A. The case was assigned to me on June 4, 2012. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to sensitive personal information is denied.

Findings of Fact

The Applicant is 35 and divorced with two children. She is employed by a defense contractor and is seeking to obtain a determination of trustworthiness in connection with her employment.

Guideline F, Financial Considerations

The Government alleges that Applicant is ineligible for trustworthiness determination because she is financially overextended and therefore at risk of having to engage in illegal acts to generate funds. Applicant admitted allegations 1.a, 1.b, 1.c, 1.d, 1.e, 1.f, 1.i, 1.j, 1.k, 1.l, 1.m, and 1.n under this paragraph. Those admissions are findings of fact. She denied allegations 1.g, and 1.h because Applicant stated she was unable to find information about the creditor for both debts. (Item 4.) Support for all of the debts alleged in the SOR is found in credit reports concerning Applicant dated October 31, 2009; and October 30, 2011. (Items 9 and 8.) The total indebtedness alleged in the SOR, including a first and second mortgage foreclosure, is \$452,121. Her non-mortgage delinquent debt totals \$29,121.

Applicant states that many of these debts became due and owing during a time she was self-employed in a janitorial business and lost clients because of the recession. Beginning in April 2010 Applicant indicated that she intended to resolve her indebtedness through a bankruptcy. She also stated that her house had been foreclosed upon in 2009. (Item 6.) Applicant did not identify her self-employment in Section 6, "Your Employment Activities," of Item 5. She has been working for her current employer since October 2009.

Applicant finally filed for relief under Chapter 7 of the Bankruptcy Code on December 20, 2011, which is the same date as her Answer, Item 4. Schedule F of her bankruptcy petition indicates that she has \$340,406.13 of unsecured debt. (Item 4.)

She states that the delay in filing for bankruptcy was brought about by an inability to save sufficient money for the filing fee. She explained that a series of personal issues kept her from being able to save money. These included a death in the family, medical issues concerning both of her parents, and the costs connected to the birth of her second child in December 2008. (Applicant Exhibit A; Items 4 and 7.) In Applicant Exhibit A, Applicant states that she had to make installment payments in order to pay the bankruptcy filing fee. She further states, "I have taken the bankruptcy courses which will help me go through the process of managing my finances better." The 341 meeting of creditors was tentatively scheduled for January 17, 2012. Applicant submitted no information as to whether the hearing was held, and if it was held, what the results were of the meeting. In addition, no information was provided to show that Applicant received a discharge of her debts, or that a tentative date for discharge had been set by the Bankruptcy Court.

The status of the debts alleged in the SOR is as follows:

1.a. Applicant admits that she is indebted to a creditor in the amount of \$131. This debt has not been paid, but has been included in her bankruptcy petition. It is unresolved.

1.b. Applicant admits that she is indebted to a creditor in the amount of \$89. This debt has not been paid, but has been included in her bankruptcy petition. It is unresolved.

1.c. Applicant admits that she is indebted to a credit union in the amount of \$8,231. This debt has not been paid, but has been included in her bankruptcy petition with the revised amount of \$11,921.41. Applicant has stated this account may be her ex-husband's, but did not provide any information to support that statement. It is unresolved.

1.d. Applicant admits that she is indebted to a creditor in the amount of \$783. This debt has not been paid, but has been included in her bankruptcy petition. It is unresolved.

1.e. Applicant admits that she is indebted to a creditor in the amount of \$607. This debt has not been paid, but has been included in her bankruptcy petition with the revised amount of \$1,149.03. It is unresolved.

1.f. Applicant admits that she is indebted to a creditor in the amount of \$1,131. This debt has not been paid, nor is it included in her bankruptcy petition. It is unresolved.

1.g. Applicant denies that she is indebted to a collection agency in the amount of \$5,912. She states in her Answer, "I was not able to locate debtor. No information found." (Item 4 at 4.) This debt has not been included in her bankruptcy petition.

1.h. Applicant denies that she is indebted to the same collection agency as 1.g. for a different account in the amount of \$698. She states in her Answer, "I was not able to locate debtor. No information found." (Item 4 at 4.) This debt has not been included in her bankruptcy petition.

Regarding both 1.g. and 1.h., Applicant was served with DOHA Interrogatories in 2011. She was informed of both of these accounts at that time. In her response, dated November 1, 2011, Applicant stated with regards to both debts that she had taken no action because she had not been able to file bankruptcy as of that time. She also refers to both of these debts in her personal financial statement, prepared at the same time. (Item 7 at 2-3, 6.)

In addition, both Items 8 and 9, the credit reports in the FORM, refer to these debts, and Item 9 provides an address for the collection agency. Finally, during an interview with an investigator from the Office of Personnel Management, she affirmatively stated that the debts were hers and would be included in her bankruptcy. The evidence of record is sufficient to show that Applicant does owe two debts to this creditor. Based on the available evidence, I find that she owes two accounts to this creditor, that the amounts are correct, and that she has paid neither one.

1.i. Applicant admits that she is indebted to a mortgage company for a first mortgage loan that went to foreclosure with a principal balance of \$318,000. An unsecured debt in the amount of \$339,533.83 to a different creditor is included in her bankruptcy petition. This debt is unresolved.

1.j. Applicant admits that she is indebted to a mortgage company for a second mortgage loan that was charged off with a principal balance of \$105,000. This debt is not included in her bankruptcy petition. It is unresolved.

1.k. Applicant admits that she is indebted to a creditor in the amount of \$3,424. This debt has not been paid, nor is it included in her bankruptcy petition. It is unresolved.

1.l. Applicant admits that she is indebted to a creditor in the amount of \$209. This debt has not been paid, nor is it included in her bankruptcy petition. It is unresolved.

1.m. Applicant admits that she is indebted to a creditor in the amount of \$4,326. This debt has not been paid, nor is it included in her bankruptcy petition. It is unresolved.

1.n. Applicant admits that she is indebted to a creditor in the amount of \$3,590. This debt has not been paid, nor is it included in her bankruptcy petition. It is unresolved.

Applicant provided no evidence concerning the quality of her professional performance, the level of responsibility her duties entail, or her track record with respect to handling sensitive information. She submitted no character references or other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate her credibility, demeanor, or character in person since she elected to have her case decided without a hearing.

Policies

When evaluating an applicant's suitability for a trustworthiness determination, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to sensitive personal information.

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. In addition, the administrative judge may also rely on his own common sense, as well as his knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

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 personal 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 such information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard sensitive personal information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of such information.

Analysis

Guideline F, Financial Considerations

The security concerns relating to the guideline for Financial Considerations are 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 guideline notes several 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 security concerns. Applicant, by her own admission, or as found by me, has over \$452,121 in past-due debts, including two mortgages. Her non-mortgage debt totals \$29,121. All of these debts have been due and owing for several years. The evidence is sufficient to raise these potentially disqualifying conditions.

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from financial difficulties. The following conditions have possible applicability in this case:

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 reliability, trustworthiness, or good judgment." Applicant's financial difficulties are of long standing. By her own admission, she has paid none of her delinquent debts, no matter how small. This mitigating condition is not applicable.

AG ¶ 20(b) provides that the disqualifying conditions may be mitigated 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 argues that many of these debts were the result of several events that led to her suffering financial hardship. There is some evidence that Applicant had to cover medical and other expenses of her parents, and that her divorce and child birth also had an impact. However, she introduced very little evidence to show she adequately responded to the debts in a responsible manner.

In addition, AG ¶ 20(c) provides that it may be mitigating where, “there are clear indications that the problem is being resolved or is under control.” Mitigation may be established under AG ¶ 20(d) when, “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” I have considered Applicant’s recent filing for Chapter 7 bankruptcy with regards to both of these mitigating conditions. As stated, there are several issues concerning the contents of the petition, and whether it is sufficient on its face since several creditors are not noticed. It is also of note that the 341 meeting had not been held and there is no information as to whether or when Applicant will receive a discharge in bankruptcy. I cannot find under these particular facts that Applicant has acted responsibly under the circumstances. As of this time there simply is not enough information to find that Applicant has made a sufficient good faith effort to resolve the debts. These mitigating conditions are not applicable.

Based on all of the available evidence, I cannot find that Applicant has mitigated the allegations under this Guideline. Paragraph 1 is found against Applicant.

Whole-Person Concept

Under the whole person concept, the administrative judge must evaluate an applicant’s eligibility for a position of trust by considering the totality of the applicant’s conduct and all the circumstances. Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a position of trust must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a) in making such a decision:

- (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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has a history of not paying her debts. As set forth above, based on all available information, I find that there have not been permanent behavioral changes as required under AG ¶ 2(a)(6). In addition, I find that there is ongoing and substantial potential for pressure, coercion, exploitation, or duress (AG ¶2(a)(8)), and that there is a likelihood of recurrence (AG ¶2(a)(9)).

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a trustworthiness determination. For all these reasons, I conclude the Applicant has not mitigated the trustworthiness concerns arising from her financial difficulties.

On balance, it is concluded that Applicant has not successfully overcome the Government's case opposing her request for a finding of trustworthiness. Accordingly, the evidence supports a finding against Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

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 through 1.n:	Against Applicant

Decision

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a determination of trustworthiness, suitability, and eligibility for Applicant to hold a Sensitive Systems Position (ADP-I/II/III). Eligibility for access to sensitive personal information is denied

WILFORD H. ROSS
Administrative Judge