



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



In the matter of:)
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[NAME REDACTED]) ADP Case No. 12-03331
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Applicant for Public Trust Position)

Appearances

For Government: Chris Morin, Esquire, Department Counsel
For Applicant: *Pro se*

03/24/2014

Decision

MALONE, Matthew E., Administrative Judge:

Applicant accrued more than \$20,000 in delinquent debt due to periods of unemployment and uninsured medical expenses. She was also arrested and convicted for grand theft from her employer. Applicant has not timely acted to resolve her financial problems, and is currently unable to pay most of the debts alleged in the SOR. Although Applicant recently sought credit counseling, she has not established a repayment plan or budget. Her financial problems are likely to recur, and her request for a position of trust is denied.

Statement of the Case

On December 13, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to obtain eligibility for an ADP I/II/III position¹ for her job with a defense contractor. After reviewing the results of the ensuing background

¹ As defined in Chapter 3 and Appendix 10 of DOD Regulation 5220.2-R, as amended (Regulation).

investigation, which included her responses to Department of Defense (DOD) interrogatories,² DOD adjudicators were unable to determine that it is clearly consistent with the interests of national security to grant Applicant's request for a position of trust.³

On September 17, 2013, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise trustworthiness concerns addressed in the adjudicative guidelines (AG)⁴ for financial considerations (Guideline F). On December 16, 2013, Department Counsel amended the SOR to add a single allegation of fact under the AG for personal conduct (Guideline E).

Applicant timely answered the SOR and the amendment, and she requested a hearing. The case was assigned to me on December 11, 2013, and I convened a hearing in this matter on January 21, 2014. Department Counsel presented Government Exhibits (Gx.) 1 - 7, which were admitted without objection.⁵ Applicant testified and submitted Applicant's Exhibits (Ax.) A - E, which were admitted without objection.⁶ DOHA received a transcript of the hearing (Tr.) on February 6, 2014.

Findings of Fact

Under Guideline F, the Government alleged that in August 2006, Applicant was arrested and convicted of felony grand theft after she, as a store cashier, allowed customers she knew to take merchandise for which they had not paid, and that she knowingly cashed bad checks (SOR 1.a); and that she owed \$21,070 for 24 unpaid debts (SOR 1.b - 1.y). Applicant denied SOR 1.b, 1.d - 1.f, 1.h - 1.k, 1.u, and 1.w. She admitted the remaining allegations under this guideline.

Under Guideline E, the Government cross-alleged as disqualifying personal conduct, the arrest alleged at SOR 1.a (SOR 2.a). Applicant admitted this allegation. Applicant's admissions are incorporated in my findings of fact. Having reviewed Applicant's response to the SOR, the transcript, and exhibits, I make the following additional findings of relevant fact.

Applicant is 39 years old and is employed by a defense contractor for work that requires access to sensitive automated information to perform her duties as a customer service representative. She was raised in State A and graduated from high school there in 1993. She attended college in that state until December 1999, but did not receive a degree. She moved to State B seeking work in 2005, and she finished her education by

² Authorized by DOD Directive 5220.6 (Directive), Section E3.1.2.2.

³ Required by the Regulation, as amended, and by the Directive, as amended.

⁴ The adjudicative guidelines were implemented by DOD on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

⁵ Also, an index listing each exhibit is included in the record as Hearing Exhibit (Hx.) 1. See Tr. 24 - 34.

⁶ Tr. 35 - 43.

taking on-line courses between May 2007 and January 2010. She graduated *magna cum laude*. She is the single mother of three children, ages 17, 11, and 9, who live with her. She receives \$480 each month in child support from the father of her two younger children. Applicant moved to her current residence, in State C, in February 2011. (Gx. 1 and 2; Tr. 35 - 36)

Applicant's 11-year-old child has suffered from chronic asthma since about age 3, requiring several emergency room visits not fully covered by insurance. The debts alleged at SOR 1.e - 1.i, 1.k, 1.o, 1.p, 1.r, 1.v, and 1.y total \$5,380. They are unpaid accounts stemming from this child's medical condition. Before 2012, Applicant relied on Medicaid for her family's medical expenses. (Gx. 2; Tr. 44, 49)

From November 1999 until March 2003, Applicant worked as a customer service representative in call centers for two different retail companies, both of which closed and left her unemployed. She found similar work between May 2003 and February 2004, when she left during a difficult pregnancy of her youngest child. She returned to work as a customer service representative in November 2004. But she left that job to care for her middle child, when his asthma was first diagnosed. In October 2005, Applicant began working two part-time jobs as a cashier at large retail stores. (Gx. 1; Gx. 2; Tr. 49 - 50)

On August 21, 2006, Applicant was arrested at one of her part-time jobs. Security personnel there had observed that, on more than one occasion, Applicant was "under ringing" merchandise; that is, she did not scan or account for some items that persons she knew were presenting at Applicant's cash register. She was also found to have cashed bad checks at her register for an acquaintance, who used the proceeds to buy store gift cards redeemable for merchandise. The total value of checks and merchandise was \$2,663.15. Applicant pleaded guilty to felony grand theft and was placed on probation for three years. She also was fined and ordered to pay about \$2,600 in restitution. Applicant was released early from probation, and she has since had the record of her arrest sealed. (Answer; Gx. 1; Gx. 2; Gx. 6; Gx. 7; Tr. 62 - 69, 74 - 77)

After her arrest and conviction, Applicant was unemployed until November 2007, when she was hired by a patient transport company. She held that job until February 2011, when she moved to State B after her release from probation and completion of her college degree. While working in patient transport, she was responsible for safeguarding patient information and medical records. Applicant was hired by her current employer in December 2012. (Gx. 1; Gx. 2; Ax. C; Tr. 50)

Applicant's uneven employment record and unexpected medical expenses have contributed to her financial problems. The Government's information corroborates the debts alleged in SOR 1.b - 1.y. Some of her debts have been delinquent since 2007 and 2008. When Applicant filled out her EQIP in December 2011, she disclosed many of the debts alleged in the SOR. She had examined her credit report before she completed the EQIP and became aware of the scope of her delinquencies. In January 2012, Applicant was subsequently interviewed by a Government investigator about her financial problems. Thereafter, Applicant made calls to some of her creditors but quickly

learned they would demand more than she could pay even in settlement. (Answer; Gx. 1 - 5; Tr. 51 - 52)

Applicant did nothing further about her debts until November 2013. She contracted with a credit counseling organization to examine her credit report, validate which debts are properly attributable to her, and eventually assist her in negotiating a repayment plan. As of the hearing, this process, for which Applicant is paying \$40 monthly, had not yet resulted in any successful disputes or in a repayment plan. (Ax. A; Tr. 53 - 56)

In July 2013, Applicant submitted a personal financial statement (PFS) in response to DOD interrogatories. The PFS reflected a \$48 net remainder after expenses each month. Applicant's expenses did not include the \$40 credit counseling fee begun in January 2014. The PFS also did not reflect any debt payments or that she also owes about \$28,000 in federal and private student loans that are currently in forbearance due to financial hardship. (Gx. 2; Tr. 56 - 60, 72 - 73)

Applicant has established a good reputation in her current workplace and among her friends and coworkers for honesty and reliability. Two personal references with detailed knowledge of Applicant's arrest and her financial problems support her eligibility for a position of trust. (Ax. C)

Policies

Positions designated as ADP I/II/III are classified as "sensitive positions."⁷ In deciding whether a person should be assigned to an ADP position, it must be determined that his or her loyalty, reliability, and trustworthiness are such that it is "clearly consistent with the interests of national security" to do so.⁸ The Regulation also requires that DOD contractor personnel are entitled to the procedural protections in the Directive before any adverse determination may be made.⁹

The Directive requires that each decision be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,¹⁰ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole-person" concept, those factors 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

⁷ Regulation, ¶ C3.6.15.

⁸ Regulation, ¶ C6.1.1.1.

⁹ Regulation, ¶ C8.2.1.

¹⁰ Directive. 6.3.

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.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of eligibility for a position of trust.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a position of trust for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government's case. Because no one is entitled to a position of trust, an applicant bears a heavy burden of persuasion. A person who has access to sensitive information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring applicants possess the requisite judgment, reliability, and trustworthiness of one who will protect sensitive information as his or her own. Any reasonable doubt about an applicant's suitability for access should be resolved in favor of the Government.

Analysis

Financial

The Government's information and Applicant's admissions in response to the SOR, are sufficient to support the allegations in the SOR. The facts thereby established raised a security concern addressed, in relevant part, at AG ¶ 18 as follows:

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.

Applicant has been experiencing financial problems characterized by chronic delinquent debt for several years. All of the debts alleged in the SOR are still unresolved, and Applicant does not have the means to do so. Her arrest in 2006 for grand theft from her employer is a crime that bears directly on Applicant's unwillingness or inability to act as a fiduciary when it comes to handling and protecting sensitive information. All of this requires application of the disqualifying conditions listed at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*); AG ¶ 19(c) (*a history of not meeting financial obligations*); and AG ¶ 19(d) (*deceptive or illegal financial practices such as*

embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust).

I have also considered the following pertinent mitigating conditions under at 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;

(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; and

(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.¹¹

Because Applicant's debts are still not resolved and have been present for several years, AG ¶ 20(a) does not apply. Granted, Applicant's finances have been adversely impacted by lapses in employment and her child's medical condition. However, some of her unemployment was due to her arrest for grand theft in 2006. Also, Applicant has had at least two years to try to resolve her debts in good faith, or to seek credit counseling, or to take other responsible action regarding her financial problems. AG ¶¶ 20(b) and (c) do not apply.

Applicant has only recently sought professional help through credit counseling. Any benefit she might take from AG ¶ 20(d) is greatly reduced by her failure to act sooner. Also, she has not presented any information in support of any disputes she may have about the validity of her debts. AG ¶ 20(e) does not apply.

Applicant's finances are not likely to improve in the near future. She is obligated to begin repaying significant student loan debt, and her credit counseling efforts have not yet shown that any of the debts alleged are invalid. On balance, Applicant has failed to mitigate the security concerns about her history of indebtedness.

¹¹ AG ¶ 20(f) (*the affluence resulted from a legal source of income*) has no relevance to these facts and circumstances.

Personal Conduct

Available information is sufficient to support the allegation under this guideline. The facts established raise a security concern about Applicant's personal conduct that is addressed at AG ¶ 15, as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

More specifically, Applicant's arrest and conviction for grand theft from her employer in 2006 requires application of the disqualifying condition at AG ¶ 16(c):

credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

As criminal conduct, Applicant's 2006 arrest would be mitigated as isolated and remote in time. However, these facts require application of AG ¶ 16(c) because Applicant's conduct undermines the Government's ability to trust that she will act in a fiduciary capacity in safeguarding sensitive information.

I have also considered the following AG ¶ 17 mitigating conditions:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant completed her probation early and, while on probation, advanced herself by completing her college education with honors. Her first job after she was arrested required that she protect the personal and medical information of her company's clients. Her arrest was not minor, but it was an isolated event and occurred more than seven years ago. The security concerns under this guideline are mitigated.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E and F. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is a 39-year-old single mother. She has experienced several challenges, some of her own doing, as she has raised her three children. Applicant appeared sincere in her desire to resolve her financial problems, and she was remorseful over her arrest in 2006. Her personal and professional associates are aware of the adverse information in her background; regardless, they recommend her for a position of trust. Unfortunately, Applicant's financial problems place her in an untenable situation. She is only marginally able to meet her current expenses, and there is little likelihood she will be able to make any meaningful progress in resolving her debts in the near future. These facts and circumstances sustain the Government's concerns about the possibility she might resort to inappropriate conduct to obtain money. A fair and commonsense assessment of all of the available information shows that Applicant has not resolved all of the doubts about her suitability for access to sensitive information. Because protection of the national interest is the primary concern here, those doubts must be resolved against the individual.

Formal Findings

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

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|---------------------------|-------------------|
| Paragraph 1, Guideline F: | AGAINST APPLICANT |
| Subparagraphs 1.a - 1.y: | Against Applicant |
| Paragraph 2, Guideline E: | FOR APPLICANT |
| Subparagraph 2.a: | For Applicant |

Conclusion

In light of all of the foregoing, it is not clearly consistent with the interests of national security for Applicant to have access to sensitive automated information. Request for a position of trust is denied.

MATTHEW E. MALONE
Administrative Judge