



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



In the matter of:)
)
) ADP Case No. 14-05339
)
Applicant for Public Trust Position)

Appearances

For Government: Andrea M. Corrales, Esq., Department Counsel
For Applicant: *Pro se*

09/29/2016

Decision

COACHER, Robert E., Administrative Judge:

Applicant has not mitigated the financial considerations trustworthiness concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

On September 24, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline F, financial considerations. DOD acted under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

Applicant answered (Ans.) the SOR on October 20, 2015, and requested a hearing before an administrative judge. The case was assigned to me on March 2, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on March 4, 2016, and the hearing was convened as scheduled on March 29, 2016. The Government offered exhibits (GE) 1 through 5, which were admitted into evidence

without objection. Applicant testified and offered exhibits (AE) A through G, which were admitted into evidence without objection. The record was held open for Applicant to submit additional information. She submitted AE H, which was admitted without objection. DOHA received the hearing transcript (Tr.) on April 6, 2016.

Findings of Fact

Applicant admitted all the SOR allegations. The admissions are incorporated as findings of fact. After a review of the pleadings and evidence, I make the following additional findings of fact.

Applicant is a 49-year-old employee of a federal contractor. She has worked for this employer since January 2014. She has an associate's degree. She is divorced and has two children.¹

The SOR alleges 10 delinquent debts, including six student loans, a 2009 Chapter 7 bankruptcy, and failure to file state income tax returns for 2007 and 2011. The debts were listed in credit reports from January 2014, July 2014, and August 2015.²

Applicant has a history of financial difficulties. She filed for Chapter 7 bankruptcy protection before the 2009 bankruptcy case, but she cannot recall when it happened or how much debt was involved.³ She experienced a short period of unemployment from November 2013 until she was hired for her current position in January 2014. Some of the non-student loan debt was incurred during her third marriage from which she obtained a divorce in August 2013. Her ex-husband was required to pay half of their 2012 federal tax payment. He did not comply with this requirement. Applicant began a second job in May 2016 to help herself financially. Her current income from both her jobs is approximately \$36,000. The status of the SOR-related debts is as follows:⁴

SOR ¶ 1.a (2009 Chapter 7 bankruptcy):

Applicant sought bankruptcy relief because of the debts she and her ex-husband incurred during their marriage. The total debt discharged through this bankruptcy was approximately \$89,000. Her student loan debt was not discharged in the bankruptcy.⁵

¹ Tr. at 5, 25; GE 1.

² GE 2-4.

³ This bankruptcy was not alleged in the SOR, so I will only consider this information as it might apply to the application of mitigating factors and the whole-person analysis.

⁴ Tr. at 27-28, 32; GE 1; AE B.

⁵ Tr. at 29-31.

SOR ¶¶ 1.b - 1.g (student loan debt- \$2,700; \$5,401; \$4,296; \$3,965; \$8,141; \$8,610):

Applicant incurred approximately \$33,000 worth of student loan debt between 2008 and 2010. She became delinquent on this debt in December 2010. The creditor began a wage garnishment of Applicant's wages for several months until she appealed the garnishment. The amount of the garnishment was approximately \$300 to \$350 per month. In May 2015, a hearing decision determined that Applicant was subject to wage garnishment, but modified the order by temporarily suspending the garnishment action because it caused a financial hardship. The decision went on to state that if Applicant did not enter into a repayment plan within six months, further garnishment would be considered. Applicant has not entered into any repayment plan for these debts and the total amount owed has increased to over \$41,000. She stated at the hearing that she would contact the creditor about establishing a payment plan, but failed to present evidence of such contact. These debts are unresolved.⁶

SOR ¶¶ 1.h - 1.i (consumer debt- \$734; \$103):

Applicant obtained a personal loan in August 2014 and used some of the proceeds to pay these debts. These debts are resolved.⁷

SOR ¶ 1.j (state tax debt- \$1,135):

Applicant obtained a personal loan in August 2014 and used some of the proceeds to pay this tax debt. This debt is resolved.⁸

SOR ¶ 1.k (failure to file 2007 and 2011 state tax returns):

Applicant testified that she failed to file these years' tax returns due to an oversight. She provided documentation showing that she filed her returns for both tax years in June 2016. She owes taxes for both years and set up a payment plan to address that debt. This issue is resolved.⁹

SOR ¶ 1.l (federal tax debt- \$800):

Applicant obtained a personal loan in August 2014 and used some of the proceeds to pay this tax debt. This debt is resolved.¹⁰

⁶ Tr. at 33, 49-51; GE 2; AE D.

⁷ Tr. at 35-37; AE C.

⁸; Ans.; AE C.

⁹ Tr. at 37-38; AE H.

¹⁰ Tr. at 48; AE C.

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. 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.

Analysis

Guideline F, Financial Considerations

The trustworthiness concern for financial considerations is set out in 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.

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 19. Three are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant had numerous delinquent debts and failed to file her 2007 and 2011 state income tax returns. The evidence is sufficient to raise the above disqualifying conditions.

Several financial considerations mitigating conditions under AG ¶ 20 are potentially applicable:

- (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.

Applicant's debts are recent, multiple, and cast doubt on her reliability, trustworthiness, and good judgment. She paid several debts, but has not established a payment plan to address her student loan debt. AG ¶ 20(a) is not applicable.

Applicant was unemployed for several months and received no assistance from her ex-husband to pay their 2012 federal income taxes. These are conditions beyond her control. She has made some efforts to resolve the debts; however, the bulk of her debt is from her student loans, which she has not addressed. The record evidence does not support that Applicant's actions were responsible under the circumstances. AG ¶ 20(b) is partially applicable.

There is no evidence of financial counselling. Given the unpaid status of her student loan debts, there are not clear indications that Applicant's financial problems are under control. Although she paid several debts and filed and paid her taxes, evidence of good-faith efforts to pay or resolve her student loan debts is lacking. AG ¶ 20(c) does not apply and ¶ 20(d) partially applies.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for access to sensitive information by considering the totality of the applicant's conduct and all relevant 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) 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for access to sensitive information must be an overall commonsense assessment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

I considered the circumstances by which Applicant became indebted. However, I also considered that she has taken no action to resolve her largest debts, which are her

student loans. She has not established a meaningful track record of financial responsibility, which causes me to question her ability to resolve her debts.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for access to sensitive information. For all these reasons, I conclude Applicant has not mitigated the financial considerations trustworthiness concerns.

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
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Subparagraphs: 1.a – 1.g:	Against Applicant
Subparagraphs: 1.h – 1.i:	For Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with national security to grant Applicant eligibility for access to sensitive information. Eligibility for access to sensitive information is denied.

Robert E. Coacher
Administrative Judge