

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

In the matter of:)	
)	
)	ADP Case No. 17-02608
)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Allison Marie, Department Counsel
For Applicant: *Pro se*

April 30, 2018

Decision

LOKEY ANDERSON, Darlene D., 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 (ASDC3I) 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 of 1987.

Applicant submitted her Electronic Questionnaire for Investigations Processing (e-QIP) on February 22, 2016. (Government Exhibit 4.) On August 23, 2017, the Department of Defense (DoD), issued an SOR detailing the trustworthiness concerns

under Guideline F regarding Applicant. 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, 21992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.

Applicant answered the SOR on September 21, 2017. She requested that her case be decided by an administrative judge on the written record without a hearing. (Item 3.) On October 18, 2017, Department Counsel submitted the Government's written case. A complete copy of the File of Relevant Material (FORM), containing eight Items, was mailed to Applicant on October 19, 2017, and received by her on October 26, 2017. The FORM notified Applicant that she had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of her receipt of the FORM. Applicant responded to the FORM on November 6, 2017, and the documents are marked and admitted into evidence as Applicant's Exhibit A. Applicant did not object to Items 1 through 8, and they are admitted into evidence, hereinafter referenced as Government Exhibits 1 through 8. Based upon a review of the pleadings and exhibits, eligibility for a public trust position is denied.

Findings of Fact

Applicant is 51 years old. She has a nursing degree and is a licensed practical nurse. She is employed with a defense contractor as a licensed practical nurse and is seeking to obtain access to sensitive information in connection with this employment.

Guideline F - Financial Considerations

The Government opposes Applicant's request for access to sensitive information on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

The Government alleges that Applicant is ineligible for a public trust position because she is financially overextended and at risk of having to engage in illegal acts to generate funds. There are thirty-eight delinquent debts, totaling in excess of \$32,618, set forth in the SOR, a state tax deficiency and a Chapter 7 bankruptcy. She also failed to timely file her state income tax return in State A for tax year 2010, and her Federal and state income tax returns in State B for tax years 2015 and 2016. Applicant admitted each

of the allegations under this guideline. (Government Exhibit 3.) Applicant's credit reports dated April 1, 2016; and March 22, 2017, which include information from all three credit reporting agencies, reflects that Applicant remains indebted to each of the creditors listed in the SOR. (Government Exhibits 6 and 7.) Applicant has been working for her current employer since May 2016.

In her answer to the SOR, Applicant states that she was under financial distress and did not make payment arrangements to resolve her debts. It appears that her financial difficulties initially started in 2007 and continued until all her financial obligations were discharged in her Chapter 7 bankruptcy in 2009. This erased all her prior debts and at that point she was debt free. Then, in 2011 to the present she has been providing financial assistance to her teenage daughter who was expecting a child. There were medical bills and a subsequent divorce that was costly. Applicant filed a Chapter 13 this time instead of a Chapter 7 to show her willingness to fulfill her financial obligations. In May 2016, Applicant suffered a heart attack and was hospitalized for one day at one facility and three days at another. She had no medical insurance at the time and missed a few days of work, which put her farther behind with her bills.

Applicant states that she has sought out help from a credit repair company that is helping her remove negative marks from her credit report. She was not happy with their results and contacted an attorney to discuss other options. He advised her to file for Chapter 13 in September 2017. She states that with the guidance of her attorney and the bankruptcy trustee, she plans to make a diligent effort to resolve her delinquent debts. She states that her initial debt of \$54,000 was reduced to \$31,500. As of October 2017, she states that she has paid an additional \$900 toward her delinquent debt which is now \$30,600. Applicant has provided a copy of the motion of confirmation of plan and the balance sheet from the trustee to show that she is following the plan. According to the plan, Applicant is paying \$525 per month for 60 months to resolve the debt. Applicant also submitted documentation which shows that she has resolved two of the debts in the SOR, specifically allegations 1.bb and 1.oo, totaling \$168.

Although Applicant identified 43 creditors in her Chapter 13 bankruptcy petition as having secured and unsecured claims, she specified that 29 of those have a total claim of \$0. Therefore, only 14 creditors of the 43 identified claims have the potential to be paid through Applicant's proposed Chapter 13 plan. In regard to the 14 creditors that would potentially be paid, it is not certain if they correspond to debts set forth in the SOR.

The following delinquent debts and/or tax returns are outstanding: 1.a. a state tax debt in the amount of \$665 for tax year 2009. 1.b. Applicant failed to file her state A income tax returns for tax year 2010. 1.c. Applicant failed to file her state B income tax returns for tax years 2015 and 2016. 1.d. A debt in the amount of \$3,262 remains owing.

1.e. A debt in the amount of \$3,129 remains owing. 1.f. A debt in the amount of \$2,907 remains owing. 1.g. A debt in the amount of \$2,247 remains owing. 1.h A debt in the amount of \$1,490 remains owing. 1.i. A debt in the amount of \$930 remains owing. 1.j. Another debt in the amount of \$930 remains owing. 1.k. A debt in the amount of \$915 remains owing. 1.l. A debt in the amount of \$879 remains owing. 1.m. A debt in the amount of \$754 remains owing. 1.n. A debt in the amount of \$564 remains owing. 1.o. A debt in the amount of \$284 remains owing. 1.p. A debt in the amount of \$917 remains owing. 1.q. A debt in the amount of \$754 remains owing. 1.r. A debt in the amount of \$624 remains owing. 1.s. A debt in the amount of \$609 remains owing. 1.t. A debt in the amount of \$462 remains owing. 1.u. A debt in the amount of \$400 remains owing. 1.v. A debt in the amount of \$375 remains owing. 1.w. A debt in the amount of \$293 remains owing. 1.x. A debt in the amount of \$284 remain owing. 1.y. A debt in the amount of \$282 remains owing. 1.z. A debt in the amount of \$259 remains owing. 1.aa. A debt in the amount of \$186 remains owing. 1.bb. A debt in the amount of \$72 has been paid. 1.cc. A debt in the amount of \$70 remains owing. 1.dd. A debt in the amount of \$45 remains owing. 1.dd. A debt in the amount of \$45 remains owing. 1.ee. A debt in the amount of \$40 remains owing. 1.ff. Another debt in the amount of \$40 remains owing. 1.gg. A debt in the amount of \$658 remains owing. 1.hh. A debt in the amount of \$564 remains owing. 1.ii. A debt in the amount of \$673 remains owing. 1.jj. A debt in the amount of \$145 remains owing. 1.kk. A debt in the amount of \$530 remains owing. 1.ll. A debt in the amount of \$224 remains owing. 1.mm. A Chapter 7 bankruptcy was filed on April 9, 2007, and the debt was discharged in 2007. 1.nn. A debt in the amount of \$5,060 remains owing. 1.oo. A debt in the amount of \$95.59 has been paid. (See Applicant's Response to the FORM.)

Policies

When evaluating an applicant's national security eligibility and suitability for a public trust position, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluation an applicant's eligibility for a position of trust.

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 AG ¶ 2 describing the adjudication process. The administrative judge's over-arching adjudicative goal is a fair, impartial, and commonsense decision. 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 national security eligibility 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 applying for a position of trust seeks to enter 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 national security eligibility. 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: “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” (See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).)

Analysis

Guideline F, Financial Considerations

The trustworthiness concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

Failure 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

AG ¶ 19 describes five conditions that could raise security concerns and may be disqualifying in this case:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations;
- (e) consistent spending beyond one's means or frivolous or irresponsible spending, which may be indicated by excessive indebtedness, significant negative cash flow, a history of late payments or of non-payment, or other negative financial indicators; and
- (f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant has a history of financial distress. For the past ten years, she has experienced financial hardship. In 2007, Applicant filed for Chapter 7 bankruptcy, and her debts were discharged. Just ten years later in April 2017, she had accumulated so much debt that she could not afford to pay it and had to file for Chapter 13 bankruptcy. Admittedly, she missed some work due to her heart attack, which in turn affected her income. However, Applicant's major problem is obviously the fact that she spends more money than she has, and does not live within her means. She has not shown a pattern of financial responsibility. Although she states that she is now paying her debt by following the Chapter 13 plan, her debt is excessive, and it will be many years before she is even close to resolving the debt. There is nothing in the record to show that her spending habits have changed or that she will not get into this problem again. These facts establish prima facie support for the foregoing disqualifying conditions, and shift the burden to Applicant to mitigate those concerns.

The guideline includes several conditions in AG ¶ 20 that could mitigate the security concerns arising from Applicant's alleged financial difficulties:

- (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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;
- (c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;
- (d) the individual initiated and is adhering to 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;
- (f) the affluence resulted from a legal source of income; and
- (g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

It is recognized that circumstances beyond her control, namely, a heart attack could have negatively affected her finances. However, AG ¶ 20(b) does not provide full mitigation here. Applicant made the choice to provide her daughter with financial assistance during the daughter's pregnancy and through her subsequent divorce to the present time. Applicant has just begun to resolve her Chapter 13 debt. Applicant has provided some documentation to demonstrate that she has acted responsibly under the circumstances, and that she is receiving financial counseling, but there are no clear indications that her financial problems are under control, or that she will be able to comply with the bankruptcy courts payment plan. Most of the delinquent debts set forth in the SOR remains delinquent. From the evidence in the record for many years Applicant did

not act responsibly under the circumstances. Now she is trying to, but it is too late. In this case, none of the mitigating conditions are applicable. Accordingly, I find against the Applicant under Guideline F (Financial Considerations). The record fails to establish sufficient mitigation of financial trustworthiness concerns under the provisions of AG ¶¶ 20(a) through 20(g).

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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.

According to 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 applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is a mature adult, who has failed to demonstrate that she can live within her means, budget her income accordingly, and pay her bills in a timely fashion. At this point, her financial problems continue as there is no evidence that they have been resolved.

Overall, the record evidence leaves me with serious doubt as to Applicant's judgment, eligibility, and suitability for a position of trust. She has not met her burden to mitigate the trustworthiness concerns arising under the guideline for Financial Considerations.

Formal Findings

Formal findings For or Against Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1:	Against the Applicant.
Subpara. 1.a.	Against the Applicant.
Subpara. 1.b.	Against the Applicant.
Subpara. 1.c.	Against the Applicant.
Subpara. 1.d.	Against the Applicant.
Subpara. 1.e.	Against the Applicant.
Subpara. 1.f.	Against the Applicant.
Subpara. 1.g.	Against the Applicant.
Subpara. 1.h.	Against the Applicant.
Subpara. 1.i.	Against the Applicant.
Subpara. 1.j.	Against the Applicant.
Subpara. 1.k.	Against the Applicant.
Subpara. 1.l.	Against the Applicant.
Subpara. 1.m.	Against the Applicant.
Subpara. 1.n.	Against the Applicant.
Subpara. 1.o.	Against the Applicant.
Subpara. 1.p.	Against the Applicant.
Subpara. 1.q.	Against the Applicant.
Subpara. 1.r.	Against the Applicant.
Subpara. 1.s.	Against the Applicant.
Subpara. 1.t.	Against the Applicant.
Subpara. 1.u.	Against the Applicant.
Subpara. 1.v.	Against the Applicant.
Subpara. 1.w.	Against the Applicant.
Subpara. 1.x.	Against the Applicant.
Subpara. 1.y.	Against the Applicant.
Subpara. 1.z.	Against the Applicant.
Subpara. 1.aa.	Against the Applicant.
Subpara. 1.bb.	For the Applicant.
Subpara. 1.cc.	Against the Applicant.
Subpara. 1.dd.	Against the Applicant.
Subpara. 1.ee.	Against the Applicant.
Subpara. 1.ff.	Against the Applicant.
Subpara. 1.gg.	Against the Applicant.
Subpara. 1.hh.	Against the Applicant.
Subpara. 1.ii	Against the Applicant.

Subpara.	1.jj.	Against the Applicant.
Subpara.	1.kk.	Against the Applicant.
Subpara.	1.ll.	Against the Applicant.
Subpara.	1.mm	Against the Applicant.
Subpara.	1.nn.	Against the Applicant.
Subpara.	1.oo.	For the 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 public trust position for the Applicant.

Darlene Lokey Anderson
Administrative Judge