



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 11-03026

Appearances

For Government: Paul Delaney, Esquire, Department Counsel
For Applicant: James Hanson, Personal Representative

03/22/2012

Decision

HOWE, Philip S., Administrative Judge:

Applicant submitted her Questionnaire for Public Trust Position (SF 85P), on July 9, 2010. On July 29, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) for Applicant. 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 Jan. 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 4, 2011. She answered the SOR in writing on August 22, 2011, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on October 3, 2011, and I received the case assignment on October 6, 2011. DOHA issued a Notice of Hearing on October 24, 2011, for a hearing date of November 10, 2011. That hearing was cancelled and another Notice of Hearing was issued on November 21, 2011, for a

hearing on December 8, 2011. I convened the hearing as scheduled on December 8, 2011. The government offered Exhibits (Ex.) 1 through 6, which were received without objection. Applicant testified on her own behalf and submitted Exhibits A through F, without objection. DOHA received the transcript of the hearing (Tr.) on December 19, 2011. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

Findings of Fact

In her Answer to the SOR Applicant admitted the factual allegations in ¶¶ 1.b, and 1.d to 1.x of the SOR, with explanations. She denied the factual allegations in ¶¶ 1.a and 1.c of the SOR. She also provided additional information to support her request for eligibility for a public trust position Applicant denied Paragraph 2 of the SOR.

Applicant is 52 years old, married, and has three children. Two children are adults and the third child is 15 years old living with her. Applicant works for a defense contractor in the health insurance business as a clerk. She started her employment in 2010. (Tr. 32, 33)

The SOR lists 24 delinquent debts totaling \$96,904. There are actually 22 delinquent debts because the debts in Subparagraphs 1.h (\$697) and 1.t (\$770, being the correct amount) are duplicates. Also, the debts in Subparagraphs 1.i (\$1,045) and 1.j (\$1,269, the correct amount) are duplicates. Applicant paid two of the remaining SOR-listed debts. She paid the debt in Subparagraph 1.a owed to a department store for \$1,352 through a garnishment. Applicant also brought her mortgage current (Subparagraph 1.c) (\$12,204 in missed payments). The remaining 20 delinquent debts remain unpaid, totaling \$81,606. Applicant disputed the amount of the debts in Subparagraphs 1.c (\$41,606) and 1.e (\$20,891, the deficiency amount on a repossessed automobile). Applicant does not deny she owes these two debts. Applicant does not deny owing any of the other debts. Applicant admitted she has no plans on how she is going to repay them. (Tr. 35, 36-46, 79, 111; Exhibits 2-6, A, B)

The 20 delinquent debts still unpaid include 15 debts with balances under \$1,000. Of those 15 debts, 11 debts are under \$500. The small debts range from \$3.00 (Subparagraph 1.v) to \$464 (Subparagraph 1.n) and total \$2,220. While these debts remain unpaid, Applicant and her husband spent money in the past year replacing their refrigerator in their community home (Home 1), which is also their primary residence, replaced the back porch that was in deteriorating condition, refurbished the bathroom to better accommodate their clients, and installing a new furnace. (Tr. 74, 78-80; SOR) Applicant's financial problems started when she and her husband opened in 2000 a community-based residential facility corporate business to care for senior citizens usually in their 70s or 80s. She hired a director who was succeeded later by that person's son. The son managed Home 1.

Applicant and her husband leased an apartment house a short distance from this residential facility. (Home 2.) That apartment house had residents in their 50s and 60s.

Their on-site director embezzled funds from the corporate checking account for Homes 1 and 2. This person was prosecuted criminally and Applicant received about \$20,000 in restitution. The amount embezzled was about \$40,000. Applicant did not sue the perpetrator in civil court because he had no assets to attach. They shut their corporate business operating Homes 1 and 2 in May 2007. This criminal action deprived Applicant of her monthly income. (Tr. 47-55; Exhibits 2-6, C)

Applicant's husband borrowed money from his father to pay the employees as the business wound down. He repaid that money. Applicant's husband took a salary from the corporate business only one year out of the seven they operated the corporate business. They used their personal funds to pay the debts of the business as the residential business bank account was drained by the embezzler and the business failed. The residential facility also had a gas leak one day that adversely affected its profitability. Applicant did not own the buildings they used, but rented them from a landlord. The residential business cost \$10,000 monthly to operate, according to the Applicant. One third of that amount was for rent, one third for employee salaries, and the last third for gas and electricity. Applicant's profit from the business was \$10,000 monthly. When that income vanished, Applicant was not able to pay the debts resulting from that business. (Tr. 54-60, 90, 92; Exhibits D and E)

Applicant and her husband also operated a small group home in their hometown, 50 miles to the east. (Home 3.) After Homes 1 and 2 closed in 2007 Applicant continued to operate Home 3 with three adults living there. This business is in their personal residence, in which they take care of adults who cannot live on their own. They are paid by the state for providing this service. Applicant also got a job to earn income. She worked at a retail store from September 2007 into 2008. Then she worked for a local hospital for a short time. She was then unemployed for nine months until obtaining a job with her current employer in 2010. Applicant earns \$1,600 monthly net income. Her husband's net income monthly is \$8,600 if the three slots in their home are filled. Their net remainder monthly income currently is \$2,800. As stated, from that amount Applicant paid for a new porch, a new refrigerator, painted the house, purchased a new furnace, and a new bathroom. Applicant projected she would need a new water heater installed soon in her personal residence-community house. (Tr. 60-64, 69, 70, 74, 78, 79)

Meanwhile, her home state was late in making payments for the services she and her husband rendered to the persons in her home. There was a payment delay of eight and a half months. The payments delayed amounted to about \$8,000. (Tr. 64-66; Attachments to Applicant's Answer)

The delay in state payments did not affect Applicant's ability to repay her older personal debts because they already existed before the payment problems with the state arose. Applicant admitted she did not have money with which to pay them from her current assets during the last five years. She devoted any income to providing for her family and operating her sole remaining home, which was also her personal residence. Those debts continued to be unpaid. (Tr. 66-67; Exhibit 3)

Applicant disclosed only two delinquent debts over 180 days delinquent on her July 2010 e-QIP. She did not answer Section 22b with a complete list of her delinquent debts. Applicant listed only the debts in Subparagraphs 1.a and 1.b. She did not list any other delinquent debts, thinking the government would check her credit record and find the other debts or already knew what her debts were. Applicant also claims she did not know the specifics of her other delinquent debts when she completed the e-QIP. Applicant was interviewed by a government investigator on January 7, 2011. At that interview Applicant did not correct the omissions of her delinquent debts before being confronted by the investigator with her 20 delinquent debts. (Tr. 83-85; Exhibit 3)

Policies

Positions designated as ADP I, ADP II, and ADP III 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.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, “[t]he

applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and 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 notes nine conditions that could raise trustworthiness concerns. Two conditions may apply in this case.

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 concerns. Applicant accumulated \$96,904 in delinquent debt as alleged in the SOR and has been unable to pay these obligations since 2007. The evidence is sufficient to raise these potentially disqualifying conditions.

The guideline also includes six examples of conditions that could mitigate trustworthiness concerns arising from financial difficulties. One mitigating condition may be considered.

Under AG ¶ 20(b), it may be mitigating 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.” As noted above, all of the financial problems arose from Applicant’s business failure in 2007, which was caused by her employee’s embezzlement of the money received by the adult care community home operated by Applicant and her husband. She did not sue the perpetrator to obtain restitution. Applicant received some money from the criminal court action brought against the embezzler, estimated at \$20,000 by Applicant. When Homes 1 and 2 closed, she lost that income.

Applicant also claims she was not reimbursed by the government for expenses according to her state’s policy regarding community homes. This delay or failure to pay adversely affected Applicant’s ability to pay her business debts.

Yet, in the same time period Applicant made improvements to her home related community care business, which is also her primary residence. Applicant also took no action to resolve any of her remaining 20 delinquent debts. The majority (11) of those debts is under \$500 and could have been paid as part of a regular installment payment plan. Applicant paid one other debt when the creditor garnished her wages. She brought her mortgage current, which was the only voluntary action she took to resolve her delinquent debts. Consequently, Applicant did not act responsibly under the circumstances since her business closed five years ago. I find this potentially mitigating condition is not a factor for consideration in this case.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to Personal Conduct:

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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a

security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes seven conditions that could raise a security concern and may be disqualifying. One condition may apply in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant listed only two debts on her e-QIP that were more than 180 days delinquent. She did not list the other 20 debts that were presented in the SOR as seriously delinquent. Applicant claims the embezzlement by a former employee and the slow payment by the state for services in their community homes caused her inability to pay her delinquent debts. The magnitude and recurring nature of these debts and unique reason for her financial problems were significant, such that it is not likely she forgot about them when completing her e-QIP. Applicant deliberately concealed relevant facts from her e-QIP. AG ¶ 16 (a) applies.

AG ¶ 17 provides seven conditions that could mitigate security concerns raised under this guideline:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.

(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;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant did not correct her omissions before being interviewed by the government investigator in January 2011. AG ¶ 17 (a) does not apply.

Applicant was not advised improperly or inadequately by a lawyer or authorized person to omit her delinquent debts beyond the two she did disclose. AG ¶ 17 (b) does not apply.

The omission of \$81,606 in delinquent debt from her SF 85P is not a minor offense, nor did it happen under such unique circumstances that the situation is unlikely to recur. The failure to disclose does cast doubt on Applicant's trustworthiness and good judgment. AG ¶ 17 (c) does not apply.

Applicant has not sought counseling or acknowledged the behavior that causes the untrustworthiness. She has not taken any positive steps to alleviate the conditions that caused her to omit her 20 delinquent debts or to reduce vulnerability to exploitation, manipulation, or duress. AG ¶ 17 (d) and (e) do not apply.

The financial information is accurate and printed in credit reports kept in the normal course of business. AG ¶ 17 (f) does not apply.

Association by Applicant with persons involved in criminal activity is not relevant nor an issue in this hearing. Therefore, AG ¶ 17 (g) does not apply.

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 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) 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 has accumulated a serious amount of debt resulting from a business failure in 2007. She admitted she and her husband have done nothing to resolve these debts in the past five years. There has been no change in her conduct regarding the debts since then. She took her current job, the third of three since 2007, to help support her family and continue to operate her home-based business. Other than this action, nothing has been done by Applicant to resolve her delinquent debts. Applicant continues in the same community home business with her husband, showing no behavioral changes. The magnitude of debt gives Applicant the potential for pressure, coercion, exploitation, or duress. The current status of her debts and the family business shows that there is likelihood for continuation and recurrence of the financial problems. She has not undertaken credit counseling. She did not show a budget. Nor did Applicant show a plan for resolving unpaid debt. Her actions during the past five years continued to demonstrate poor financial judgment.

Her personal conduct trustworthiness concern is serious because she omitted a substantial amount of delinquent debt from her e-QIP. She was intimately involved in the business that failed and knew she had delinquent debts. Disclosure of only two debts is insufficient to meet the requirements of Section 22b on the e-QIP. Applicant voluntarily limited her debt disclosure. That action creates a potential for pressure, coercion, exploitation, or duress.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a public trust position alleged. For all these reasons, I conclude Applicant did not mitigate the trustworthiness concerns arising from her financial considerations. Applicant did not mitigate the same concern with regards to her personal conduct failure to disclose her debts to the government. I conclude the "whole-person" concept against Applicant.

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 to 1.x:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

PHILIP S. HOWE
Administrative Judge