



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



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| In the matter of: |) | |
| |) | |
| [NAME REDACTED] |) | ADP Case No. 14-06975 |
| |) | |
| Applicant for Position of Trust |) | |

Appearances

For Government: Gina Marine, Esq., Department Counsel
For Applicant: *Pro se*

11/16/2015

Decision

MALONE, Matthew E., Administrative Judge:

Applicant accrued significant delinquent debt as a result of unforeseen business and medical problems. Her response to her financial problems, and her efforts to resolve her debts, reflect positively on her judgment and reliability. Her request for eligibility to occupy a position of trust is granted.

Statement of the Case

On August 6, 2013, 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 5200.2-R, as amended (Regulation).

investigation, 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.²

On April 30, 2015, DOD issued Applicant a Statement of Reasons (SOR) alleging facts which raise trustworthiness concerns addressed through the adjudicative guideline (AG)³ for financial considerations (Guideline F). Applicant timely responded to the SOR (Answer)⁴ and requested a hearing. The case was assigned to me on July 9, 2015, and I convened a hearing on August 4, 2015. Department Counsel for the Defense Office of Hearings and Appeals (DOHA) presented Government Exhibits (Gx.) 1 - 5.⁵ Applicant testified and presented Applicant's Exhibits (Ax.) A and B. I left the record open after the hearing to receive additional relevant information. The record closed on August 14, 2015, when I received a 62-page submission that is included, without objection, as Ax. C.⁶ DOHA received the hearing transcript (Tr.) on August 12, 2015.

Findings of Fact

Under Guideline F, the Government alleged that Applicant owes \$81,044 for 29 delinquent or past-due debts (SOR 1.a - 1.cc). At hearing, Department Counsel acknowledged that the debts at SOR 1.bb and 1.cc are duplicates of the debts alleged at SOR 1.c and 1.f, respectively. (Gx. 5; Tr. 86 - 87) Accordingly, SOR 1.bb and 1.cc are resolved for the Applicant. Applicant admitted, with explanations, all of the remaining allegations except for SOR 1.v, which she disputes. In addition to the facts established by Applicant's admissions, and based on all available information, I make the following findings of fact.

Applicant is 45 years old and is employed by a defense contractor in a position that requires eligibility for a position of trust. Her employer supports management of the health care system used by members of the military, and Applicant must be found suitable to be entrusted with personally identifiable information (PII) associated with the health care system's constituents. In December 2010, Applicant was hired by her current employer, first as a temporary agency employee, then as a permanent employee in August 2011. From 2002 until May 2010, Applicant was employed at least part-time or self-employed in a property rental business she and her husband ran with

² Required by the Regulation, as amended, and by DOD Directive 5220.6, as amended (Directive).

³ 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).

⁴ At hearing, Applicant proffered an amended response that corrected minor errors contained in the original Answer. The amended response is included in the record as Hearing Exhibit (Hx.) 1.

⁵ Department Counsel also provided a copy of the letter forwarding to Applicant advance copies of Gx. 1 - 7 (Hx. 2) and a list identifying Gx. 1 - 5 (Hx. 3).

⁶ Department Counsel's memorandum forwarding Ax. C and waiving objection thereto is included as Hx. 4.

another couple. However, most of her time before being hired for her current position was spent as a stay-at-home mother. (Answer; Hx. 1; Gx. 1; Gx. 2)

Applicant and her husband have been married since May 1998. They have three children, ages 9, 11, and 16. In addition to their rental business, Applicant's husband has always worked as a home construction and renovations contractor. In late 2007 and early 2008, his business nearly failed due to the collapsing housing market and economic recession. A 2009 restaurant venture Applicant's husband started with his father failed when his father became ill. Since about 2013, his contracting business has started earning close to his pre-recession income. (Answer; Hx. 1; Gx. 1; Gx. 2; Ax. C at 57 - 62)

Applicant and her husband started experiencing financial problems around 2007, when the economy slowed and income from her husband's contracting business fell off. Additionally, the couple with whom Applicant and her husband had formed a real estate partnership divorced. The other couple filed for bankruptcy protection leaving Applicant and her husband responsible for the partnership's liabilities. Applicant and her husband were barely able to cover the partnership's mortgages and other expenses during periods with no tenants, which occurred more frequently with the economic downturn in 2007 and 2008. The debt at SOR 1.b represents past-due payments on the second mortgage of one of their properties. However, they have since brought that account current. (Answer; Hx. 1; Gx. 1 - 5; Ax. C at 8 - 13; Tr. 87 - 94)

Applicant's financial difficulties also resulted in a mortgage delinquency for their principle residence, alleged at SOR 1.a. That debt also has been resolved and their mortgage is again current. (Answer; Hx. 1; Gx. 1 - 5; Ax. C at 3 - 6)

Applicant and her husband bought a timeshare interest in a vacation property when his business was healthy. One of the first actions they took when they realized their finances were deteriorating was to notify the timeshare company of their difficulty in keeping up with required payments. The debt at SOR 1.w represents that past-due debt. In 2010, the company agreed to accept a deed in lieu of foreclosure to resolve this obligation. (Answer; Hx. 1; Gx. 1 - 5; Ax. C at 14 - 17; Tr. 96 - 97)

The debts alleged at SOR 1.g - p, 1.r - 1.u, and 1.x - 1.z are for medical expenses incurred when Applicant had no medical insurance or insufficient coverage through her current job. In 2011, before she was hired as a permanent employee and received medical insurance, Applicant suffered a knee injury that required extensive rehabilitation and kept her from working for about six weeks. This occurred not long after one of her children fell and broke an ankle. Also in 2011, Applicant's husband became ill and required surgery. Applicant was unable to pay all of her medical bills due to extended periods of lost income coupled with unexpected repair expenses for their rental property. At times between 2008 and 2012, Applicant and her family had to apply for welfare and unemployment benefits. (Answer; Hx. 1; Gx. 2; Ax. C at 29 - 51)

After Applicant recovered and returned to work as a full-time permanent employee, she and her husband were able to catch up on missed mortgage, car loan, and other accounts not addressed in the SOR. However, in 2013, Applicant was injured in a car accident. The resulting medical bills and lost income hindered repayment of her family's 2011 medical bills, as well as the personal credit debts alleged at SOR 1.c - 1.f, 1.i, and 1.aa. Applicant has a lawsuit pending against the other driver in her 2013 car accident and she anticipates receiving a monetary settlement sufficient to cover her remaining medical bills. In the meantime, she and her husband still receive rental income that covers their expenses. Even though they do not realize a profit from those rentals, the associated tax breaks have resulted in annual refunds that have enabled them to repay other debts not alleged herein. (Answer; Hx. 1; Gx. 2; Ax. C at 7, 19 - 28, 52 - 56; Tr. 94 - 97)

Applicant has an excellent reputation in the workplace and in her community for hard work and integrity. She and her husband are active in their church, which has provided them financial assistance and counseling over the past few years. (Ax. A; Ax. B; Ax. C at 18)

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

Each decision must 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, commonly referred to as the "whole-person" concept, listed in the guidelines at AG ¶ 2(a).¹¹

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

⁷ Regulation, ¶ C3.6.15.

⁸ Regulation, ¶ C6.1.1.1.

⁹ Regulation, ¶ C8.2.1.

¹⁰ Directive, 6.3.

¹¹ "(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."

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 Considerations

Available information is sufficient to support all of the SOR allegations. The facts established raise a trustworthiness concern about Applicant's finances that is addressed 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. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

More specifically, available information requires application of the disqualifying conditions at AG ¶¶ 19(a) (*inability or unwillingness to satisfy debts*); and 19(c) (*a history of not meeting financial obligations*). As to AG ¶ 19(a), the record shows Applicant has been unable, not unwilling, to repay all of her past-due debts.

I have also considered the following pertinent AG ¶ 20 mitigating conditions:

- (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.¹²

All of these mitigating conditions have at least partial application. As to AG ¶ 20(a), the “behavior” is ongoing, in that Applicant still has unresolved debts. However, none of her unpaid debts were the result of financial mismanagement or irresponsible decision making. Most of her current financial problems are the result of a 2013 car accident that interrupted her ability to repay unpaid debts from 2011. She has not incurred any new delinquencies since then.

AG ¶ 20(b) applies because Applicant’s debts arose from, or were exacerbated by loss of income due to illness, injury, and unavoidable business declines as a result of the 2007 and 2008 economic downturn. As to whether Applicant acted responsibly under the circumstances, the record shows she resolved past-due mortgage obligations and a past-due timeshare account as soon as she and her husband had the means to do so. This is sufficient to satisfy the second prong of this mitigating condition.

AG ¶ 20(c) applies based on Applicant’s use of church financial assistance and counseling resources. She presented a good command of her monthly finances and is acting to resolve her debts while still meeting her family’s current financial needs.

AG ¶ 20(d) applies based on Applicant’s pre-SOR resolution of her mortgage and other debts that are not addressed in the SOR. Had it not been for her car accident, she likely would not have the scope of debt alleged in her SOR and would likely have made more progress in resolving more of her debts.

I have evaluated the facts and have applied the appropriate adjudicative factors under Guideline F. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Specifically, I note Applicant’s response to her financial problems and her complete candor about those problems. Most of the unresolved debt at issue here is from unplanned medical expenses for which she did not have any or adequate insurance coverage. Subsequent debts remain unresolved due to factors beyond Applicant’s control, but she is trying to resolve them as quickly as her current circumstances allow. There is no misconduct or financial irresponsibility underlying Applicant’s financial problems, and her good reputation for trustworthiness and reliability indicate such problems will not recur. A fair and commonsense assessment of all available information shows that the Government’s concerns about Applicant’s trustworthiness have been satisfied.

¹² The mitigating conditions at AG ¶¶ 20(e) and 20(f) are not pertinent to these facts and circumstances.

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:

Paragraph 1, Guideline F: FOR APPLICANT

Subparagraphs 1.a - 1.cc: For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the interests of national security for Applicant to occupy a position of trust. Applicant's request for ADP eligibility is granted.

MATTHEW E. MALONE
Administrative Judge