



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



In the matter of:)
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SSN:)
)
Applicant for Public Trust Position)

ADP Case No. 07-04937

Appearances

For Government: Stephanie C. Hess, Esq., Department Counsel
For Applicant: *Pro se*

January 28, 2008

Decision

MASON, Paul J., Administrative Judge:

Applicant submitted her Questionnaire for a Public Trust Position (PTA), on May 22, 2006. On July 23, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under financial considerations (Guideline F) and personal conduct (Guideline E). 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, 1992), as amended (Directive); Department of Defense (DoD) Regulation 5200.2-R, Personnel Security Program, dated Jan. 1987, as amended (Regulation), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued on or after September 1, 2006.

Applicant answered the SOR in writing on August 15, 2007, and requested a hearing before an Administrative Judge. DOHA issued a notice of hearing on October 13, 2007, and the hearing was held on November 13, 2007. The government's three

exhibits (GE 1-3) were received in the record. Applicant testified on his own behalf and submitted 17 exhibits (GE A through GE O) in the record. DOHA received the transcript of the hearing (Tr.) on November 29, 2007. Applicant submitted additional documents that have been admitted in the record as AE P and AE Q. The post-hearing exhibits contain information from the debt settlement firm, a printout of the trip cost for travel to obtain treatment for Applicant's children, and literature addressing bankruptcy. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is granted.

Rulings on Procedure

At the beginning of the hearing, I instructed Applicant that her husband could sit at the trial table to guide her through the proceedings, and offer advice when needed; I also told her that if he intended to provide guidance at the trial table, he could not testify. (Tr. 5) As the hearing progressed, it became clear Applicant could not answer relevant questions regarding the listed debts. I concluded her husband's testimony was essential in ascertaining the status of the four SOR debts. Hence, to promote the development of a full record, and specifically to receive testimonial explanations from him about Applicant's exhibits and his efforts to resolve the debts, I reversed my original ruling and allowed Applicant's husband to testify.

Findings of Fact

In her Answer to the SOR, dated August 15, 2007, Applicant essentially admitted the factual allegations but disputed the charge-off dates. She also noted that certain debts had been settled while other debts were being negotiated for settlement. She denied the factual allegation in paragraph 2 that she deliberately omitted information from the PTA. She claimed she knew that the debts were delinquent but did not know the debts were over 180 days delinquent.

Applicant is 40 years old and a licensed clinical social worker. She has been married for 16 years and has three children. She seeks eligibility for access to sensitive position.

Financial Considerations

In 1999, Applicant recalled she and her husband were handling their finances in a responsible manner. On October 4, 1999, Applicant gave birth to triplets after encountering undescribed problems during her pregnancy. After the children were born, Applicant had to stop working to take care of them. The children had a medical problem that could only be treated in city X located on the other side of the state. The medical problem required 16 trips to city X between 2000 and 2005 to correct the problem. (AE Q) Each trip involved traveling to City X treatment location and remaining there for various periods while the children were being treated.

Between 2001 and 2006, Applicant's husband, a financial planner/broker, saw his salary continue to diminish by almost 50%, according to tax records. (AE L) Financial problems soon followed in 2002 in deciding which bills to pay first. In early 2003,

Applicant took a part-time job as a consultant through her church. Before long, her clientele began to grow dramatically, and her church asked her to move elsewhere because they could no longer handle the traffic. In the summer of 2003, she purchased a building with three colleagues, and opened a social work consulting practice. After approximately nine months, the three colleagues withdrew from the venture, and left her saddled with the building mortgage and other continuing expenses to operate the building. The mortgage and expenses weighed heavily on Applicant's earnings. Her husband's financial planning business continued to suffer. (AE L) Their children were growing and so were the expenses to raise them.

Applicant and her husband put the building up for sale in 2005. They sold the building in the spring of 2007, with the closing on May 4, 2007. Though they wanted much more, they were able to sell it for \$185,000.00. After paying the costs connected to the sale, they cleared \$60,000.00. They used some of the proceeds to eliminate the arrearage on their mortgage, and some to reduce the credit line on their home. They hired a debt settlement firm (AE J) to contact and negotiate a settlement with the listed creditors. On March 2007, Applicant's husband acquired a second job as a professor for an online university. (AE A) Applicant has curtailed her spending by not eating in fancy restaurants and avoiding expensive when grocery shopping. Applicant's husband has incorporated a detailed family budget into the daily finances.

There are four past due (charged off) debts identified under paragraph 1. The total amount of the debt is \$69,747.00. Though Applicant contends the charge-off dates are incorrect, she still owes most of the debt amounts quoted (AE F).

- 1.a. The credit card account (\$29,363.00) was opened in 1998 and charged off in October 2004. There is no evidence the account has been acted upon, and the record does not indicate the account is satisfied partially or completely.

- 1.b. The credit card account (\$11,768.00) was opened in November 2000, and charged off in May 2005. The account was settled in December 2007. (AE P)

- 1.c. A credit card account (\$16,543.00) was opened in 1993 and charged off in July 2005.

- 1.d. A second credit card account (\$12,073.00) from the same creditor identified in 1.c., was charged off in July 2005. According to AE I, the account was settled in September 2007. AE 1 also shows that Applicant settled with an unlisted creditor.

Paragraph 2 of the SOR alleges Applicant intentionally falsified her PTA on May 22, 2006. Question 22b. of the PTA requires information about debts over 180 days delinquents. Applicant answered "NO." She indicated:

It wasn't intentional at all when they said that I was in debt more than a 180 days behind on any debt. I was - - I didn't know and especially because, you know, as of today the reason, sir, the reason my husband takes care of the all the finances is because there are sometimes - -

when I know, that you may not care about it - - But sometimes I don't with - - you know, the triplets if one is sick, I don't sleep well, you know, my daughter has an infection right now. I haven't slept well. I work full-time so that's the reason why he tires to take away from me all that, you know supposedly burden. Even though I'm supposed to know all that. But at the time when I filled out the application I did not know it and it wasn't my intention to lie about it. I did not know we were six months behind. (Tr. 28)

Throughout the hearing, Applicant was asked questions about the delinquent debts. She repeatedly deferred to her husband for in depth explanations of each debt and specific efforts to resolve the debt. She testified that her primary job was to raise the children. She articulated the same position in her answers to the government's interrogatories on June 8, 2007. (GE 2) I find she did not intentionally omit the delinquent information from her (PTA) on May 22, 2006.

AE A shows Applicant's budget, Applicant's income, and her husband's income from his financial planning position and from his teaching position. Applicant's husband believes they can eliminate the overdue debt in six months with the anticipated \$40,000.00 he expects to receive in commissions.

A licensed clinical social worker (LCSW) met Applicant when she began working for the company as a case manager in April 2006. The LCSW considers Applicant to be a diligent worker who carries out her duties in professional manner. From their increasing social interaction, the LCSW believes Applicant's husband is a dedicated father and supportive husband.

The minister of the neighborhood church has known Applicant and her husband for 10 years. According to the minister, the Appellant and her husband are excellent parents. The minister considers Applicant to be a very ethical person.

Applicant's performance two performance appraisals for April to July 2006, and then July 2006 to July 2007 highlight Applicant's enthusiasm and dedication for the clients.

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 over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2c., 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 ¶ 2b. 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.

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 also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Financial Considerations (FC)

An individual who is financially overextended is at risk of committing poor judgment to generate funds.

Personal Conduct (PC)

Demonstrating poor judgment during the security investigation is indicative of poor judgment while also demonstrating that the individual cannot safeguard classified information.

Analysis

The government has established a case under FC disqualifying condition (DC) 19.a. "inability or unwillingness to satisfy debts" and FC DC 19.c. "a history of not meeting financial obligations." Four delinquent debts totaling \$69,747.00 were charged off between 2004 and 2005.

There are four mitigating conditions (MC) that may apply to assuage the security concerns associated with Applicant's indebtedness. FC MC 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" applies even though the behavior was fairly recent and the amount of remaining debt is sizable. The medical problems of the children and Applicant's lack of success with the consulting practice are circumstances unlikely to recur.

Applicant receives substantial consideration under FC MC 20.b. "the conditions that resulted into the financial problem were largely beyond the person's control, and the individual acted reasonably." First, Applicant had to suspend her employment so she could take care of her children in late 1999 and 2000, and thereafter. Second, Applicant and her husband spent much time and money traveling to the other side of the state to obtain treatment for the children. Third, the tax records (AE L) show Applicant's husband saw his earnings drop by about 50% between 2001 and 2006. Having weighed the evidence of Applicant's behavior between 2005 (when Applicant put the building on sale) and May 2007 (when Applicant sold the building), I conclude she acted reasonably under the circumstances. First, she obtained employment with her current employer in April 2006. Second, there is no evidence of additional accounts becoming delinquent after 2005. Third, the sale of the building in May 2007 freed funds to apply to the listed and unlisted debts. In sum, FC 20.b. weighs heavily in Applicant's favor.

Reference is usually made to FC MC 20.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" to determine whether counseling is needed. Because each case turns on its own circumstances, it is noted that in Applicant's marriage, she is responsible for the children and her husband is responsible for the finances. Her husband's efforts in settling the delinquent debts, and his active use of a budget to control their spending indicates that they are on the path to regaining control of their financial obligations. Applicant receives some mitigation under FC MC 20.c. and FC MC 20.d. "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." While the debts in 1.b. and 1.d. were resolved by settlement rather than a full pay off, Applicant settled the 1.b. account in April 2007, almost three months before issuance of the SOR. Applicant's husband believes he will extinguish the remaining delinquent debt in 1.a. and 1.c. in 6 months with the help of \$20,000.00 in new business. Though such a prediction may be overly optimistic, his progress to this point in settling with the listed and unlisted creditors, and in bringing the house equity/credit line to a current status gives me ample reason to conclude he will satisfy the remaining debt. Subparagraphs 1.a. through 1.d. are resolved in Applicant's favor.

Displaying dishonesty during a trustworthiness investigation is generally disqualifying under the PC guideline unless the evidence fails to establish all elements of PC DC 16.a. “deliberate omission or falsification of relevant facts from a personnel security questionnaire use to determine security clearance eligibility.” There was an omission of relevant information from a trustworthiness application. An initial review of Applicant’s testimony raises a reasonable inference that she should have known the debts were delinquent. She admits she knew. Considering her statements in the exhibits and her testimony at the hearing, I conclude that she knew the debts were delinquent, but did not know they were over 180 days delinquent. Therefore, the element of “deliberateness” is absent from PC DC 16.a.. Without all elements present, the disqualifying condition has not been established. Subparagraph 2.a. is found in Applicant’s favor.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate the Applicant’s eligibility for a public trust position by considering the totality of her conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2a. 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 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 ¶ 2c., 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 have considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Since 1999, Applicant’s financial health over the years has been hampered by three events, (1) the medical problem that her children shared following birth in October 1999, (2) her husband’s reduced earnings between 2001 and 2006, and (3) the purchase of the building in 2003 that turned out to be terrible burden on Applicant’s bill paying capabilities. She and her husband exercised good judgment by continuing to pay the mortgage on the building rather than letting it slip into foreclosure. Even though they were not able to sell the building for more than a year or until May 2007, they did not let any other debts become delinquent during the period. The documentation demonstrates they are actively negotiating with the remaining two creditors, and should be able to resolve both accounts in the near future. The favorable character statements lauding Applicant’s character, and the equally probative job evaluation information describing her joy in her position warrants a favorable outcome for Applicant under the financial considerations and personal conduct guidelines.

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 (Financial Considerations, Guideline F): FOR APPLICANT

Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant

Paragraph 2 (Personal Conduct, Guideline E): FOR APPLICANT

Subparagraph 2.a.	For Applicant
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Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

Paul J. Mason
Administrative Judge