



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



In the matter of:)
)
-----) ADP Case No. 07-08098
SSN: -----)
)
Applicant for Public Trust Position)

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: *Per Se*

May 22, 2008

Decision

WESLEY, Roger C., Administrative Judge:

Statement of Case

On November 5, 2007, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, and Department of Defense (DoD) Regulation 5200.2-R, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative determination of Applicant's eligibility for occupying an ADP I/II/III position, and recommended referral to an administrative judge to determine whether a trustworthiness determination clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on December 21, 2007, and requested a hearing. The case was assigned to me on January 15, 2008, and was scheduled for hearing on February 22, 2008. A hearing was held on February 22, 2008, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's application for a public trust position. At hearing, the Government's case consisted of five exhibits; Applicant relied on three

witnesses (including herself) and eight exhibits. The transcript (R.T.) was received on March 3, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility to access a public trust position is granted.

Procedural Rulings and Evidentiary Issues

Before the close of the hearing, Appellant requested leave to supplement the record with documentation of her payments of several of her medical and consumer creditors, and efforts to document a likely favorable judgment covering creditor 1.c and contact with creditor 1.b. For good cause shown, Applicant was granted three weeks, to March 17, 2008, to supplement the record. Within the time permitted, Applicant supplemented the record with documented copies of her cover letter to Department Counsel, her favorable judgment with creditor 1.c, her checking additions and subtractions covering a 2002 account transaction involving creditor 1.b, and a recent earnings statement. Her post-hearing exhibits were admitted and considered.

Summary of Pleadings

Under Guideline F, Applicant is alleged to have (a) petitioned for Chapter 7 bankruptcy in 1993, and was discharged in 1994 and (b) accumulated two delinquent or charged off debts exceeding \$23,000.00.

For her answer to the SOR, Applicant admitted her 1993 bankruptcy petition and discharge in 1994. She admitted her two listed debts with creditors 1.b and 1.c, respectively, but denied the amounts owed. Applicant provided explanations concerning her loss of employment that precipitated her 1993 bankruptcy, and her subsequent loss of employment in 2002 and ensuing downturn in her home-based business, and denial of unemployment benefits that deprived her of any income for a 14-month period before her return to full time employment in June 2003. Applicant claimed unsuccessful credit counseling and more recent working with an attorney to resolve her remaining two outstanding debts.

Findings of Fact

Applicant is a 53-year-old senior customer service representative for a defense contractor who seeks a trustworthiness determination. The allegations covered in the SOR and admitted to by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Applicant is currently divorced and has no children. She received two Associated Arts degrees and intends to pursue her bachelors degree as well (R.T., at 66-67).

Following her divorce and loss of employment due to a county reduction in force in State 1 in the early 90s, Applicant went through a difficult financial period during which she time she was unable to meet all of her financial obligations (R.T., at 47, 70-

71). Pressed to her limits, she petitioned for Chapter 7 bankruptcy in August 1993. In her Chapter 7 petition, she scheduled \$61,466.00 in secured claims and \$9,114.00 in unsecured claims (R.T., at 72). Applicant was discharged in bankruptcy in January 1994.

In April 2002, Applicant resigned her State 2 job over an Equal Employment Opportunity Commission (EEOC) dispute, and embarked on a home-based business of her own. Because of the circumstances in which she resigned her State 1 county job, she was not eligible for unemployment benefits (R.T., at 81). She worked temporarily in various capacities for a number of months before embarking on a home-based business in State 1 (see ex. 1). With too little resources to pursue her EEOC complaint in court, she dropped her claims.

Unable to generate any profit from her home-based business or find full time employment in State 1, Applicant essentially had no income for approximately 14 months. To make ends meet, she was forced to invade her retirement fund, use her savings, and exercise her stock options. Still, she did not have enough income to make ends meet and fell behind in her financial obligations. By April 2003 she had exhausted most of her retirement, savings and stock options, and could no longer fund her creditor 1.b and 1.c debts (R.T., at 78). Facing financial hardship, she telephoned her creditors to enlist their assistance (R.T., at 76-78).

In June 2003, Applicant found employment in State 2 as a system administrator. Once employed and relocated to State 2, she began contacting her old creditors to explore repayment arrangements (R.T., at 75-76). She was able to make a verbal payment arrangement with creditor 1.c and began making monthly payments of \$392.16 (see ex. 2; R.T., at 59, 75-78). She was laid off by her State 2 employer in June 2004, however, and accepted a position with her current employer the same month (see ex. 1; R.T., at 67, 76). While transitioning to her new assignment in State 3, she briefly suspended her creditor 1.c payments (R.T., at 76).

Once relocated to State 3, Applicant wrote to creditor 1.c's collection agent and advised the agent that she would be resuming her monthly payments as soon as she was settled in her new location (R.T., at 59-60). The following month (in July 2004), she sought counseling from Consumer Credit Counseling Services (CCCS) to explore debt consolidation (see ex. C; R.T., at 64-66). CCCS developed a budget for her and recommended she work with the individual creditors herself (see ex. C; R.T., at 64-65). In the meantime, Applicant never received any written response from her June 2004 letter to creditor 1.c, and never received any correspondence identifying the creditor's agent and its payment demands.

Months after writing to creditor 1.c, Applicant began receiving harassing phone calls from the creditor's agent. In March 2007, creditor 1.c served Applicant with court papers demanding payment of the creditor's entire carried balance. Creditor 1.c claimed \$13,600.00 in owed principal, interest and assorted charges and fees. Shortly after receiving creditor 1.c's legal complaint, she consulted a local attorney to assist her

in responding to the complaint (R.T., at 83-84). Records document her attorney's obtaining a favorable judgment against creditor 1.c in February 2008 (see ex. L).

Besides her creditor 1.c debt, Applicant encountered problems in resolving her creditor 1.b debt. Records indicate that she opened this credit card account in March 1998 and last used the card in October 2003 (see exs. 3, 4 and 5). This creditor 1.b account has since been sold several times to different collection agencies. Applicant's last credit report of September 2007 reflects a \$6,847.00 balance. While Applicant admits to using the card and being indebted to creditor 1.b, she disputes the \$10,643.00 currently demanded by the creditor.

Applicant continued making regular payments on her creditor 1.b account between 2000 and 2002 until she lost her State 1 job in April 2002 (R.T., at 73). Having lost her State 1 job, she was forced to cease making monthly payments on this account as well. Upon resuming full time employment in State 2 in June 2003, she worked out a payment arrangement with the 1.b creditor (in September 2003). Under this payment arrangement, she made regular \$100.00 payments to the creditor on the carried balance of \$7,761.14 (see ex. F; R.T., at 73-74) until approximately June 2004, when she lost her job in State 2 and relocated to State 3 to accept a new position (R.T., at 73).

Following the advice of her CCCS counselor, Applicant hand-wrote a note to creditor 1.b (similar to the one she wrote to creditor 1.c), advising the creditor of her circumstances and promising to resume her payments as soon as she could get settled in State 3 (R.T., at 54-56). While she never received any written response to her note, she soon began receiving harassing phone calls from creditor 1.b's collection agent.

Applicant subsequently learned that the collection agent for creditor 1.b had withdrawn \$102.95 from her checking account in August 2004 without permission, ostensibly to cover one of her monthly payments (see ex. M; R.T., at 55-57). While Applicant was able to reverse the debit with her bank, and close her account (R.T., at 57), she never received any satisfactory answers from the creditor or its agent. As a result, she stopped making payments to creditor 1.b on her payment plan. While she remains interested in satisfying this debt, she has not been able to reach the creditor (R.T., at 83).

In February 2008, Applicant through her retained counsel filed a formal dispute with the credit reporting agencies concerning the creditor 1.b debt (see exs. A and B). To date, she has not received as response from either of the reporting agencies or the creditor itself.

Currently, Applicant has an annualized net pay stream of \$57,252.00 (effective February 25, 2008). This works out to between \$3,200.00 and \$4,000.00 a month (*compare* exs. D and N; R.T., at 87). After deducting her estimated monthly expenses (\$2,325.00), she has a net monthly remainder of between \$875.00 and \$1,675.00 a month (R.T., at 88-94). With her current income, she has been able to stay current with

her other debts listed in her most recent credit report (see ex. 3; R.T., at 62). Applicant remains committed to paying her creditor 1.b debt, if she can successfully enlist the creditor to return her calls.

Applicant is highly regarded by her supervisor and facility security officer (FSO). Both describe Applicant as a very responsible employee (R.T., at 42-46). As a testament to her trustworthiness, she has been afforded wide access to her department's highest level of secured information (R.T., at 42). DoD's deputy program manager who is familiar with Applicant's customer support efforts extols her contributions as a model customer service representative who provides an impressive example of worthy emulation (see ex. J).

Policies

On April 9, 1993, the Composite Health Care Program Office (CHCSPO), the Defense Office of Hearing and Appeals (DOHA), and the Assistant Secretary of Defense for Command, Control, Communication and Intelligence (ASDC31), entered into a Memorandum of Agreement (MOA), which gave DOHA responsibility to provide trustworthiness determinations for contractor personnel working on unclassified Information Systems Positions as defined in DoD Regulation 5200.2-R.

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by judges in the decision making process covering DOHA cases cover security clearance applications, and are used to address trustworthy determinations as well. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision.

In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Financial Considerations

The Concern: "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.”

Burden of Proof

By virtue of the precepts framed by the revised Adjudicative Guidelines, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

Analysis

Applicant is a senior customer service representative for a defense contractor who accumulated a number of delinquent debts following her divorce and a series of job losses. Considered together, and without resolution, they raise trust concerns over her application for a public trust position.

Trust concerns are raised under the financial considerations guideline of the revised Adjudicative Guidelines where the individual applicant is so financially overextended as to indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, which can raise questions about the individual's reliability, trustworthiness and ability to protect classified information, and place the person at risk of having to engage in illegal acts to generate funds. Applicant's accumulation of delinquent debts and her past inability to address most of these debts

warrant the application of two of the disqualifying conditions (DC) of the Guidelines for financial considerations: DC 19(a) "inability or unwillingness to satisfy debts" and DC 19©) "a history of not meeting financial obligations."

Applicant's debts are attributable in part to income shortages following her divorce, and experienced employment problems in two different states. Employment losses are attributable to her recurrent problems following her successful bankruptcy discharge in 1994. Applicant's only two listed debts (with creditors 1.b and 1.c) represent credit card accounts that she has long disputed over added amounts and aggressive collection practices. One of the creditors (creditor 1.c) initiated debt enforcement proceedings after Applicant stopped making monthly payments in June 2004 under a previous payment arrangement with the creditor. Just this year the creditor's claims was dismissed for failure to prosecute, and Applicant is credited with favorably resolving this debt in her favor.

Like creditor 1.c, Applicant's creditor 1.b debt arose out of a credit card account that became delinquent and was assigned to collection. She subsequently completed a payment plan with one of this creditor's collection agents and made monthly payments on this account for over a year (*i.e.*, between June 2003 and June 2004) before stopping altogether after learning of the creditor's unauthorized accessing of her checking account. Subsequent efforts to contact this creditor's most recent collections agent to work out a repayment plan have so far been unsuccessful. Applicant continues to dispute the carried amount owed on this creditor 1.b debt.

Given Applicant's exhibited extenuating circumstances associated with her divorce and recurrent employment losses in two different states, and the limited resources she had available to her after exhausting her savings and retirement accounts, Applicant may rely on MC 20 (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," of the Guidelines for financial considerations. Extenuating circumstances impacted Applicant for extended periods following employment losses, ensuing relocations, and the depletion of her own resources.

Mitigation credit is also available to Applicant based on her credible proofs of favorably resolving her creditor 1.c debt and establishing a current payment record with most of her other creditors. Only creditor 1.b remains outstanding. Because it is a relatively large debt (now over \$10,000.00, with accrued interest and late fees), it remains a sources of some potential security concern.

Age of the debts referenced in the SOR (both the creditor 1.b debt and the debts discharged in Applicant's 1994 bankruptcy) that are at issue is covered by three of the mitigating conditions for financial considerations: MC 20(a), "the behavior happened so long ago, was so infrequent, or occurred under circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good

judgment,” has applicability, while not dispositive. MC 20(d), “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts,” has some applicability. MC 20(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,” has applicability as well with respect to creditor 1.c, and to some extent with creditor 1.b.

Applicant continues to dispute the amount claimed by creditor 1.b; although, she acknowledged owing the creditor money, and has made efforts in the past to address the debt with a payment plan. For this single account, regardless of whether it reflects an otherwise valid debt owing, it either is or soon may no longer be enforceable under either State 1's (where the account originated) applicable statute of limitations for written contracts, or State 3's (where Applicant has resided since June 2004).

The state statute of limitations in both State 1 for claims based on a written contract is four years (see C. Code Civ. Pro, §§ 337 (stating suit on written obligations must be filed within four years) and 343 (2007)). Like state 1, State 3 also employs a four-year time bar for filing suit on written obligations (see §16.004(a)(3) of T Civ. Practice and Remedies Code) and claims not otherwise provided for (see §16.051 of T Civ. Practice and Remedies Code). Applicant's creditor 1.b debt was opened in 1998 and actively maintained through April 2002. Following a year of suspended payments on this account, Applicant initiated monthly payments in June 2003 pursuant to a payment plan with the creditor.

So, by June 2004 when Applicant ceased making any further payments on her creditor 1.b account, the applicable state statute of limitation had likely been tolled by her re-affirmation of the creditor 1.b debt. Were the controlling statute of limitation to start afresh with Applicant's last suspension of payments in June 2004, the statute in either State would appear to still have several months of life in it before it could be potentially used to bar any enforcement action against creditor 1.b's debt claim. Still, there would appear to be little risk of collection on the debt by creditor 1.b at this time, or justification for attributing judgment lapses to Applicant under all the circumstances considered.

Statutes of limitation in general are considered important policy tools for discouraging plaintiffs from pursuing stale claims and promoting finality in litigation. They have never been equated with good-faith efforts, though, to repay overdue creditors. See, e.g., ISCR Case No. 02-30304, at 3 (App. Bd. April 2004)(quoting ISCR Case No. 99-9020, at 5-6 (App. Bd. June 2001). Potentially applicable statutes of limitation have not, in turn, been recognized by our Appeal Board to absorb security risks associated with unresolved delinquent debts.

Weight, if any, to be assigned to potentially applicable statutes of limitations under the new Guidelines should be considered in light of all the circumstances surrounding the existing debts, and must take account of the Applicant's entire history of demonstrated trust and responsibility. Viewed in this whole person light, the

controlling state statutes of limitation for written contracts in either State 1 or State 3 (which is ever determined to apply) is entitled to be accorded mitigation weight in evaluating Applicant's overall financial risk.

Because the relevant statutes of limitations extant in States 1 and 3 may not yet have ripened into fully applicable enforcement bars, Applicant may not claim the benefits of either or both statutes for several more months. She is at least close enough to the four-year elapse time in both states, however, to consider the potential availability of the bar as a source of mitigation of her creditor 1.b debt.

Although the counseling advice Applicant relied on with CCCS is relatively aged (2004), she is entitled to some counseling credit and earnest efforts on her part in looking for sources of financial advice with the resources available to her and ultimately retaining an attorney to help with her two problem debts carried in her credit reports. Applicant may take limited advantage 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." Based on her initiated efforts to date, prospects for her gaining important insights in handling her finances in the future appear to be promising.

Holding a public trust position involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor. Financial stability in a person certified to hold a position of trust is required precisely to inspire trust and confidence in the holder of the public trust position. While the principal concern of a public trust employee's demonstrated financial difficulties is vulnerability to coercion and influence, judgment and trust concerns are implicit in financial cases (as here).

Taking into account all of the facts and circumstances surrounding Applicant's debt accumulations, her documented steps taken to resolve them, and the responsibility and trustworthiness she is credited with in her work, Applicant mitigates trust concerns related to both her disputed debts and her proven debt delinquencies. Favorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.c of the SOR.

In reaching my decision, I have considered the evidence as a whole, including each of the E2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE F: (FINANCIAL CONSIDERATIONS): FOR APPLICANT

Sub-paras. 1.a through 1.c:

FOR APPLICANT

Conclusions

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's application for a public trust position. Access to a public trust position is granted.

Roger C. Wesley
Administrative Judge