



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



In the matter of:)
)
) ADP Case No. 14-03162
)
)
Applicant for Public Trust Position)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: Susanna Farber, Esquire

08/19/2015

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant's eligibility to occupy a public trust position is granted.

Statement of the Case

Applicant completed and signed a Questionnaire for Public Trust Position (SF 85P) on April 12, 2013. The Department of Defense (DOD) Consolidated Adjudications Facility, (CAF) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F, financial considerations, on October 28, 2014. The action was taken under DOD Regulation 5200.2-R. Personnel Security Program, dated January 1987, as amended and modified (regulation); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines For Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR on November 3, 2014. She answered the SOR in writing on November 17, 2014, and she requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on February 9, 2015, and I received the case assignment on March 2, 2015. DOHA issued a notice of hearing on April 20, 2015, and I convened the hearing as scheduled on May 14, 2015. The Government offered five exhibits (GE.) 1 through 5, which were received, marked, and admitted into evidence without objection. Applicant testified. She submitted three exhibits (AE) A through C, which were received, marked, and admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on May 22, 2015. I held the record open until June 14, 2015, for the submission of additional matters. On this date, Applicant timely requested additional time to submit some of the requested documentation because she had not received documents requested from creditors. By Order dated June 16, 2015, Applicant request was granted and she was given until June 30, 2015 to submit documentation. Applicant timely submitted AE D through AE Q, which were received, marked, and admitted without objection. The record closed on June 30, 2015.

Findings of Fact

In her Answer to the SOR, Applicant admitted all the factual allegations in the SOR, with explanations. She denied the general security concern in AG ¶ 18. She also provided additional information to support her request for eligibility for a public trust position.

Applicant, who is 56 years old, works as a customer service agent for a DOD contractor. She has worked for her employer since September 2001. Supervisors, co-workers, and a former employer wrote letters of recommendation on behalf of Applicant. They describe her as honest, trustworthy, reliable, and dependable. Several also advised that she is a person of high moral character with a strong work ethic. She is well-respected by all who know her and work with her. She always follows company rules and policies. Her higher level supervisor is aware of her financial problems.¹

Applicant graduated from high school. She and her husband married in 1984. They have a 25-year-old son. Her husband works as a paramedic. Applicant has no issues with drug or alcohol abuse, nor does she have an arrest record. When she completed her e-QIP, she acknowledged financial problems. She advised that her financial problems built up over time, not because of a specific event, such as divorce or unemployment.²

In 2010, Applicant and her husband discussed their financial situation. They concluded that they could file for bankruptcy or hire a debt relief company to help them

¹AE C.

²GE 1; Tr. 27.

resolve their debts. They hired a law firm (Company 1) that worked with individuals to resolve debts. They signed a contract on October 10, 2010. Under the terms of the contract, Applicant and her husband would pay \$960 a month for four years, with the first three months payment fully applied to the program fee and monthly maintenance cost of \$45. For the next 21 monthly payments, approximately \$333 of the payment applied to the program fee and monthly maintenance fee. The remaining monies would be used to resolve her debts. The payments for the last two years applied to debt reduction except for the \$45 monthly maintenance fee. Under the contract, Applicant would pay \$46,067 over four years. In exchange, Company 1 agreed to manage 10 debts of Applicant's, totaling \$87,814. In 2013, Company 1 contacted Applicant and advised that it was no longer operating its debt reduction program and referred Applicant to another company. When Company 1 ended the contract with Applicant, Applicant was not required to pay the remaining monies due under the contract. Applicant provided documentation showing that she paid Company 1 \$19,775 during approximately two and one-half years of the contract with the last payment made in March 2013. Company 1 did not provide her with a list of her payments under the contract or a list of the debts it paid on her behalf.³

Applicant hired Company 2 in November 2013. Under the terms of the contract with Company 2, Applicant agreed to pay \$11,011 for its services. Applicant completed her payments to Company 2 in October 2014. Company 2 agreed to resolve five debts, totaling \$29,159.⁴

A review of the May 2013 credit report shows three credit card debts had been paid for less than the full amount owed. These same three debts are listed with Company 1 for resolution. These debts totaled \$34,459 and are not listed in the SOR as unpaid debts.⁵

The SOR identifies 10 debts totaling \$62,729. The \$15,343 debt in allegation 1.a related to a credit card. Company 1 and Company 2 agreed to negotiate a settlement of this debt. The record evidence is unclear if either company negotiated a payment of this debt. Applicant and the creditor agreed to a resolution of the debt. The creditor agreed to cancel the debt and issued a 1099-C form for \$12,859 on December 17, 2013. Applicant claimed this cancelled debt as income on her 2013 income tax returns. The \$2,484 difference in the amount forgiven and the amount listed on the credit report is not explained.⁶ The difference could reflect some payments by the debt resolution companies or an incorrect amount on the credit report. This debt is resolved.⁷

³Response to SOR attachment; AE A; AE H; Tr. 24-25, 28-29.

⁴Response to SOR attachment; AE I; Tr. 25, 28-29.

⁵GE 2.

⁶The May 2015 credit report continues to show a past-due balance on this account. GE 5.

⁷GE 2; GE 5; AE G; Tr. 23.

SOR allegations 1.b (\$9,610) and 1.e (\$1,041) are two separate debts held by the same collection agency after being purchased from the original creditor. Neither debt is paid or resolved. Company 2 agreed to resolve the first debt, which is still an open account with this Company. Company 1 told Applicant that it resolved the second debt, but did not provide her with any documentation showing payment of the debt. The credit reports show the debt as unresolved.⁸

SOR allegation 1.c (\$5,277) belongs to a collection agency and relates to debt held by a bank. Company 1 included this debt (\$4,334) in its list of debts to resolve for Applicant. She understood that Company 1 resolved this debt, but it did not provide her with any documentation showing that the debt was resolved and paid. The debt is listed as owed on the May 2015 credit report. Company 2 did not agree to resolve this debt.⁹

Applicant disputed the debt in SOR allegation 1.d (\$1,710) as shown on the credit reports as she believed it was the same debt as in allegation 1.h, which has been resolved. A review of the credit reports revealed that the debts are not the same. Company 2 is working with the new credit collection agent holding this debt. SOR allegation 1.i (\$523) has recently been sold, and Company 2 is working with the new holder of the debt to resolve it.¹⁰

SOR allegations 1.f (\$3,637) and 1.g (\$19,126) relate to a banking debt and a credit card debt held by the same creditor. Company 1 included these two debts in its contract. Company 1 reached a resolution of the \$3,637 in 2012. The debt was paid in May 2012. Applicant resolved the larger debt in November 2014 with the creditor holding the debt.¹¹ Both of these debts are resolved.¹²

The final two SOR allegations concern a store credit card debt in allegation 1.h (\$2,191) and a bank credit card debt in allegation 1.j (\$4,271). Although Company 1 included both debts in its plan, it did not resolve the debts. In 2014, the store creditor issued a 1099-C form, forgiving a debt of \$1,717.¹³ Applicant claimed this debt as income on her 2014 income tax returns. Applicant independently negotiated a

⁸GE 2 - GE 5; Response to SOR attachment; Tr. 45-46.

⁹GE 2 - GE 5; Response to SOR attachment; AE A; Tr. 38.

¹⁰GE 2 - GE 5; Response to the SOR; Tr. 41-43.

¹¹The November 4, 2014 resolution letter showed a balance due of \$12,377, which is substantially lower than the \$19,126 balance listed on the credit and the \$16,031 amount identified as the balance owed by Company 1. The difference in the balances are not explained. The difference could be due to some payments made on the account or an error on the credit reports. AE A; AE B; GE 2.

¹²GE 2 - GE 5; Response to SOR, attachment; AE A; AE B; Tr. 19, 47.

¹³The difference in the amount of debt forgiven and the amount of the debt listed on the credit reports is not explained. The difference could be due to some payments made on the account or an error on the credit reports.

settlement of the bank credit card debt with the law firm representing the creditor holding the debt. Applicant paid the negotiated amount in settlement of the debt in May 2015. These debts are resolved.¹⁴

The two debts (1.a and 1.h) forgiven by the creditors total \$14,576. Applicant claimed the forgiven debt as income, creating an additional tax debt with the Internal Revenue Service (IRS) for the tax years 2013 and 2014. Applicant provided a copy of the IRS tax transcripts for the tax years 2010 through 2014. She timely filed her tax return each year. For the tax years 2010 through 2013, Applicant owed additional tax money. In 2014, she received a small refund. The IRS tax transcript for the tax year 2010 indicates that in June 2011, Applicant developed an installment agreement with the IRS to pay her tax debt. This agreement is still in place and includes her additional tax debts. Applicant initially paid the IRS \$150 a month. This amount increased to \$250 a month and later to \$300 a month. The tax transcripts and her bank statement reflect that Applicant complies with the terms of the IRS installment agreement.¹⁵

Applicant earns \$2,637 a month in gross income, and she receives \$2,049 a month in net income. Her husband earns approximately \$7,605 a month in gross income and he receives approximately \$4,087 a month in net income after deductions including an approximate monthly payment of \$333 on a loan against his 401(k) account. Their total net monthly income is approximately \$6,136 a month.¹⁶ Their monthly expenses include \$2,538 for housing, \$300 for utilities, \$400 for cable, internet, and phones, \$600 for food, \$366 for gasoline, \$50 for tolls, \$240 for car insurance, \$291 for other payments, \$550 for federal and state tax payments, and \$170 for miscellaneous expenses including eating out. Her monthly expenses total approximately \$5,505 leaving sufficient income each month to cover other unanticipated expenses. Applicant has not opened new credit accounts since 2010. She acknowledged at the hearing that she is sometimes late with payments. There is no evidence of financial counseling.¹⁷

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” 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 national interests. 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

¹⁴GE 2 - GE 5; AE A; AE J; Tr. 31, 42-43, 48-49.

¹⁵AE K - AE P; Tr. 34-35.

¹⁶Her budget shows \$6,482 a month in net income, which is not supported by the earnings statements submitted. AE D; AE E; AE Q.

¹⁷AE D; AE E; AE Q; Tr. 33-34.

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.

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 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. 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 to obtain 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.

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.

AG ¶ 19 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

- (a), an inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (e) consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis;

By 2010, Applicant and her husband had accumulated significant debt and experienced difficulty paying the debts. The source of the debts relates to spending habits. The evidence is sufficient to raise these potentially disqualifying conditions.

The Financial Considerations guideline also includes examples of conditions that can mitigate trustworthiness concerns. I have considered mitigating factors AG ¶ 20(a) through ¶ 20(f), and the following are potentially applicable:

- (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;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and
- (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.

Applicant did not relate her debts to any event beyond her control, making AG ¶ 20(b) inapplicable. Applicant disputed the debt in allegation 1.d because she believed it was the same debt as in 1.h, which has been resolved. Her belief was reasonable, but was later shown to be inaccurate. AG ¶ 20(e) has some applicability to SOR allegation 1.d only.

In 2010, Applicant and her husband decided to seek assistance with resolving their debts. At this time, they realized that they needed to take control of their finances. They hired two debt management companies to help with the resolution of their debts. Through these companies, Applicant resolved three non-SOR debts, two SOR debts, and possibly two other SOR debts. While it is not clear if the last two debts are resolved, Applicant's testimony that Company 1 told her the debts were paid is credible because she has been open and honest throughout the trustworthiness process about her debts. Applicant and her husband took control of their finances in 2010 and have continued to work towards the resolution of their debts. AG ¶ 20(c) applies.

Applicant's decision to hire a debt management company for assistance in resolving her debts and her payments to the company under her contract reflect a "good-faith" effort to resolve her debts. In addition, her efforts to resolve debts outside of the efforts of Company 1 and Company 2 reflect a "good-faith" effort by her to take control of her debts and resolve them. AG ¶ 20(d) applies.

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 the 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. The decision to grant or deny a trustworthiness determination requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a trustworthiness concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a public trust position should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate trustworthiness concern.

In assessing whether an Applicant has established mitigation under Guideline F, the Appeal Board provided the following guidance in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008):

In evaluating Guideline F cases, the Board has previously noted that the concept of “meaningful track record” necessarily includes evidence of actual debt reduction through payment of debts.” See, e.g., ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 2007). However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. See, e.g., ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). All that is required is that an applicant demonstrate that he has “. . . established a plan to resolve his financial problems and taken significant actions to implement that plan.” See, e.g., ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). The Judge can reasonably consider the entirety of an applicant’s financial situation and his actions in evaluating the extent to which that applicant’s plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (“Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.”) There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

The evidence in support of granting a trustworthiness determination to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant’s financial problems began when she and her husband decided to use credit cards to finance their lifestyle, which created significant unpaid debt. Applicant and her husband realized that they needed to take control of their finances and sought help. They hired a debt management company to help. Under their agreement with Company 1, they agreed to pay \$46,067 over four years to resolve their debts. Company 1 agreed to resolve 10 debts on their behalf. Before it discontinued the contract with Applicant, Company 1 resolved four debts totaling \$38,763 and may have resolved another \$6,318 in debts after receiving at least \$19,775 in payments from Applicant. Applicant retained another company to resolve additional debts and paid this company \$11,000 to do so. On her own, Applicant contacted three creditors, two of whom agreed to forgive two debts, and she paid the third debt of \$4,271. Through the help of one of the two debt management companies, another debt in the amount of \$19,126 was resolved. These actions by Applicant reflect a track record of debt management over the last five years. Applicant understood that she needed to resolve her debts and took action. She has consistently followed through with this decision. She also took definitive action to make

sure her tax debts are being paid, not ignored. She has not resolved all the debts identified in the SOR, but the remaining \$11,843 of unpaid debt is about 18% of the total debt alleged in the SOR and about 13% of the total debt existing in 2010 when Applicant hired Company 1. The remaining unpaid debts cannot be a source of improper pressure or duress in light of the actions she had taken. Of course, the issue is not simply whether all her debts are paid: it is whether her financial circumstances raise concerns about her fitness to hold a public trust position. While some debts remain unpaid, they are insufficient to raise trustworthiness concerns because Applicant took responsibility for her debts and has been working to resolve all her debts since 2010.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a trustworthiness determination. For all these reasons, I conclude Applicant mitigated the trustworthiness concerns arising from her finances under Guideline F.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	For Applicant
Subparagraph 1.j:	For Applicant

Conclusion

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

MARY E. HENRY
Administrative Judge