



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



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| In the matter of: |) | |
| |) | |
| [NAME REDACTED] |) | ADP Case No. 14-04772 |
| |) | |
| Applicant for Position of Trust |) | |

Appearances

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

10/29/2015

Decision

MALONE, Matthew E., Administrative Judge:

Applicant accrued significant delinquent debt as a result of an abusive marriage that ended by divorce in 2007. Legal fees, periods of unemployment in 2008 and 2013, and unplanned medical bills incurred while she was uninsured initially hindered her ability to pay or otherwise resolve her debts. However, her current finances are sound, she has begun to pay off her debts, and available information shows she will continue her efforts. Her request for eligibility to occupy a position of trust is granted.

Statement of the Case

On August 21, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to obtain eligibility for an ADP I/II/III position¹ for her

¹ As defined in Chapter 3 and Appendix 10 of DOD Regulation 5200.2-R, as amended (Regulation).

job with a defense contractor. After reviewing the results of the ensuing background 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 November 4, 2014, 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) and requested a decision without a hearing. On April 6, 2015, Department Counsel issued a File of Relevant Material (FORM)⁴ in support of the SOR, to which Applicant responded on May 22, 2015.⁵ On June 2, 2015, Applicant requested a hearing.⁶ Department Counsel agreed to her request and made the case ready for hearing on June 19, 2015. The case was assigned to me on July 9, 2015, and I convened a hearing on August 5, 2015. Department Counsel for the Defense Office of Hearings and Appeals (DOHA) presented Government Exhibits (Gx.) 1 - 7.⁷ Applicant testified and presented Applicant's Exhibits (Ax.) A - D. DOHA received the hearing transcript (Tr.) on August 14, 2015.

Findings of Fact

Under Guideline F, the Government alleged that Applicant owes \$94,035 for 26 delinquent or past-due debts (SOR 1.a - 1.z). Applicant admitted, with explanations, all of the allegations. 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 as an information systems support analyst. Her duties require eligibility for a position of trust because her employer supports management of the health care system used by members of the military. Applicant must be found suitable to be entrusted with personally identifiable information (PII) associated with the health care system's constituents. From February 1990 until June 2008, Applicant held a position of trust as

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 Directive, Enclosure 3, Section E3.1.7. *See also* Government Exhibit 6. This document has little evidentiary value other than to complete the procedural record in this case. I have taken administrative notice of the FORM and the arguments contained therein.

⁵ Government Exhibit 7. *See also* Tr. 25 - 27. Applicant's response to the FORM contains specific documentation of her claims of debt repayment. It also contains relevant whole-person information.

⁶ An email clarifying Applicant's request for a hearing is included as Hearing Exhibit (Hx.) 1. *See also* Tr. 8 - 9.

⁷ 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 - 7 (Hx. 3).

she worked in a similar capacity for a federal agency. In December 2008, Applicant was hired by her current employer for a systems support position unrelated to DOD information. She left that job in May 2012 to help manage her husband's small business, which was struggling at the time. (Answer; Gx. 1; Gx. 2; Gx. 7; Tr. 91)

Applicant and her husband have been married since June 2008. Applicant was previously married from October 1991 until separating in 2005 and divorcing in July 2007. She and her ex-husband had two children, now ages 21 and 15. Applicant's ex-husband was ordered to pay child support as part of the divorce; however, Applicant only received child support from her ex-husband for about six months after they separated in 2005. Applicant characterized her ex-husband as abusive, irresponsible, and unfaithful.(Gx. 1; Gx. 2; Gx. 7; Ax. C; Tr. 42 - 43, 92)

When Applicant submitted her EQIP, she disclosed several of the debts alleged in the SOR. All of the debts alleged in the SOR were subsequently documented in credit reports obtained by the Government. The debts alleged at SOR 1.a - 1.d, 1.f, 1.h, 1.r - 1.w, and 1.y are for joint accounts opened during her first marriage. Applicant claimed that the debts at SOR 1.r - 1.w were paid in either 2001 or 2003, but she did not present documentation in support of her claim. Those debts appear on two of the three, but not the most recent, credit reports provided by the Government. (Answer; Gx. 1 - 5; Gx. 2; Gx. 7; Tr. 44, 78 - 80)

Applicant's remaining debts were incurred after she separated from her ex-husband in 2005. The debts at SOR 1.e, and 1.n - 1.q are for unpaid medical expenses in 2012. The debts at SOR 1.g, and 1.i - 1.m are for individual accounts Applicant could not pay after she and her ex-husband separated and she no longer had financial support from him. (Answer; Gx. 1 - 5; Gx. 7; Tr. 60)

Applicant and her ex-husband lived in State A and worked at the same federal agency. When they divorced, he quit his job with that agency. Together they accrued most of the debts alleged in the SOR. They also bought a house in 2002 for about \$190,000. In 2003, they took about \$8,000 out of the house. Applicant put the house on the market in late 2007, but the value had fallen significantly by then. It was not until November 2009 that the house was sold through a short sale that did not yield any significant proceeds. As a result of the short sale, her mortgage obligations, including the debt at SOR 1.a, and other smaller debts, including SOR 1.z, were satisfied. (Gx. 1; Gx. 2; Gx. 4; Gx. 7; Ax. B; Tr. 48 - 54)

When Applicant remarried in June 2008, she left her federal job in State A to live with her new husband in State B. She was unemployed until going to work for her current employer in December 2008. She and her husband were supported by his income as a small businessman. In May 2012, Applicant's husband was struggling to keep his business afloat. He was overwhelmed by doing the work for which he was paid while at the same time trying to meet his bookkeeping, payroll, and other administrative obligations. Applicant left her systems support job to help her husband, but she received no income for her work. While she was helping her husband, she was not covered by

medical insurance. The debts alleged at SOR 1.e, and 1.n - 1.q arose from an emergency surgery she required. Applicant has been repaying these debts since shortly after her subject interview with a Government investigator in September 2013. In addition to regular \$100 monthly payments, her state tax refunds for 2013 and 2014 were diverted to satisfy these accounts.(Answer; Gx. 1 - 5; Gx. 7; Ax. D; Tr. 44 - 46, 61 - 71)

Applicant also is making regular, albeit modest, payments on other debts, including the debts at SOR 1.u, 1.w, and 1.x. Her plan has been to pay smaller debts first, and when the money used to pay those debts is again available, to apply those amounts to other debts as circumstances allow. Most of her efforts to date have been focused on her medical bills. Applicant has been hindered in her ability to make more repayment progress by having to support her grandmother, who died in 2013 and by having to pay college tuition and other expenses for her two children. (Answer; Gx. 1; Gx. 2; Gx. 7; Ax. C; Ax. D; Tr. 47, 58 - 59, 87 - 90)

After her subject interview, Applicant also contacted a credit counseling resource and learned more about managing her personal finances. She has used that information to control her household expenses and avoid further unpaid debt. She has not used a credit card since her divorce and most of the assets (house, cars, etc.) in her second marriage are in her husband's name. Available information shows her income is sufficient to avoid any new unpaid debts, but she is still unable to pay all of the remaining debts from her first marriage. (Answer; Gx. 7; Tr. 81 - 90)

Applicant's performance evaluations from both periods with her current employer show she is an excellent employee. Letters of recommendation and support, praise Applicant's integrity, reliability, work ethic, and expertise. A common thread in others' observations of Applicant is that she is a reliable team player with a positive attitude. (Gx. 7; Ax. A)

Policies

Positions designated as ADP I/II/III are classified as "sensitive positions."⁸ 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.⁹ The Regulation also requires that DOD contractor personnel are entitled to the procedural protections in the Directive before any adverse determination may be made.¹⁰

⁸ Regulation, ¶ C3.6.15.

⁹ Regulation, ¶ C6.1.1.1.

¹⁰ Regulation, ¶ C8.2.1.

The Directive requires that each decision be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,¹¹ 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).¹²

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 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.

¹¹ Directive. 6.3.

¹² “(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.”

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.¹³

All of these mitigating conditions have at least partial application. As to AG ¶ 20(a), the "behavior" is ongoing, in that Applicant is responsible in some way for all of the debts and most of them remain unpaid. However, none of her unpaid debts were the result of financial mismanagement or some other irresponsible decision making. She has incurred no new unpaid debt in almost ten years, and the healthy state of her current finances indicates she is not likely to experience such financial problems in the future.

AG ¶ 20(b) applies because Applicant's debts arose from, or were exacerbated by, her divorce, the subsequent lack of financial support as she raised two children, unplanned medical expenses, and two periods of unemployment. As to whether Applicant acted responsibly under the circumstances, the record shows she has improved how she manages her personal finances, and she embarked on a methodical approach to resolving her medical and other smaller debts in late 2013. She has not used personal credit in nearly ten years. This is sufficient to satisfy the second prong of this mitigating condition.

AG ¶ 20(c) applies based on Applicant's use of available consumer credit counseling information. 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.

¹³ The mitigating conditions at AG ¶¶ 20(e) and 20(f) are not pertinent to these facts and circumstances.

AG ¶ 20(d) applies based on Applicant's proactive approach to resolving her medical debts. Those are the largest of her financial obligations incurred since her first marriage. Although most of her efforts began around the time she was interviewed in September 2013, the record also shows she was hindered in her ability to act sooner by events beyond her control. She is also credited with promptly resolving her mortgage obligations from her first marriage.

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. Also noteworthy is the fact that Applicant held a position of trust without incident for 18 years. Many of the debts at issue here resulted from a bad marriage and it is likely her ex-husband was responsible for at least half of the total debt incurred before 2005. 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 has been no misconduct underlying Applicant's financial problems, and Applicant's 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.

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.z: 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