



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 14-03323

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel
For Applicant: *Pro se*

01/12/2016

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges 12 delinquent debts totaling \$42,809. Applicant did not provide sufficient evidence of progress paying or otherwise resolving her delinquent debts. Her eligibility to occupy a public trust position is denied.

Statement of the Case

On March 1, 2013, Applicant signed and submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of an application for a public trust position (SF 86). (Item 3) On October 28, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, and modified; DOD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleges trustworthiness concerns under Guideline F (financial considerations). (Item 1) The SOR detailed reasons why the DOD CAF was unable to find that it is consistent with the national interest to grant or continue Applicant's eligibility to occupy a public trust position, which entails access to sensitive information. (Item 1) The DOD CAF recommended referral to an administrative judge to determine

whether access to sensitive information should be granted, continued, denied, or revoked.

On November 28, 2014, Applicant responded to the SOR allegations, and she requested a decision without a hearing. (Item 1) A complete copy of the file of relevant material (FORM), dated June 25, 2015, was provided to her on July 15, 2015.¹ The FORM included seven exhibits, which were admitted without objection. (Items 1-7) Applicant did not provide a response to the FORM. The case was assigned to me on December 10, 2015.

Findings of Fact²

In her Answer to the SOR, Applicant admitted all of the SOR allegations. Her admissions are accepted as findings of fact.

Applicant is a 33-year-old medical customer service representative who has been employed by a defense contractor since March 2013.³ She received a general educational development (GED) certificate in 2002. In 2006, she married, and she has been separated from her spouse for several years. Her spouse is incarcerated. Her children were born in 2001, 2007, and 2012. She has never served in the military. She was unemployed from January 2002 to May 2004, from July 2011 to August 2011, and from July 2012 to March 2013. She has had periods of underemployment. There is no evidence of felony charges, alcohol abuse, or use of illegal drugs.

Financial Considerations

Applicant's SOR allegations are as follows: ¶¶ 1.a and 1.i are charged-off debts relating to purchase of vehicles for \$20,023 and \$8,749; ¶ 1.b is a telecommunications collection account for \$1,725; ¶¶ 1.c, 1.e, 1.f, and 1.l are medical collection accounts or delinquent debts for \$1,338, \$553, \$178, and \$213; ¶¶ 1.d, 1.g, and 1.h are charged-off debts or collection accounts of unspecified origin for \$950, \$163, and \$93; ¶ 1.j is a bank collection debt for \$495; and ¶ 1.k is an apartment-related collection debt for \$8,392.

In Applicant's April 30, 2013 Office of Personnel Management (OPM) personal subject interview (PSI), she described her history of delinquent debt, and admitted the SOR debts. (Item 7) She indicated her spouse was sentenced to eight years of

¹The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated July 2, 2015, and Applicant's receipt is dated July 15, 2015.

²Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

³The sources for the information in this paragraph are Applicant's February 28, 2013 Electronic Questionnaires for Investigations Processing (e-QIP) version of an application for a public trust position (SF 86) and her April 30, 2013 Office of Personnel Management (OPM) personal subject interview (PSI). (Items 2 and 7)

incarceration for driving under the influence of alcohol (DUI), and he was expecting to remain incarcerated until 2015. As of April 2013, she planned to file for divorce in a few months. (Items 3, 7)

Applicant's FORM noted the absence of other mitigating information. The FORM explained that Applicant had 30 days from the receipt of the FORM "in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. If you do not file any objections or submit any additional information . . . your case will be assigned to an Administrative Judge for a determination based solely" on the evidence set forth in this FORM. (FORM at 2-3)

The DOHA letter conveying the FORM to Applicant reiterated that Applicant had a 30-day opportunity to submit evidence supporting her approval or continuation of access to sensitive information. Applicant did not file a response to the FORM.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The standard applicable to trustworthiness cases is that set forth in *Egan*, "regarding security clearances: such a determination 'may be granted only when 'clearly consistent with the interests of the national security'" ADP Case No. 14-00590 at 3 (Dec. 10, 2014) (citing *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013); ADP Case No. 12-04343 at 3 (App. Bd. May 21, 2013)). The Government's authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. See *Id.* at 527.

Positions designated as ADP I and ADP II are classified as "sensitive positions." 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." Regulation ¶ C6.1.1.1. 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, an 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 an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to sensitive information. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security and trustworthiness suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance [or access to sensitive information].” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance [or trustworthiness] determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

The protection of the national security and sensitive records is of paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security.” This decision is based on national security and is not a determination as to the loyalty of the applicant.

Analysis

Financial Considerations

AG ¶ 18 articulates the trustworthiness concern relating to financial problems:

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 provides two disqualifying conditions that could raise a trustworthiness concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts;” and “(c) a history of not meeting financial obligations.” Applicant’s OPM PSI, SOR response, and credit reports establish 12 delinquent debts totaling \$42,809. In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained the evidentiary-threshold weight given to credit reports in financial cases:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government’s obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply. (internal citation omitted).

The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c) requiring additional inquiry about the possible applicability of mitigating conditions. Five mitigating conditions under AG ¶ 20 are potentially applicable:

- (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;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;⁴ and

⁴The Appeal Board has previously explained what constitutes a “good faith” effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the “good faith” mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant’s debts. The Directive does not define the term “good-faith.” However, the Board has indicated that the concept of good-faith “requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.” Accordingly, an applicant must

(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's conduct in resolving her delinquent debt does not warrant full application of any mitigating conditions to all of her SOR debts; however, she provided some mitigating information. Four circumstances beyond her control adversely affected her finances: (1) separation and possible divorce from her husband; (2) periods of unemployment; (3) Applicant's underemployment; and (4) her husband's incarceration. However, she did not provide enough information about her income and expenses over the last three years to prove she acted responsibly under the circumstances.

The SOR was issued on October 28, 2014, and Applicant received ample notice of her delinquent debts raising trustworthiness concerns. There is no financial documentation relating to her SOR creditors showing maintenance of contact with creditors,⁵ establishment of payment plans, disputes of debts, payments to creditors, or other evidence of progress or resolution of her SOR debts. She did not receive financial counseling in the previous three years. Mitigation is limited because there is insufficient evidence that her financial problems are being resolved, are under control, and will not recur. Financial considerations trustworthiness concerns are not mitigated.

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) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation

do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

⁵Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

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. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

There is some evidence supporting approval of Applicant's access to sensitive information. Applicant is a 33-year-old medical customer service representative who has been employed by a defense contractor since March 2013. She has been separated from her spouse for several years, and her spouse is incarcerated. She was unemployed from January 2002 to May 2004, from July 2011 to August 2011, and from July 2012 to March 2013. She has had periods of underemployment. Her ability to address her financial problems is limited. There is no evidence of felony charges, alcohol abuse, or use of illegal drugs.

The financial evidence against approval of Applicant's access to sensitive information is more substantial at this time. Applicant has a history of financial problems. She has 12 delinquent debts totaling \$42,809. Applicant did not provide sufficient evidence of progress paying or otherwise resolving her delinquent debts, which shows lack of financial responsibility and judgment and raises unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect sensitive information. See AG ¶ 18. More evidence of financial progress is necessary to mitigate trustworthiness concerns.

It is well settled that once a concern arises regarding an applicant's eligibility for a public trust position, there is a strong presumption against the grant or renewal of a public trust position. Unmitigated financial considerations concerns lead me to conclude that grant or reinstatement of a public trust position to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary to justify the award of a public trust position in the future. With more effort towards resolving her past-due debts and a documented track record of behavior consistent with her obligations, she may well be able to demonstrate persuasive evidence of her worthiness for access to sensitive information.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations concerns are not mitigated. For the reasons stated, I conclude Applicant is not eligible for access to sensitive information at this time.

