



**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. 14-03598

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

12/31/2015

Decision

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges a Chapter 7 bankruptcy discharge of her debts in 2004, failure to file state and federal tax returns from 2006 through 2012, and 28 delinquent or charged-off debts and collection accounts totaling \$15,604. Applicant did not provide sufficient evidence of progress paying or otherwise resolving her delinquent debts. She did not file her federal and state tax returns from 2006 through 2012. Her eligibility to occupy a public trust position is denied.

Statement of the Case

On February 28, 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 2) On November 7, 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 December 1, 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 August 27, 2015, was provided to her on October 7, 2015.¹ The FORM included five exhibits, which were admitted without objection. (Items 1-5) Applicant did not provide a response to the FORM. The case was assigned to me on December 18, 2015.

Findings of Fact²

In her Answer to the SOR, Applicant indicated "I admit" next to each of the SOR allegations in light pencil, or "I admit" may have been written and then partially erased. (Item 2) She wrote "unable to pay" under SOR ¶¶ 1.e and 1.g through 1.ee. (Item 2) Her admissions are accepted as findings of fact.

Applicant is a 48-year-old medical referral specialist who has been employed by a defense contractor since February 2013.³ In 1982, she married, and in 1996, she divorced. In 1997, she married, and in 1999, she divorced. In 2002, she married, and in 2004, she divorced. In 2009, she married her spouse. Her children were born in 1982, 1984, 1985, and 1989, and her step-daughter was born in 1968. She has never served in the military. She was unemployed from January to September 2010 because her elbow was injured. She has had periods of underemployment. There is no evidence of felony charges, alcohol abuse, use of illegal drugs, or rule violations.

Financial Considerations

Applicant's SOR allegations are as follows: ¶ 1.a is a Chapter 7 bankruptcy discharge of her debts in 2004; ¶¶ 1.b and 1.c are failures to file federal and state tax

¹The Defense Office of Hearings and Appeals (DOHA) transmittal letters are dated September 1 and 14, 2015, and Applicant's receipts are dated October 6 and 7, 2015. The DOHA transmittal letter informed Applicant that she had 30 days after her receipt to submit information.

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

³The source of the information in this paragraph is Applicant's February 28, 2013 Electronic Questionnaires for Investigations Processing (e-QIP) version of an application for a public trust position (SF 86). (Item 2)

returns for 2006 through 2012;⁴ ¶ 1.d is an apartment-related collection debt for \$4,135; ¶¶ 1.f and 1.y are telecommunications collection debts for \$1,188 and \$216; ¶¶ 1.g, 1.i, and 1.m are bank collection debts for \$775, \$635, and \$482; ¶¶ 1.e, 1.h, 1.j, 1.v, 1.x, and 1.aa are collection debts of unspecified origin for \$1,205, \$661, \$588, \$754, \$239, and \$128; ¶¶ 1.k, 1.l, 1.n, 1.o through 1.s, 1.u, 1.w, 1.z, 1.bb through 1.ee, are medical collection or delinquent debts for \$526, \$494, \$420, \$129, \$100, \$49, \$48, \$27, \$911, \$241, \$141, \$105, \$95, \$82, and \$61; and ¶ 1.t is a dental collection debt for \$1,169.

In Applicant's March 20, 2013 Office of Personnel Management (OPM) personal subject interview (PSI), she described her history of delinquent debt, admitted the SOR debts, 2004 bankruptcy, and her and her husband's failures to file their state and federal tax returns from 2006 through 2012. (Item 3) She described periods of underemployment and unemployment and medical issues. In 2010, Applicant and her spouse met with a tax advisor, who drafted federal tax returns for Applicant for 2006 through 2009. (Item 3) The tax advisor told Applicant she owed \$15,869 for her federal tax returns for tax years 2006 through 2009. (Item 3) They did not take further actions to address their taxes because her husband was receiving expensive cancer treatments, and she had medical problems or debts. (Item 3)

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

⁴The SOR did not allege that willful failure to file return, supply information, or pay tax may constitute a misdemeanor-level federal criminal offense under 26 U.S.C. § 7203. See note 6, *infra*. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

(citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). I have considered the non-SOR evidence related to this issue for the four purposes (reasons (b) to (e)), and not for any other purpose.

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 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 three disqualifying conditions that could raise a trustworthiness concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts;” “(c) a history of not meeting financial obligations;” and “(g) failure to file annual Federal, state, or local income tax returns as required . . .” Applicant’s OPM PSI and credit reports establish a Chapter 7 bankruptcy discharge of her debts in 2004, failure to file state and federal tax returns from 2006 through 2012, and 28 delinquent or charged-off debts and collection accounts totaling \$15,604. 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), 19(c), and 19(g) 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;⁵ 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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the

⁵The 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 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)).

applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

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. She is credited with mitigating the allegation in SOR ¶ 1.a because discharge of her debts in 2004 under Chapter 7 of the Bankruptcy Code is not recent. Five circumstances beyond her control adversely affected her finances: (1) divorce; (2) unemployment from January to September 2010; (3) Applicant’s medical problems; (4) underemployment; and (5) her husband’s medical problems. 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.

Applicant’s failure to file her state and federal tax returns for 2006 through 2012, and to show some progress towards paying her taxes raises the most significant trustworthiness concern. The federal government considers failure to file federal income tax returns important enough to warrant making that conduct a federal criminal offense under 26 U.S.C. § 7203.⁶ On November 7, 2014, the SOR was issued, and Applicant learned that her failure to file her federal and state tax returns raised a trustworthiness concern. She has not filed her tax returns.

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,⁷ 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

⁶26 U.S.C. § 7203, willful failure to file return, supply information, or pay tax, provides:

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000 (\$100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution.

⁷“Even 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.

limited because there is insufficient evidence that her financial problems are being resolved, are under control, and will not occur in the future. 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 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 48-year-old medical referral specialist who has been employed by a defense contractor since February 2013. Five circumstances beyond her control adversely affected her finances: (1) divorce; (2) unemployment from January to September 2010; (3) Applicant's medical problems; (4) underemployment; and (5) her husband's medical problems. There is no evidence of felony charges, alcohol abuse, use of illegal drugs, or rule violations.

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 failed to file state and federal tax returns from 2006 through 2012,⁸ and she has 28 delinquent or charged-off debts and collection accounts totaling \$15,604.

⁸The Appeal Board has recently reversed three grants of security clearances involving failures to file or pay federal income taxes. See ISCR Case No. 14-03358 at 3, 5 (App. Bd. Oct. 9, 2015) (stating "A security clearance represents an obligation to the Federal Government for the protection of national secrets. Accordingly failure to honor other obligations to the Government has a direct bearing on an applicant's reliability, trustworthiness, and ability to protect classified information."); ISCR Case No. 14-01894 at 2-6 (App. Bd. Aug. 18, 2015) (emphasizing the applicant's failure to timely file and pay taxes); ISCR Case No. 12-05053 at 4 (App. Bd. Oct. 30, 2014) (noting not all tax returns were filed, and an insufficient discussion of Applicant's efforts to resolve tax liens).

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 her tax issues, 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, the Regulation, 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.

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:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b through 1.ee:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Mark Harvey
Administrative Judge