



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



In the matter of:)
)
) ADP Case No. 14-06047
)
Applicant for Public Trust Position)

Appearances

For Government: Ray T. Blank, Esq., Department Counsel
For Applicant: *Pro se*

03/28/2016

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate trustworthiness concerns pertaining to Guideline F (financial considerations). Eligibility to occupy a public trust position is denied.

Statement of the Case

On April 8, 2013, Applicant submitted a Questionnaire for National Security Positions version of an application for a public trust position (SF-86). On March 27, 2015, 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). The SOR detailed reasons why DOD 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. The DOD CAF recommended referral to an administrative judge to determine whether access to sensitive information should be granted, continued, denied, or revoked.

On April 28, 2015, Applicant answered the SOR and elected to have her case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated August 31, 2015, was provided to her by letter dated December 16, 2015. Applicant received the FORM on December 31, 2015. She was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit additional information within the 30-day period. On March 15, 2016, the case was assigned to me.

Findings of Fact

Applicant admitted SOR ¶¶ 1.d and 1.i, and denied SOR ¶¶ 1.a – 1.c, 1.e - 1.h, 1.j – 1.t.¹

Background Information²

Applicant is a 49-year-old applicant seeking employment with a defense contractor who requires her to have a public trust position. During her Office of Personnel Management Personal Subject Interview (OPM PSI) on April 29, 2014, she was employed at a health club and taking on-line college courses. (Items 4, 8)

Applicant has attended several college-level institutions since 2004, and as of her April 2014 OPM PSI, she had not graduated. However, during her OPM PSI, she stated that she expected to graduate with a bachelor's degree in December 2014. Applicant has never married and has no dependents. She did not serve in the U.S. armed forces. (Items 4, 8)

Financial Considerations

Applicant's SOR lists 20 delinquent debts totaling approximately \$71,297. The delinquencies are comprised of a variety of creditors to include credit card companies, medical debts, former landlords, and the U.S. Government. (SOR ¶¶ 1.a – 1.t; Item 1)

Applicant's debts are listed on her April 22, 2014, October 28, 2014, and August 31, 2015 credit reports. (Items 5, 6, 7)

During Applicant's April 29, 2014 OPM PSI, she attributed most of her debts to identity theft that occurred "approximately seven to eight years ago" or were paid through other sources. She stated that she ran her credit report in "2011 or 2012" and

¹ Department Counsel's FORM noted that Applicant's SOR answer had a handwritten note on the third page of her SOR answer purporting to list attached enclosures. Department Counsel further noted that the case file did not include any enclosures. Applicant did not address this discrepancy during the 30-day time she was afforded after receipt of her FORM to file objections and submit material in refutation, extenuation, or mitigation.

² The limited background information regarding Applicant was derived from the FORM and was the most current information available.

believes that all of the fraudulent charges were removed except for her landlord-related accounts. She was unemployed when she was attending college and during those times was supported by student loans and her mother, who passed in January 2012, and later by her boyfriend. Her mother was an attorney and a county circuit court judge. (Items 2, 4, 8)

While Applicant was attending college, she depended on her mother for her “main financial support.” Since her mother’s passing, Applicant has struggled financially adding that her mother’s estate is “tied up in probate.” During Applicant’s April 2014 OPM PSI, she stated that within the next month, she expected to receive \$100,000 to \$150,000 from her mother’s estate. She planned to pay off all of the accounts she was “responsible for” from her mother’s inheritance. (Items 2, 4, 8)

During a follow-up OPM PSI on June 20, 2014, Applicant stated that she had started paying off her smaller debts and added that her mother’s estate was released by probate on June 19, 2014, but her mother’s home had not been sold nor had she received any money as of that date. (Item 8) A review of Applicant’s credit reports indicate that her indebtedness began in 2009 and has been ongoing. (Items 5, 6, 7)

As noted, Applicant admitted the debts in SOR ¶¶ 1.d (charged-off credit card account for \$627) and 1.i (2009 U.S. Government tax lien for \$6,304). She claimed the debt in SOR ¶ 1.d was paid off in June 2014 and that she has been making payments on the tax lien and she was negotiating a lesser amount. She claimed her medical debts were being paid at \$150 per month. (Items 2, 8) Applicant did not submit any documentation to support her claims of payments. (Items 2, 4, 8)

Applicant did not address her lack of documentation after receiving her FORM. There is no record evidence documenting any attempt by Applicant to contact any of her creditors or documentation that she paid or settled any of her debts. There is no record evidence that Applicant sought financial counseling nor does the FORM contain any character evidence or performance evaluations. In short, Applicant provided no evidence demonstrating that her financial situation is under control.

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 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.”

Analysis

Financial Considerations

AG ¶ 18 articulates the trustworthiness concern for 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.”

In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

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). Applicant’s history of financial problems is documented not only in her credit reports, but also in the additional evidence contained in the FORM. The evidence establishes the validity of the allegations and 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; 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.

Considering the record evidence as a whole,³ financial considerations concerns remain. If favorable evidence exists, Applicant did not provide it. None of the five financial considerations mitigating conditions above are applicable or partially applicable to explain, extenuate, or mitigate the SOR allegations. The available information shows that Applicant has taken little or no affirmative action to resolve the financial shortcomings identified in her FORM.

With that said, a trustworthiness case is not aimed at collecting debts.⁴ Rather the purpose is to evaluate an applicant's judgment, reliability, and trustworthiness consistent with the guidelines in the Directive. In evaluating Guideline F cases, the Appeal Board has established the following standard:

The Board has previously noted that the concept of a meaningful track record necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that [she] has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that [she] has established a plan to resolve his financial problems and taken significant actions to implement that plan. 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 [her] outstanding indebtedness is credible and realistic. 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 payments of such debts one at a time. 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.⁵

³ See ISCR Case No. 03-02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). When making a recency analysis for AG ¶ 20(a), all debts are considered as a whole.

⁴ ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010).

⁵ ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008) (internal citations and quotation marks omitted).

In requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, she failed to submit sufficient evidence to supplement the record with relevant and material facts regarding her circumstances, articulate her position, and mitigate the financial considerations concerns. She failed to offer evidence of financial counseling or provide documentation regarding her past efforts to address her delinquent debt. She failed to establish a track record of delinquent debt resolution. By failing to provide such information, and in relying on an explanation, lacking sufficient detail to fully establish mitigation, public trust concerns remain.

After weighing the relevant disqualifying and mitigating conditions and evaluating the evidence in light of the whole-person concept,⁶ I conclude Applicant did not present sufficient evidence to explain, extenuate, and mitigate the Guideline F public trust concerns. Accordingly, Applicant has not met her ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant her eligibility for a public trust position.

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
Subparagraphs 1.a to 1.t:	Against Applicant

Conclusion

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

Robert J. Tuidier
Administrative Judge

⁶ AG ¶ 2(a) (1)-(9).