



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



In the matter of:)
)
) ADP Case No. 17-03627
)
Applicant for Public Trust Position)

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel
For Applicant: Daniel P. Meyer, Esq., Applicant’s Counsel

July 2, 2019

Decision On Remand

CEFOLA, Richard A., Administrative Judge:

Statement of the Case

On November 27, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR), detailing trustworthiness concerns under Guideline F, Financial Considerations. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); the Adjudicative Guidelines (AG) effective within the DOD for SORs issued after June 8, 2017.

Applicant answered the SOR (Answer) on December 19, 2017, originally requesting this matter be determined without a hearing. As a result, a File of Relevant Material (FORM) was submitted by the Government on March 1, 2018. Applicant responded to the FORM on April 8, 2018. (Response) However, on June 15, 2018, Applicant requested a hearing before an administrative judge. The case was assigned to me on June 19, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 8, 2018, scheduling the hearing for August 22, 2018. The

hearing was convened as scheduled. The Government offered Exhibits (GXs) 1 through 4, which were admitted without objection. Applicant testified on her own behalf and presented two documents, which I marked Applicant's Exhibits (AppXs) A and B. The record was left open until November 26, 2018, for receipt of additional documentation. On October 22, 2018, and on November 21, 2018, respectively, Applicant offered AppXs C and D, which were admitted without objection. DOHA received the transcript of the hearing (TR) on September 4, 2018.

On December 26, 2018, the undersigned issued a Decision denying Applicant national security eligibility for access to sensitive information. I considered Applicant's Response in rendering my Decision. On April 1, 2019, the Honorable Appeal Board remanded that Decision to the undersigned "to give the parties a chance to offer the Response or object to its admission as appropriate." On May 22, 2019, the undersigned issued an Order On Remand in compliance with the Appeal Board's instructions. On May 31, 2019, Department Counsel offered said Response into evidence. (Post-Hearing Exhibit (PHX) 1.) On June 4, 2019, Applicant's Counsel did not object to the admission of the Response into evidence, and further offered Applicant's budget into evidence. (PHX 2.) On June 17, 2019, Department Counsel objected to the admission of said budget. (PHX 3.) Pursuant to the Directive's Additional Procedural Guidance E3.1.10., said budget is admitted into evidence as AppX E.

Findings of Fact

Applicant admitted the allegations set forth in SOR ¶¶ 1.b through 1.d, with explanations. She denied SOR ¶ 1.a.

Guideline F – Financial Considerations

Applicant is 49 years old, married and has two adult children. (GX 1 at pages 5 and 18, and TR at page 16 lines 4~13.)

1.a. Applicant denies that she has a Federal tax lien, in the amount of about \$30,000, entered against her and her husband in February of 2015. She avers that, as she now files separate tax returns from her husband, she is not responsible for his tax delinquencies. (TR at page 16 line 14 to page 21 line 20.) However, at her hearing Applicant also acknowledged her responsibility, as they owed back taxes, in part, as a result of their 2012 joint tax return filing. (*Id.*, and Response at page 6.) Applicant also noted in her Response that her husband had intermittent tax levies filed against his separate Federal tax returns. (Response at pages 3 and 4.) At her hearing, Applicant averred that she would submit further documentation showing that her spouse is now paying \$833, biweekly, to the Internal Revenue Service towards this tax lien. (TR at page 18 lines 1~18.) Despite having more than five months to submit said documentation, Applicant has only submitted a budget showing that no federal taxes are being paid. (AppX E at page 1.) This allegation is found against Applicant.

1.b.-1.d. Applicant admits that she is indebted to the Navy Federal Credit Union for past-due debts totaling about \$80,000. (TR at page 21 line 21 to page 26 line 19.) Applicant has submitted documentation showing she has begun to make monthly payments of \$600 towards these admitted debts. (AppXs C and D.) I find she is making a good-faith effort to address these credit union debts; and as such, these allegations are found for Applicant.

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for a position of trust.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." 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.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. According to Directive ¶ E3.1.15, "[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable [trustworthiness] decision."

A person applying for a position of trust seeks to enter 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 national security eligibility. 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. Finally, as emphasized in Section

7 of EO 10865: “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline F - Financial Considerations

The trustworthiness concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

Failure 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

AG ¶ 19 describes three conditions that could raise trustworthiness concerns and may be disqualifying in this case:

- (a) inability to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (f) . . . failure to pay annual Federal . . . income tax as required.

Applicant had significant credit union delinquencies, and has a significant Federal tax lien. The evidence raises the above trustworthiness concerns, thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline includes four conditions in AG ¶ 20 that could mitigate trustworthiness concerns arising from financial problems:

- (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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

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

(g) the individual has made arrangements with the appropriate tax authority . . . to pay the amount owed and is in compliance with those arrangements.

Although Applicant is addressing the credit union debt, she has yet to address the \$30,000 Federal tax lien. This guideline is found against Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant has yet to address her significant Federal tax lien. Overall, the record evidence leaves me with doubt as to Applicant's judgment, reliability, eligibility, and suitability for a position of trust. She failed to meet her burden to mitigate the trustworthiness concerns raised under the guidelines for financial considerations.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph: 1.a:	Against Applicant
Subparagraphs 1.b.~1.d.:	For Applicant

Conclusion

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

Richard A. Cefola
Administrative Judge