



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



In the matter of:)
)
) ADP Case No. 22-01754
)
Applicant for Public Trust Position)

Appearances

For Government: Troy L. Nussbaum, Esquire, Department Counsel
For Applicant: *Pro se*

08/29/2024

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the trustworthiness concerns regarding financial considerations. Eligibility to occupy a public trust position is granted.

Statement of the Case

On February 16, 2022, Applicant applied for a public trust position and submitted an Electronic Questionnaires for Investigative Processing (e-QIP). On March 10, 2022, she was interviewed by an investigator with the U.S. Office of Personnel Management (OPM). On November 16, 2022, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudications Services (CAS) issued a Statement of Reasons (SOR) to her under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016) (AG), effective June 8, 2017.

The SOR alleged trustworthiness concerns under Guideline F (financial considerations) and Guideline E (personal conduct) and detailed reasons why the DCSA adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue Applicant's eligibility for occupying a public trust position to support a contract with the DOD. The SOR recommended referral to an administrative judge to determine whether such eligibility should be granted, continued, denied, or revoked.

On December 8, 2022, Applicant responded to the SOR and requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on January 18, 2023. The case was assigned to me on August 29, 2023. A Notice of Microsoft Teams Video Teleconference Hearing was issued on June 26, 2024. I convened the hearing as scheduled on July 24, 2024.

At the commencement of the hearing, Department Counsel moved to withdraw the allegation pertaining to personal conduct. There being no objection, the motion was granted. Government exhibits (GE) 1 through GE 5 were admitted into evidence without objection. Applicant testified. The transcript (Tr.) was received on August 5, 2024. I kept the record open until the close of business on August 2, 2024, to enable Applicant to supplement it with documentation that was identified during the hearing. She took advantage of that opportunity and submitted several documents that were marked and admitted into evidence as Applicant exhibits (AE) A through AE I without objection. The record closed on August 2, 2024.

Findings of Fact

In her Answer to the SOR, Applicant admitted, with some comments, all factual allegations pertaining to financial considerations. (SOR ¶¶ 1.a. through 1.iii.). Her admissions are incorporated herein. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Background

Applicant was a 51-year-old employee of a defense contractor, and she has served as a tool assistant since 2021. She had also been serving as a security officer for another contractor (on different shifts) since early 2018 but it appears that she has not worked for it for some unspecified time. She previously worked for other employers as a security supervisor (August 2002 until August 2012), and in security (August 2012 until March 2017). She was unemployed from March 2017 until early January 2018. She is a 1992 high school graduate. She has never been granted a secret clearance. She has never served in the U.S. military. She was married in 1998 and divorced in 2000. She has one child, born in 2009.

Financial Considerations

General source information pertaining to the financial accounts discussed below can be found in the following exhibits: GE 2 (Enhanced Subject Interview, dated March

10, 2022); GE 3 (Combined Experian, TransUnion, and Equifax Credit Report, dated February 23, 2022); GE 4 (Equifax Credit Report, dated January 18, 2023); GE 5 (Experian Credit Report, dated July 16, 2024); and AE D (Personal Financial Statement, dated July 30, 2024).

The SOR alleged 61 delinquent accounts, of which 60 of them are medical accounts that were placed for collection, totaling approximately \$52,891. One of the individual accounts has an unpaid balance as high as \$2,384, and another has an unpaid balance as low as \$74. (GE 3 at 2-20)

According to Applicant, her child's father does not provide any financial support (Tr. at 19). Her financial issues started when she lost her job March 2017 and was unable to pay her mortgage. She had purchased the residence for \$50,000 in 2010, and her monthly mortgage payments were \$597. (Tr. at 29) The bank attempted to foreclose on the property, but Applicant was able to resolve the issue and the foreclosure was dismissed. (GE 2 at 5) She has made timely monthly payments since at least December 2020. (GE 4 at 8) In 2018, Applicant did not have health insurance because the deductibles were too high, and the coverage was not good, so she opted out of it. She got better health insurance in 2019. (Tr. at 20-21)

A series of events occurred over which Applicant had no control:

- in 2017, her automobile was rearended and totaled, and she had to purchase a new vehicle, with only a portion of her expenses covered. (Tr. at 23);

- the collision also caused her medical expenses with chiropractors and regular doctors, but only a portion of those medical expenses were covered. (Tr. at 22-23);

- the collision was resolved with the assistance of an attorney, but the attorney's services cost her about one-third of her \$20,000 award (Tr. at 24), and she cannot verify that fact because the attorney has since passed away and she cannot find any paperwork. (AE C);

- in November 2019 she had emergency gallbladder surgery, but her health insurance did not cover many of the surgery-related expenses. (GE 2 at 8);

- in late June 2023, she was diagnosed with acute chest pain that was "highly indicative of myocardial injury" and underwent a double coronary artery bypass surgery (CABG-2). She was released to homecare in early July 2023, and underwent cardiac rehabilitation. (Tr. at 19; AE F at 5; AE G at 2, 14-15; AE H at 5; AE I at 2, 14);

- in July 2024, she underwent an angioplasty and stenting and had a cardiac stent placement in a cardiac artery and underwent cardiac rehabilitation. (Tr. at 12)

In addition to all the above, Applicant has been diagnosed by her hospital physicians with the following conditions: type 2 diabetes mellitus with hyperglycemia, atherosclerotic heart disease of native coronary artery without angina pectoris,

pneumonia, acute respiratory failure with hypoxia, atelectasis, other pneumothorax, essential (primary) hypertension, scoliosis, sleep apnea, migraine, anxiety, and asthma. (AE I at 2-3) Because of her various medical conditions, Applicant has been prescribed over a dozen medications and medical devices. (AE I at 4-6)

Applicant had every intention to address her outstanding accounts, but the various incidents and conditions interfered with her efforts, and she simply forgot because she was worried about getting better for her daughter. As of the date of the hearing, she had not resolved any of the accounts, but was hopeful of doing so. (Tr. at 12, 27, 30) When she receives new medical bills, she routinely pays the medical provider the required co-pay. (Tr. at 33)

Applicant's Earning Statements for her hourly wages reflect a variety of gross and net pay over each two-week period. Since April 1, 2024, she has worked between 40 and 101 hours per each two-week period, and her net pay has been between \$1,428.17 and \$1,837.56. (AE E) She apparently did not understand the complexity of the Personal Financial Statement, for as of July 30, 2024, she reported an inaccurate biweekly gross salary but an accurate net salary for that period. She reported monthly expenses of approximately \$1,000, and one monthly debt payment (her mortgage) of \$594.97. Although she did not compute a monthly remainder, she would have had approximately \$1,138 available for saving or spending. (AE D) During a two-month period between April 2024 and June 2024, her checking account ending balances were between approximately \$995 and \$318. (AE A; AE B)

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 [position of public trust]." (*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)) As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. DOD contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. In this regard, it should be noted that a memorandum from the Deputy Under Secretary of Defense for Counterintelligence and Security, Adjudication of Trustworthiness Cases, dated November 19, 2004, covers the handling of trustworthiness cases under the Directive. The memorandum directed the Defense Office of Hearings and Appeals (DOHA) to continue to utilize the Directive in ADP contractor cases for trustworthiness determinations.

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for a public trust position.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in 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 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence." "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." (ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1)) "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 Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sept. 22, 2005))

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 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. Furthermore, "security clearance determinations, and by inference, public trust determinations, should err, if they must, on the side of denials." (*Egan*, 484 U.S. at 531)

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.

Analysis

Guideline F, Financial Considerations

The trustworthiness concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

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.

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 19:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so; and
- (c) a history of not meeting financial obligations.

Applicant failed to maintain 61 accounts, totaling approximately \$52,891, in a current status and they all became delinquent. AG ¶¶ 19(a) and 19(c) have been established, but there is no evidence that Applicant had been unwilling to satisfy her debts regardless of an ability to do so, and AG ¶ 19(b) has not been established.

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from financial difficulties under AG ¶ 20:

- (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;
- (c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control; and

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

AG ¶¶ 20(a) and 20(b) apply. Commencing in 2017, a series of events occurred over which Applicant had no control. They continued up until the week before the hearing in this matter. She was the innocent victim of a rear-end collision, totaling her vehicle and causing her medical issues. She lost her employment and was unemployed for approximately ten months. She had poor health insurance with high deductibles or periods without health insurance. She experienced numerous health issues and unexpected medical emergencies resulting in a CABG-2, gallbladder removal, and an angioplasty and stenting. She underwent rehabilitation. Added to those issues, the father of Applicant's child has not paid any child support. Despite all those issues, when confronted with the probable foreclosure of her residence, Applicant managed to fight back and successfully managed to have that action dismissed. She has made timely monthly payments since at least December 2020. She continues to obtain medical care but now she always pays the required copay. Other than the delinquent medical accounts and the one non-medical account, all her present accounts are current.

Nevertheless, a debt that became delinquent several years ago is still considered recent because "an applicant's ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions." ISCR Case No. 15-06532 at 3 (App. Bd. Feb. 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sept. 13, 2016)). Applicant acknowledged initially that she was unable to keep those accounts current due to her unique circumstances but that she had every intention of doing so when she was able to do so. However, the various incidents and conditions interfered with her efforts, and she simply forgot because she was worried about getting better for her daughter.

Since April 1, 2024, she has worked between 40 and 101 hours per each two-week period, and her net pay has been between \$1,428.17 and \$1,837.56. Her monthly expenses are approximately \$1,000, in addition to one monthly mortgage payment of \$594.97. She should have approximately \$1,138 available for saving or spending. During a two-month period between April 2024 and June 2024, her checking account ending balances were between approximately \$995 and \$318. While that amount is not overwhelming, although she has continuing health issues, since most of her serious health issues are now behind her, she can start focusing on resolving her delinquent debts.

Based on the evidence, it appears that Applicant either ignored her delinquent accounts for a substantial period or simply was unable to address them because of her health issues. While she was willing to try to resolve them, she has made no efforts in working with her creditors to resolve the accounts. The Appeal Board has previously commented on a somewhat similar situation:

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.

An applicant who begins to resolve his or her financial problems only after being placed on notice that his or her [public trust position] is in jeopardy may be lacking in the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his or her own interests. (See, e.g., ISCR Case No. 17-01213 at 5 (App. Bd. Jun. 29, 2018); ISCR Case No. 17-00569 at 3-4 (App. Bd. Sept. 18, 2018) In this instance, Applicant has denied that she had begun making such efforts even after the SOR was issued. Her inability to do so was because of her serious health issues, including one the week before the hearing, not because of disinterest.

Trustworthiness decisions are aimed at evaluating an applicant's judgment, reliability, and trustworthiness. They are not a debt-collection procedure. The guidelines do not require an applicant to establish resolution of every debt or issue alleged in the SOR. An applicant needs only to establish a plan to resolve financial problems and take significant actions to implement the plan. There is no requirement that an applicant immediately resolve issues or make payments on all delinquent debts simultaneously, nor is there a requirement that the debts or issues alleged in an SOR be resolved first. Rather, a reasonable plan and concomitant conduct may provide for the payment of such debts, or resolution of such issues, one at a time. Mere promises to pay debts in the future, without further confirmed action, are insufficient. In this instance, Applicant managed to save her residence from foreclosure and has continued to make timely monthly payments since December 2020 and she has maintained her present accounts in a current status. She is burdened only by her delinquent medical accounts.

Under the present circumstances, I believe Applicant should be extended an additional period to start addressing her delinquent medical debts, perhaps to start resolving the smaller ones in the amounts \$74, \$109, \$126, and \$164. Should such efforts be successful within the next 90 days, additional security monitoring under SEAD 4, App. C, Condition C, under the DOD Continuous Vetting Program may be appropriate until the issue is finally resolved within a reasonable period of extended time:

Eligibility granted or continued, despite the presence of issue information that can be partially but not completely mitigated, with the provision that additional security measures shall be required to mitigate the issue(s). Such measures include, but are not limited to, additional security monitoring, access restrictions, submission of periodic financial statements, or attendance at counseling sessions.

There is no evidence of financial counseling. Applicant is currently in a better position financially and health-wise than she had been as she has a good monthly remainder and her only delinquent debts are the original 60 medical debts and the 1 non-medical account. Too many issues were obstructions beyond her control to enable her address those debts. Applicant's delayed actions for such a long period, under the circumstances, no longer cast doubt on her current reliability, trustworthiness, and good judgment. (See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010))

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 SEAD 4, App. A, ¶ 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.

Under SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant eligibility for a position of public trust must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis. See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); see also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

There is obviously some evidence against mitigating Applicant's financial considerations. She failed to maintain 61 accounts in a current status allowing them to become delinquent. Accounts totaling \$52,891 were placed for collection.

The mitigating evidence under the whole-person concept is more substantial. Applicant is a 51-year-old employee of a defense contractor, and she has been serving as a tool assistant since 2021. Commencing in 2017, a series of events occurred over which Applicant had no control. They continued up until the week before the hearing in this matter. In addition to a vehicle accident and the expenses related to it, she has experienced numerous health issues and unexpected medical emergencies resulting in a CABG-2, gallbladder removal, and an angioplasty and stenting. She underwent rehabilitation. She does not receive any child support. Despite all those issues, when confronted with the probable foreclosure of her residence, Applicant managed to have that action dismissed. She has made timely monthly payments since at least December 2020. She continues to obtain medical care but now she always pays the required copay.

Other than the delinquent medical accounts and the one non-medical account, all of her present accounts are current.

In ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008), the Appeal Board addressed a key element in the whole-person analysis in financial cases stating:

In evaluating Guideline F cases, the Board has previously noted that the concept of “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 he [or she] has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he [or she] has “. . . established a plan to resolve his [or her] 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 [or her] actions in evaluating the extent to which that applicant’s plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (“Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.”) 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 payment 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.

Applicant’s track record of efforts to resolve her debts has been stalled by her significant health issues. She has the declared intention to resolve her debts, but her health has not permitted her to do so. When healthy she has been able to work 101 hours during a two-week period in an effort to earn additional salary. After weighing the disqualifying and mitigating conditions under Guideline F and evaluating all the evidence in the context of the whole person, I conclude that Applicant proffered substantial mitigating evidence, which was more than sufficient to overcome the disqualifying conditions established under Guideline F. Additional security monitoring under SEAD 4, App. C, Condition C, under the DOD Continuous Vetting Program may be appropriate until the issue is finally resolved within a reasonable period of extended time. See SEAD 4, App. A, ¶¶ 2(d) (1) through AG 2(d) (9).

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:	FOR APPLICANT
Subparagraphs 1.a. through 1.iii.:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a position of public trust to support a contract with the DOD. Eligibility is granted.

ROBERT ROBINSON GALES
Administrative Judge