



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ADP Case No. 12-07785
)
Applicant for Public Trust Position)

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

11/15/2015

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate Guideline F (financial considerations) trustworthiness concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

On March 30, 2012, Applicant submitted a Questionnaire for National Security Positions (SF-86). On December 11, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (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 alleged security concerns under Guideline F. The SOR detailed reasons why DOD was unable to find that it is clearly consistent with national security to grant or continue a public trust position for Applicant, and referred her case to an administrative judge for a determination whether her access to sensitive information should be granted or denied.

On March 11, 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 April 22, 2015, was provided to her by letter dated August 5, 2015. On September 3, 2015, Applicant received the FORM. She was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not provide additional information within the 30-day period after receipt of the FORM. On October 27, 2015, DOHA assigned the case to me.

Findings of Fact

Applicant admitted all of the SOR allegations. Her admissions are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

Applicant is a 63-year-old computer programmer employed by a defense contractor since January 2012. She seeks a public trust position in conjunction with her current employment. (Item 4, Item 6)

Applicant graduated from high school in 1970. She was awarded a bachelor's degree in 1975 and a master's degree in 1979. Applicant was married from 1969 to 1974, and that marriage ended by divorce. She has one adult son. Applicant did not serve in the armed forces. (Item 1)

Financial Considerations

Applicant's SOR contains nine delinquent debts, totaling approximately \$14,469. These debts are from a variety of creditors and range from a \$200 collection account to a \$9,905 charged-off credit card account. (SOR ¶¶ 1.a -1.i)

There is substantial evidence to support the SOR allegations through Applicant's admissions, her credit reports dated April 13, 2012, and April 21, 2015, and her April 25, 2012 Office of Personnel Management Personal Subject Interview (OPM PSI). (Item 2, Item 5, Item 6, Item 7) Her record of indebtedness began in approximately 2009 and has been ongoing. (Item 5, Item 6)

In her SF-86, Applicant reported her numerous debts and discussed them during her OPM PSI and in her March 5, 2014 Interrogatory Response. (Item 4, Item 6) Applicant explains in her OPM PSI that her financial problems began when she was laid off by a large U.S. company in March 2009. (Item 4, Item 6) In her OPM PSI, Applicant stated that she lives paycheck to paycheck and that her attempts to resolve her debts by summer 2013 were derailed when her son went missing as a result of a medical condition. She traveled cross-country to locate him and fell behind on her homeowner association payments, leading to a costly legal dispute. (Item 6)

In answering her SOR, Applicant denies each debt alleged, but offers no explanation beyond her denials, and offers no documentation to establish the current status of the debts. (Item 3) She provides no documentation of any attempts to pay her

debts or of a good-faith effort to otherwise resolve her debts. As noted, Applicant did not submit such information after being provided with an opportunity to do so following receipt of her FORM. Applicant's SOR debts remain unresolved according to her April 21, 2015 credit report. (Item 7) She has not sought financial counseling. (Item 6)

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.” Section 7 of Executive Order (EO) 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

Analysis

Financial Considerations

AG ¶ 18 articulates the security 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 classified 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.”

The evidence establishes 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,¹ I conclude none of the five financial considerations mitigating conditions above are applicable or partially applicable to explain, extenuate, or mitigate the trustworthiness concern. The available information shows that Applicant has taken little or no affirmative action to resolve her delinquent debts.

With that said, an adjudication of eligibility for a public trust position is not aimed at collecting debts.² 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 [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 actions in evaluating

¹ 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.

² ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010).

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.³

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 security concerns. She failed to offer evidence of financial counseling or provide documentation regarding her past efforts to address her delinquent debt. By failing to provide such information, and in relying on a the limited information contained in the FORM, financial considerations trustworthiness concerns remain.

After weighing the relevant disqualifying and mitigating conditions and evaluating the evidence in light of the whole-person concept,⁴ I conclude Applicant did not present sufficient evidence to explain, extenuate, and mitigate the Guideline F security concern. Accordingly, Applicant has not met her ultimate burden of persuasion to show that it is clearly consistent with national security 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 – 1.i: 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.

ROBERT J. TUIDER
Administrative Judge

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

⁴ AG ¶ 2(a) (1)-(9).