



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



In the matter of:)
)
-----) ADP Case No. 13-01363
)
Applicant for Public Trust Position)

Appearances

For Government: Gregg A. Cervi, Esquire, Department Counsel
For Applicant: *Pro se*

09/15/2014

Decision

Harvey, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges 13 delinquent collection debts for \$43,602 and failure to fully pay income taxes for tax years 2009 and 2010. Applicant paid her income taxes, paid one SOR debt, and filed for bankruptcy. She had a track record of paying her debts until she became unemployed. Financial considerations concerns are mitigated. Eligibility for a public trust position is granted.

Statement of the Case

On August 9, 2013, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (Item 5) On December 27, 2013, the Department of Defense (DOD) issued an SOR to Applicant, pursuant to Department of Defense 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 Jan. 1987, as amended (Regulation); and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleges trustworthiness concerns under Guideline F (financial considerations). (Item 1) The SOR detailed reasons why DOD was unable to find that it is clearly 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) DOHA recommended referral to an administrative judge to determine whether such access to sensitive information should be granted, continued, denied, or revoked.

On April 3, 2014, Applicant responded to the SOR allegations and waived her right to a hearing. (Item 4) A complete copy of the file of relevant material (FORM), dated July 31, 2014, was provided to her on August 19, 2014.¹ On August 26, 2014, Applicant responded to the FORM. The case was assigned to me on September 3, 2014.

Findings of Fact²

In her Answer to the SOR, Applicant admitted the SOR allegations in ¶¶ 1.c to 1.j and 1.m and 1.n, and she provided mitigating information. (Item 5) Her admissions are accepted as findings of fact.

Applicant is a 45-year-old hospital and family advocate employed by a defense contractor.³ In 1987, she graduated from high school. She has not served in the military. She married in 1994, and she was divorced in 1999. Her children were born in 1995 and 1997. There is no evidence of reportable criminal offenses, alcohol or drug abuse, or violations of her employment rules. She disclosed her financial problems on her August 9, 2013 SF 86.

Financial Considerations

Applicant's history of delinquent debt is documented in her August 17, 2013 credit report, September 18, 2013 Office of Personnel Management personnel subject interview (OPM PSI), SOR response, and FORM response.

In 2009, Applicant's credit score was 729, and in 2010, her credit score was 778. (Item 4) In June 2011, her credit score was 717. In August 2011, Applicant was injured at home. (Item 4) She was unemployed from October 2011 to May 2012. (Item 4) Her boyfriend moved out of their residence, and her household no longer had two incomes. (Item 4) She was not receiving child support payments for her two children. (Item 4)

Applicant's SOR alleges 13 delinquent collection debts for \$43,602 as follows: ¶ 1.a (\$1,888) tax debt; ¶ 1.b failure to fully pay taxes in 2009 and 2011; ¶ 1.c (\$4,234) credit card collection debt; ¶ 1.d (\$783) credit card collection debt; ¶ 1.e (\$4,599) credit

¹The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated August 6, 2014, and Applicant's receipt is dated August 19, 2014. 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.

³ The source for the information in this paragraph is Applicant's August 9, 2013 SF 86. (Item 5)

card collection debt; ¶ 1.f (\$2,584) credit card collection debt; ¶ 1.g (\$638) credit card collection debt; ¶ 1.h (\$3,060) credit card collection debt; ¶ 1.i (\$3,483) credit card collection debt; ¶ 1.j (\$1,436) credit card collection debt; ¶ 1.k (\$616) utility collection debt; ¶ 1.l (\$517) telecommunications collection debt; ¶ 1.m (\$5,129) credit card collection debt; and ¶ 1.n (\$16,523) collection debt resulting from a repossessed vehicle. She said she paid the debt in SOR ¶ 1.k, and never had an account with the telecommunications company in SOR ¶ 1.l. (Item 4)

Applicant's November 2013 pay statement shows her annual income is \$75,000, and \$3,903 was garnished from her pay, completing payment of her federal income tax debt.⁴ On June 11, 2014, Applicant completed financial counseling in preparation for filing for bankruptcy under Chapter 7 of the Bankruptcy Code. On June 11, 2014, she retained a bankruptcy attorney, and her meeting with creditors was scheduled for August 6, 2014.

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 [public trust position]." *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.

⁴The source for the information in this paragraph is Applicant's FORM response. Applicant provided her bankruptcy documentation to corroborate her statement about the status of her bankruptcy.

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 suitability for a public trust position. 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 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 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 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 delinquent debt is documented in her credit report, September 18, 2013 OPM PSI, SOR response, and FORM response. Applicant’s SOR alleges 13 delinquent collection debts for \$43,602 and failure to fully pay income taxes for tax years 2009 and 2010. The Government established 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;⁵ and

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,

(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 eligibility [for a public trust position], there is a strong presumption against the grant or maintenance of a [public trust position]. 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 [trustworthiness] concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in [public trust position] decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to [sensitive] 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).

AG ¶¶ 20(d) and 20(e) are not applicable. Applicant's debts were recently delinquent; she is utilizing bankruptcy to resolve her debts; and she did not provide documented proof to substantiate the basis of any disputed debts and evidence of actions to resolve the dispute. She did not provide evidence that she established and maintained contact with her creditors.⁶

A recent Appeal Board decision illustrates the analysis for applying AG ¶¶ 20(a) and 20(b). In ISCR Case No. 09-08533 (App. Bd. Oct. 6, 2010), the applicant had \$41,000 in delinquent credit card debt and defaulted on a home loan generating a \$162,000 delinquent debt. *Id.* at 2. That applicant filed for bankruptcy the same month the Administrative Judge issued her decision. *Id.* at 1-2. The applicant in ISCR Case No. 09-08533 was recently divorced, had been unemployed for 10 months, and had childcare responsibilities. Her former husband was inconsistent in his payment of child

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)).

⁶Even 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.

support to her. The Appeal Board determined that AG ¶ 20(a) was “clearly applicable (debt occurred under such circumstances that it is unlikely to recur and [the debt] does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment)” even though that applicant’s debts were unresolved at the time the Administrative Judge’s decision was issued. *Id.* at 3. The Appeal Board also decided that the record evidence raised the applicability of AG ¶ 20(b) because of the absence of evidence⁷ of irresponsible behavior, poor judgment, unreliability, or lack of trustworthiness. *Id.* at 4.

Applicant’s conduct in resolving her debts warrants full application of AG ¶¶ 20(a), 20(b), and 20(c). She paid \$3,903, resolving her income tax debt, and she received financial counseling in preparation for filing for bankruptcy under Chapter 7 of the Bankruptcy Code. She paid the debt in SOR ¶ 1.k (\$616). She saved funds to retain a bankruptcy attorney. Her meeting with creditors was scheduled for August 6, 2014.

Applicant’s illness, loss of employment, the failure of her children’s father to pay child support, and her boyfriend’s decision to move out are circumstances largely beyond her control. Before her illness and unemployment, she had excellent credit. She understands what she must do to establish and maintain her financial responsibility.⁸ The Appeal Board explained that circumstances beyond one’s control can cause unresolved debt, and are not necessarily a bar to having access to sensitive and classified information stating:

However, the Board has previously noted that an applicant is not required to be debt-free nor to develop a plan for paying off all debts immediately or simultaneously. All that is required is that an applicant act responsibly given his [or her] circumstances and develop a reasonable plan for repayment, accompanied by “concomitant conduct,” that is, actions which evidence a serious intent to effectuate the plan. See ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008).

ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009).

Applicant admitted responsibility for and took reasonable and responsible actions to resolve her SOR debt by filing for bankruptcy under Chapter 7 of the Bankruptcy Code. There are clear indications the problem is being resolved and is under control. Once Applicant’s debts are discharged, she will receive a fresh financial start, and based on her overall good-credit history, her financial problems are unlikely to recur. Her delinquent SOR debts do not cast doubt on her current reliability, trustworthiness,

⁷ Applicant has the burden of proving the applicability of any mitigating conditions, and the burden to disprove a mitigating condition never shifts to the Government.

⁸The Appeal Board has indicated that promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner. ISCR Case No. 07-13041 at 4 (App. Bd. Sept. 19, 2008) (citing ISCR Case No. 99-0012 at 3 (App. Bd. Dec. 1, 1999)).

or good judgment. Her efforts are sufficient to fully mitigate financial considerations trustworthiness concerns.

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.

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. AG ¶ 2(c). 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.

Applicant is a 45-year-old hospital and family advocate employed by a defense contractor. In 1987, she graduated from high school. She married in 1994, and she was divorced in 1999. Her children were born in 1995 and 1997. There is no evidence of reportable criminal offenses, alcohol or drug abuse, or violations of her employer's rules. She is sufficiently mature to understand and comply with her public trust responsibilities. There is every indication that she is loyal to the United States, the DOD, and her employer.

Applicant is credited for admitting responsibility for her delinquent debt on her SF 86. Her illness, loss of employment, failure of the father of her children to pay child support, and her boyfriend moving out of their residence caused her to have financial problems. These are all circumstances largely beyond her control. She maintained good credit before she became unemployed. The Appeal Board has 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 has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he 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 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.

ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations and quotation marks omitted).

Applicant is an intelligent person, and she understands what she needs to do to establish and maintain her financial responsibility. Discharge of her debts under Chapter 7 of the Bankruptcy Code is a reasonable choice under her particular financial circumstances. Prior to her unemployment, she had excellent credit, and her overall history shows a "meaningful track record" of debt repayment. I am confident she will establish and maintain her financial responsibility.⁹

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude financial considerations concerns are mitigated. Eligibility for a public trust position is granted.

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 to 1.n:	For Applicant

⁹Of course, the Government can re-validate Applicant's financial status at any time through credit reports, investigation, and additional interrogatories. Approval of access to sensitive information now does not bar the Government from subsequently revoking it, if warranted. "The Government has the right to reconsider [trustworthiness] significance of past conduct or circumstances in light of more recent conduct having negative [trustworthiness] significance." ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012). Violation of a promise made in a [trustworthiness] context to pay legitimate debts also raises judgment concerns under Guideline E, and may support future revocation of a public trust position. An administrative judge does not have "authority to grant an interim, conditional, or probationary clearance." ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012) (citing ISCR Case No. 10-03646 at 2 (App. Bd. Dec. 28, 2011)). See also ISCR Case No. 04-03907 at 2 (App. Bd. Sep. 18, 2006) (stating, "The Board has no authority to grant [a]pplicant a conditional or probationary [public trust position] to allow her the opportunity to have a [public trust position] while she works on her financial problems."). This footnote does not imply that this Applicant's public trust position is conditional.

Conclusion

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

Mark Harvey
Administrative Judge