



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



In the matter of:)
)
XXXXXXXXXXXX, XXXXX) ADP Case No. 14-00035
)
Applicant for Public Trust Position)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

06/19/2014

Decision

Tuider, Robert J., Administrative Judge:

Applicant’s statement of reasons (SOR) alleges five delinquent debts, totaling \$12,514. Due to circumstances beyond her control, she had insufficient financial resources to timely pay her debts. She settled and paid four debts, and the other debt is in an established payment plan. Financial considerations concerns are mitigated. Her eligibility to occupy a public trust position is granted.

Statement of the Case

On June 29, 2012, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of an application for a public trust position (SF 86). (GE 1) On February 28, 2014, 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; Department of Defense (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). 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. DOHA recommended referral to an administrative judge to determine whether such access to sensitive information should be granted, continued, denied, or revoked.

On March 12 and 27, 2014, Applicant responded to the SOR, and she requested a hearing. On April 7, 2014, Department Counsel indicated he was ready to proceed on Applicant's case. On April 9, 2014, the Defense Office of Hearings and Appeals (DOHA) assigned Applicant's case to me. On April 24, 2014, DOHA issued a hearing notice, setting the hearing for May 16, 2014. Applicant's hearing was held as scheduled.

At the hearing, Department Counsel offered five exhibits, and Applicant offered three exhibits. (Tr. 14-15; GE 1-5; AE A-C) There were no objections, and I admitted GE 1-5 and AE A-C. (Tr. 15) The record was held open after the hearing until June 4, 2014, for additional evidence. On May 27, 2014, DOHA received the transcript of the hearing. On June 3, 2014, Department Counsel provided seven documents received from Applicant, which were admitted into evidence without objection. (AE D-J)

Findings of Fact¹

Applicant's SOR response admitted responsibility for the SOR debts in ¶¶ 1.a-1.e. She also provided mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 62-year-old senior systems analyst employed by a defense contractor since April 2012. (Tr. 18, 22; GE 1) She has worked for various levels of government (local, state, and federal) or contractors for more than 40 years. She worked for the state government from 2010 to 2012. (Tr. 18) In 1969, she graduated from high school. (Tr. 16) She has attended college for two years. (Tr. 17) She was determined eligible for a public trust position in 2009. (Tr. 17-18) She has never served in the military. (Tr. 21)

Applicant married in 1970, and she was divorced in 2004. (Tr. 20) In 2013, her former husband retired from the Army National Guard as a sergeant first class (E-7). (Tr. 19) She does not receive financial support from her former husband or part of his retirement pay. Her 36-year-old daughter lives with Applicant. (Tr. 21)

Financial Considerations

Applicant's history of delinquent debt is documented in her credit reports, her August 14, 2012 Office of Personnel Management (OPM) personal subject interview (PSI), her November 18, 2013 responses to DOHA interrogatories, her SOR response, and her hearing record. (GE 2-5) Her OPM PSI, responses to DOHA interrogatories, and SOR response provided specific notice to her of the debts causing trustworthiness concerns.

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Applicant had a heart attack and triple bypass surgery in about 2001. (Tr. 23) She had to see a doctor every two weeks for the next four years. (Tr. 23) She reduced her work to part time for several years. (Tr. 23-24) After her divorce in 2004, she discovered she and her former husband had about \$9,000 in delinquent debt. (Tr. 24, 47)

Applicant said she paid all of their debts without his help. (Tr. 24) In 2012, she paid the four debts in SOR ¶¶ 1.b (\$164), 1.c (\$155), 1.d (\$85), and 1.e (\$72), and they are not reflected on her May 2014 credit reports as delinquent debts. (Tr. 29, 51-53; AE A, B; SOR response)

The creditor in SOR ¶ 1.a (\$12,038) obtained a judgment against Applicant in 2006. (Tr. 32; GE 5 at 49) Applicant's daughter lived at a different address, and her daughter accepted service of the judgment. (Tr. 36; GE 5 at 32) Applicant disputed her responsibility for several debts and filed a police report, asserting that her husband's mistress was forging her name on credit applications. (Tr. 47-48) Applicant was unaware of the judgment in 2006 until the OPM investigator asked her about it on August 14, 2012. (GE 2) Applicant asked the attorney seeking payment of the judgment to provide the original documents so that she could verify her signature on the loan documents; however, the documents were not provided. (Tr. 50) Nevertheless, Applicant decided to make payment arrangements to address the judgment to resolve any security or trustworthiness concerns. (Tr. 37-38, 48, 50-51; AE A at 3) The balance is now about \$19,000 after she made nine \$420 payments to the creditor. (Tr. 40-41; AE A)

Applicant's personal financial statement (PFS) showed the following monthly amounts: gross salary \$6,827; net income \$5,120; expenses \$805; debts \$1,257 (\$186,000—mortgage); and net remainder \$3,057. (AE J) Applicant did not describe any financial counseling.

Character Evidence

Four coworkers and friends, some of whom have known Applicant more than 20 years, provided statements supporting her access to sensitive information. (AE D, G, H, I) They described her as dependable, friendly, ethical, dedicated, helpful, and professional. (AE D, G, H, I)

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 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. *Id.* (internal citation omitted).

Applicant’s history of delinquent debt is documented in her credit reports, her OPM PSI, her responses to DOHA interrogatories, her SOR response, and her hearing record. Applicant’s SOR alleges five delinquent debts, totaling \$12,514. Her largest debt has been delinquent since 2006. 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;² 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.

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 security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. 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 security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

²The 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, 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].

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)) (internal citation and footnote omitted.)

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Applicant's conduct in resolving her debts warrants full application of AG ¶¶ 20(a) to 20(d). AG ¶ 20(e) is not applicable. Applicant did not provide documentation showing that she disputed any of her delinquent SOR debts. Applicant's divorce and her husband's failure to pay his debts caused Applicant to have debts she could not afford to pay. Her financial problems were affected by circumstances largely beyond her control. She paid \$9,000 in delinquent debts accrued by her former husband. She paid four delinquent SOR debts and established a payment plan to resolve her remaining SOR debt. She promised to continue to make payments on her remaining SOR debt.³

The Appeal Board explained that circumstances beyond one's control can cause unresolved debt, and are not necessarily a bar to having access to classified information stating:

However, the Board has previously noted that an applicant is not required to be debt-free [or] 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 debts, establishing some good faith. She established and maintained contact with her creditors.⁴ Her financial problem is being resolved, are under control, are unlikely to recur; and do not cast doubt on her current reliability, trustworthiness, or good judgment. Her efforts are sufficient to fully mitigate financial considerations security 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

³The 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)).

⁴Even 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.

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.

Under AG ¶ 2(c), 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. 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 62-year-old senior systems analyst employed by a defense contractor since April 2012. She has worked for various levels of government, local, state, and federal or contractors for more than 40 years. She married in 1970, and she was divorced in 2004. Her 36-year-old daughter lives with Applicant. She is sufficiently mature to understand and comply with her security responsibilities. She deserves substantial credit for supporting the U.S. Government as an employee of a contractor. There is every indication that she is loyal to the United States and her employer. There is no evidence that she abuses alcohol or uses illegal drugs. Divorce and her former husband's failure to pay his debts contributed to her financial woes. I give Applicant substantial credit for admitting responsibility for her delinquent debts. She received a favorable endorsement from four coworkers or friends. She has sufficient financial resources to ensure she can pay her debts.

Even though she lacked financial resources because of divorce, Applicant paid four SOR debts and \$9,000 of her former husband's debts. She also made nine \$420 payments on her remaining unpaid SOR debt. She promised to continue to make payments to address her remaining SOR debt. 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. There is simply no reason not to trust her. Moreover, she established a “meaningful track record” of debt re-payment. I am confident she will maintain her financial responsibility.

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 are mitigated. Eligibility for access to classified information 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.e:	For Applicant

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.

Robert J. Tuidor
Administrative Judge