



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ADP Case No.: 14-00600
)
Applicant for Public Trust Position)

Appearances

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

08/05/2014

Decision

TUIDER, Robert J., Administrative Judge:

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

Statement of the Case

On August 29, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On March 14, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline F (financial considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), effective within the Department of Defense for SORs issued after September 1, 2006.

On April 14, 2014, Applicant answered the SOR, and on June 5, 2014 supplemented her answer. On May 19, 2014, Department Counsel was prepared to

proceed. On May 20, 2014, the case was assigned to me. On May 22, 2014, DOHA issued a notice of hearing scheduling the hearing on June 27, 2014. The hearing was held as scheduled.

At the hearing, the Government offered Government Exhibits (GE) 1 through 3, and Hearing Exhibit (HE) I, which were admitted into evidence without objection. Applicant testified and offered Applicant Exhibits (AE) A and B, which were received into evidence without objection. On July 9, 2014, DOHA received the hearing transcript (Tr.).

Procedural Matters

Department Counsel moved to withdraw SOR ¶¶ 1.h, 1.q, 1ff, and 1gg. He further moved to amend the amount alleged in SOR ¶ 1.x from \$3,424 to \$1,249. Receiving no objection from the Applicant, I granted Department Counsel's motions. (Tr. 9-11.)

Findings of Fact

Of the 33 debts alleged under Guideline F, Applicant denied seven of them -- SOR ¶¶ 1.i, 1.j, 1.aa, 1.bb, 1.cc, 1.ee, and 1.gg with explanations; and admitted the remaining 26 allegations with explanations. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 53-year-old claims processor, who has been employed by a defense contractor since November 2011. She seeks a position of public trust to retain her position with her employer. (GE 1, Tr. 17-21.)

Applicant graduated from high school in June 2000. She has been attending a technical college since 2012, approximately two years, and hopes to earn an associate's degree in accounting and management. She has not served in the armed forces. (GE 1, Tr. 21-24, 27.)

Applicant has been married four times and would have been married five times; however, her fiancé passed away before they could get married. She has three adult children. (GE 1, Tr. 24-26.)

Financial Considerations

The SOR alleges 33 debts totaling \$35,643. The debts include collection debts in varying amounts ranging from \$75 to \$5,019. Applicant attributes her financial difficulties primarily to the aftermath of her most recent divorce in 2011, two brief periods of unemployment in 2011, health-related issues, and financial support she provided to her daughter. The Applicant had a stroke 15 years ago, an aneurysm five years ago, back surgery four years ago, and loaned her daughter \$11,000 to help her

with her bills and nursing school tuition. (GE 1, AE A, SOR answer, Tr. 26-39, 55-56, 59-60, 62-65.)

Applicant testified that she contacted her creditors by telephone after she was unemployed to inform them that she was unable to pay them. According to her testimony, her creditors informed her to contact them when she was re-employed and earning income. After Applicant was re-employed in 2011, she did not contact any of her creditors because she did not have the money to pay them. However, Applicant did contact Sallie Mae to repay a non-SOR debt. This particular debt was of some importance to Applicant because her sister had cosigned on a Sallie Mae loan to help Applicant's youngest son. Applicant did provide a June 27, 2014 statement for this debt reflecting that her Sallie Mae account was current with a balance of \$3,785. (AE B, Tr. 39-41.)

Applicant disputed the seven SOR debts that she denied; however, she did not provide any documentation to support the basis of her denials. (Tr. 41-48.) Applicant also claimed to have paid the collection account for medical services in SOR ¶ 1.t, but also did not provide any documentation as proof of payment. (Tr. 54-58.) Nor has she made any progress in repaying any of her other creditors. (Tr. 53-54.)

Applicant's employee assistance program referred her to a credit counseling service. She contacted them "a year or so ago" hoping that she could consolidate her debts, but was unable to do so. Applicant stated that her net monthly remainder is "barely enough to put in the gas tank" or less than \$100. (Tr. 46-49.) Applicant's 401k retirement has "a hundred some dollars in it" and she has "enough" money in her savings account to make the next monthly payment on her niece's single-wide mobile home, which is where she is living. Applicant stated she makes \$10.26 per hour as a full-time employee. (49-53.)

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See 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." (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. DOD 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, the 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 the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), 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 decision.

The protection of the national security is the 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." 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.

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

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.

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." See *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

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 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.” 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 by her admissions as well as by her credit reports. Applicant’s SOR lists 33 delinquent debts totaling \$35,643. Department Counsel has withdrawn four of those debts leaving the remaining 29 debts unresolved. The majority of her debts have been delinquent for several years or more. 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; 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 fully apply. Applicant is able to receive partial credit under AG ¶ 20(e) for debts listed under SOR ¶¶ 1.i, 1.j, 1.aa, 1.bb, 1.cc, and 1.ee. If Applicant resolved or disputed her debts as she claimed, she did not provide documentation of same. Her debts remain listed on her credit reports. There is no evidence in the record that satisfactorily mitigates the remaining debts alleged. Absent such evidence, I am unable to fully apply mitigating conditions under this concern.

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 relevant 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 access to sensitive information must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c).

The comments in the Analysis section of this decision are incorporated in the whole-person concept analysis. To Applicant's credit, she has worked full-time the majority of her adult working life and until her most recent divorce had maintained financial responsibility. She also loaned her daughter \$11,000 to her detriment and seeks to repay a Sallie May loan that her sister cosigned, and is making payments on her niece's mobile home.

However, I cannot overlook her history of financial irresponsibility. After the Government put Applicant on notice that her finances were a concern, she failed or was unable to take appropriate corrective action. Even her six delinquent accounts of less than \$100 each remain unpaid. I can only conclude that Applicant is unable or unwilling to take the necessary steps to regain financial responsibility. After weighing the

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.

disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude she has not mitigated trustworthiness concerns pertaining to financial considerations.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not mitigated or overcome the Government's case. For the reasons stated, I conclude she is not eligible for access to 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
Subparagraph 1.a – 1.g:	Against Applicant
Subparagraphs 1.h:	Withdrawn
Subparagraph 1.i – 1.p:	Against Applicant
Subparagraph 1.q:	Withdrawn
Subparagraphs 1.r – 1.ee:	Against Applicant
Subparagraphs 1.ff – 1.gg:	Withdrawn

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