



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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-----) ADP Case No. 14-02220
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)
Applicant for Public Trust Position)

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

April 21, 2015

Decision

ROSS, Wilford H., Administrative Judge:

On August 1, 2014, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DoD 5200.2-R, "Personnel Security Program," dated January 1987, as amended (Regulation); and the adjudicative guidelines (AG) effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing on September 6, 2014 (Answer), and requested a hearing before an Administrative Judge. The Defense Office of Hearings and Appeals (DOHA) received the request soon thereafter, and I received the case assignment on December 8, 2014. DOHA issued a notice of hearing on December 11, 2014, and I convened the hearing as scheduled on January 13, 2015. The Government offered Government Exhibits 1 through 6, which were received without objection. Applicant testified on her own behalf, and submitted Applicant Exhibit A, which was also received without objection. DOHA received the transcript of the hearing (Tr.) on January

22, 2015. I granted Applicant's request to keep the record open until January 26, 2015, to submit additional matters. She submitted Applicant Exhibit B on January 23, 2015, which was admitted without objection. The record closed on January 26, 2015. Based upon a review of the pleadings, exhibits, and testimony, eligibility to occupy a sensitive position is granted.

Findings of Fact

Applicant is 46 years old, has an associate of arts degree, and is married with four children. Her husband is a stay-at-home father, looking after their son, who is severely disabled. She is employed by a healthcare provider, and she seeks access to sensitive information in connection with her employment.

Guideline F, Financial Considerations

Applicant admitted subparagraphs 1.c, and 1.i of the SOR. Those admissions are findings of fact. She denied the other allegations in the SOR. She also provided additional information to support her request for access to a sensitive position.

The SOR lists eight delinquent debts, totaling approximately \$67,223 (SOR 1.a through 1.h). The existence and amount of these debts is supported by credit reports dated February 27, 2013; March 21, 2014; November 3, 2014; and January 13, 2015. (Government Exhibits 3, 4, 5, and 6.) The ninth allegation (1.i) regards a home foreclosure.

Applicant maintains that her financial difficulties resulted from two events. First, in approximately 2005 her purse was stolen. After that she was the victim of identity theft. She attempted to file a police report at that time, but was unable to do so. She eventually filed a police report concerning this event in August 2014. (Applicant Exhibit A; Tr. 30-33.) Applicant did file an extended fraud alert with the credit reporting companies in July 2007, as shown in the four credit reports submitted by the Government. (Government Exhibits 3, 4, 5, and 6; Tr. 34-36.)

The second event was the fact that Applicant was laid off from her job in June 2006. She was unemployed for two years while taking care of her children. (Government Exhibit 1 at Section 13A; Tr. 39-40.)

The current status of the SOR-listed debts is as follows.

1.a It is alleged in this subparagraph that Applicant is indebted to a collection agency for a bank debt in the amount of \$748. Applicant submitted documentation from the collection agency stating, "Based on the research conducted by the Customer Service Department, the above referenced account has been closed due to fraud." (Applicant Exhibit B at 31; Tr. 56-57.) It is resolved.

1.b. It is alleged in this subparagraph that Applicant is indebted to a bank for debt in the amount of \$2,210. Applicant testified that she has no knowledge of this account. She submitted several letters she has written to this bank over the past two years attempting to obtain information about this account. To date the bank has not responded. (Applicant Exhibit B at 25-29; Tr. 53-56.) This debt is in dispute.

1.c. This allegation concerns a home equity line of credit (HELOC) Applicant had with the same bank as her mortgage. This debt will be discussed in conjunction with subparagraph 1.i, below.

1.d. It is alleged in this subparagraph that Applicant is indebted to a collection agency for a cable bill in the amount \$383. Applicant stated that she had returned the equipment and did not owe anything. Government Exhibit 3, dated February 27, 2013, is the only credit report that shows this debt. It also states, "Consumer disputes this account inform." According to Applicant the debt has been resolved with the cable company. (Tr. 52.) This debt is unresolved, but under dispute.

1.e. Applicant denied this debt for cable service in the amount of \$93. She maintains that this was a fraudulent account, related to people living in their foreclosed house and using the utilities without permission. Government Exhibit 3, dated February 27, 2013, is the only credit report that shows this debt. (Tr. 58.) It is unresolved.

1.f. Applicant denied owing this debt for \$142 in regards to utility service to the house that was foreclosed upon. She states that the utility was properly informed when Applicant surrendered the house after the foreclosure and moved out. The credit report submitted by Applicant states, "Acct info disputed by consumer." (Applicant Exhibit B at 33; Tr. 58-60.) This debt is unresolved, but under dispute.

1.g. Applicant denied owing this debt for \$194 in regards to utility service to the house that was foreclosed upon. She states that the utility was properly informed when Applicant surrendered the house after the foreclosure and moved out. The credit report submitted by Applicant states, "Acct info disputed by consumer." (Applicant Exhibit B at 33; Tr. 58-60.) This debt is unresolved, but under dispute.

1.h. Applicant denies owing \$453 for a delinquent medical debt. She testified that the account is fraudulent since, "I have never used that hospital." She also states that the account has been removed from her credit report. The February 27, 2013 credit report states, "Delinquency due to disputed billing procedures." The debt does not appear on the most recent credit report in the file. (Government Exhibits 3, and 6; Applicant Exhibit B at 34; Tr. 60.) This debt is unresolved, but under dispute.

1.i and 1.c. Applicant and her husband had a first mortgage and a HELOC concerning their house. They were able to maintain payments on the house until she was laid off from her job and the birth of her son, who is severely handicapped. They attempted to work out a loan modification with the lender, who held both the mortgage and the HELOC. The modification was unsuccessful and the house was foreclosed upon by the mortgage holder on December 8, 2010. Applicant and her husband

received a Form 1099 concerning this transaction, which they appropriately submitted with their 2010 tax return. Applicant and her husband retained an attorney concerning the bank's activities with this property. He advised them that if they were contacted by the bank about the HELOC not to pay anything and have the bank contact him. They have followed his advice. The bank has not been in contact with them. (Applicant Exhibit B at 5-24; Tr. 37-47.)

Applicant testified that her current financial situation is stable. She testified, "At this point in our life, we are making it. We are paying our bills and everything." (Tr. 50.) She also submitted documentation showing that a collection agency had responded to a dispute concerning a debt not alleged in the SOR by closing the account. (Applicant Exhibit B at 30.)

A retired US Air Force chaplain wrote a letter of recommendation for Applicant. He states that she is "a highly professional, trustworthy individual." (Applicant Exhibit B at 2.)

Policies

Positions designated as ADP I, ADP II, and ADP II are classified as "sensitive positions." (See DoD Regulation 5200.2-R (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 the DoD and DOHA by the Defense Security Service and Office of Personnel Management. 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 access to a sensitive position, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to a sensitive position.

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 AG ¶ 2(a) describing the adjudicative process. The administrative judge's over-arching 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 the applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining a favorable access decision.

A person who seeks access to a sensitive position 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 that 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 10865 provides that adverse 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 *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

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

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.

The guideline notes several conditions that could raise trustworthiness concerns and could potentially apply in this case. Under AG ¶ 19(a), “an inability or unwillingness

to satisfy debts,” is potentially disqualifying. Similarly, under AG ¶ 19(c), “a history of not meeting financial obligations,” may raise trustworthiness concerns. I find that both of these disqualifying conditions apply to Applicant in this case. The evidence has established that Applicant accumulated significant delinquent debt over the past decade, which she has been unable or unwilling to pay.

AG ¶ 20 provides conditions that could mitigate trustworthiness concerns from financial difficulties. AG ¶ 20(a) states it may be mitigating when, “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.” Furthermore, under AG ¶ 20(b), it may be mitigating where, “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.” Here, Applicant’s financial difficulties were primarily caused by two incidents, the fact she suffered from identity theft and the two years she was off work after the lay off in 2006. She was pro-active in contacting the credit bureaus about the identity theft, and some of her alleged creditors have been responsive in answering her disputes. With regards to the other debts, including her mortgage and the HELOC, it is clear that she did the best she could under the circumstances.

AG ¶ 20(c) states it may be mitigating where “there are clear indications that the problem is being resolved or is under control.” In addition, AG ¶ 20(d) states it may be mitigating where “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Finally, AG ¶ 20(e) finds it mitigating where “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.” These three conditions are also applicable to Applicant’s case. Applicant’s current financial situation is stable. She is able to pay her monthly debts and is not getting further into debt. She has shown repeated efforts to obtain necessary information from creditors, has properly disputed debts to the credit reporting bureaus and directly to creditors, has filed extended fraud alerts with the credit reporting bureaus, and also filed a police report.

Applicant has not resolved the HELOC. However, that fact is not dispositive in this case. The bank that held both the mortgage and the HELOC chose to foreclose under the first deed of trust. They have not been in communication with Applicant for several years, and she testified credibly that she would pay this debt if requested. Under the particular circumstances of this case, her conduct has mitigate the trustworthiness concerns raised by her financial situation. Guideline F is found for Applicant.

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.

Under AG ¶ 2 (c), the ultimate determination of whether to grant eligibility for access to a sensitive position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. My discussion under Guideline F applies here as well. Applicant has submitted sufficient information to show that she will not get into financial difficulties again. She has done the best she could under difficult circumstances. There is significant evidence of rehabilitation and permanent behavioral changes under AG ¶ 2(a)(6). I find little to no potential for coercion or duress under AG ¶ 2(a)(8); nor is there a likelihood of recurrence (AG ¶ 2(a)(9)). In conclusion, I have no significant questions or doubts as to Applicant's eligibility and suitability to occupy a sensitive position. For all these reasons, I conclude Applicant has mitigated the trustworthiness concerns under the whole-person concept.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:

FOR APPLICANT

Subparagraphs 1.a through 1.i:

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 to occupy a designated ADP I/II/III sensitive position. Eligibility for access to sensitive information is granted.

Wilford H. Ross
Administrative Judge