



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ADP Case No. 14-02573
)
Applicant for Public Trust Position)

Appearances

For Government: Gina L. Marine, Esq., Department Counsel
For Applicant: *Pro se*

06/26/2015

Decision

TUIDER, Robert J., Administrative Judge:

Applicant’s statement of reasons (SOR) alleges 14 delinquent debts, totaling \$20,995. She failed to provide sufficient documentation of her progress resolving her financial problems. Financial considerations concerns are not mitigated. Her eligibility to occupy a public trust position is denied.

Statement of the Case

On January 31, 2013, Applicant submitted a Questionnaire for National Security Positions version of an application for a public trust position (SF 86). (Item 4) On July 24, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an 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 Jan. 1987, as amended (Regulation); and the adjudicative guidelines (AG), which became effective on September 1, 2006.

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 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)

The DOD CAF recommended referral to an administrative judge to determine whether access to sensitive information should be granted, continued, denied, or revoked.

On August 26, 2014, Applicant responded to the SOR allegations, and she did not request a hearing. (Item 3) A complete copy of the file of relevant material (FORM), dated February 13, 2015, was provided to her on March 12, 2015.¹ Applicant submitted information within the time period of 30 days after receipt of copy of the FORM. By memorandum dated May 4, 2015, Department Counsel did not object to Applicant's post-FORM submissions. The case was assigned to me on May 15, 2015.

Findings of Fact

In her Answer to the SOR, Applicant admitted all of the SOR allegations except SOR ¶ 1.h She also provided mitigating information. (Item 3) Her admissions are accepted as findings of fact.

Applicant is a 30-year-old claims processor employed by a defense contractor since March 2013. She graduated from high school in May 2004. Applicant has never married and has a nine-year-old daughter. She has never served in the military. There is no evidence of felony or misdemeanor charges, alcohol abuse, or use of illegal drugs. There is no evidence of security or rule violations. (Items 4, 5)

From September 2004 to December 2004, Applicant was employed as a machine operator. From December 2004 to December 2006, she was unemployed. From December 2006 to June 2007, Applicant was employed as a claims analyst. From June 2007 to December 2007, she was unemployed. From December 2007 to November 2008, Applicant was employed as a document filer. From November 2008 to November 2009, she was unemployed. From November 2009 to July 2011, Applicant was employed as a customer service representative. From July 2011 to April 2012, she was employed as a loan processor. From April 2012 to March 2013, Applicant was unemployed. She received unemployment benefits during her last three period of unemployment. (Items 4, 5)

Financial Considerations

Applicant's SOR alleges a total of 14 debts -- 13 delinquent medical debts and 1 non-medical debt (SOR ¶ 1.h), totaling \$20,995. The allegations are summarized as follows: SOR ¶ 1.a (\$161), ¶ 1.b (\$14,215), ¶ 1.c (\$908), ¶ 1.d (\$160), ¶ 1.e (\$520), ¶ 1.f (\$598), ¶ 1.g (\$160), ¶ 1.h collection account non-medical debt (\$136); ¶ 1.i (\$2,266), ¶ 1.j (\$240), ¶ 1.k (\$210); ¶ 1.l (\$1,001); ¶ 1.m (\$230); and ¶ 1.n (\$190).

¹The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated February 25, 2015, and Applicant's receipt is dated March 12, 2015. The DOHA transmittal letter informed Applicant that she had 30 days after her receipt to submit information.

Applicant attributes her financial problems to transportation and medical expenses associated with severe injuries she sustained in an automobile accident “in 2006 or 2007.” She did not have health care insurance at the time of the accident and as a result accrued the medical bills listed in her SOR. Applicant has not been able to pay these bills as a result of gaps in employment and multiple periods of unemployment. (Item 5) She stated in her April 9, 2013 Office of Personal Management Personal Subject Interview (OPM PSI) that she knew she was responsible for these debts and would contact her creditors as necessary and set up payment plans. (Item 5)

In her SOR answer, Applicant provided a document from a medical creditor that she would be making \$40 monthly payments on a \$320 balance. Department Counsel correctly pointed out in her FORM that this was insufficient evidence to establish a payment plan on her \$20,859 total debt. (Item 3) In her FORM response, Applicant did provide recent documentation that she paid the non-medical debt in SOR ¶ 1.h for \$136, and three medical debts in SOR ¶¶ 1.d (\$160), 1.g (\$160), and 1.k (\$210). (FORM response)

However, with regard to the remaining medical debts, Applicant’s documentation falls short of the mark. She provided a self-prepared typed statement listing each SOR debt stating that she agreed to pay \$40 a month for the remaining unpaid medical debts. Her unannotated documentation does not support her assertion that she has an approved \$40 monthly payment plan in place to address her remaining balance. (FORM response) There is no evidence of financial counseling.

The FORM advised Applicant that she had 30 days “to submit documentary information in rebuttal or to explain adverse information in the FORM.” (FORM at 7) The February 25, 2015 DOHA letter conveying the FORM to Applicant reiterated that Applicant had a 30-day opportunity to submit evidence supporting her approval or continuation of access to sensitive information.

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." Applicant's SOR and credit reports allege 14 delinquent debts.

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).

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).

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

Applicant's conduct in resolving her delinquent debt does not warrant full application of any mitigating conditions except for the debts in SOR ¶¶ 1.d, 1.g, 1.h, and 1.k. With regard to those debts, AG ¶ 20(d) is applies.

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].

(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)).

Applicant's 2006 to 2007 accident is a circumstance beyond her control. She also sustained several periods of unemployment for which she received unemployment compensation. These are circumstances largely beyond her control that adversely affected her finances; however, Applicant did not act responsibly under the circumstances. She received ample notice of her delinquent debts raising trustworthiness concerns. She did not provide sufficient information about her finances to establish her inability to make greater progress paying her SOR creditors. There is no record evidence of financial counseling.

There is limited financial documentation relating to her showing maintenance of contact with SOR creditors,³ establishment of payment plans, disputes of debts, payments to creditors, or other evidence of progress or resolution of her SOR debts. There is insufficient evidence that her financial problems are being resolved, are under control, and will not occur in the future. Financial considerations concerns are not mitigated.

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 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.

There is some evidence supporting approval of Applicant's clearance. Applicant is a 30-year-old claims processor employed by a defense contractor since May 2013.

³Even 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.

Some circumstances beyond her control adversely affected her finances, including her 2006 to 2007 automobile accident and periods of unemployment. She is a single parent. Applicant is credited with mitigating the debts in SOR ¶¶ 1.d, 1.g, 1.h, and 1.k. There is no evidence of felony or misdemeanor charges, alcohol abuse, use of illegal drugs, or of rule violations. She contributes to her company and the Department of Defense.

The financial evidence against approval of Applicant's clearance is more substantial at this time. Applicant has a history of financial problems. Applicant's credit reports and SOR allege 14 delinquent debts totaling \$20,995. As a result of mitigating four debts, she has modestly reduced that amount. She failed to provide sufficient documentation of her progress resolving her financial problems, which shows lack of financial responsibility and judgment and raises unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect sensitive information. See AG ¶ 18. More financial progress is necessary to mitigate trustworthiness concerns.

It is well settled that once a concern arises regarding an applicant's eligibility for a public trust position, there is a strong presumption against the grant or renewal of a public trust position. Unmitigated financial considerations concerns lead me to conclude that grant or reinstatement of a public trust position to Applicant is not warranted at this time.

In requesting a decision without a hearing, Applicant chose to rely on the written record. In so doing, however, she failed to submit sufficient information or 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 limited explanation without sufficient corroborating evidence, financial considerations security concerns remain.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary to justify the award of a security clearance in the future. With more effort towards documented resolution of her past-due debts, and a track record of behavior consistent with her obligations, she may well be able to demonstrate persuasive evidence of her security clearance worthiness

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations concerns are not mitigated. For the reasons stated, I conclude Applicant is not eligible for access to classified information at this time.

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.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraphs 1.e - 1.f:	Against Applicant
Subparagraphs 1.g – 1.h:	For Applicant
Subparagraphs 1.i – 1.j:	Against Applicant
Subparagraph 1.k:	For Applicant
Subparagraphs 1.l – 1.n:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Robert J. Tuider
Administrative Judge