



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 14-02699

Appearances

For Government: Ray T. Blank, Jr., Esq., Department Counsel
For Applicant: *Pro se*

03/20/2015

Decision

Harvey, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges a bankruptcy, three delinquent collection debts, and a state tax lien totaling \$17,752. On June 27, 2014, her husband satisfied the state tax lien for \$16,371, which constituted 92 percent of their delinquent SOR debt. She and her husband have three remaining SOR debts totaling \$1,381 to resolve. Her debts resulted from unemployment, underemployment, and medical problems. She promised to pay her SOR debts when her financial circumstances improve. She has a track record of paying her current debts and expenses. Financial considerations concerns are mitigated. Eligibility for a public trust position is granted.

Statement of the Case

On March 6, 2013, Applicant signed an Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (Item 4) On August 1, 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; DOD Regulation 5200.2-R, *Personnel Security Program*, dated January 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). (HE 2) The SOR detailed reasons why the DOD Consolidated Adjudications Facility (CAF) was unable to find that it is clearly consistent with national security to grant or continue Applicant's eligibility to occupy a public trust position, which entails access to sensitive information. (HE 2) The DOD CAF recommended referral to an administrative judge to determine whether such access to sensitive information should be granted, continued, denied, or revoked. (Item 1)

On August 28, 2014, Applicant responded to the SOR allegations and waived her right to a hearing. (Item 2) A complete copy of the file of relevant material (FORM), dated December 15, 2014, was provided to her on January 7, 2015. Applicant did not respond to the FORM. The case was assigned to me on March 12, 2015.

Findings of Fact¹

In her Answer to the SOR, Applicant admitted the SOR allegations and provided mitigating information. (Item 2) Her admissions are accepted as findings of fact.

Applicant is a 45-year-old medical-referral specialist, who has been working with medical records since February 2013.² She was unemployed from July to December 2012. Otherwise, she was employed from 1999 to present. She has never served in the military. She married in 1990, and she has five children, who were born in 1985, 1987, 1992, 1994, and 1997. She graduated from high school in 1990, and she has taken some college courses. (Item 8) There is no evidence of reportable criminal offenses, alcohol or drug abuse, or violations of her employment rules.

Financial Considerations

Applicant's history of delinquent debt is documented in her March 6, 2013 SF 86, three credit reports, SOR response, and FORM response. (Items 2, 4-7) Her SOR alleges a bankruptcy in 2007, three delinquent collection debts, and a state tax lien totaling \$17,752. On June 27, 2014, her husband paid the state tax lien for \$16,371, and she and her husband have three debts totaling \$1,381 to resolve.

In 2007, Applicant and her husband's debts were discharged under Chapter 7 of the Bankruptcy Code. About \$10,000 in debt was discharged. (Item 8) Applicant's husband failed to file their state income tax return in 2003. (Item 4) On March 13, 2009, the state obtained a judgment and lien and began garnishing \$1,200 monthly from her husband's pay. (Items 2, 4) She has not had formal credit counseling. The state filed a lien satisfaction debt on June 27, 2014. (Item 2) Applicant and her husband paid some non-SOR debts. (Items 5-6, 8)

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

² Unless stated otherwise, the facts in this paragraph are from Applicant's March 6, 2013 Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (Item 4)

Applicant explained she is “currently in the process of paying” the credit card debts in SOR ¶¶ 1.c (\$614) and 1.d (\$518) “to show [her] responsibility and trustworthiness.” (Items 2, 8) She was unaware of the medical debt in SOR ¶ 1.e (\$249); however, she promised to diligently seek to resolve it. (Item 2)

Applicant was unable to work for more than a month in the last half of 2014 because of “a near stroke.”³ She lost pay and had medical bills to address. Her medical problems have delayed her resolution of some of her debts. She enjoys her work and assisting military personnel and their families with their medical issues. She promised to continue to work on her outstanding SOR debts and to maintain and establish her financial responsibility. She has a good work record with her current employer; she has received extensive training from her employer, and she believes she is an asset to the DOD contractor.

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.

A person who seeks access to sensitive information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This

³ The facts in the paragraph are from Applicant’s February 11, 2015 FORM response.

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).

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.”

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 SF 86, credit reports, SOR response, and FORM response. Applicant’s SOR alleges a bankruptcy, three delinquent collection debts, and a state tax lien totaling \$17,752. 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;⁴ and

⁴The 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)).

(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(a) to 20(c) are applicable. Resolution of Applicant's SOR debts has been delayed by unemployment, underemployment, and Applicant's medical problems. Applicant's husband paid their state tax debt through wage garnishment.⁵ On June 27, 2014, her husband satisfied the state tax lien for \$16,371, which constituted 92 percent of their delinquent SOR debt. She and her husband have three remaining SOR debts totaling \$1,381 to resolve. She and her husband paid some non-SOR debts. Applicant did not provide evidence that she established and maintained contact with some of her creditors.⁶

In ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009) the Appeal Board addressed a situation where an applicant, who had been sporadically unemployed and lacked the ability to pay his creditors, noting that "it will be a long time at best before he

⁵Of course, Applicant loses some mitigating credit because her and her husband's state tax debt payments were made through garnishment of her husband's salary even though her opportunity to establish a payment plan was limited because of her limited income and other financial commitments. Payment of a debt "through garnishment rather than a voluntary effort diminishes its mitigating force." Compare ISCR Case No. 08-06058 at 4 (App. Bd. Aug. 26, 2010) with ISCR Case No. 04-07360 at 2-3 (App. Bd. Sept. 26, 2006) (payment of two of four debts through garnishment did not bar mitigation of financial considerations concerns).

⁶"Even 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.

has paid” all of his creditors. The applicant was living on unemployment compensation at the time of his hearing. The Appeal Board explained that such a circumstance was 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 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). The applicant in ISCR Case No. 08-06567 used his limited resources to (1) resolve some of his debts; (2) had a repayment plan for the remaining debts; and (3) took “reasonable actions to effectuate that plan.” *Id.* The Appeal Board remanded the Administrative Judge’s decision because it did not “articulate a satisfactory explanation for his conclusions,” emphasizing the Administrative Judge did “not explain[] what he believes that applicant could or should have done under the circumstances that he has not already done to rectify his poor financial condition, or why the approach taken by applicant was not ‘responsible’ in light of his limited circumstances.” *Id.*

Applicant has not accrued any new delinquent debt since obtaining her present employment in 2013. Her illness, loss of employment, and underemployment are circumstances largely beyond her control. She understands what she must do to establish and maintain her financial responsibility.⁷ Applicant admitted responsibility for and took reasonable and responsible actions to resolve as much of her debts as was possible based on her circumstances. There are clear indications the problem is being resolved and is under control. 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

⁷The 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)).

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 medical-referral specialist, who has been working with medical records since February 2013. She graduated from high school in 1990, and she has taken some college courses. There is no evidence of reportable criminal offenses, alcohol or drug abuse, or violations of her employment 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 with admitting responsibility for her delinquent debts on her SF 86. On June 27, 2014, her husband satisfied the state tax lien for \$16,371. She and her husband have three remaining SOR debts totaling \$1,381 to resolve. Her illness, loss of employment, and underemployment contributed to her financial problems. These are all circumstances largely beyond her control. 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 understands what she needs to do to establish and maintain her financial responsibility. She has paid or kept current all of the debts that have occurred while she has been employed. Her husband paid their delinquent state tax debt. She took reasonable actions under her particular financial circumstances to address her delinquent debts. Her overall history shows a “meaningful track record” of debt repayment. I am confident she will continue her establishment and maintenance of her financial responsibility, and pay her last three SOR debts when she is able to do so.⁸

I have carefully applied the law, as set forth in 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.e:	For Applicant

Conclusion

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

Mark Harvey
Administrative Judge

⁸Of course, the Government may 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.