



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



In the matter of:)	
)	
SSN:)	ADP Case No. 08-06395
)	
Applicant for Public Trust Position)	

Appearances

For Government: Jennifer I. Goldstein, Esquire, Department Counsel
For Applicant: *Pro se*

May 19, 2010

Decision

RIVERA, Juan J., Administrative Judge:

Applicant failed to mitigate the trustworthiness concerns based on financial considerations. Applicant's eligibility to occupy an ADP I/II/III position is denied.

Statement of the Case

On October 12, 2007, Applicant submitted a Questionnaire for Public Trust Positions (SF 85P). On May 11, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to her, detailing the basis for its preliminary decision to deny Applicant eligibility for a public trust position, citing trustworthiness concerns under Guideline F (Financial Considerations). The action was taken under Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DoD Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with national security to grant Applicant eligibility to occupy an automated data processing (ADP) position, and it recommended referral to an administrative judge to determine Applicant's eligibility for an ADP position.

On September 2, 2009, Applicant responded to the SOR allegations. She elected to have her case decided on the written record in lieu of a hearing (Item 3). A complete copy of the file of relevant material (FORM), dated October 21, 2009, was provided to her by letter dated October 27, 2009. She received the FORM on November 10, 2009. She did not respond to the FORM and submitted no material in refutation, extenuation, and mitigation. The case was assigned to me on January 19, 2010.

Findings of Fact

Applicant admitted the 42 SOR allegations. Her admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, and having considered Applicant's answer to the SOR and her answers to DOHA interrogatories, I make the following additional findings of fact.

Applicant is 27 years old. She has worked in an ADP position for a defense contractor since October 2006. Her current employer is sponsoring Applicant for a public trust position. She received her General Educational Development (GED) certificate in June 2001, and attended college during 2005-2006, but has not completed a degree. She married in early 2008. She has two children, ages nine and three.

Applicant's security clearance application shows she was employed from January 2002 until June 2005 (cashier and customer service representative); from August 2005 until October 2006 (financial advisor at a university); and since October 2006 with her current employer. She was unemployed from October 2001 to January 2002, from June 2005 to August 2005, and from April 2006 to October 2006.

In her October 2007 public trust position application, Applicant disclosed many of the delinquent debts alleged in the SOR. Her background investigation addressed her financial problems. Applicant's April 2008 personal subject interviews show she was forthcoming with the investigator, admitting many of her delinquent debts and explaining her financial situation. At her interview, Applicant stated she did not have the financial means to pay her delinquent debts, but that she had recently married and with the additional income she was hoping to make some progress paying her debts. She promised to seek assistance from a credit counseling organization. She admitted she was embarrassed by her financial situation, but stated her credit situation could not be used to blackmail her.

In her response to the SOR, Applicant admitted all 42 delinquent debts alleged in the SOR totaling \$20,000. These debts are unresolved. In general, the delinquent debts include a repossessed car, delinquent credit accounts, retailer accounts, utilities,

numerous telephone service accounts, student loans, and 28 delinquent medical accounts.

In September 2009, Applicant wrote a letter to DOHA stating that she had started taking the necessary steps to repair her credit. She indicated that her student loans were no longer in default, that she was paying \$275 monthly toward her student loans, and started school again. She explained she intended to address her medical bills next, make contact with other creditors, and attempt to settle some of her delinquent debts. She averred she now understood the importance of having good credit.

In October 2009, DOHA asked Applicant to document her efforts to resolve her delinquent debts with evidence of payments, settlements, or contact with creditors. In her response, Applicant stated: "I did not provide documentation because at this time I can not afford to make any payments towards this debt because of financial problems." (Item 6)

Applicant presented little evidence of paid debts, negotiations, or of any reasonable effort to resolve her delinquent debts before or after she was issued the SOR. A government investigator confronted her concerning his financial problems in April 2008. She promised to address her delinquent debts, and has failed to show reasonable efforts to fulfill her promises.

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 that "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 controlling 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 classified 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. 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 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."

Analysis

Guideline F, Financial Considerations

Under Guideline F, the trustworthiness concern is that 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 ¶ 18.

Applicant's history of delinquent debt is well documented. She admitted all 42 delinquent debts alleged in the SOR totaling \$20,000, most of which have been delinquent for many years. She presented no evidence of paid debts, negotiations, or other efforts to resolve her delinquent debts before or after she was issued the SOR. AG ¶ 19(a): "inability or unwillingness to satisfy debts;" and AG ¶ 19(c): "a history of not meeting financial obligations," apply.

AG ¶ 20 lists six conditions that could mitigate the financial considerations trustworthiness concerns:

(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;

(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; and

(f) the affluence resulted from a legal source of income.

Applicant established some circumstances beyond her control contributing to her inability to pay her taxes, i.e., her periods of unemployment and being a single mother of two. Notwithstanding, none of the mitigating conditions fully apply. Applicant's behavior is recent because all of her debts are unresolved. The evidence is not sufficient to fully raise circumstances beyond her control, that she received financial counseling, that she made good-faith efforts to resolve any of her outstanding delinquent debts, or that she had a reasonable basis to dispute the legitimacy of her delinquent debts.

Considering the evidence as a whole, her failure to show diligence and efforts to resolve her financial obligations shows lack of judgment or unwillingness to abide by rules and regulations. Her behavior cast doubt on her reliability, trustworthiness, and judgment.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance 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 eligibility for a security clearance or 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature woman, and a good mother. She has been successfully working for a government contractor for close to three years. There is no evidence of any security violation, or that she is not a competent worker. These factors show some responsibility and mitigation.

On the other hand, there are more substantial circumstances that weigh against Applicant in the whole-person analysis. Applicant has been fully employed since October 2006. She presented no evidence of paid debts, negotiations, or other efforts to resolve her delinquent debts even after she was issued the SOR. A government investigator confronted her concerning her financial problems in April 2008. She promised to address her delinquent debts, and she failed to show any reasonable effort to accomplish her promises.

Considering the record as a whole, Applicant's financial behavior raises doubt about her ability to have access to sensitive information and her trustworthiness. For all these reasons, I conclude Applicant failed to mitigate the trustworthiness concerns arising from her financial considerations.

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.pp:

Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with national security to grant or continue Applicant's eligibility to occupy an ADP I/II/III position. Applicant's eligibility to occupy an ADP I/II/III position is denied.

JUAN J. RIVERA
Administrative Judge