



**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. 14-06209

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel

For Applicant: *Pro se*

06/22/2017

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to deny her eligibility for a public trust position. Applicant did not present sufficient evidence to explain, extenuate, or mitigate the trustworthiness concern stemming from her problematic financial condition. Nor did she did mitigate the security concern raised by her personal conduct. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on March 31, 2014. On March 27, 2015, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent Applicant a statement of reasons (SOR), detailing trustworthiness concerns under Guideline F for financial considerations and Guideline E for personal conduct.¹ The SOR is similar to a

¹ This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). In addition, Security Executive Agent Directive (SEAD) 4, *National Security Adjudication Guidelines* (AG), effective within the Defense Department on June 8, 2017, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2016). In this case, the SOR was issued under

complaint in a civil court case. It detailed the factual reasons for the action under the security guidelines known as Guideline F for financial considerations and Guideline E for personal conduct. Applicant answered the SOR via fax dated June 24, 2015, and she answered the Guideline E allegation via email on June 16, 2016. She requested a decision based on the written record without a hearing.

On July 20, 2016, Department Counsel submitted a file of relevant and material information (FORM).² Included in the FORM were seven items of evidence, items four through seven of which are marked as Government Exhibits 1 through 4.³ Exhibits 1, 2, and 4 are admitted into evidence. Exhibit 3 is discussed below. The FORM was mailed to Applicant on the same day, and Applicant received it on August 1, 2016. Applicant's response to the FORM was due on June 30, 2016. Applicant did not respond to the FORM. The case was assigned to me on June 1, 2017.

Procedural Matters

The FORM includes Exhibit 3, which is a report of investigation (ROI) summarizing Applicant's interview that took place during the May 2014 background investigation. The ROI is not authenticated as required under ¶ E3.1.20 of the Directive.⁴ Department Counsel's written brief includes a footnote advising Applicant that the summary was not authenticated and that failure to object may constitute a waiver of the authentication requirement. Nevertheless, I am not persuaded that a *pro se* applicant's failure to respond to the FORM, which response is optional, equates to a knowing and voluntary waiver of the authentication requirement. The record does not demonstrate that Applicant understood the concepts of authentication, waiver, and admissibility. It also does not demonstrate that she understood the implications of waiving an objection to the admissibility of the ROI. Accordingly, Exhibit 3 is inadmissible, and I have not considered the information in the ROI.

Adjudicative Guidelines effective within the Defense Department on September 1, 2006. My Decision and Formal Findings under the revised Guidelines F and E would not be different under the 2006 Guidelines.

² The file of relevant material consists of Department Counsel's written brief and supporting documentation, some of which are identified as evidentiary exhibits in this decision.

³ Items one through three are the SOR, the SOR transmittal letter, and Applicant's answer, respectively. Because the SOR and Applicant's answer are the pleadings in this case, they are not marked as exhibits. The transmittal letter has no substantive value and, therefore, is not marked as an exhibit.

⁴ See *generally* ISCR Case No. 12-10933 (App. Bd. Jun. 29, 2016) (In a concurring opinion, Judge Ra'anan notes the historical concern about reports of investigation in that they were considered by some to present a heightened problem in providing due process. Judge Ra'anan raises a number of pertinent questions about using an unauthenticated ROI in a non-hearing case with a *pro se* applicant.).

Findings of Fact

Applicant is 30 years old and a high school graduate with some college credits. She has never been married and has three children. Since August 2013, she has worked for a health-care contractor to the Defense Department.⁵ Applicant is seeking to obtain eligibility to occupy a position of public trust for her current job responsibilities. Eligibility is necessary, because her job involves access to sensitive but unclassified information. This was Applicant's first security clearance application.⁶

Under Guideline F, the SOR alleged 14 delinquent debts totaling approximately \$21,221.⁷ Under Guideline E, the SOR alleged that Applicant failed to disclose those delinquent debts in her SF 86. Applicant's answer to the SOR admitted all of those delinquencies.⁸ Applicant admitted the Guideline E allegation.⁹ Applicant did not disclose her delinquent debts in her SF 86.¹⁰

Policies

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."

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 to obtain a favorable trustworthiness decision.

⁵ Exhibit 1.

⁶ Exhibit 1.

⁷ SOR ¶¶ 1.a-m.

⁸ Answer ¶¶ 1.a-m.

⁹ FORM Item 3.

¹⁰ Exhibit 1.

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 safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Discussion

Guideline F – Financial

Under Guideline F for financial considerations,¹¹ the suitability of an applicant may be questioned or put into doubt when that applicant has a history of excessive indebtedness or financial problems or difficulties. The overall concern is:

Failure 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 or sensitive information.¹²

The concern is broader than the possibility that a person might knowingly compromise classified information to obtain money or something else of value. It encompasses concerns about a person's self-control, judgment, and other important qualities. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information.

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions or factors:

AG ¶ 19(a) inability to satisfy debts;

AG ¶ 19(c) a history of not meeting financial obligations;

AG ¶ 20(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;

¹¹ AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

¹² AG ¶ 18.

AG ¶ 20(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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

AG ¶ 20(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

AG ¶ 20(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and,

AG ¶ 20(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 evidence supports a conclusion that Applicant has a problematic financial condition sufficient to raise a trustworthiness concern under Guideline F. She appears to be unable to satisfy her debts, and she has a history of not meeting her financial obligations. Therefore, AG ¶¶ 19(a) and (c) apply.

I have considered mitigating conditions AG ¶¶ 20(a) through (e). The Government contends that the facts do not support those mitigating conditions.¹³ I concur. Applicant has not mitigated the security concern under Guideline F.

Guideline E – Personal Conduct

Under Guideline E for personal conduct, the concern is that “[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified or sensitive information.”¹⁴ A statement is false or dishonest when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if, for example, the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, reasonably did not know the information, or genuinely thought the information did not need to be reported.

In assessing an allegation of falsification, I consider not only the allegation and applicant’s answer but all relevant circumstances.¹⁵ Here, the SOR alleged that Applicant

¹³ Government Brief, pp. 5-6.

¹⁴ AG ¶ 15.

¹⁵ AG ¶¶ 2(a) and (d)(1)-(9) (explaining the “whole-person” concept and factors).

“falsified material facts” when she “failed to disclose” her delinquent debts in her security clearance application. Applicant admitted that allegation. The SOR did not, however, allege that Applicant’s failure to disclose was knowing, willful, deliberate, or intentional, states of mind that are sanctioned by 18 U.S.C.1001. Therefore, although I find that Applicant did fail to disclose her delinquent debts, the record does not support a finding that she did so knowingly, willfully, deliberately, or intentionally, especially since this was Applicant’s first experience with the security clearance process.

Conclusion

The record creates doubt about Applicant’s trustworthiness, good judgment, and ability to protect sensitive information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also considered the “whole-person” concept.¹⁶ Accordingly, I conclude that Applicant did not meet her ultimate burden of persuasion to show that it is clearly consistent with the interests of national security to grant her eligibility for access to sensitive information.

Formal Findings

The formal findings on the SOR allegations are:

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|---------------------------|-------------------|
| Paragraph 1, Guideline F: | Against Applicant |
| Subparagraph 1.a - m: | Against Applicant |
| Paragraph 2, Guideline E | Against Applicant |
| Subparagraph 2.a. | Against Applicant |

In light of the record as a whole, it is not clearly consistent with the interest of national security to grant Applicant eligibility for access to sensitive information.

Philip J. Katauskas
Administrative Judge

¹⁶ AG ¶¶ 2(a) and (d)(1)-(9).