



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



In the matter of:)
)
) ADP Case No. 14-06959
)
)
Applicant for Public Trust Position)

Appearances

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

04/28/2017

Decision

TUIDER, Robert, Administrative Judge:

Applicant failed to mitigate public trust concerns regarding Guidelines F (financial considerations) and E (personal conduct). Her eligibility to occupy a public trust position is denied.

Statement of the Case

On May 6, 2013, Applicant submitted a Questionnaire for National Security Positions (SF-86). On December 30, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, under Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleges trustworthiness concerns under Guidelines F and E. The SOR detailed reasons why DOD CAF 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. The DOD CAF recommended referral to an administrative judge to determine whether access to sensitive information should be granted, continued, denied, or revoked.

On February 24, 2016, Applicant responded to the SOR allegations and supplemented that response with e-mails dated March 28, 2016 and March 20, 2016, and she did not request a hearing. A complete copy of the file of relevant material (FORM), dated April 20, 2016, was provided to her on that same day.¹ Applicant did not respond to the FORM. The case was assigned to me on April 6, 2017.

Findings of Fact

Applicant neither admitted nor denied her SOR allegations, but rather claimed that the majority of “these debts” were accrued “after” she certified her SF-86 in May 2013.

Background Information²

Applicant is a 32-year-old service representative employed by a defense contractor since July 2010. (Item 3) She graduated from high school in 2003, and attended two different colleges, but has not earned a degree. (Items 3, 4) Applicant married in June 2003 and separated in July 2003. Since separation, she has no idea of her estranged husband’s whereabouts. (Items 3, 4) Applicant did not list any dependents on her SF-86. (Item 3)

Financial Considerations

Applicant has 28 unresolved debts totaling approximately \$18,670, of which approximately \$12,539 is medical debt. (Items 5 – 7) Applicant stated that she has not paid her debts because she does not have the money and because she cares for her mother who is dependent on her. (Item 2) Additionally, Applicant’s most recent credit report reveals new delinquent debt. (Item 7) There are eight new medical collection accounts and several past due accounts in varying amounts. (Item 7)

Applicant has been employed full-time with her current employer since July 2010. (Item 3) As of May 2013, she claimed that she was capable of meeting her financial obligations despite the fact she lives “paycheck to paycheck.” (Item 4) There are no specific details regarding what specifically impacted her ability to keep up with her payments, the costs associated with caring for her mother, and why she does not have the money to pay her debts as of at least February 2016. There are also no details in

¹The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated April 20, 2016, and Applicant’s receipt is dated April 29, 2016. The DOHA transmittal letter informed Applicant that she had 30 days after her receipt to submit information.

² The limited background information regarding Applicant was derived from the FORM and was the most current information available.

the record as to Applicant's efforts since her May 2013 Office of Personnel Management Personal Subject Interview (OPM PSI) to address her debts and, if none, the reason for the delay. There is also no information in the record as to how Applicant was able to fund her travel to the Dominican Republic and Haiti in June and July 2012. (Items 3 – 4)

The file lacks any evidence that Applicant paid, arranged to pay, settled, compromised, disputed, or otherwise resolved any of the delinquent SOR accounts. She did not describe financial counseling or present a budget. The record lacks corroborating or substantiating documentation and detailed explanations of the causes for her financial problems and other mitigating information. The FORM noted that Applicant had 30 days from the receipt of the FORM "in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. If you do not file any objections or submit any additional information . . . your case will be assigned to an Administrative Judge for a determination based solely on the evidence set forth in this FORM." (FORM)

Personal Conduct

When Applicant completed her May 2013 SF-86, she failed to list required information regarding past debts and did not otherwise notify the Government that she had any delinquent debts. (Item 3) Furthermore, during her May 2013 OPM PSI, when asked if she had any account placed in collection, Applicant indicated "No." (Item 4) Applicant claims that she was never asked for any payment nor received any delinquent notices in the mail for any of her medical visits. (Item 4) Applicant stated during that OPM PSI that she would "pull up her credit report and contact all of the creditors for each account to resolve any remaining balance." (Item 4)

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/Personal Conduct

The Government met its burden of production in support of the allegations in the SOR. The facts established raise a trustworthiness concern addressed, in relevant part, at AG ¶ 18 as follows:

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.

More specifically, available information requires application of the disqualifying conditions at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*); and 19(c) (*a history of not meeting financial obligations*). In response to the Government's information, it was incumbent on Applicant to produce information sufficient to refute or mitigate the facts established against her. She did not submit any documents in response to the SOR or the FORM. Applicant did not show that she had paid or otherwise resolved any of her delinquent debt. None of the mitigating conditions in AG ¶ 20 apply.

The Government also met its burden of production in support of the allegation under personal conduct. The facts established raise a trustworthiness concern addressed in relevant part, at AG ¶ 15 as follows:

Conduct 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

More specifically, available information requires application of the disqualifying condition at AG ¶ 16(a) (*deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*).

Applicant failed to list her debts as required on her SF-86. It is not credible that Applicant received no notices or phone calls on any of these accounts and was completely unaware of the state of her financial affairs when she completed her SF-86. An applicant's completion of a security clearance application is the initial step in requesting a public trust position and the investigative process is contingent upon the

honesty of the applicant. Applicant's explanation is not enough to overcome her willful misrepresentation of her true financial situation.³ She knowingly and deliberately chose not to disclose complete and accurate information regarding her financial history. None of the mitigating conditions in AG ¶ 17 apply.

In summary, Applicant did not mitigate the trustworthiness concerns raised by the Government's information. In addition to evaluating the facts and applying the appropriate adjudicative factors under Guidelines F and E, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant has been gainfully employed since July 2010, and she is presumed to be a mature, responsible citizen. Nonetheless, without other information suggesting her financial problems or falsification concerns are being addressed, doubts remain about her suitability for access to sensitive information. Protection of the national interest is the principal focus of these adjudications. According, those doubts must be resolved against the Applicant.

In requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, she failed to submit sufficient evidence to supplement the record with relevant and material facts regarding her circumstances, articulate her position, and mitigate the financial trustworthiness 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 an explanation lacking sufficient detail to fully establish mitigation, financial considerations trustworthiness concerns remain.

Formal Findings

The formal findings on the SOR are as follows:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a - 1.bb:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a:	Against Applicant

³The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

Conclusion

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

ROBERT TUIDER
Administrative Judge