



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



In the matter of:)
)
) ADP Case No.: 15-05692
)
)
Applicant for Public Trust Position)

Appearances

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

06/05/2017

Decision

TUIDER, Robert J., Administrative Judge:

This case involves trustworthiness concerns raised by Guideline F (financial considerations). Eligibility for a public trust position is denied.

Statement of the Case

On June 18, 2012, Applicant submitted an Electronic Questionnaires for Investigation Processing (e-QIP), seeking eligibility for a public trust position. On March 17, 2016, the Department of Defense (DOD) sent her a Statement of Reasons (SOR), citing trustworthiness concerns under Guideline F. DOD acted under 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* (January 1987), as amended (Regulation);¹ and the adjudicative guidelines (AG)

¹ On April 3, 2017, DOD Manual 5200.02, *Procedures for the DoD Personnel Security Program (PSP)*, (Manual) was published. It cancelled and incorporated the Regulation, but it did not include the provisions for ADP cases. ADP cases continue to be adjudicated in accordance with the Deputy Under Secretary of Defense's Memorandum for the Director, Defense Office of Hearings and Appeals, dated November 19, 2004.

implemented by DOD on September 1, 2006. The AG are codified in 32 C.F.R. § 154, Appendix H (2006), and they replace the guidelines in Appendix 8 of the Regulation.

On April 20, 2016, Applicant answered the SOR, and requested a hearing before an administrative judge. On June 30, 2016, Department Counsel was ready to proceed and the case was assigned to me on August 8, 2016. On September 29, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing scheduling the hearing on October 28, 2016. The hearing was held as scheduled.

At the hearing, the Government offered Government Exhibits (GE) 1 through 6, and Hearing Exhibit (HE) I, which were received in evidence without objection. Applicant testified, but did not present the testimony of any other witness. Applicant offered Applicant Exhibit (AE) A, a tabbed three-ring binder, which was received in evidence without objection. On November 7, 2016, DOHA received the hearing transcript (Tr.).

Findings of Fact

Of the 22 allegations under Guideline F, Applicant admitted eight of them -- SOR ¶¶ 1.a, 1.b, 1.c, 1.e, 1.g, 1.i, 1.j, and 1.l with explanations; and denied the remaining 14 allegations with explanations. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 55-year-old lead technical database administrator employed by a defense contractor since May 2012. She currently holds an interim position of public trust and seeks to upgrade that position to permanent to enhance her position within her company. (GE 1, Tr. 12-15)

Applicant graduated from high school in May 1979. She was awarded an associate's degree in June 1981, a bachelor's degree in May 1984, and an MBA in May 1989. She did not serve in the U.S. armed forces. (GE 1, Tr. 15-17, 19)

Applicant was married from August 1990 to February 2011, and that marriage ended by divorce. She has two adult children, a son and daughter from that marriage, who are both disabled and dependent on her for support. Her son is autistic, and her daughter has "high functioning autism with a severe case of ADHD and anxiety." (GE 1, Tr. 17-19)

Financial Considerations

The SOR contains 22 allegations, of which 20 are debts totaling approximately \$21,693. (Tr. 10) The remaining two allegations are bankruptcy filings – the first was a chapter 7 bankruptcy filed in January 2003 and discharged in February 2004; and the second was a chapter 13 bankruptcy filed in April 2010 and dismissed in November 2010, for failure to make payments. The SOR allegations were established through

Applicant's admissions and through the evidence presented. (SOR ¶¶ 1.a – 1.v; GE 1 – 6)

A review of the hearing transcript and accompanying evidence does not document any efforts by Applicant to repay, settle, dispute, or otherwise resolve any of the alleged debts. She claimed that she was making payment on several debts, but did not submit proof of any payments. Documented efforts would include items such as receipts, canceled checks, correspondence of payment arrangements, or anything demonstrating tangible steps to resolve alleged debts. (Tr. 19-85; GE 1 – 6; AE A) Applicant stated that she did not know where all of her paperwork was, because she had moved to a new home three weeks before her hearing. (Tr. 33)

During Applicant's August 13, 2012 Office of Personnel Management's Personal Subject Interview (OPM PSI), she stated that she would contact her creditors and make payment arrangements. (GE 2) In her April 20, 2016 SOR answer, she also stated that she would contact her creditors and make payment arrangements.

Applicant testified that she was unable to make satisfactory progress on her debts because of work demands and time required to care for her children. She stated that she works "60 to 70 hours a week" and had "a couple that squatted with me for two-and-a-half years saying they were going to take care of my kids, and didn't." (Tr. 38; AE A) She added that she moved into a new house in April 2016 and the couple moved her and followed her to her new home continuing to live in her house and "did nothing." (Tr. 38-39, 77-81; AE A) Applicant also discussed various medical and divorce-related issues that occurred in the 2010 to 2012 timeframe as well as relocating in 2012 to accept a job in a different state. (AE A) Applicant provided documentation that she was repaying an \$8,560.98 non-alleged state debt levied against her wages. (Tr. 87; AE A)

Applicant's annual income is \$116,000, and she receives \$586 in monthly child support from her former husband. Her net monthly check is \$6,200 because of "deductions." Applicant added that her former husband is not prompt on paying child support. (Tr. 39-40, 83-84) Applicant has been employed full-time since 2000 with "about a week of unemployment" in 2012. (Tr. 24) She "pay[s] the bills as they come in and try (sic) to live on the rest." Applicant "rarely" has any money left over after she pays her bills. (Tr. 41) Applicant has not sought financial counseling.

Character Evidence

Applicant submitted a reference letter from the owner of a Medicaid waiver provider agency, who corroborated Applicant's explanation regarding her financial situation. In particular, the owner discussed the recalcitrant couple, discussed above, who moved into Applicant's home and became a financial burden on Applicant. The owner also discussed Applicant's dedication to her children. Applicant submitted her 2016 employee performance review that documented solid performance. She also submitted numerous work-related e-mails that discussed her above average work performance and her contribution to the company. (AE A)

Policies

The Under Secretary of Defense's Memorandum of November 19, 2004, treats ADP positions as sensitive positions, and it entitles applicants for ADP positions to the procedural protections in the Directive before any final unfavorable access determination may be made. The standard set out in the Manual and the adjudicative guidelines assignment to sensitive duties is that 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. Manual ¶ 7.1a(2); AG ¶ 2.b.

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. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information.

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 an evaluation of the whole person. The 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.

The protection of the national security is the paramount consideration. Under AG ¶ 2(b), "[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security." The Government must present substantial evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. 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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). An applicant has the ultimate burden of demonstrating that it is clearly consistent with national security to grant or continue eligibility for access to sensitive information.

Analysis

Financial Considerations

The concern under this guideline is set out in AG ¶ 18:

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.

This concern is broader than the possibility that a person might knowingly compromise sensitive information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting sensitive information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding sensitive information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

The documentary evidence submitted at the hearing establishes two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations"). The following mitigating conditions under this guideline are potentially applicable:

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;

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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

AG ¶ 20(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;

AG ¶ 20(d): the individual initiated 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.

No mitigating conditions are established. Applicant's delinquent debts are recent, numerous. She provided no evidence of the circumstances under which the delinquencies were incurred. She has not sought or received financial counseling. Although, Applicant claimed to be working on or paying several debts, she provided no documentation to substantiate her claims. She has made no documented payments on her debts, except for the involuntary collection of her state debt. She disputed several debts, but she again provided no documentary evidence of the basis for her dispute. I am not unmindful of Applicant's situation with regard to her two adult disabled children

and the time she must dedicate to caring for them as well as the demands of her job. However, Applicant was put on notice that her finances had raised a public trust position concern as early as June 2012 when she completed her e-QIP and approximately two months later during her August 2012 OPM PSI. Approximately four years later, she received her March 2016 SOR. It is difficult to accept Applicant's explanation that in a four-year period, given her educational level, experience, and income, that she was unable to address her financial situation in a meaningful way.

Whole-Person Concept

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. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a public trust position by considering the totality of the applicant's conduct and all relevant circumstances. An 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.

I have incorporated my comments under Guideline F in my whole-person analysis and I have considered the factors in AG ¶ 2(a). After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the trustworthiness concerns raised by her delinquent debts. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with national security to continue her eligibility for a public trust position.

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

Subparagraph 1.a – 1.v: Against Applicant

Conc lusion

I conclude that is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for a public trust position is denied.

ROBERT J. TUIDER
Administrative Judge