



**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. 15-08393

Appearances

For Government: Andrea M. Corrales, Esq., Department Counsel

For Applicant: *Pro se*

04/04/2017

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke her eligibility for a public trust position. Applicant mitigated the trustworthiness concern based on her personal conduct. She did not, however present sufficient evidence to explain, extenuate, or mitigate the trustworthiness concern stemming from her problematic financial condition. 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 June 3, 2015. About ten months later on March 29, 2016, 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

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). Department of Defense Regulation 5200.2-R, *Personnel Security Program* (Jan. 1987), as amended

is similar to a complaint. Applicant answered the SOR on April 22, 2016, and requested a decision based on the written record without a hearing.

On May 19, 2016, Department Counsel submitted a file of relevant and material information (FORM).² Included in the FORM were five items of evidence, items one through four of which are admitted into evidence as Government Exhibits 1 through 4. The FORM was mailed to Applicant, who received it on May 31, 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 March 10, 2017.

Procedural Matters

The FORM includes Exhibit 5, which is a report of investigation (ROI) summarizing Applicant's interview that took place during the September 2015 background investigation. The ROI is not authenticated as required under ¶ E3.1.20 of the Directive.³ 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 5 is inadmissible, and I have not considered the information in the ROI.

Findings of Fact

Applicant is 46 years old and at the time of her SF 86 she had been employed since June 2014 as a customer service representative for a health-care contractor to the Defense Department. She has her high school equivalency and some community college credits. She has one grown son from her first marriage and two sons (19 and 15) from her current marriage. 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.

(Regulation. In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006).

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 See generally ISCR Case No. 12-10933 (App. Bd. Jun. 29, 2016) (In a concurring opinion, Judge Ra'anani 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'anani raises a number of pertinent questions about using an unauthenticated ROI in a non-hearing case with a *pro se* applicant.).

Under Guideline F, the SOR alleged 17 delinquent debts totaling approximately \$16,600. Under Guideline E, the SOR alleged that Applicant deliberately failed to disclose those delinquent debts in her SF 86. Applicant's answer to the SOR admitted all but one alleged debt (an educational loan).⁴ That delinquent debt is, however, supported by the record.⁵ Applicant's answer explained that she was unaware of the delinquent debts, because her spouse was in the military and in charge of the family finances. She further explained that her financial state is one of the reasons she is separated from her husband and seeking divorce, so she can become financially stable. She provided no evidence, however, that she has paid or attempted to pay any of the SOR debts.

Under Guideline E it is undisputed that Applicant did not disclose her delinquent debts in her SF 86. Applicant, however, denied that she falsified her SF 86. She reiterated that she was unaware of the delinquent debts, because her spouse kept that information from her. Applicant claims that she first learned of her delinquent debts during her personal subject interview in September 2015.

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See 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." (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. 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, 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.

⁴ Exhibit 2 (SOR para. 1.I. (\$4,616)).

⁵ Exhibit 4.

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.

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,⁶ 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 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 a [person's] reliability, trustworthiness, and ability to protect [sensitive] information.⁷

The concern is broader than the possibility that a person might knowingly compromise sensitive 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 sensitive information.

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

⁶ AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

⁷ AG ¶ 18.

AG ¶ 19(a) inability or unwillingness to satisfy debts;

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

AG ¶ 20(b) the conditions that resulted in the financial problems 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 [person] acted responsibly under the circumstances;

AG ¶ 20(c) [t]here are clear indications that the problem is being resolved or is under control; and

AG ¶ 20(d) the [person] initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

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 pay her debts, thus triggering AG ¶ 19(a) & (c). Even if I credit Applicant's claim that her indebtedness was kept from her by her spouse whom she is in the process of divorcing, which I do, she has known since her September 2015 interview about the delinquent debts.⁸ Yet she provided no documents showing payments or efforts to pay any of the SOR debts. A trustworthiness adjudication is not a proceeding aimed at collecting an applicant's debts. Rather, it is a proceeding aimed at evaluating an applicant's judgment, reliability, and trustworthiness.⁹

The record demonstrates Applicant's inability to satisfy her debts. Even if I conclude that Applicant's separation and divorce are conditions largely beyond her control, a partially mitigating factor under AG ¶ 20(b), the record does not indicate that she has acted responsibly as to her debts, that the problem is being resolved, is under control, or that Applicant has made good-faith efforts to repay overdue creditors.

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 [a person's] reliability, trustworthiness, and ability to protect [sensitive] information.”¹⁰ 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,

⁸ The Appeal Board has held that inattention to family finances can be reason to question an applicant's judgment. ISCR Case No. 13-00786 at 3 (App. Bd. Mar. 28, 2014). The instant case, however, appears not to involve inattention but reflects an effort by Applicant's spouse to keep Applicant in the dark about the family finances.

⁹ ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008).

¹⁰ AG ¶ 15.

inadvertently overlooked it, misunderstood the question, reasonably did not know the information, or genuinely thought the information did not need to be reported.

Applicant's explanation for her failure to disclose her delinquent debts in her SF 86 is that she was unaware at the time of the existence of those debts. She was unaware, she claims, because her spouse kept that information from her. She admitted those debts in her answer to the SOR and claims she is now in the process of divorcing her spouse, in part because of the financial straits he has put her in. I find this to be a plausible explanation, one that is not rebutted by any Government evidence. I find that Applicant's failure to disclose her debts in her SF 86 was not deliberate.

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*. 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:

Paragraph 1, Guideline F:	Against Applicant
Subparagraph 1.a - q:	Against Applicant
Paragraph 2, Guideline E	For Applicant
Subparagraph 2.a.	For Applicant

Conclusion

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