



**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. 15-07469

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel

For Applicant: *Pro se*

11/17/2017

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to deny her eligibility for a public trust position. Applicant presented sufficient evidence to explain, extenuate, or mitigate the trustworthiness concern stemming from her problematic financial condition. She did not, however, mitigate the trustworthiness 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 April 8, 2015. On April 15, 2016, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility 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 detailed the factual reasons for the action

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

under the guidelines known as Guideline F for financial considerations and Guideline E for personal conduct. Applicant answered the SOR on May 4, 2016, and requested a decision based on the written record without a hearing.

On October 18, 2016, Department Counsel submitted a file of relevant and material information (FORM).² The FORM was sent to Applicant on October 24, 2016, and Applicant received the FORM on November 2, 2016.³ Applicant responded to the FORM on December 6, 2016, enclosing documents which I have marked as Applicant's Exhibits (AE) A through J and which documents are admitted into evidence without objection. Included in the FORM were twelve items of evidence, items three through 12 of which are marked as Government Exhibits (GE) 1 through 10.⁴ Exhibits 1 through 8 and 10 are admitted into evidence without objection. Exhibit 9 is discussed below. The case was assigned to me on August 8, 2017.

Because of the age of this case, I *sua sponte* reopened the record on August 31, 2017, and so advised Applicant and Department Counsel. I did so to allow Applicant to (1) review the revised Adjudicative Guidelines (effective June 8, 2017), and (2) supplement the record to update the current status of her indebtedness. I left the record open until close of business September 15, 2017, which was then extended to September 29, 2017, without objection. Applicant submitted additional documents updating the status the SOR debts, which I have marked as AE K through O and are admitted into evidence, without objection.

Procedural Matters

The FORM includes Exhibit 9, which is a report of investigation (ROI) summarizing Applicant's interview that took place during the July 2015 background investigation. The ROI is not authenticated as required under ¶ E3.1.20 of the Directive.⁵ 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

Register and codified in 32 C.F.R. § 154, Appendix H (2016). In this case, the SOR was issued under 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 The Defense Office of Hearings and Appeals' (DOHA) transmittal letter is dated October 24, 2016, and Applicant's receipt is dated November 2, 2016. The DOHA transmittal letter informed Applicant that she had 30 days after receiving it to submit information.

⁴ Items one and two are the SOR and Applicant's answer, respectively. Because the SOR and Applicant's answer are the pleadings in this case, they are not marked as exhibits.

⁵ 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.).

requirement. The footnote is prominently prefaced with a bolded, upper-case notice to Applicant and flagging for Applicant the importance of the footnote, which then explains the concepts of authentication and waiver. In a case such as this, where Applicant has responded to the FORM, it is fair to conclude that Applicant read the footnote, understood it, and chose not to object to the ROI. The ROI is, therefore, admissible.⁶

Findings of Fact

Applicant is 53 years old and has an associate's degree in nursing. She is divorced (since July 2001) and has two adult sons. Since February 2013, she has worked for a defense contractor. Applicant is seeking to obtain eligibility to occupy a position of public trust, because her sponsor provides healthcare services to the Department of Defense. Eligibility is necessary, because a job with her sponsor would involve access to sensitive but unclassified information.

Under Guideline F, the SOR alleged a Chapter 7 bankruptcy in August 2001 that was converted to a Chapter 13 in January 2002 and discharged for hardship in February 2004. The SOR alleged a Chapter 13 bankruptcy in April 2011 that was dismissed in June 2012 for failure to make plan payments. In addition, the SOR alleged 18 delinquent debts totaling \$102,479.

Applicant admitted the bankruptcy filings, with explanations. The 2001 Chapter 7 bankruptcy was filed, because she was injured in an automobile accident that put her out work for three months. It was converted to a Chapter 13 in 2002, and because Applicant was out of work, she could not make the plan payments, which resulted in a hardship discharge in February 2004. Applicant offered no explanation for what caused her to file the 2011 Chapter 13 bankruptcy. She did, however, state that she allowed that bankruptcy to be dismissed, on advice of counsel.⁷ She also attributed one of the SOR debts, SOR ¶ 1.c, to medical bills incurred due to a heart attack she suffered in April 2015.⁸ As noted below, that debt has been resolved.

According to Applicant's answer to the SOR and her initial and supplemental responses to the FORM, the following is the status of the SOR debts (with supporting documentation cited in footnotes):⁹

⁶ This is consistent with a recent Appeal Board Decision. ISCR Case No. 15-05047 at 4 (Nov. 8, 2017) (ROI is admissible where applicant's response to a FORM did not object to the admission of the ROI).

⁷ Answer, p. 6; AE A.

⁸ Answer, p. 6.

⁹ Applicant admitted five of the SOR debts. Even for those she denied, for eight of them she answered that they were paid or were being paid. Answer ¶¶ 1.c through 1.t.

SOR ¶¶ 1.c, f, i, l, m, and r have been placed with a credit counseling and consolidation agency, to which Applicant makes monthly payments of \$892.¹⁰

SOR ¶ 1.j is under a payment plan with the creditor.¹¹

SOR ¶ 1.d has been paid.¹²

SOR ¶¶ 1.o, p, q, and s have been paid.¹³

SOR ¶ 1.e has been paid.¹⁴

SOR ¶ 1.g has been paid.¹⁵

SOR ¶ 1.h has been paid but no supporting documentation provided.¹⁶

SOR ¶ 1.k is a mortgage account on which Applicant is current.¹⁷

SOR ¶ 1.n: Applicant has a payment agreement with the creditor.¹⁸

SOR ¶ 1.t has been paid.¹⁹

In sum, all of Applicant's SOR debts have been resolved. She paid her debts or is paying them.

Under Guideline E, the SOR alleged that Applicant deliberately failed to disclose her April 2011 Chapter 13 bankruptcy and the SOR delinquent debts in her security clearance application. There is no question that Applicant did not disclose that bankruptcy

¹⁰ Answer, p. 9; AE A and AE B.

¹¹ Answer, pp. 1-2, 9-10, 13; AE J.

¹² Answer, pp. 2, 14; AE F.

¹³ Answer, pp. 7, 9, 14-16; AE A, D, G, H, and I.

¹⁴ AE K.

¹⁵ AE A and AE L.

¹⁶ AE A. I was unable to find the document Applicant submitted showing payment of this debt. In any event, the debt is immaterial (\$79).

¹⁷ AE N.

¹⁸ AE A and AE M. Under the agreement, Applicant makes monthly payments to Halstead Financial Services, LLC.

¹⁹ AE A and AE O.

or the SOR debts in her security clearance application.²⁰ Applicant's handwritten answer to the SOR denied that she filed a bankruptcy in 2011, but then she stated that "all remaining payments were made to XX law firm." That was the firm that represented Applicant in that bankruptcy.²¹ She denied the SOR Guideline E allegation stating: "I did not deliberately fail to disclose any information – I did not have documents with dates in front of me, nor did I know that some accounts were present."²² During Applicant's July 2015 background interview, she was asked about the April 2011 Chapter 13 bankruptcy, and the summary of that interview reports: "The subject had no knowledge of this bankruptcy. She has never filed for bankruptcy and could not explain why this was on her credit report. She intends to investigate and attempt resolution. She did not list this bankruptcy on her security questionnaire because she had no knowledge of it."²³ The bankruptcy court docket entries show the filing of the Chapter 13 voluntary petition on her behalf as the debtor on April 21, 2011, numerous court actions, and its dismissal in June 2012.²⁴ One of the unsecured creditors listed in her bankruptcy filing is the same creditor alleged in SOR ¶ 1.e (a debt she admitted).²⁵

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

²⁰ GE 1.

²¹ GE 6. In her typed response to the SOR, she repeated: "All remaining payments for the Chapter 13 bankruptcy were made to attorney XX [her attorney in the bankruptcy proceeding]."

²² Answer.

²³ GE 9.

²⁴ GE 6.

²⁵ GE 6, p. 24 (Schedule F). I do not suggest that that bankruptcy debt is the same debt as alleged in the SOR, only that Applicant must have known of that creditor when she listed it in her bankruptcy filing.

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,²⁶ 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.²⁷

The concern is broader than the possibility that a person might knowingly compromise classified or 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 classified or sensitive 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

²⁶ AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

²⁷ AG ¶ 18.

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, 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; and

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

The evidence supports a conclusion that Applicant has had problematic financial conditions 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. The next inquiry is whether any of the mitigating conditions apply.

The debts that raised trustworthiness concerns were delinquent when the SOR was issued in April 2016 and remained in arrears when the FORM was filed in October 2016. Therefore, AG ¶ 20(a) does not apply.

Applicant was in an automobile accident in 2001 that put her out of work for three months, necessitating the filing of a Chapter 7 bankruptcy in 2001. That accident, however, does not appear to have caused the indebtedness that prompted the issuance of the SOR. Nor does the heart attack in April 2015 appear to have caused the SOR indebtedness, save for one account (SOR ¶ 1.c, which has been resolved). The auto accident in 2001 and her heart attack in 2015 are circumstances largely beyond her control, but there is no causal nexus between those circumstances and the SOR indebtedness. Therefore, AG ¶ 20(b) does not apply.

By the time Applicant answered the SOR, she had placed six of her SOR debts with a credit counseling and consolidation agency. With her answer and her initial response to the FORM, Applicant established that she had resolved \$20,103 of the total SOR debt of \$102,479. With her supplemental response to the FORM, Applicant showed that she had resolved all but \$79 of her SOR debt. Therefore, AG ¶¶ 20(c) and (d) apply.²⁸

²⁸ Although Department Counsel did not object to Applicant's responses to the FORM, he did argue that because the majority of Applicant's attempts to resolve her indebtedness occurred after the issuance of the SOR, those efforts should be given little mitigating weight. Counsel's argument is well-taken, but recognizing the post-SOR timing of those efforts does not wholly negate their mitigating effect.

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.”²⁹ 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 analyzing the facts of this case, I considered the following disqualifying conditions:

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 national security eligibility or trustworthiness, or award fiduciary responsibilities; and,

AG ¶ 16(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

In assessing an allegation of deliberate falsification, I consider not only the allegation and applicant’s answer but all relevant circumstances.³⁰ Here, the SOR alleged that in completing her application for a public trust position, Applicant deliberately failed to disclose her April 2011 bankruptcy filing and the SOR debts. There is no question that Applicant did not disclose any of that information in her security clearance application. The question is whether her omission was deliberate.

In her answer to the SOR, Applicant denied that she had filed a bankruptcy petition in April 2011, but in that same answer she identified the person who appears in bankruptcy court filings as her attorney. And one of the SOR creditors is named as an unsecured creditor in Applicant’s bankruptcy filing. The bankruptcy court recorded numerous activities in her case from its filing in April 2011 until its dismissal in June 2012. Common sense tells us that the filing of a bankruptcy petition (especially a second one) and living through those proceedings must be memorable personal financial experiences, ones not easily overlooked or forgotten. Adjudications of public trust applications are held

²⁹ AG ¶ 15.

³⁰ AG ¶¶ 2(a) and (d)(1)-(9) (explaining the “whole-person” concept and factors).

to a commonsense standard.³¹ Using that standard, I find that Applicant deliberately omitted information about her 2011 bankruptcy and delinquent debts from her application for a public trust position. AG ¶ 16(a) applies. I find no mitigating conditions that apply here.

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.³² 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:	For Applicant
Subparagraphs 1.a – 1.t:	For 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 interests of national security to grant Applicant eligibility for access to sensitive information.

Philip J. Katauskas
Administrative Judge

³¹ See ISCR Case No. 00-0628 (App. Bd. Feb. 24, 2003).

³² See note 30, *supra*.