



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



In the matter of:)
)
) ADP Case No. 17--00491
)
Applicant for Public Trust Position)

Appearances

For Government: Mary Margaret Foreman, Esq., Department Counsel
For Applicant: *Pro se*

12/15/2017

Decision

LYNCH, Noreen, Administrative Judge:

Applicant's statement of reasons (SOR) alleges 15 delinquent debts totaling \$14,218, and deliberate intention to omit the delinquent debts on her May 19, 2015 Electronic Questionnaire for National Security Positions (SF-86) or security clearance application (SCA) with intent to deceive the Government about her finances. Financial considerations and personal conduct trustworthiness concerns are not mitigated. Eligibility for access to sensitive information is denied.

Statement of the Case

On May 19, 2015, Applicant signed an SCA. (GE 1) On April 26, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant, pursuant to DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, and modified; DOD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), which became effective on September 1, 2006.

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue his access to sensitive information, and recommended referral to an administrative judge to determine

whether access to sensitive information should be granted, continued, denied, or revoked. Specifically, the SOR set forth trustworthiness concerns arising under the financial considerations and personal conduct guidelines. (SOR)

Applicant timely answered the SOR and requested an administrative determination based on the written record. On July 24, 2017, Department Counsel sent Applicant the Government's written case, known as a file of relevant material (FORM), which contained seven items. Applicant received the FORM on August 4, 2017. Applicant did not respond to the FORM.

The SOR in this case was issued under DoD 5200.2-R and the September 1, 2006 AGs. DoD Manual 5200.02, *Procedures for the DOD Personnel Security Program (PSP)* became effective on April 3, 2017, and it incorporates and replaces DoD 5200.2-R. While this case was pending a decision, the Director of National Intelligence issued Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the September 1, 2006 AGs and are effective "for all covered individuals" on or after June 8, 2017. Accordingly, I have evaluated Applicant's eligibility for access to sensitive information under DoD Manual 5200.02 and the new AGs.¹

Findings of Fact²

Applicant's SOR response admitted: she was indebted to the creditors in SOR ¶¶ 1.a through 1.o, and admitted under SOR ¶ 2.a that she did not list the delinquent accounts and provided no further information as alleged in the SOR.

Applicant is a 37-year-old claims analyst who has worked for her public trust sponsor since April 2002. (Item 3) In 1997, she graduated from high school. She did not serve in the military. She is married with one child. She currently holds a DOD position of public trust.

Financial Considerations

Applicant volunteered during her investigative interview in 2016, that she believed she had three delinquent credit card accounts, but she could not recall the accounts. (Item 4) She is the sole account holder. She stated that she has not paid any of the accounts because she does not have sufficient income. She further explained that she has no intention of paying the accounts because she does not have the money. When she was

¹ Application of DOD 5200.2-R and the September 1, 2006 AGs, which were in effect when the SOR was issued, would not change my decision in this case.

² Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

confronted with the delinquent accounts, she answered that she did not recall the account or why they were delinquent. (Item 4)

Applicant, in response to her DOD interrogatories in August 2016, admitted to each of the SOR alleged delinquent accounts; stated that she has not paid them, and has no payment plan for them. (Item 5) Applicant's credit reports confirm the delinquent debts. (Items 6 and 7)

Personal Conduct

SOR ¶ 2.a. alleges that Applicant deliberately omitted material facts on her SCA in May 19, 2015, when she answered "No" to Section 26- Financial Record Delinquency involving routine accounts. Applicant confirmed her answer of "No" when interviewed: yet on her budget report in the file, she listed some of the SOR accounts. Also, she reported a total net monthly income of \$3,962 (for she and her spouse), with a monthly net remainder of \$460.98. She admitted that she intentionally did not list any delinquent accounts. She did not provide any additional information in response to the FORM to provide mitigation.

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 [public trust position]." *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 formerly designated as ADP I and ADP II are classified as noncritical-sensitive positions and include those personnel "[w]ith access to automated systems that contain military active duty, guard, or reservists' personally identifiable information or information pertaining to Service members that is otherwise protected from disclosure by DoD 5400.11-R where such access has the potential to cause serious damage to the national security." DOD Manual 5200.02 ¶ 4.1a(3)(c).

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 suitability for a public trust position. 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 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).

The protection of national security and sensitive records is paramount. 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.”

Analysis

Financial Considerations

AG ¶ 18 articulates the trustworthiness concern for financial problems:

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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

AG ¶ 19 includes three disqualifying conditions that could raise a trustworthiness concern and may be disqualifying in this case: “(a) inability to satisfy debts;” “(b) unwillingness to satisfy debts regardless of the ability to do so;” and “(c) a history of not

meeting financial obligations.” The evidence of record establishes AG ¶¶ 19(a), 19(b), and 19(c). Further inquiry about the applicability of mitigating conditions is required.

Seven financial considerations mitigating conditions under AG ¶ 20 are potentially applicable:

(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;

(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;

(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;

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

(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;

(f) the affluence resulted from a legal source of income; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's eligibility [for a public trust position], there is a strong presumption against the grant or maintenance of a [public trust position]. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising [trustworthiness] concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in [public trust position] decisions is that articulated in *Egan, supra*. “Any doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Applicant presented no information concerning the delinquent accounts. She does not recall when they became delinquent, but she admitted to each of them. Her responses to the interrogatories confirmed that she has not paid any of the accounts and has no plan in place to do so. She provided no information except that she does not have the money to pay them and does not intend to pay them. There is no evidence of financial counseling. None of the mitigating conditions apply.

Personal Conduct

AG ¶ 15 explains why personal conduct is a trustworthiness concern stating:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes one condition that could raise a trustworthiness concern and may be disqualifying in this case in regard to the alleged falsification of his SCA, "(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire. . . . used to conduct investigations, . . . determine security clearance eligibility or trustworthiness. . . ." ³ Applicant confirmed that she answered "no" and gave no reason that would mitigate her omissions. She knew she had at least three or four delinquent debts and volunteered that information during her interview. She provided no reasonable explanation to refute the deliberate omission. She has not mitigated the personal conduct issue.

³ The 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)).

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a public trust position by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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.

Under AG ¶ 2(c), "[t]he ultimate determination" of whether to grant a public trust position "must be an overall commonsense judgment based upon careful consideration" of the guidelines and the whole-person concept. My comments under Guidelines F and E are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 37-year-old claims analyst who has worked for a DOD contractor since 2002. She graduated from high school in 1997. She is married and has one child. She has held a position of trust for a number of years.

Applicant has not paid any of the alleged SOR delinquent accounts, but she admitted to each of them. Her credit reports confirm the delinquent accounts. She answered her interrogatories and confirmed that she has not paid any of them and has no plan in place to address the accounts. She informed the interviewer that she has no intention of paying them and cited the lack of money to pay them. She reported a net remainder on the budget that was in the file. She admitted that she did not list the delinquent debts on the SCA. She has provided no information to supplement the record. She has not met her burden of proof in this case.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude that financial considerations and personal conduct trustworthiness concerns are not mitigated. It is not clearly consistent with the interests of national security to grant Applicant eligibility for 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
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Subparagraphs 1.a through 1.o:	Against Applicant
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Paragraph 2, Guideline E:	AGAINST APPLICANT
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Subparagraph 2.a:	Against Applicant
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Conclusion

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

Noreen A. Lynch
Administrative Judge