



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



In the matter of:

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ADP Case No. 17-00576

Applicant for Public Trust Position

Appearances

For Government: Chris Morin, Esq., Department Counsel

For Applicant: *Pro se*

03/12/2018

Decision

TUIDER, Robert, Administrative Judge:

Applicant mitigated the trustworthiness concerns under Guideline F (financial considerations). Eligibility for access to sensitive information is granted.

Statement of the Case

On March 29, 2016, Applicant submitted a Questionnaire for National Security Positions (SF-86), seeking eligibility for a public trust position. On April 17, 2017, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) listing trustworthiness concerns under Guideline F.

On April 28, 2017, Applicant answered the SOR, and requested a hearing before an administrative judge. On May 18, 2017, Department Counsel was ready to proceed. On May 26, 2017, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On June 26, 2017, DOHA issued a notice of hearing scheduling the hearing on August 15, 2017. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 3, and Hearing Exhibit (HE) I, which were received in evidence without objection. Applicant testified, did not call any witnesses, and offered Applicant Exhibits (AE) A and B, which was received in evidence without objection. I held the record open until September 29, 2017, to afford Applicant an opportunity to submit additional evidence.

Applicant timely submitted AE C through E, which were received in evidence without objection. On August 23, 2017, DOHA received the hearing transcript (Tr.).

Findings of Fact

Applicant admitted all of the SOR allegations, with explanations. Additional findings of fact follow.

Background Information

Applicant is a 39-year-old office manager employed by a defense contractor since November 2013. She seeks a position of public trust to enhance her position within her company. (GE 1, Tr. 14-19)

Applicant graduated from high school in May 1997. She estimates that she has earned “[p]robably between 15 and 30” college credit hours. (Tr. 19) Applicant was married from March 2002 to April 2011, and from May 2011 to August 2015. Both marriages ended by divorce. She has been living with a cohabitant and current boss since November 2013. Applicant has two daughters, ages 14 and 12, from her first marriage who reside with her. (GE 1; Tr. 19-22)

Financial Considerations

Applicant’s SOR lists four debts, a charged-off credit card account for \$11,851, a credit card collection account for \$522, a credit card collection account for \$150, and a collection account for \$91. Total debt alleged is \$12,614. (SOR ¶¶ 1.a – 1.d) These allegations are established through Applicant’s admissions and the Government’s exhibits. (GE 1 – 3)

Applicant attributes her financial difficulties to her two divorces, moving expenses, and six months of unemployment. She also testified that she does not receive the full amount of her monthly child support, which adds stress to her budget. (Tr. 23-24) The status of her debts is discussed below.

1.a – CHARGED-OFF CREDIT CARD FOR \$11,851. Applicant stated that her former husband was responsible for a large portion of the charges made on this credit card. The credit card was in Applicant’s name and she was held responsible for all charges incurred. Applicant made payment arrangements to make \$229 monthly payments. Post-hearing, she submitted documentation that she began making those payments. This monthly payment is a line item on her monthly budget. (SOR answer; Tr. 9, 24-25, 27-30; AE D, AE E) **DEBT BEING RESOLVED.**

1.b – CREDIT CARD COLLECTION ACCOUNT FOR \$522. Paid in full. (SOR answer; Tr. 10-12; AE A, AE B) **DEBT RESOLVED.**

1.c – CREDIT CARD COLLECTION ACCOUNT FOR \$150. Paid in full. (SOR answer; Tr. 10-12; AE A) **DEBT RESOLVED.**

1.d – **COLLECTION ACCOUNT FOR \$91.** Paid in full. (SOR answer; Tr. 10-12; AE A) **DEBT RESOLVED.**

As reflected above, Applicant is making payments on one or her debts and has paid the other three debts. Applicant's annual salary is "[p]robably about \$11,000 to \$13,000." She estimates her monthly take-home pay is "[a]nywhere from \$700 to \$1,000 a month." Applicant shares housing expenses with her cohabitant. (Tr. 25-27) Post-hearing, Applicant submitted a budget that reflects she is leading a modest life style and lives within her means. She has a net monthly remainder of \$33. (AE C)

Policies

In issuing the SOR, 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 for Determining Eligibility for Access to Classified Information* implemented by DOD on September 1, 2006.

While the case was pending a decision, the Security Executive Agent implemented Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017, which replaced the 2006 AG, and are applicable to all adjudicative decisions issued on or after June 8, 2017. I decided this case under the current AGs implemented by SEAD 4.

The DOD considers ADP positions to be "sensitive positions." For a person to be eligible for sensitive duties, the person's loyalty, reliability, and trustworthiness must be such that assigning the person to a sensitive position is clearly consistent with the national security interests of the United States. AG ¶ 2.c. Applicants for ADP positions are entitled to the procedural protections in the Directive before any final unfavorable access determination is made. (Under Secretary of Defense's Memorandum for the Director, Defense Office of Hearings and Appeals, dated November 19, 2004)

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.

A public trust position decision resolves whether it is clearly consistent with the interests of national security to grant or continue an applicant's access to sensitive information. The Government must prove, by substantial evidence, controverted facts

¹ ADP cases are adjudicated under the provisions of the Directive. (Deputy Under Secretary of Defense's Memorandum for the Director, Defense Office of Hearings and Appeals, dated November 19, 2004.)

alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national security interest of the United States to grant or continue his or her access to sensitive information.

Persons with access to sensitive information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national security as their own. The “clearly consistent with the interests of national security” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” AG ¶ 2(b). Eligibility for a public trust position decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing access to sensitive information.

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. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

AG ¶ 19 provides two disqualifying conditions that could raise a trustworthiness concern and may be disqualifying in this case: “(a) inability to satisfy debts”; “and “(c) a history of not meeting financial obligations.” The record established these disqualifying conditions requiring additional inquiry about the possible applicability of mitigating conditions.

AG ¶ 20 lists five potential mitigating conditions:

(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; and

(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.

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 security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. 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 security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified 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's conduct does not warrant full application of AG ¶ 20(a) because there is more than one delinquent debt and her financial problems are not isolated. Her debt is a "continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)). Nevertheless, she receives partial credit under AG ¶ 20(a) because the debts occurred under circumstances that are unlikely to recur and do not cast doubt on her current reliability, trustworthiness, or good judgment.

Applicant merits full credit under AG ¶ 20(b) because her two divorces and unemployment were circumstances beyond her control and she acted responsibly under the circumstances. Even though she did not have the funds to remain current on her debts, she remained in contact with her creditors and has taken reasonable steps to resolve her debts.²

AG ¶ 20(c) is partially applicable even though Applicant did not seek formal financial counseling. She has, however, produced evidence that reflects she is living within her means and has regained financial responsibility. There are clear indications that her financial problems are resolved or are being resolved. Furthermore, there is sufficient information to establish full mitigation under AG ¶ 20(d).³ Despite her limited resources, Applicant worked diligently with her creditor to set up a payment plan for the debt in SOR ¶ 1.a and paid off the other three smaller debts. Given her limited financial resources, Applicant has done all that can reasonably be expected of her. AG ¶ 20(e) is not relevant.

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

²“Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties.” ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

³The Appeal Board has previously explained what constitutes a “good-faith” effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the “good-faith” mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term ‘good-faith.’ However, the Board has indicated that the concept of good-faith ‘requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.’ Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the “good-faith” mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

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(c). 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 mitigated the trustworthiness concerns raised by her delinquent debts. Accordingly, I conclude she has carried her burden of showing that it is clearly consistent with national security to grant 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: FOR APPLICANT

Subparagraphs 1.a – 1.d: For Applicant

Conclusion

I conclude that it is clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for a public trust position is granted.

ROBERT TUIDER
Administrative Judge