



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



In the matter of:)
)
) ADP Case No. 17-02089
)
Applicant for Public Trust Position)

Appearances

For Government: Robert B. Blazewick, Esquire, Department Counsel
For Applicant: *Pro se*

01/31/2018

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant has failed to mitigate the trustworthiness concerns regarding financial considerations. Eligibility to occupy a public trust position is denied.

Statement of the Case

On November 10, 2016, Applicant applied for a public trust position and submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On June 30, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to her, pursuant to DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *National Security Adjudicative Guidelines* (AG) established by Directive 4 of the Security Executive Agent (SEAD 4) (December 10, 2016), effective June 8, 2017.

The SOR alleged trustworthiness concerns under Guideline F (Financial Considerations), and detailed reasons why the DOD CAF was unable to make an affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's eligibility for occupying a public trust position to support a

contract with the DOD. The SOR recommended referral to an administrative judge to determine whether to grant or continue Applicant's eligibility for occupying a public trust position to support a contract with the Department of Defense, and recommended referral to an administrative judge to determine whether such eligibility should be granted, continued, denied, or revoked.

It is unclear when Applicant received the SOR as there is no receipt in the case file. In a statement, notarized on July 19, 2017, Applicant responded to the SOR allegations, and elected to have her case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was mailed to Applicant on August 18, 2017, and she was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. In addition to the FORM, Applicant was furnished a copy of the Directive. Applicant purportedly received the FORM on September 14, 2017. The response was due on October 14, 2017. Applicant chose not to take advantage of that opportunity. The case was assigned to me on January 26, 2018.

Findings of Fact

In her Answer to the SOR, Applicant admitted nearly all of the factual allegations pertaining to financial considerations in the SOR (§§ 1.b. through 1.m.). Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 38-year-old employee of a defense contractor. She has been serving as a Medical Scribe for her current employer since January 2017. She previously held positions as a clinical assistant, a mental health technician, and counselor, with a number of employers. It is unclear if she is a high school graduate. Applicant attended a college from February 2013 until May 2014, and she received a designation as a Certified Nursing Assistant (CNA). She has never served with the U.S. Military. She has never been granted a security clearance, and it is unclear if she ever held a public trust position. Applicant was married in 2009 and divorced in 2011. She married again in 2012, and has been separated since 2014. She has one son, born in 1996.

Financial Considerations¹

It is unclear when Applicant first experienced financial difficulties, but a review of her 2016 credit report reveals that both a tax lien and a judgment were filed against her in 2012. She acknowledged that she had been through one period of unemployment from

¹ General source information pertaining to the financial accounts discussed below can be found in the following exhibits: Item 3 (e-QIP, dated November 10, 2016; Item 2 (Applicant's Answer to the SOR, dated July 19, 2017); Item 5 (Personal Subject Interview, dated March 28, 2017); Item 4 (Combined Experian, TransUnion, and Equifax Credit Report, dated December 20, 2016).

August 2016 until January 2017. The only factor she attributed to her inability to pay her bills was that she had insufficient funds to do so.²

When Applicant completed her e-QIP in November 2016, she acknowledged having only one delinquent account, a repossessed vehicle that she claimed her ex-husband purchased in her name, and that the financial issue arose in 2006. She denied having any other delinquent accounts.³ When she was interviewed by an investigator from the U.S. Office of Personnel Management (OPM) in March 2017, she again stated that she had no other delinquent debts, but she was confronted with additional delinquent debts, some of which she acknowledged, and some of which she claimed to have no knowledge of.⁴

The SOR identified 13 purportedly continuing delinquent debts totaling approximately \$16,448 that had been placed for collection, charged off, repossessed, or one to judgment, as reflected by the December 2016 credit report. Those accounts were as follows:

(SOR ¶ 1.a.): a judgment in the amount of \$8,130 that Applicant initially said was for the vehicle her ex-husband purchased in her name, and that she was making payments when she could afford to do so.⁵ During her OPM interview, she claimed to know nothing about the judgment.⁶ In her Answer to the SOR, Applicant denied the account, stating it was from her ex-husband, and that she was “still fighting in court.” She failed to submit any documentation to support her contentions: the account was not her account; she had made any efforts with the creditor to resolve the account; she had been making payments; or the matter was in litigation. The account has not been resolved.

(SOR ¶ 1.b.): an unspecified type of unsecured account, identified by Applicant as a student loan, with an unpaid balance of \$600 that was charged off in June 2014.⁷ During her OPM interview, she claimed to know nothing about the account.⁸ In her Answer to the SOR, Applicant contended that she had paid off the account, and she submitted extracts of a 2017 Credit Karma credit report that reported that the account has a balance of \$959, and that Applicant has paid off 60 percent of her student loan amount.⁹ The documents she submitted do not support her contentions that she had paid the charged-off \$600 or

² Item 5, *supra* note 1, at 7. Applicant submitted documentation related to an Interim Peace Order and a Temporary Peace Order against an individual who was apparently stalking her, but there is no evidence to support a conclusion that the situation had any relevance to Applicant's finances or financial situation.

³ Item 3, *supra* note 1, at 31-33.

⁴ Item 5, *supra* note 1, at 5.

⁵ Item 4, *supra* note 1, at 5.

⁶ Item 5, *supra* note 1, at 7.

⁷ Item 4, *supra* note 1, at 6.

⁸ Item 5, *supra* note 1, at 7.

⁹ Credit Report extracts, downloaded July 18, 2017, attached to Applicant's Answer to the SOR.

that the account had been successfully resolved by her, for there are no cancelled checks, receipts, bank account reports, or letters from the creditor. The account has not been resolved.

(SOR ¶ 1.c.): a vehicle loan with a high credit of \$10,113 and unpaid and past-due balance of \$4,087 on a vehicle that was repossessed.¹⁰ During her OPM interview, she claimed the account was the same one related to the judgment,¹¹ but she failed to submit documentation to support that claim. In her Answer to the SOR, Applicant stated that she was going through hardship because she was not working, and her mother died. She offered no evidence to indicate that she had contacted the creditor or had made any payments. The account has not been resolved.

(SOR ¶ 1.d.): an apartment lease with an unpaid balance of \$1,245.¹² On March 23, 2017, Applicant settled the account for less than the full balance by paying the collection agent \$374, and the remaining \$871.33 was cancelled.¹³ The account has been resolved.

(SOR ¶¶ 1.e. and 1.f.): two utility accounts with unpaid balances of \$644 and \$477.¹⁴ During her OPM interview, Applicant claimed to have no knowledge of the larger account, but agreed that the smaller account was hers, and she indicated she would pay it when she has the funds to do so.¹⁵ In her Answer to the SOR, Applicant contended that she had made payment arrangements regarding the larger account, and that she had paid the smaller account.¹⁶ She failed to submit any documentation, such as payment agreements, cancelled checks, receipts, or account statements, to support her contentions that there were payment arrangements made with one creditor, or that the other creditor had been paid. In the absence of such documentation, I conclude the accounts remain unresolved.

(SOR ¶¶ 1.g. through 1.m.): seven medical accounts with unpaid balances of \$435, \$236, \$194, \$141, \$115, \$91, and \$53 with a variety of collection agents.¹⁷ During her OPM interview, Applicant claimed to have little specific knowledge of the accounts, but indicated she would pay them when she has the funds to do so.¹⁸ In her Answer to the SOR, Applicant acknowledged that she did not have health insurance at the time. For two

¹⁰ Item 4, *supra* note 1, at 6.

¹¹ Item 5, *supra* note 1, at 7.

¹² Item 4, *supra* note 1, at 8.

¹³ Account Detail, dated July 18, 2017, attached to Applicant's Answer to the SOR.

¹⁴ Item 4, *supra* note 1, at 9.

¹⁵ Item 5, *supra* note 1, at 6-7.

¹⁶ Item 2, *supra* note 1, at 2.

¹⁷ Item 4, *supra* note 1, at 9-10.

¹⁸ Item 5, *supra* note 1, at 6.

of the accounts (SOR ¶¶ 1.i. and 1.j.) she claimed to have made payment arrangements, and for one account (SOR ¶ 1.i.) she claimed to have paid it. Applicant failed to submit any documents, such as payment agreements, cancelled checks, receipts, or account statements, to support her claims. The accounts have not been resolved.

There is no evidence of a budget, repayment plans, or any financial counseling. Applicant failed to submit a Personal Financial Statement to reflect her family's combined net monthly income, monthly expenses, or any remainder available for discretionary use or savings. In the absence of such information, there is no evidence to indicate that Applicant's financial problems are now under control.

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 [position of public trust]." ¹⁹ As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. DOD contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. ²⁰

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for a public trust position.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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 common sense decision. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence." ²¹ The Government initially has the burden of producing evidence to establish

¹⁹ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

²⁰ It should be noted that a memorandum from the Deputy Under Secretary of Defense for Counterintelligence and Security, Adjudication of Trustworthiness Cases, dated November 19, 2004, covers the handling of trustworthiness cases under the Directive. The memorandum directed the Defense Office of Hearings and Appeals (DOHA) to continue to utilize the Directive in ADP contractor cases for trustworthiness determinations.

²¹ "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "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).

a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.²²

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of sensitive information. Furthermore, security clearance determinations, and by inference, public trust determinations, should err, if they must, on the side of denials.²³ In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline F, Financial Considerations

The trustworthiness concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

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.

²² See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

²³ *Egan*, 484 U.S. at 531.

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 19:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so;
- (c) a history of not meeting financial obligations; and
- (e) consistent spending beyond one's means or frivolous or irresponsible spending, which may be indicated by excessive indebtedness, significant negative cash flow, a history of late payments or of non-payment, or other negative financial indicators.

Applicant has had a long-standing problem with her finances. She has chronically found herself with insufficient funds to prevent her accounts from becoming delinquent. They were placed for collection, some were charged off, one went to judgment, and another resulted in a repossession. AG ¶¶ 19(a), 19(c), and 19(e) apply. There is insufficient evidence to support AG ¶ 19(b).

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties under 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;
- (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;²⁴ and

²⁴ The 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.'

(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.

I have concluded that AG ¶ 20(b) minimally applies, and AG ¶¶ 20(a), 20(c), 20(d), and 20(e) do not apply. The nature, frequency, and recency of Applicant's continuing financial difficulties make it difficult to conclude that it occurred "so long ago" or "was so infrequent." While Applicant mentioned her mother's death, a period of unemployment, and some irrelevant situations, the only factor she attributed to her inability to pay her bills was that she had insufficient funds to do so. When Applicant completed her e-QIP, she acknowledged having only one delinquent account, a repossessed vehicle that she claimed her ex-husband purchased in her name, and that the financial issue arose in 2006. She denied having any other delinquent accounts. When she was interviewed by an OPM investigator, she again stated that she had no other delinquent debts, but she was confronted with additional delinquent debts, some of which she acknowledged, and some of which she claimed to have no knowledge of.

While Applicant resolved one account with a relatively small payment of \$374, there is no documentation to reflect that accounts as modest as \$53, \$93, or \$115, have been resolved. Applicant contends that she either resolved, or is in the process of resolving other accounts, but she still failed to submit the necessary documentation.

Applicant offered no explanation as to why she took no action to resolve her delinquent accounts before her period of unemployment or after she obtained her current position. Applicant's professed actions and intentions are not supported by any documentation. There is no evidence to indicate that Applicant ever received financial counseling. It is unclear if she has funds remaining at the end of each month for discretionary use or savings. There is no evidence to reflect that Applicant's financial problems are under control. Applicant has not acted responsibly by failing to address her delinquent accounts and by making little, if any, efforts of working with her creditors.²⁵ Applicant's actions under the circumstances cast doubt on her current reliability, trustworthiness, and good judgment.²⁶

Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy [or statute of limitations]) 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)).

²⁵ "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 or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

²⁶ See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

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 SEAD 4, Appendix (App.) A, ¶ 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 SEAD 4, App. A, ¶ 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. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.²⁷

There is some evidence in favor of mitigating Applicant's conduct. She has been with her current employer since January 2017. She was unemployed from August 2016 until January 2017. She previously declared her intention of addressing her creditors and resolving her financial problems.

The disqualifying evidence under the whole-person concept is more substantial. Applicant repeatedly found herself with delinquent accounts, and some were placed for collection or charged off. There was one judgment and one repossession. Although Applicant had the opportunity to submit any documentation to support her contentions regarding her purported resolution efforts, with one exception, she failed to do so. There is no overall repayment plan, no budget, and no indication of her current finances. There is no evidence from third-parties as to her current reputation for reliability, trustworthiness, and good judgment. Despite her promises to resolve her delinquent accounts, Applicant has essentially taken relatively little positive actions to do so. Considering the relative absence of confirmed debt resolution and elimination efforts, Applicant's financial issues are likely to remain. Applicant's actions, or demonstrated inaction, under the circumstances cast doubt on her current reliability, trustworthiness, and good judgment.

The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:²⁸

²⁷ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

²⁸ ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted).

In evaluating Guideline F cases, the Board has previously noted that the concept of “meaningful track record” necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that he [or she] has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he [or she] has “. . . established a plan to resolve his [or her] financial problems and taken significant actions to implement that plan.” The Judge can reasonably consider the entirety of an applicant’s financial situation and his [or her] actions in evaluating the extent to which that applicant’s plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (“Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.”) There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

Applicant has demonstrated an essentially poor track record of debt reduction and elimination efforts, generally ignoring all but one of her debts. She promised to take some corrective actions, and she claimed that she had taken other measures to resolve her delinquencies, but could not support her claims with documentation. Overall, the evidence leaves me with questions and doubts as to Applicant’s eligibility and suitability for a public trust position. For all of these reasons, I conclude Applicant has failed to mitigate the trustworthiness concerns arising from her financial considerations. See SEAD 4, App. A, AG ¶¶ 2(d)(1) through 2(d)(9).

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a. through 1.c:	Against Applicant
Subparagraph 1.d.:	For Applicant
Subparagraphs 1.e. through 1.m.:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility to occupy a public trust position to support a contract with the Department of Defense. Eligibility is denied.

ROBERT ROBINSON GALES
Administrative Judge