



**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. 14-03143

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

06/08/2015

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 February 6, 2013, Applicant applied for a public trust position and submitted an Electronic Questionnaire for Investigations Processing (e-QIP).¹ On August 12, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to her, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged trustworthiness concerns under Guideline F (Financial Considerations), and detailed

¹ Item 2 (e-QIP, dated February 6, 2013).

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 a security clearance for Applicant. 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 October 2, 2014, Applicant responded to the SOR allegations and elected to have her case decided on the written record in lieu of a hearing.² A complete copy of the Government's file of relevant material (FORM) was provided to Applicant on February 25, 2015, 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, as well as the Guidelines applicable to her case. Applicant received the FORM on March 23, 2015. The response was due on April 22, 2015. Applicant submitted information in response to the FORM, to which Department Counsel did not object.³ The case was assigned to me on June 1, 2015.

Findings of Fact

In her Answer to the SOR, Applicant admitted all but one of the factual allegations pertaining to financial considerations in the SOR (¶¶ 1.a. through 1.o., and 1.q.). She denied the remaining allegation. 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 37-year-old employee of a defense contractor. She has been serving as a claims processor with her current employer since March 2013.⁴ She was previously unemployed on several occasions during which she was generally supported by her parents: from July 2006 until January 2008; from August 2008 until November 2008; from October 2009 until April 2010; from June 2010 until June 2011; and from January 2013 until March 2013.⁵ Applicant graduated from high school in 1995, and for several years attended college courses, but did not receive a degree.⁶ She has never served with the U.S. military.⁷ She was never granted a security clearance,⁸ and it is

² Item 1 (Applicant's Answer to the SOR, dated October 2, 2014).

³ Memorandum, dated May 6, 2015.

⁴ Item 3 (Personal Subject Interview, dated April 6, 2013), at 1.

⁵ Item 2, *supra* note 1, at 14-15, 17-18, 20; Item 3, *supra* note 4, at 1-2.

⁶ Item 2, *supra* note 1, at 11-14.

⁷ Item 2, *supra* note 1, at 23.

unclear if she ever held a public trust position. Applicant was married in September 2000, and temporarily separated from September 2006 until May 2012. Although they are no longer “separated,” Applicant’s husband has been incarcerated since August 2009.⁹ They have four children, born in 1996, 1997, 1999, and 2004.¹⁰

Financial Considerations

It is unclear when Applicant first experienced financial difficulties, but a review of her February 2013 credit report¹¹ reveals at least one delinquent account as early as 2006.¹² She reported some other accounts in her e-QIP as being delinquent since 2007.¹³ At some point, Applicant’s finances deteriorated to the point where her accounts were not timely addressed by her to prevent them from becoming delinquent, placed for collection, or charged off. One vehicle was repossessed. Applicant attributed her financial problems to her periods of unemployment; her period of separation from her husband which resulted in her income being reduced from a two income household to a single income household; and having to raise four children.¹⁴ Applicant has “always” been on Medicaid.¹⁵ While there was at least one delinquent medical account, Applicant reported no major illnesses or other unexpected incidents that were largely beyond her control.

In her February 2013 e-QIP, Applicant stated she anticipated making payments on some of her delinquent accounts when she got her income tax refund.¹⁶ Although she did not specifically use the words “identity-theft,” she did not recognize other accounts in her name and said that “somebody must have used [her] information.”¹⁷ During her April 2013 interview with an investigator from the U.S. Office of Personnel Management (OPM), Applicant stated her future intent was to dispute those accounts “in question,” and if those accounts are hers, as well as her valid accounts for which there is no dispute, she would set up payment arrangements by 2014.¹⁸

⁸ Item 2, *supra* note 1, at 39-40.

⁹ Item 2, *supra* note 1, at 25; Item 3, *supra* note 4, at 2.

¹⁰ Item 2, *supra* note 1, at 28-30; Item 3, *supra* note 4, at 2.

¹¹ Item 4 (Combined Experian, TransUnion, and Equifax Credit Report, dated February 16, 2013).

¹² Item 4, *supra* note 11, at 6.

¹³ Item 2, *supra* note 1, at 42-56.

¹⁴ Item 3, *supra* note 4, at 7.

¹⁵ Item 3, *supra* note 4, at 7.

¹⁶ Item 2, *supra* note 1, at 45, 46-50, 51-53, 55.

¹⁷ Item 2, *supra* note 1, at 42-56.

¹⁸ Item 3, *supra* note 4, at 7-8.

The SOR identified 17 purportedly continuing delinquent debts totaling approximately \$25,183 that had been placed for collection, charged off, or repossessed, as reflected by the February 2013 credit report¹⁹ and a March 2014 credit report.²⁰ Those accounts were as follows: SOR ¶ 1.a. for \$185; SOR ¶ 1.b. for \$178; SOR ¶ 1.c. for \$2,618; SOR ¶ 1.d. for \$12,545; SOR ¶ 1.e. for \$871; SOR ¶ 1.f. for \$428; SOR ¶ 1.g. for \$4,866; SOR ¶ 1.h. for \$1,453; SOR ¶ 1.i. for \$598; SOR ¶ 1.j. for \$474; SOR ¶ 1.k. for \$212; SOR ¶ 1.l. for \$180; SOR ¶ 1.m. for \$167; SOR ¶ 1.n. for \$161; SOR ¶ 1.o. for \$128; SOR ¶ 1.p. for \$70; and SOR ¶ 1.q. for \$49.

In her Answer to the SOR in October 2014, Applicant acknowledged all of the accounts and, with the exception of one account which she contended she had already resolved (SOR ¶ 1.p.), and the account related to a vehicle repossession (SOR ¶ 1.d.), she stated she would make arrangements to pay them.²¹ Applicant has offered no documentation to support the creation of any repayment plan, or positive actions with her creditors, such as letters, statements, receipts, or cancelled checks. She did not submit any documentation indicating she had disputed any of the accounts with either the creditors, collection agents, or the credit reporting agencies. She did offer one document downloaded from the Internet reflecting that the collection agent for the account identified in SOR ¶ 1.i. settled with the attorney general of one particular state for making payday loans that violate the state's usury and licensed lender laws.²² She did not submit evidence reflecting that her account was of the type identified or that she disputed the particular account. There is no evidence that Applicant has taken any steps to resolve her debts.

It is not known what Applicant's financial resources may be because she did not submit a personal financial statement to indicate her net monthly income, her monthly household or debt expenses, or whether or not she has any funds remaining at the end of each month for discretionary use or savings. She offered no evidence to indicate that her financial problems are now under control. There is no evidence to indicate that Applicant ever received financial counseling.

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 security clearance."²³ 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. Positions designated as ADP I/II/III are classified as "sensitive

¹⁹ Item 4, *supra* note 11.

²⁰ Item 5 (Equifax Credit Report, dated March 24, 2014).

²¹ Item 1, *supra* note 2, at 1-3.

²² Applicant's Response to the FORM (Download, dated April 21, 2015), at 3.

²³ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

positions.”²⁴ “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.”²⁵ 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.²⁶

When evaluating an applicant’s suitability for a public trust position, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG 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.”²⁷ The Government initially has the burden of producing evidence to establish 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.²⁸

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

²⁴ Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

²⁵ Regulation ¶ C6.1.1.1.

²⁶ Regulation ¶ C8.2.1.

²⁷ “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).

²⁸ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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.²⁹ 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 security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

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 an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. . . .

The guideline notes several conditions that could raise trustworthiness concerns. Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly, under AG ¶ 19(c), "a history of not meeting financial obligations" may raise trustworthiness concerns. Applicant has had a long-standing problem with her finances which started as early as 2006. It is unclear if she found herself with insufficient funds to continue making her routine monthly payments or if she simply chose to stop doing so, and various accounts became delinquent, and were placed for collection or charged off. One vehicle was repossessed. AG ¶¶ 19(a) and 19(c) apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where "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." Also, under AG ¶ 20(b), financial security concerns may be mitigated where "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, or a death, divorce or separation), and the individual acted responsibly under the circumstances." Evidence that "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control" is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows

²⁹ *Egan*, 484 U.S. at 531.

“the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.”³⁰ In addition, AG ¶ 20(e) may apply if “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.”

AG ¶ 20(b) partially applies. AG ¶¶ 20(a), 20(c), 20(d), and 20(e) do not apply. The nature, frequency, and recency of Applicant’s continuing financial difficulties since about 2006 make it difficult to conclude that it occurred “so long ago” or “was so infrequent.” Applicant was previously unemployed on several occasions during which she was generally supported by her parents: from July 2006 until January 2008; from August 2008 until November 2008; from October 2009 until April 2010; from June 2010 until June 2011; and from January 2013 until March 2013. She attributed her financial problems to her periods of unemployment; her period of separation from her husband which resulted in her income being reduced from a two income household to a single income household; and having to raise four children. However, Applicant offered no explanation as to why she took no action to resolve her delinquent accounts between periods of unemployment or after she obtained her current position in March 2013. Applicant offered no evidence of a good-faith effort to resolve any of her debts and essentially ignored them until relatively recently.

Applicant failed to submit any documentation such as receipts, cancelled checks, account records, etc., to support her contentions that one of her delinquent accounts was resolved. Likewise, she did not submit documentation regarding possible debt consolidation, disputes, or any continuing contacts with her creditors. 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.³¹ Applicant’s actions under the

³⁰ 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.’ 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)).

³¹ “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.

circumstances cast doubt on her current reliability, trustworthiness, and good judgment.³²

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(a):

- (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), 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.³³

There is some evidence in favor of mitigating Applicant's conduct. She has been with her current employer since March 2013. She was previously unemployed on numerous occasions. She has declared her intention of addressing her creditors and resolving her financial problems.

The disqualifying evidence under the whole-person concept is more substantial. There is no evidence from third-parties as to her current reputation for reliability, trustworthiness, and good judgment. Despite her repeated promises to resolve her delinquent accounts, Applicant has essentially taken no positive actions to do so. Applicant's actions under the circumstances cast doubt on her current reliability, trustworthiness, and good judgment. Considering the relative absence of confirmed debt resolution and elimination efforts, Applicant's financial issues are likely to remain.

The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:³⁴

³² See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

³³ 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).

³⁴ ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted).

