



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ADP Case No. 14-04683
)
Applicant for Public Trust Position)

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

02/29/2016

Decision

TUIDER, Robert J., Administrative Judge:

Applicant mitigated trustworthiness concerns pertaining to Guideline F (financial considerations). Her eligibility to occupy a public trust position is granted.

Statement of the Case

On June 28, 2013, Applicant submitted a Questionnaire for National Security Positions version of an application for a public trust position (SF-86). On January 8, 2015, 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 (AG), which became effective on September 1, 2006.

The SOR alleges trustworthiness concerns under Guideline F (financial considerations). The SOR detailed reasons why DOD was unable to find that it is consistent with the national interest to grant or continue Applicant's eligibility to occupy a public trust position, which entails access to sensitive information. The DOD CAF recommended referral to an administrative judge to determine whether access to sensitive information should be granted, continued, denied, or revoked.

On February 10, 2015, Applicant responded to the SOR. On June 1, 2015, Department Counsel was ready to proceed on Applicant's case. On June 5, 2015, DOHA assigned Applicant's case to me. On June 11, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for July 9, 2015. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 4, which were received into evidence without objection. Applicant testified, did not call any witnesses, and offered Applicant Exhibits (AE) A through E, which were received into evidence without objection. I held the record open until July 24, 2015 to afford the Applicant an opportunity to offer additional evidence. Applicant timely submitted AE F through P, which were received into evidence without objection. On July 17, 2015, DOHA received the hearing transcript (Tr.).

Procedural Matters

Department Counsel moved to withdraw SOR ¶ 1.k. Without objection from the Applicant, I granted Department Counsel's motion. (Tr. 9-10)

Findings of Fact

Applicant denied SOR ¶¶ 1.e, 1.f. and 1.k with explanations, and admitted the remaining SOR allegations with explanations. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 56-year-old operations manager employed by a defense contractor since July 2013. She seeks a public trust position as a requirement of her continued employment. (GE 1; Tr. 15, 17-18)

Applicant graduated from high school in June 1976. She took "some college courses but [she] didn't complete college." Applicant was married two times – from July 1988 to August 2003 and from January 2004 to March 2009. Both marriages ended by divorce. She has two adult children, a son and a daughter. Applicant did not serve in the U.S. armed forces. (GE 1; Tr. 15-16, 18-20, 23-24)

Financial Considerations

With the withdrawal of SOR ¶ 1.k, ten allegations remained consisting of two tax-related allegations and eight debts totaling \$15,186. (SOR ¶¶ 1.a – 1.k) Applicant attributes her financial problems and failure to file her 2012 state and federal tax returns to events leading up to, during, and after her 2009 divorce, and a period of unemployment from June 2012 to July 2013. The cumulative effect of these events resulted in Applicant "having a meltdown and not being functional enough to be responsible." Before Applicant married her second husband, she had good credit, owned a home, had built up her savings, and was on track to retire at 55. (GE 1; Tr. 20-27)

Applicant approached the resolution of her debts in a systematic and measured way. She prioritized her debts starting first by filing her 2012 state and federal tax returns in 2014. Her cumulative state and federal tax liability was approximately \$2,400. She set up a monthly payment plan of \$200 to address her tax debt and paid off that cumulative debt shortly after her hearing. All of her past tax issues are resolved. (SOR ¶¶ 1.e and 1.f; Tr. 28-35; AE E – AE I)

Next, Applicant paid off two of her smaller debts, an \$85 collection utility account and a \$119 collection utility account. (SOR ¶¶ 1.g and 1.j; Tr. 35-37; AE M, AE N, AE O) She has attempted to pay a \$64 collection medical account. However, after repeated attempts to locate the creditor Applicant stated, “no one can seem to find me or the bill in their system.” She will continue her efforts to locate creditor. (SOR ¶ 1.h; Tr. 35-37) She also will continue with her plan to repay her remaining five debts. (SOR ¶¶ 1.a – 1.d, 1.i; Tr. 35-37) When she was unable to pay her creditors, Applicant contacted all of them to inform them that she was unemployed and would contact them after she was employed to make payment arrangements. (Tr. 36-37)

At the time of hearing, Applicant was paying \$1,045 a month in rent plus utilities. In order to have more funds to pay down her debts, Applicant moved in with her adult daughter at the end of her lease in November 2015. Her daughter submitted a letter stating that Applicant “will live in my home as long as necessary, rent-free, so that she will be financially enabled to pay her debt.” Her daughter also stated that she would be providing her mother with financial assistance on an as-needed basis. (Tr. 38-41; AE C, AE E) Applicant’s annual salary is approximately \$43,000. (Tr. 18) Her budget reflects that she leads a modest lifestyle and lives paycheck to paycheck. (AE E) Applicant is working with a financial counselor. (AE M)

Character Evidence

In addition to her daughter’s letter, Applicant submitted three work-related reference letters: (1) new business manager/operations manager; (2) compliance and security officer; and (3) referral management trainer. The collective sense of these documents describes Applicant as hard working, a team player, honest, and trustworthy. These individuals support Applicant for a public trust position. (AE A, AE B, AE D)

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.” *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 designated as ADP I and ADP II are classified as “sensitive positions.” Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3. “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.” Regulation ¶ C6.1.1.1. 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. See Regulation ¶ C8.2.1.

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 security and trustworthiness suitability. 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 security clearance [or 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). “[S]ecurity clearance [or trustworthiness] determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

AG ¶ 18 articulates the trustworthiness concern relating to financial problems:

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.

AG ¶ 19 provides two financial considerations disqualifying conditions that could raise a trustworthiness concern and may be disqualifying in this case, "(a) inability or unwillingness to satisfy debts," and "(c) a history of not meeting financial obligations." Applicant's history of delinquent debt is established by the evidence presented. The Government established disqualifying conditions AG ¶¶ 19(a) and 19(c).

Five 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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;
- (c) 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;
- (d) the individual initiated 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.

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 debt occurred under circumstances that are unlikely to recur and does not cast doubt on her current reliability, trustworthiness, or good judgment.

Applicant's conduct in resolving her debts warrants application of AG ¶ 20(b). The fallout from Applicant's 2009 divorce and period of unemployment from June 2012 to July 2013 could not have been anticipated. Her financial problems were generated by circumstances beyond her control. Applicant acted responsibly by remaining in contact with her creditors; however, she did not have the money to pay them. When she did acquire the money, she began addressing her debts by prioritizing them beginning with filing and paying her state and federal income taxes.

AG ¶ 20(c) is applicable. Applicant consulted with a credit counselor. Her plan to regain financial responsibility started by addressing her tax liability and proceeding from there. She paid off two of her smaller debts and has additional funds as a result of moving in with her daughter. She will apply those funds to larger debts. Her budget reflects she leads a modest lifestyle and does her best with the resources she has.

Full mitigation is warranted under AG ¶ 20(d).¹ There are clear indications that her financial problems are resolved or are being resolved. She is taking this process seriously and has demonstrated a good-faith effort to repay her creditors with the means available to her. She will continue to do so until she has regained financial responsibility. AG ¶ 20(e) is not relevant because she did not dispute her responsibility for any SOR debts.

In sum, Applicant has taken reasonable actions to resolve her delinquent debts and regain her financial responsibility. Her efforts are sufficient to fully mitigate financial considerations trustworthiness concerns. Assuming, financial considerations concerns are not mitigated under AG ¶ 20, trustworthiness concerns are mitigated under the whole-person concept, *infra*.

¹The 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)).

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.

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. AG ¶ 2(c). The discussion in the Analysis section under Guideline F is incorporated in this whole-person section. However, further comments are warranted.

Applicant had the misfortune of going through a divorce that financially and emotionally devastated her. Three years after her divorce she experienced a 13-month period of unemployment. Applicant's efforts to regain financial responsibility are ongoing. She has made a significant lifestyle adjustment by moving in with her daughter to free up money to repay her creditors.

Both the mitigating conditions under Guideline F and the whole-person analysis support a favorable decision. I specifically considered Applicant's circumstances that led to her financial difficulties, the steps she has taken to resolve her financial situation, her potential for future service as a defense contractor, her reference letters, and her testimony and demeanor. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude she has mitigated the financial considerations security concerns.

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

. . . 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 [she] has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that [she] has . . . established a plan to resolve [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 [her] actions in evaluating the extent to which that applicant's plan for

the reduction of [her] 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.

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

Applicant understands what she needs to do to establish and maintain her financial responsibility. Her efforts at debt resolution have established a “meaningful track record” of debt re-payment. I am confident she will resolve the remaining debts on his SOR and maintain her financial responsibility.²

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines.

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 to 1.j:	For Applicant
Subparagraph 1.k:	Withdrawn

²Of course, the Government can re-validate Applicant’s financial status at any time through credit reports, investigation, and additional interrogatories. Approval of a public trust position now does not bar the Government from subsequently revoking it, if warranted. “The Government has the right to reconsider the [trustworthiness] significance of past conduct or circumstances in light of more recent conduct having negative [trustworthiness] significance.” ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012). Violation of a promise made in a trustworthiness context to pay legitimate debts also raises judgment concerns under Guideline E, and may support future revocation of a public trust position. An administrative judge does not have “authority to grant an interim, conditional, or probationary [public trust position].” ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012) (citing ISCR Case No. 10-03646 at 2 (App. Bd. Dec. 28, 2011)). See also ISCR Case No. 04-03907 at 2 (App. Bd. Sep. 18, 2006) (stating, “The Board has no authority to grant [a]pplicant a conditional or probationary [public trust position] to allow her the opportunity to have a [public trust position] while she works on her financial problems.”). This footnote does not imply that this Applicant’s public trust position is conditional.

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

Robert J. Tuidor
Administrative Judge