



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



In the matter of:)
)
 ---) ADP Case No. 14-04801
)
 Applicant for Public Trust Position)

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

09/15/2015

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 May 5, 2014, Applicant applied for a public trust position and submitted an Electronic Questionnaire for Investigations Processing (e-QIP).¹ On January 8, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to her, pursuant to DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended and modified (Regulation); 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 reasons why the DOD CAF

¹ Item 3 (e-QIP, dated May 5, 2014).

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 February 6, 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 mailed to Applicant on June 16, 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 June 24, 2015. The response was due on July 22, 2015. As of this date, Applicant had not submitted any response to the FORM. The case was assigned to me on September 10, 2015.

Findings of Fact

In her Answer to the SOR, Applicant admitted all of the factual allegations pertaining to financial considerations in the SOR (§§ 1.a. through 1.h.). 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 39-year-old employee of a defense contractor. She has been serving as an appointment setter with her current employer, on a part-time basis, since June 2014.³ She was previously unemployed on several occasions, during which she spent her free time with her children, and received cash grants under a welfare program called Temporary Assistance for Needy Families (TANF): from March 2008 until January 2011; from September 2012 until March 2014; and again from May 2014 until June 2014. She obtained some part-time employment through two employment agencies between periods of unemployment.⁴ Applicant graduated from high school in 1994.⁵ She has never served with the U.S. military.⁶ She was never granted a security clearance,⁷ and it is unclear if she ever held a public trust position. Applicant was married in 2007 and divorced in 2011.⁸ She has two children, born in 2008 and 2009.⁹

² Item 2 (Applicant's Answer to the SOR, dated February 6, 2014).

³ Item 5 (Personal Subject Interview, dated June 17, 2014), at 2.

⁴ Item 5, *supra* note 3, at 3.

⁵ Item 3, *supra* note 1, at 9-10.

⁶ Item 3, *supra* note 1, at 15.

⁷ Item 3, *supra* note 1, at 26.

Financial Considerations

It is unclear when Applicant first experienced financial difficulties, but she acknowledged that when she turned 18 in 1994, she obtained as many credit cards as she could and spent beyond her means, without thinking how she was going to pay for her purchases.¹⁰ She contends she made minimum payments on her credit cards until December 2004. Because of a motor vehicle accident in October 2004, her vehicle was not drivable and she had no insurance, so she rented a car for one month. At the end of the rental period in December 2004, the entire balance \$3,200 was withdrawn from her bank account by the rental agency, leaving her account overdrawn by that amount. Thereafter, she was unable to make any minimum payments, and she had no idea as to how to do so.¹¹ 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 judgment was filed against her.

A review of Applicant's May 2014 credit report¹² reveals at least two delinquent accounts as early as 2008 and a judgment in 2009.¹³ Because there were a number of other charge accounts from when she initially obtained them, Applicant believes she has other delinquent accounts that were not listed in her credit report.¹⁴ Aside from her 2004 automobile accident, her 2011 divorce, and her funded periods of unemployment, Applicant reported no major illnesses or other unexpected incidents that were largely beyond her control. She simply said that she "fell on hard times."¹⁵ In her interview with an investigator from the U.S. Office of Personnel Management (OPM), Applicant acknowledged that she has been unable to make any payments on her accounts since January 2005. Her plan for resolving her delinquent accounts is to file for bankruptcy if she can afford to do so with the income tax refund she expects to receive in 2015, and have her larger bills discharged, and she will pay the smaller utility bills and medical debts.¹⁶ She anticipates that her parents will assist her in paying the utility bills, and she plans to establish repayment plans for her medical bills.¹⁷

⁸ Item 3, *supra* note 1, at 17.

⁹ Item 3, *supra* note 1, at 19-20.

¹⁰ Item 5, *supra* note 3, at 4; Item 3, *supra* note 1, at 31.

¹¹ Item 5, *supra* note 3, at 4.

¹² Item 4 (Combined Experian, TransUnion, and Equifax Credit Report, dated May 22, 2014).

¹³ Item 4, *supra* note 10, at 5-6, 8.

¹⁴ Item 5, *supra* note 3, at 4-5.

¹⁵ Item 3, *supra* note 1, at 28-29.

¹⁶ Item 5, *supra* note 3, at 4-5, 7; Item 3, *supra* note 1, at 29-31.

¹⁷ Item 5, *supra* note 3, at 7.

The SOR identified eight purportedly continuing delinquent debts totaling approximately \$9,435 that had been placed for collection, charged off, or gone to judgment, as reflected by the May 2014 credit report.¹⁸ Those accounts were as follows: SOR ¶ 1.a. for \$3,026 that went to judgment;¹⁹ SOR ¶ 1.b. for \$976 that was charged off;²⁰ SOR ¶ 1.c. for \$176;²¹ SOR ¶ 1.d. for \$113;²² SOR ¶ 1.e. for \$2,683;²³ SOR ¶ 1.f. for \$1,986;²⁴ SOR ¶ 1.g. for \$232;²⁵ and SOR ¶ 1.h. for \$243.²⁶

Applicant has offered no documentation to support the creation of any repayment plans, or positive actions with any of 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 not offer any documentation to indicate that she had engaged a bankruptcy attorney or that she had filed for bankruptcy under Chapter 7 of the U.S. Bankruptcy Code. There is no evidence that Applicant has taken any steps to resolve her debts since she was interviewed in June 2014, over a year ago.

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. Applicant noted that she now resides with her parents, and they absorb the costs of her room and board and some of the utilities, and she contributes to the utilities. She contends that her newer accounts are current and that she maintains a positive balance in her checking account,²⁷ but 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

¹⁸ Item 4, *supra* note 12.

¹⁹ Item 4, *supra* note 12, at 5; Item 5, *supra* note 3, at 6.

²⁰ Item 4, *supra* note 12, at 6; Item 5, *supra* note 3, at 5.

²¹ Item 4, *supra* note 12, at 7; Item 5, *supra* note 3, at 6.

²² Item 4, *supra* note 12, at 5; Item 5, *supra* note 3, at 6.

²³ Item 4, *supra* note 12, at 7; Item 5, *supra* note 3, at 5.

²⁴ Item 4, *supra* note 12, at 7-8; Item 5, *supra* note 3, at 5.

²⁵ Item 4, *supra* note 12, at 8; Item 5, *supra* note 3, at 6-7.

²⁶ Item 4, *supra* note 12, at 8; Item 5, *supra* note 3, at 6-7.

²⁷ Item 5, *supra* note 3, at 7.

emphasizing, “no one has a ‘right’ to a security clearance.”²⁸ 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 positions.”²⁹ “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.”³⁰ 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.³¹

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.”³² 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.³³

²⁸ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

²⁹ Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

³⁰ Regulation ¶ C6.1.1.1.

³¹ Regulation ¶ C8.2.1.

³² “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).

³³ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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.³⁴ 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. In addition, AG ¶ 19(b) may apply if there is "indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt." 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. When she turned 18, she obtained as many credit cards as she could and spent beyond her means, without thinking about how she was going to pay for her debts. She eventually found herself with insufficient funds to make the necessary minimum monthly payments and her accounts became delinquent, and were placed for collection or charged off. One account went to judgment. AG ¶¶ 19(a), 19(b), 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

³⁴ *Egan*, 484 U.S. at 531.

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 “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.”³⁵ 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 2004 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 spent her free time with her children, and received cash grants under the TANF welfare program: from March 2008 until January 2011; from September 2012 until March 2014; and again from May 2014 until June 2014. She obtained some part-time employment through two employment agencies between periods of unemployment. She attributed her financial problems to spending beyond her means from 1994 until 2004, her automobile accident in 2004, her automobile rental bill of \$3,200, and falling on hard times. She did not expressly attribute any financial hardship to her periods of unemployment or underemployment, or to her divorce.

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 June 2014. Applicant offered no evidence of a good-faith effort to resolve any of her debts and essentially ignored them to this date. She has indicated an intention to pay some of the smaller accounts and declare bankruptcy with respect to the larger accounts. She has failed to submit any documentation to support any of her

³⁵ 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)).

stated intentions. 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.³⁶ Applicant's actions under the circumstances cast doubt on her current reliability, trustworthiness, and good judgment.³⁷

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.³⁸

There is some evidence in favor of mitigating Applicant's conduct. She has been with her current employer since June 2014. She was previously unemployed on numerous occasions. She has declared her intention of addressing her creditors and resolving her financial problems by paying the smaller ones and seeking bankruptcy protection and discharge of the larger ones.

³⁶ "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.

³⁷ See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

³⁸ 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).

The disqualifying evidence under the whole-person concept is more substantial. In 1994, when she turned 18, Applicant obtained as many credit cards as she could and spent beyond her means, without thinking how she was going to pay for her purchases. When she had a motor vehicle accident in October 2004, her vehicle was not drivable and she had no insurance, so she rented a car. The cost of the rental was \$3,200. At the end of the rental period in December 2004, the entire amount was withdrawn from her bank account by the rental agency, leaving her account overdrawn by that amount. Thereafter, she was unable to make any minimum payments, and she had no idea as to how to do so. 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 judgment was filed against her.

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. During her periods of unemployment, Applicant received cash grants under the TANF welfare program, and she spent her free time with her children. She did not mention any attempts to obtain employment to pay her debts while on the TANF welfare program. 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:³⁹

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.

³⁹ ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted).

