



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



In the matter of:)
)
 ---) ADP Case No. 19-01910
)
 Applicant for Public Trust Position)

Appearances

For Government: Aubrey M. De Angelis, Esquire, Department Counsel
For Applicant: *Pro se*

03/13/2020

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the trustworthiness concerns regarding financial considerations and drug involvement and substance misuse. Eligibility for a public trust position is denied.

Statement of the Case

On April 19, 2018, Applicant applied for a public trust position and submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On July 25, 2019, the Defense Office of Hearings and Appeals (DOHA) issued her a set of interrogatories. She responded to those interrogatories on August 8, 2019. On October 28, 2019, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to her under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines (AG)* (December 10, 2016), for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position, effective June 8, 2017.

The SOR alleged trustworthiness concerns under Guidelines F (Financial Considerations) and H (Drug Involvement and Substance Misuse) and detailed reasons why the DOD CAF was unable to find 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 such eligibility should be granted, continued, denied, or revoked.

In a sworn statement dated November 21, 2019, Applicant responded to the SOR, and she 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 by DOHA on January 21, 2020, and she was afforded an opportunity 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 Adjudicative Guidelines applicable to her case. Applicant received the FORM on January 29, 2020. Her response was due on February 28, 2020. Applicant chose not to respond to the FORM, for as of March 10, 2020, no response had been received. The case was assigned to me on March 10, 2020. The record closed on March 10, 2020.

Findings of Fact

In her Answer to the SOR, Applicant admitted all of the factual allegations in the SOR (SOR ¶¶ 1.a. and 1.b., and SOR ¶¶ 2.a. through 2.c.). 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:

Background

Applicant is a 31-year-old employee of a defense contractor. She has been serving with her current employer, initially as a bilingual medical service coordinator since January 2017, and subsequently as a customer service lead since November 2018. A 2006 high school graduate, Applicant received a bachelor's degree in 2013. She has never served with the U.S. military. She has never been married, but she has been cohabiting since 1990. She has no children.

Financial Considerations

Applicant has a lengthy negative employment history with repeated incidents that resulted in her termination from employment by various employers: as a cashier in 2009 for appearing at work hungover with a verified blood alcohol content of 0.04; as a loan originator in 2010 when her position was purportedly eliminated; as a consultative sales associate in 2012 for unsatisfactory performance; as a bartender in 2012 following a drug-related arrest; as a bilingual human resources administrator in 2014 for unsatisfactory performance; and as a bilingual debt collector in 2016 for a policy violation and unfavorable employment and conduct. (Item 5, at 5; Item 4, at 15-25)

When Applicant completed her April 2018 e-QIP, she acknowledged that she had failed to file her federal and state income tax returns for the tax years 2015 and 2016 because she was unable to do so online, and because she did not have sufficient funds to pay her income taxes at the appropriate times. (Item 4, at 46-47) When she was interviewed by an investigator from the U.S. Office of Personnel Management (OPM) in January 2019, she admitted that she still had not made any attempts to file her income tax returns or to pay any income taxes that she might owe for those years. (Item 5, at 5) When she submitted her responses to the interrogatories on August 8, 2019, she again confirmed that she still had not filed her federal and state income tax returns, and that she did not have an installment agreement with the Internal Revenue Service (IRS). (Item 5, at 11-13) She did, however, submit a Request for Transcript of Tax Return (Form 4506-T) to the IRS seeking account transcripts for the years in question. There was no transcript for the tax year 2015 submitted with her responses to the interrogatories, but there was one for the tax year 2016, and it reflected that as of July 31, 2019, no tax return had been filed. (Account Transcript, dated July 31, 2019, attached to the responses to the interrogatories) In her November 2019 Answer to the SOR, she admitted that her federal and state income tax returns for those two years had still not been filed.

It is not known what Applicant's current financial resources may be because she did not report her current net monthly income; monthly expenses; and any monthly remainder that might be available for discretionary spending or savings. There is no evidence of a budget. There is no evidence of financial counseling. In the absence of any financial information, it remains difficult to determine if Applicant is currently in a better position financially than she had been.

Drug Involvement and Substance Misuse

Applicant was a recreational substance abuser whose substance of choice was marijuana – a Schedule I Controlled Substance. She used marijuana, with varying frequency, estimated at 10 to 15 times per year, from about September 2004 when she was in high school, and she continued using it through college until at least December 2017, when she was 29 years old. She used marijuana socially with other individuals. She generally used it when it was passed around, but on occasion, she purchased it from individual sources that she claimed she could not recall. (Item 4, at 42-43; Item 5, at 4-5) Her relationship with marijuana resulted in two arrests:

- On December 12, 2012, when she was 24 years old, she was arrested and charged with (1) possession of marijuana less than 200 grams, a felony; (2) maintaining a drug trafficking place, a felony; and (3) possession of drug paraphernalia, a misdemeanor. On October 29, 2013, she was entered into a diversion program, and charges (2) and (3) were dismissed, and charge (1) was deferred upon probation by judgment. On May 8, 2015, charge (1) was dismissed. (Item 6) She claimed that she was “unintentionally involved as [her] boyfriend was selling marijuana at [her] apartment while [she] was at work.” She added that she “would not have allowed that to happen at [her] place of residence had [she] known.” (Item 4, at 43) Nevertheless, she continued using marijuana for another five years.

•On January 16, 2013, she was arrested and charged with (1) bail jumping, a felony, and (2) possession of drug paraphernalia, a misdemeanor. The charges were dismissed on August 28, 2015. (Item 6) Applicant explained that the charges were related to a positive drug test that occurred during her placement in the diversion program following her December 2012 arrest. (Item 5, at 4)

Applicant was never required to attend any drug-related counseling, education, or treatment. (Item 5, at 5) She claims that she no longer associates with anyone who uses drugs “as she has since grown up and is more mature. (Item 5, at 5) Moreover, she stated that she does “not plan on using, purchasing or distributing drugs in the future as [she has] matured in the last few years” (Item 5, at 17)

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].” (*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)) 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to such information “only upon a finding that it is clearly consistent with the national interest to do so.”

DOD contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. In this regard, 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 DOHA to continue to utilize the Directive in ADP contractor cases for trustworthiness determinations.

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 commonsense 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.” “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))

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. (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.” (*Egan*, 484 U.S. at 531) 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.

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

- (a) inability to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (f) failure to file or fraudulently filing annual federal, state, or local income tax returns or failure to pay annual federal, state, or local income tax as required.

Applicant failed to file her federal and state income tax returns for the tax years 2015 and 2016, claiming that she was unable to do so online, and because she did not have sufficient funds to pay her income taxes at the appropriate times. As of July 31, 2019, according to the IRS, no tax return had been filed for the tax year 2016. In her November 2019 Answer to the SOR, Applicant admitted that the federal and state income tax returns for the tax years 2015 and 2016 had still not been filed. AG ¶¶ 19(a), 19(c), and 19(f) have been established.

The guideline also includes examples of conditions that could mitigate trustworthiness 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; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

None of the mitigating conditions apply. An applicant who begins to resolve his or her financial problems only after being placed on notice that his or her security clearance, and by inference, his or her public trust position, is in jeopardy, may be lacking in the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his or her own interests. (See, e.g., ISCR Case No. 17-01213 at 5 (App. Bd. Jun. 29, 2018); ISCR Case No. 17-00569 at 3-4 (App. Bd. Sept. 18, 2018). Applicant completed her e-QIP in April 2018; underwent her OPM interview in January 2019; answered her interrogatories in August 2019; the SOR was issued in October 2019; and the FORM was sent to her in January 2020. Each step of the trustworthiness review process placed her on notice of the significance of the financial issues confronting her. She took no actions regarding her unfiled federal income tax returns until she filed her request for the federal transcripts in July 2019. She offered no evidence that she took any action with respect to the state income tax returns. As of the date that she answered the SOR in November 2019, the federal and state income tax returns still remained unfiled. She offered no update as to the status of those income tax returns in response to the FORM.

The DOHA Appeal Board has observed:

Failure to file tax returns suggests that an applicant has a problem with complying with well-established governmental rules and systems. Voluntary compliance with such rules and systems is essential for protecting [sensitive] information. ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002). As we have noted in the past, a [trustworthiness] adjudication is not directed at collecting debts. See, e.g., ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). By the same token, neither is it directed toward inducing an applicant to file tax returns. Rather, it is a proceeding aimed at evaluating an applicant's judgment and reliability. *Id.* A person who fails repeatedly to fulfill his or her legal obligations does not demonstrate the high degree of good judgment and reliability required of those granted access to [sensitive] information. See, e.g., ISCR Case No. 14-01894 at 5 (App. Bd. Aug. 18, 2015). See *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 284 F.2d 173, 183 (D.C. Cir. 1960), *aff'd*, 367 U.S. 886 (1961).

ISCR Case No. 14-04437 at 3 (App. Bd. Apr. 15, 2016). See ISCR Case No. 14-05476 at 5 (App. Bd. Mar. 25, 2016) (citing ISCR Case No. 01-05340 at 3 (App. Bd. Dec. 20, 2002)); ISCR Case No. 14-01894 at 4-5 (App. Bd. Aug. 18, 2015).

There is no evidence of financial counseling, or a budget. In the absence of additional financial information, it remains difficult to determine if Applicant is currently in a better position financially than she had been. Applicant's actions, or inaction, under the circumstances cast doubt on her current reliability, trustworthiness, and good judgment. See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

Guideline H, Drug Involvement and Substance Misuse

The trustworthiness concern relating to the guideline for Drug Involvement and Substance Misuse is set out in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

Furthermore, on October 25, 2014, the Director of National Intelligence (DNI) issued Memorandum ES 2014-00674, *Adherence to Federal Laws Prohibiting Marijuana Use*, which states:

[C]hanges to state laws and the laws of the District of Columbia pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines (Reference H and I). An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. As always, adjudicative authorities are expected to evaluate claimed or developed use of, or involvement with, marijuana using the current adjudicative criteria. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

The guideline notes some conditions under AG ¶ 25 that could raise trustworthiness concerns in this case:

(a) any substance misuse (see above definition); and

(c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant was admittedly a recreational substance abuser. She purchased, possessed and used marijuana, a controlled substance, with varying frequency, over a 13-year period, reportedly ending as recently as December 2017. She claimed that she

generally used marijuana socially with others. She was arrested on two separate occasions for drug-related incidents. AG ¶¶ 25(a) and 25(c) have been established.

The guideline also includes examples of conditions under AG ¶ 26 that could mitigate trustworthiness concerns arising from Drug Involvement and Substance Misuse:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; and (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Neither condition applies. Applicant used marijuana for over 13 years, reportedly ending as recently as December 2017. There was nothing infrequent about her marijuana use, and there is no evidence to indicate that it happened under such circumstances that it was unlikely to recur. In fact, even after she was arrested and charged with drug-related felonies and a misdemeanor, and placed into a diversion program, she continued using marijuana, and she was caught doing so when she tested positive for marijuana as part of the diversion program. Although she contended that the 2012 arrest was due to her boyfriend's activities at her residence, activities that she claimed she would not have approved of, she continued using marijuana for five more years. While she now acknowledges her past drug involvement, she claims to have no intention of future drug involvement.

A person should not be held forever accountable for misconduct from the past. In this instance, she used marijuana for 13 years, with the most recent drug involvement and substance misuse taking place in December 2017. Continued abstinence is to be encouraged, but the relatively brief period of such abstinence is in stark contrast to the lengthy period of her marijuana use, and it is considered insufficient to conclude that the reported abstinence will continue. Given Applicant's cavalier attitude towards laws, rules, and regulations, her use of marijuana, despite knowing that such use was prohibited, continues to cast doubt on her current reliability, trustworthiness, and good judgment.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a position of public trust 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, 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 position of public trust 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. 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).

There is some evidence in favor of mitigating Applicant's trustworthiness concerns. Applicant is a 31-year-old employee of a defense contractor. She has been serving with her current employer, initially as a bilingual medical service coordinator since January 2017, and subsequently as a customer service lead since November 2018. A 2006 high school graduate, Applicant received a bachelor's degree in 2013.

The disqualifying evidence under the whole-person concept is simply more substantial. Applicant failed to file her federal and state income tax returns for the tax years 2015 and 2016. As of her 2019 Answer to the SOR, Applicant admitted that those income tax returns had still not been filed. She offered no claimed change in the status of those federal and state income tax returns by the date the record closed. She also was admittedly a recreational substance abuser. She purchased, possessed and used marijuana, a controlled substance, with varying frequency, over a 13-year period, reportedly ending as recently as December 2017. She claimed that she generally used marijuana socially with others. She was arrested on two separate occasions for drug-related incidents, with the second incident associated with her registering a positive drug-test result during her time in a court-ordered diversion program.

Overall, the evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a position of public trust. For all of these reasons, I conclude Applicant has failed to mitigate the trustworthiness concerns arising from her financial considerations and drug involvement and substance misuse. See SEAD 4, App. A, ¶¶ 2(d)(1) through AG 2(d)(9).

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:

AGAINST APPLICANT

Subparagraphs 1.a. and 1.b.:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a. through 2.c.:	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 for a position of public trust to support a contract with the DOD. Eligibility is denied.

ROBERT ROBINSON GALES
Administrative Judge