



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



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| In the matter of: |) | |
| |) | |
| |) | ADP Case No. 23-01306 |
| |) | |
| Applicant for Public Trust Position |) | |

Appearances

For Government: Daniel P. O’Reilley, Esq., Department Counsel
For Applicant: *Pro se*

08/19/2024

Decision

DORSEY, Benjamin R., Administrative Judge:

Applicant did not mitigate the criminal conduct, financial considerations, or personal conduct trustworthiness concerns. Eligibility for access to sensitive information is denied.

Statement of the Case

On October 16, 2023, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guideline J (criminal conduct), Guideline F (financial considerations), and Guideline E (personal conduct). Applicant responded to the SOR on November 13, 2023, and requested a decision on the written record in lieu of a hearing.

The Government’s written case was submitted on April 4, 2024. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was advised that she had 30 days from her date of receipt to file objections and submit material to refute, extenuate, or mitigate the trustworthiness concerns. Applicant received the FORM on April 5, 2022, and she responded to the FORM on May 19, 2024 (FORM Response). The Government exhibits (Items 1-12) and the FORM Response are admitted in evidence without objection.

Findings of Fact

Applicant is a 53-year-old employee of a defense contractor, who is seeking to become a federal employee at a federal medical center. She has worked for her current employer since about July 2022. From 2008 until 2021, she was employed as a federal employee at another federal medical center until she resigned in about March 2021, after receiving a Notice of Proposed Removal, and being barred from the military base where she worked. She earned a high school diploma in 1990. She has been married since 2007 but was legally separated in about 2019. She has no children. (Items 4, 5, 9, 10)

Between 1992 and 2020, Applicant was arrested 12 times, including six arrests for theft. Her other arrests involved, among other things, destruction of property (1992 and 1993), illegal drug possession charges (1995 and 1997), intimidating a juror (1995), and forgery of financial documents (1995, twice in 2006, 2020). She was found guilty of forgery and grand theft in 1995, found guilty of violating a protective order in 2000, and found guilty of theft and forgery in April and in May 2006.

Applicant's most recent arrest, in 2020, involved multiple counts of theft and fraud she committed in 2019. In March 2022, she pleaded guilty to a felony charge of identity theft and the remaining charges were dismissed. She is on probation for that felony conviction until sometime later this year. She has completed her restitution payments that were part of her sentence. Her probation officer wrote a letter stating that Applicant has been compliant with her restitution payments and the other terms of her probation. She admitted the SOR allegations regarding her arrests with additional comments, except she denied the arrest that led to her felony conviction because the SOR alleged an incorrect date of arrest. The SOR alleges that she was arrested in March 2020, but she was arrested at a later date. However, she has admitted the underlying conduct that led to this arrest. (Items 2-8; FORM Response)

The conduct that resulted in her March 2022 felony conviction for identity theft involved her stealing credit cards from co-workers and using them to make unauthorized charges on those cards. She also opened additional credit-card accounts in those co-workers' names without their knowledge and consent. Her supervisor opined that, because Applicant had stolen personally identifiable information, she had lost confidence in Applicant's ability to maintain sensitive information and provided her with a notice of intent to remove her from her employment. Before Applicant could be terminated, she resigned, because she had been physically barred from accessing the military base where she worked. (Items 2-9; FORM Response)

Several of Applicant's arrests involved financial crimes such as forging checks and falsifying signatures on financial documents. She filed a petition in Chapter 7 bankruptcy in 2019 and had about \$40,000 of unsecured debt discharged in about February 2020. A February 2023 credit report reflects no delinquent accounts. (Items 2-9, 11, 12; FORM Response)

In addition to the aforementioned work discipline, Applicant was disciplined in November 2020, and suspended for five days for unacceptable conduct and use of offensive language when she got into an argument with a co-worker, cursed at her, and needed intervention to deescalate the incident. In September 2019, she received a Letter of Reprimand for absence without leave and failure to comply with leave procedures. (Items 2-5, 9, 10; FORM Response)

Despite being required to do so, Applicant failed to list her 2020 resignation and suspension and her 2019 Letter of Reprimand on her certified 2022 Electronic Questionnaires for Investigations Processing (e-QIP). Despite being required to do so, she also failed to disclose her 1997 and 1995 illegal drug possession arrests on the e-QIP. She disclosed her 2022 felony conviction on the e-QIP. During a 2022 personal subject interview (PSI), she told a DOD investigator that she left her job in 2021 because she was embarrassed by an incident involving someone's identity. She claimed that she was not fired or asked to quit, and that she was available for re-hire. She did not tell the DOD investigator about being put on notice that she would be terminated or about being denied access to the military base until she was confronted. She claimed that she did not intentionally fail to disclose this information in the e-QIP, but believes these failures were caused by problems with the computer she used to complete the e-QIP. She volunteered some of her drug use to the DOD investigator before being confronted. However, she did not volunteer her drug arrests before being confronted. (Items 2-10; FORM Response)

Applicant claimed that she has learned from her mistakes, has matured, and will no longer engage in any similar wrongdoing. With respect to any inconsistencies in her reporting of derogatory information, she claims that she has either forgotten or "chosen to forget" many of the details from her criminal past. She provided character-reference letters from co-workers claiming that she is dependable, hard-working, has good character, and always fosters a positive work environment. She provided a financial statement, pay stubs from her employer, and a letter of appreciation for her work during a government blood drive. (Items 2, 4, 5; FORM Response)

Policies

This case is adjudicated under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a public trust position, the 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 the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(a), 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 decision.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable trustworthiness decision.

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 safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline J, Criminal Conduct

The trustworthiness concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.

AG ¶ 31 describes conditions that could raise a trustworthiness concern and may be disqualifying. The following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

There is substantial evidence that Applicant engaged in a pattern of criminal behavior from about 1995 until 2019. The above referenced disqualifying condition is established, thereby shifting the burden to Applicant to provide evidence in mitigation.

Conditions that could mitigate criminal conduct trustworthiness concerns are provided under AG ¶ 32. The following are potentially applicable:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

As it has been about five years since Applicant's latest arrest, at first blush, it appears that a significant amount of time has passed since she engaged in criminal behavior. However, this amount of time without criminal conduct pales in comparison to the time over which she engaged in crimes. She is still on probation for her latest conviction, and that crime involved deceit, theft, and dishonesty. There is reliable evidence in the form of investigative reports and her admissions that she engaged in this behavior. There is no bright-line rule for how much time must elapse to make criminal behavior unlikely to recur or to establish evidence of successful rehabilitation. However, given the nature, number, and frequency of her actions, I have questions and doubts regarding her reliability, trustworthiness, and good judgment. AG ¶¶ 32(a) and 32(c) are not applicable. AG ¶ 32(d) has some applicability because of her good employment record, volunteer activities, restitution, and probation compliance.

Guideline F, Financial Considerations

The trustworthiness concern 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.

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 19. The following are potentially applicable in this case:

(a) inability to satisfy debts; and

(d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, expense account fraud, mortgage fraud, filing deceptive loan statements and other intentional breaches of financial trust.

Applicant filed a petition in Chapter 7 bankruptcy in 2019, and a significant amount of her unpaid debt was discharged in 2020. She has engaged in financial criminal behavior, including forging financial documents. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate the financial considerations trustworthiness concerns are provided under AG ¶ 20. The following 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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances; and
- (d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

The allegation surrounding Applicant's Chapter 7 bankruptcy filing has been mitigated by the passage of time without additional delinquent accounts, making those delinquencies unlikely to recur. AG ¶ 20(a) applies to that SOR allegation. I also find for Applicant with respect to the portion of SOR ¶ 2.a that cross-alleged ¶¶ 1.e. and 1.h. under Guideline F, because there is no evidence those cross-alleged crimes involve financial wrongdoing. Therefore, SOR ¶¶ 1.e and 1.h are not established under Guideline F.

For the reasons I indicated in my analysis under Guideline J, I do not find that Applicant's other financial crimes are unlikely to recur, and they cause me to question her reliability, trustworthiness, and good judgment. None of the mitigating paragraphs apply to the financial crimes alleged in SOR ¶¶ 1.a through 1.d, that were cross-alleged under Guideline F, SOR ¶ 2.a.

Guideline E, Personal Conduct

The trustworthiness concern for personal conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 16. The following are potentially applicable in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.

This includes, but is not limited to, consideration of:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or government protected information;
- (2) any disruptive, violent, or other inappropriate behavior;
- (3) a pattern of dishonesty or rule violations.

The Government has cross-alleged all the Guideline J and Guideline F paragraphs under Guideline E. As those allegations are sufficient for an adverse determination under both of those Guidelines, they are not established under Guideline E.

In 2021, Applicant was barred from entering the military base where she worked because she stole her co-workers' identity. The same employer disciplined her in 2020 and 2019. AG ¶ 16(d) is established.

Applicant deliberately omitted information from the e-QIP regarding her employment discipline in 2019, 2020, and 2021, as well as her 1997 and 1995 drug-related arrests. She claimed that she did not intentionally omit this information or that she had computer problems. However, her significant criminal history involving

dishonest and deceitful behavior, and her inconsistent statements to the investigator during the PSI about the reason for her resignation in 2019 cause me to question the veracity of her reporting. AG ¶ 16(a) is established.

AG ¶ 17 provides conditions that could mitigate personal conduct security concerns. The following mitigating conditions potentially apply in Applicant's case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(f) the information was unsubstantiated or from a source of questionable reliability.

None of the Guideline E mitigating conditions apply to Applicant's employment discipline from 2019 through 2021. Her behavior in violating her employer's rules is consistent with her other failures to follow laws and rules and causes me to question her reliability, trustworthiness, and good judgment. These failures to follow rules are not infrequent nor unusual, so I do not find that they are unlikely to recur. There is no evidence that she has obtained counseling to correct this behavior.

None of the Guideline E mitigating conditions apply to Applicant's failure to report her 2021 employment discipline and her 1997 and 1995 drug-related arrests on the e-QIP. Deliberately omitting relevant information from a security questionnaire is not minor. She did not volunteer the omitted information before being confronted with it. She did not acknowledge this deceitful behavior. Instead of telling the truth to the investigator after being confronted, she lied again and told the investigator that she resigned in 2021 because of "embarrassment," and failed to mention her theft of her co-worker's identity until confronted. For these reasons, I do not find that her behavior is unlikely to recur, and I question her reliability, trustworthiness, and good judgment.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 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 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines J, F, and E in my whole-person analysis. I have also considered her favorable character references.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a public trust position. I conclude Applicant did not mitigate the criminal conduct, financial considerations, or personal conduct trustworthiness concerns.

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:

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| Paragraph 1, Guideline J: | AGAINST APPLICANT |
| Subparagraph 1.a-1.i: | Against Applicant with the exception of the date of arrest listed in paragraph 1.b, that occurred on a later date. |
| Paragraph 2, Guideline F: | AGAINST APPLICANT |
| Subparagraph 2.a: | Against Applicant with the exception of cross-alleged paragraphs 1.e and 1.h, which were not established. |
| Subparagraph 2.b: | For Applicant |
| Paragraph 3, Guideline E: | AGAINST APPLICANT |
| Subparagraph 3.a: | For Applicant |

Subparagraphs 3.b-3.f:

Against Applicant

Conclusion

It is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

Benjamin R. Dorsey
Administrative Judge