



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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Applicant for Public Trust Position)

ADP Case No. 13-01068

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

06/17/2014

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the case file, pleadings, and exhibits, Applicant mitigated financial concerns. Eligibility for holding a public trust position is granted.

Statement of Case

On October 31, 2013, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing reasons why the DoD could not make the affirmative determination of eligibility for holding a public trust position and recommended referral to an administrative judge to determine whether eligibility to hold a public trust position should be granted, continued, denied, or revoked. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AGs), implemented by the Department of Defense on September 1, 2006.

Applicant responded to the SOR on November 14, 2013, and requested a hearing. The case was assigned to me on March 26, 2013, and was scheduled for hearing on April 23, 2014. The hearing was convened on that date. At hearing, the

Government's case consisted of seven exhibits (GEs 1-7). Applicant relied on two witnesses (including herself) and 10 exhibits. The transcript (Tr.) was received on May 2, 2014.

Procedural Issues

Before the close of the hearing, applicant requested leave to keep the record open to permit her the opportunity to supplement the record with a personal financial statement, a letter explaining her credit repair counseling, and a letter covering the allegations set forth in subparagraph 1.g. For good cause shown, Applicant was granted seven days to supplement the record. The Government was afforded two days to respond. Within the time permitted, Applicant supplemented the record with a personal financial statement, correspondence covering her subparagraph 1.e and 1.g debts, and a letter from a credit repair service confirming her enrollment in the program. Applicant's exhibits were admitted as AEs K-N.

Summary of Pleadings

Under Guideline F, Applicant allegedly accumulated nine delinquent debts. These debts exceeded \$17,000.

In her response to the SOR, Applicant admitted each of the allegations with explanations. She claimed her creditor 1.a account is in the process of being settled. She claimed that the debts covered by subparagraphs 1.b and 1.c, 1.e-1.g, and 1.i were either removed from her credit reports or reflect a zero balance. She claimed her account with creditor 1.d is being paid with her debit card, and she claimed her account with creditor 1.h was satisfied through a combination of tax deductions and direct payment.

Findings of Fact

Applicant is a 39-year-old health care specialist who seeks a determination of eligibility to hold a public trust position. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Prior to losing her job and moving to her current state of residence in 2005, Applicant was unmarried and childless. (GEs 1 and 3) She earned some college credits and has no military service. (GE 1) She currently co-habits with an old friend and has no children. (GE 3; Tr. 107-117)

Applicant's finances

While living in another state, Applicant lost her job and "fell on hard times." (GE 3; Tr. 40-43) Between 2005 and 2009, Applicant was homeless and was either

unemployed or worked temporary jobs at much lower hourly rates than she was used to making. (GE 3; Tr. 40-43)

During the period when she was either unemployed or working temporary jobs, Applicant did not have the resources to cover her bills and fell behind with her accounts. (GE 3; Tr. 42-49) Applicant's delinquent accounts reported in her credit report consist of the following: Creditor 1.a (\$1,995); creditor 1.b (\$1,961); creditor 1.c (\$1,550); creditor 1.d (\$300); creditor 1.e (\$524); creditor 1.f (\$1,484); creditor 1.g (\$9,052); creditor 1.h (\$119); and creditor 1.i (\$158)

In 2009, Applicant relocated to her current state. (GE 3; Tr. 50) Once she obtained full-time employment with her current employer in 2010, she first addressed and paid her past-due federal taxes. Beginning in 2013, she began addressing her listed delinquent consumer debts. (GE 3; Tr. 69-75) Applicant has since repaid all of her debts. (GE 3; Tr. 118-125) She documented full or settled payments with the following creditors: Creditor 1.a for \$1,203 (AE D); creditor 1.b for \$1,961 (AE A); creditor 1.c for \$1,550 (AE B); creditor 1.d for \$300 (AE E); creditor 1.e for \$424 (AE L); creditor 1.f for \$1,484 (AE G); creditor 1.g for \$9,052 (AE H); creditor 1.h for \$119 (AE I); and creditor 1.i for \$158 (AE J).

Applicant provided a post-hearing financial statement that reveals monthly net income of \$2,888, monthly expenses of \$1,115; monthly debts of \$772, and a net monthly remainder of \$1,001. (AE K) She assures she has good financial standing now and is fully able to manage her finances. (GE 3; Tr. 56-62) Applicant shares her living expenses with her boyfriend; this has helped her to better manage her bills and maintain a sizeable monthly reserve. She has also engaged a financial counseling and credit repair service. (AE N; Tr. 107-117) The program is designed to work with the credit bureaus and creditors to audit and verify the information within the customer's credit reports.

Endorsements

Applicant did not provide any endorsements from friends or coworkers. Her mother corroborated the brief living arrangements she made with her after she lost her job and received her eviction notice. (GE 3; Tr. 48, 92-97) Her mother provided further corroborating information about how Applicant managed to cope with her homeless situation while financially strapped during the 2005-2009 time-frame. (Tr. 92-97) Applicant's current boyfriend, who has known her since she was 13 years of age and is aware of her homeless experiences, confirmed the financial progress she has been able to make with his help since she obtained full-time employment. (Tr. 107-117)

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering public trust eligibility cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to hold a public trust position. These guidelines include

"[c]onditions that could raise a security concern [trustworthiness concerns] and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate trustworthiness concerns." These guidelines must be considered before deciding whether or not eligibility to hold a public trust position should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable trust risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

Financial Considerations

The Concern: "Failure or inability to live within one's means, satisfy debts 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. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts." AG, ¶ 18.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's eligibility to hold a public trust position may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense

appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility to hold a public trust position depends, in large part, on the relevance and materiality of that evidence. See *Kungys v. United States*, 485 U.S. 759, 792-800 (1988). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR; and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to hold or maintain a public trust position. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused a position requiring trust and reliability before it can deny or revoke eligibility to hold a public trust position. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to demonstrate good judgment and trustworthiness.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her eligibility to hold a public trust position through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all public trust positions be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her trust eligibility. Like security clearance determinations, public trust eligibility decisions "should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Applicant is a healthcare specialist for a health services company who accumulated delinquent debts exceeding \$17,000 during lengthy periods of unemployment and underemployment. Her debt accruals warrant the application of two disqualifying conditions (DC): ¶ 19(a), "inability or unwillingness to satisfy debts," and ¶ 19(c) "a history of not meeting financial obligations."

Holding a public trust position involves a fiduciary relationship between the Government and the public trust position holder. Quite apart from any agreement the trust holder may have signed with the Government, the nature of the public trust position holder's duties necessarily imposes important duties of trust and candor on the holder that are considerably higher than those typically imposed on Government employees and contractors involved in other lines of Government business. See *Snapp v. United States*, 444 U.S. 507, 511 n.6 (1980). Failure of the applicant to make concerted efforts to pay or resolve her debts when able to do so raises concerns about whether the applicant has demonstrated the trust and judgment necessary to safeguard sensitive information.

Since regaining full-time employment in 2012, Applicant has managed to repay or settle all of her listed delinquent debts. Aided by her boyfriend with whom she co-habits, she has been able to maintain a monthly net remainder of around \$1,000. (AE K) While the Appeal Board has never required an applicant to repay all of his or her debts in demonstrating a return to financial stability, Applicant has managed to repay all of her listed debts. Her efforts reflect a determined efforts to resolve her financial problems and take significant actions to implement her plan. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008).

Based on Applicant's demonstrated years of unemployment and underemployment, considerable extenuating circumstances are associated with her inability to pay off or otherwise resolve her debts. Available to Applicant is MC ¶ 20(b), "the conditions that resulted in the behavior 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."

Extenuating circumstances alone are not enough to enable Applicant to mitigate trust concerns over her past failures to address her debts. See ISCR Case No. 05-11366, at 4 n.9 (App. Bd. Jan. 12, 2007)(citing other ISCR case authorities)). To her credit, Applicant has managed to repay or settle all of her listed delinquent debts since she returned to full-time employment in 2010. Her efforts merit the application of three additional mitigating conditions covered by the financial considerations guideline: MC ¶ 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;" MC ¶ 20(c) "the person has received counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;" and MC ¶ 20(d), "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts," apply to Appellant's situation.

A whole-person assessment enables Applicant to surmount the judgment questions raised by her accumulation of delinquent debts and failure to take earlier steps to address them. Quite clearly, recurrent unemployment and underemployment problems played a considerable role in her accumulation of so much debt exposure and is a source of some continuing trustworthiness and judgment concerns.

With help from her full-time employment and her boyfriend, Applicant paid off all of her listed debt delinquencies and currently maintains a positive monthly remainder. Overall, a trustworthiness eligibility assessment of Applicant based on her demonstrated repayment efforts to date is enough to enable her to overcome concerns arising out of her accumulation of delinquent debts.

Taking into account all of the documented facts and circumstances surrounding Applicant's debt accumulations and her good-faith repayment initiatives, Applicant has been able to restore her finances to stable levels commensurate with the minimum requirements for holding a public trust position. Favorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.i.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE F (FINANCIAL CONSIDERATIONS): FOR APPLICANT

Subparagraphs. 1.a through 1.i: For Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's eligibility to hold a public trust position. Eligibility is granted.

Roger C. Wesley
Administrative Judge

