



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



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| In the matter of: |) | |
| |) | |
| |) | ADP Case No. 14-00225 |
| |) | |
| Applicant for a Public Trust Position |) | |

Appearances

For Government: Stephanie C. Hess, Esq., Department Counsel
For Applicant: *Pro se*

06/23/2015

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department’s intent to deny her eligibility to occupy a public trust position in the defense industry. Applicant submitted sufficient evidence to mitigate the security concerns raised by her \$8,000 in delinquent debt. However, she failed to mitigate the criminal and personal conduct concerns raised by her recent criminal activity and her continued association with individuals engaged in criminal activity. Accordingly, her request for access to sensitive information is denied.

Statement of the Case

On March 14, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing trustworthiness concerns under the financial considerations, criminal conduct, and personal conduct guidelines.¹ DOD adjudicators were unable to find that it is clearly consistent with the interests of national security to grant or continue Applicant’s access to sensitive information and recommended that the case be submitted to an administrative judge for a determination whether to revoke or deny Applicant’s eligibility to occupy a public trust position.

¹ This case is adjudicated under DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). The *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG replace the guidelines in Enclosure 2 to the Directive.

Applicant timely answered the SOR and requested a hearing.² At the hearing, convened on February 12, 2015, I admitted Government's Exhibits (GE) 1 through 4, and Applicant's Exhibits (AE) A through D, without objection. After the hearing, Applicant submitted AE E through H, without objection.³ Department Counsel submitted GE 5, which is also admitted without objection. DOHA received the transcript (Tr.) on February 24, 2015.

Procedural Issues

Before the hearing commenced, Department Counsel learned that Applicant did not receive a copy of the Government's discovery documents. Department Counsel provided Applicant a copy of the documents to review before the hearing. During the hearing, I confirmed that the documents were sent to the address Applicant provided on the SOR receipt. After receiving the SOR, Applicant moved and did not inform Department Counsel of her new address. After updating Applicant's address for the record, I gave Applicant the option to reconvene the hearing at a later date to allow her additional time to prepare for the hearing. Applicant indicated her choice to proceed with the hearing as scheduled. Without objection from Department Counsel, I left the record open after the hearing to allow Applicant to submit additional documentation. Department Counsel sent a second copy of the Government's exhibits to Applicant after the hearing.⁴

Findings of Fact

Applicant, 37, has worked for a federal contractor since August 2013. Her position requires access to personally identifiable information (PII). On her electronic questionnaire for investigations processing (e-QIP), submitted that same month, Applicant disclosed several delinquent accounts and a 2010 arrest for shoplifting. The ensuing investigation revealed that Applicant is indebted to seven creditors for approximately \$8,000. In addition to the 2010 shoplifting arrest, Applicant was also arrested several times between 2001 and 2005 for prostitution. Most recently, she was arrested in March 2013 for possession of drug paraphernalia.⁵

Criminal Conduct

Applicant began working as a prostitute in 1998, when she was 21 years old. Initially, she engaged in sex work to escape an abusive home life. Between 2001 and 2002, Applicant was arrested several times on prostitution charges in State 1 and State 2. In 2002, she was convicted of prostitution charges in State 2 and sentenced to 20 days confinement. After meeting her husband in 2004, Applicant continued working as

² The Government's discovery letter, dated November 28, 2014, is appended to the record as Hearing Exhibit (HE) I.

³ HE II.

⁴Tr. 9-12.

⁵ Tr. 25-26, 39-40; GE 1, 3-4.

prostitute because, doing so, at times, provided the couple's only source of income. In December 2005, Applicant was arrested in State 3, which resulted in the consolidation of several cases. She was charged with four counts of failure to appear and one prostitution charge. She successfully completed a diversion program that resulted in the charges being dropped. She has not worked as a prostitute since 2005.⁶

Applicant did not have contact with the criminal justice system again until 2010, when she was arrested for shoplifting. According to Applicant, she agreed to conceal merchandise in her purse for a friend. Applicant claims to have pleaded guilty to the charge for a friend who would have received a stiffer penalty. Applicant received probation, was ordered to attend a shoplifting and theft diversion program, and ordered to pay a fine. In 2013, Applicant was charged with possession of drug paraphernalia, after the items were found in her car during a routine traffic stop. Applicant testified that the paraphernalia belonged to the passenger in her car and that he told the police officer that the paraphernalia belonged to him. Applicant was issued a citation and received a court date. Applicant failed to appear, citing the financial hardship caused by having to appear in a court 200 miles away from home, which included lost income from having to take off work, finding child care for her daughter, and gas money for the 400 mile round trip. At the time of her trustworthiness hearing, these charges were still outstanding. After the hearing, Applicant negotiated a plea agreement on the drug and failure to appear charges. Under its terms, Applicant will plead guilty to possession of drug paraphernalia. She will not serve jail time, but will be assessed a fine in addition to a warrant fee. It is unclear if the court will accept Applicant's plea or if she will be subject to some form of court-ordered monitoring.⁷

Financial Issues

Applicant's financial problems began after her marriage in 2006. Her husband has an extensive criminal history and has been incarcerated for the majority of their nine-year marriage. Applicant's husband went to prison in 2007, serving 18 months for a probation violation. Their daughter, now seven, was born while he was incarcerated. When Applicant's husband was released from prison in 2008, Applicant provided the family's only income. Applicant also tried to provide financial support to her three stepchildren, who live in State 1. In an attempt to integrate her husband back into the household, Applicant transferred some of the household responsibilities to him, such as caring for their young daughter and entrusting him to pay the bills. In 2009, Applicant learned that he was using the money to support his drug habit and extramarital affairs. Upon discovering his conduct, Applicant took loans to repay the debts, but soon she became unable to repay the loans. Applicant's husband returned to prison in August 2011. He is serving a six-year sentence and is scheduled for release in 2017.⁸

⁶ Tr. 26-29, 31, 88, 95-98; GE 2.

⁷ Tr. 74-86; GE 2.

⁸ Tr. 24, 31-37, 40-42, 54-55, 66-67, 99; AE C-D.

Applicant currently earns \$15 per hour and has the opportunity to work three hours of overtime each week. She is able to live within her means, but does not have significant disposable income. She decided to file for Chapter 7 bankruptcy protection in April 2014, but the petition was dismissed because she could not afford to pay the bankruptcy fees. She filed again in December 2014, this time representing herself. She petitioned for and received a waiver of the bankruptcy fees. The bankruptcy, which included the debts alleged in the SOR, was discharged on May 19, 2015.⁹

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.”¹⁰ “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.”¹¹ 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.¹² An administrative judge’s objective is a fair, impartial, and commonsense decision that embraces all available, reliable information about the person, past and present, favorable and unfavorable.

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 the 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 a public trust position 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.

⁹ Tr. 37-38, 46-62-54, 56, 59-64; GE 5; AE F.

¹⁰ DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation) ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

¹¹ Regulation ¶ C6.1.1.1.

¹² See Regulation ¶ C8.2.1.

Analysis

Financial Considerations

Unresolved delinquent debt is a serious trustworthiness concern because failure to “satisfy debts [or] 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 sensitive information.”¹³

The SOR alleges that Applicant owes approximately \$8,000 in delinquent debt. The allegations are supported by the credit reports in the record.¹⁴ Applicant has demonstrated an inability to pay her debts as well as a history of not doing so.¹⁵ Her financial problems were caused by events beyond her control – her husband’s use of the household income to support his drug abuse habit. Given her financial situation, Applicant’s decision to resolve her delinquent debt through bankruptcy is reasonable. Having received the benefit of bankruptcy protection, Applicant’s finances appear to be under control. She has mitigated the financial considerations concerns.¹⁶

Criminal Conduct

Criminal activity creates doubt about a person’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.¹⁷ Applicant admits to an extensive criminal history, consisting of multiple misdemeanor offenses, dating back to 2000. Between 2000 and 2005, Applicant was arrested on several occasions for prostitution. She pleaded guilty to a shoplifting charge in 2010 and has an impending guilty plea on a 2013 drug and failure to appear charges.¹⁸ Given the circumstances and recency of her criminal conduct, none of the criminal conduct mitigating conditions apply.

Applicant’s circumstances have changed sufficiently that it is unlikely she will engage in prostitution in the future. These offenses are mitigated by the passage of time. She has also been able to establish a positive employment record since 2005. However, these facts do not fully mitigate the criminal conduct concerns. Applicant’s criminal conduct is connected to her choice of associations in her personal life. These choices raise serious concerns about her judgment and cast doubts on her current suitability to occupy a position of trust. A review of an Applicant’s trustworthiness is not

¹³ AG ¶ 18.

¹⁴ GE 3-4.

¹⁵ AG ¶¶ 19(a) and (c).

¹⁶ AG 20(b).

¹⁷ AG ¶ 30.

¹⁸ AG ¶ 31(a).

limited to an evaluation of Applicant's conduct during duty hours; off-duty conduct is also material in evaluating an individual's trustworthiness. Applicant chooses to associate with individuals involved in criminal conduct and those relationships have resulted in her continued participation in criminal activity.

Applicant was not pressured or coerced into engaging in criminal conduct. In 2010, Applicant admitted that she willingly accepted a criminal penalty to help a friend. In 2013, Applicant allowed another friend to bring illegal items into her car. These continued interactions with individuals engaged in criminal activity increase the likelihood that Applicant will engage in criminal conduct in the future. Furthermore, ambiguity remains regarding the disposition of her most recent criminal charges. While the unresolved nature of Applicant's most recent criminal conduct does not preclude a granting her eligibility to occupy a public trust position, it does weigh against it.

Applicant's recent criminal activity, while relatively minor, indicates that Applicant may treat the rules and regulations associated with handling and protecting sensitive information with the same disregard of the law. Applicant's conduct indicates that she does not possess the requisite judgment, reliability and trustworthiness of those seeking to enter into a fiduciary relationship with the government.

Personal Conduct

Applicant's criminal conduct is also disqualifying under the personal conduct guideline. As discussed above, Applicant has engaged in conduct that shows questionable judgment, an unwillingness to comply with rules or regulations, and raises questions about her ability to protect sensitive information.¹⁹ Furthermore, Applicant's history of criminal conduct and her continued association with individuals engaged in criminal activity, if known, has the potential to negatively impact her professional or community standing.²⁰ Applicant failed to mitigate the personal conduct security concerns. Applying the same analysis employed in the discussion of the criminal conduct mitigating conditions, Applicant's off-duty conduct and her continued association with individuals involved in criminal activity continue to reflect negatively on her current trustworthiness. She has failed to take any steps to reduce or eliminate these areas of vulnerability or exploitation.

Whole Person Concept

Based on the record, I have doubts about Applicant's eligibility to occupy a public trust position. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(a). It is not the purpose of trustworthiness adjudications to punish an applicant for past acts of misconduct. The purpose of the trustworthiness adjudication is to make "an examination of a sufficient period of a person's life to make an affirmative

¹⁹ AG ¶ 15.

²⁰ AG ¶¶ 16(e) and (g).

determination that the person is a risk.”²¹ In cases involving access to sensitive personal information, the degree of acceptable risk is less than that acceptable to mere access to employment.²² Applicant is smart, industrious, and capable of high performance in the workplace. However, in her personal life, Applicant continues to maintain relationships and engage in activities that compromise her judgment, trustworthiness, and reliability. Following *Egan*²³ and the clearly-consistent standard, these concerns must be resolved in favor of the government.

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, Financial Considerations: | FOR APPLICANT |
| Subparagraphs 1.a -1.g: | For Applicant |
| Paragraph 2, Criminal Conduct: | AGAINST APPLICANT |
| Subparagraphs 2.a – 2.c: | For Applicant |
| Subparagraphs 2.d – 2.e: | Against Applicant |
| Paragraph 3, Personal Conduct | AGAINST APPLICANT |
| Subparagraph 3.a: | Against Applicant |

Conclusion

In light of all of the circumstances presented, it is not clearly consistent with the interests of national security to grant Applicant access to sensitive information. Her eligibility to occupy a position of public trust is denied.

Nichole L. Noel
Administrative Judge

²¹ AG ¶ 2(a).

²² See *Gayer v. Schlesinger*, 490 F.2d 740, 750 (D.C. Cir. 1973).

²³ *Navy v. Egan*, 484 U.S. 518 (1988).