



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 15-00094

Appearances

For Government: Nicole Smith, Esq., Department Counsel

For Applicant: *Pro se*

08/23/2016

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, I conclude that Applicant mitigated trust concerns regarding her past drug use but did not mitigate trust concerns regarding her finances. Eligibility for holding a public trust position is denied.

History of the Case

On August 28, 2015, the Department of Defense (DOD) Consolidated Adjudication Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the preliminary affirmative determination of whether to grant eligibility for 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 (E.O. 10855), *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security*

Clearance Review Program (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AGs) implemented by the DOD on September 1, 2006.¹

Applicant responded to the SOR on September 29, 2015, and requested a hearing. This case was assigned to me on April 1, 2016. The case was scheduled for hearing on May 25, 2016. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's application for eligibility to hold a public trust position. At the hearing, the Government's case consisted of four exhibits (GEs 1-4); Applicant relied on the one witness (herself) and three exhibits. (AEs A-C) the transcript was received on June 2, 2016.

Procedural Issues

Before the closing of the hearing, Applicant requested the record be kept open to permit her the opportunity to supplement the record with a signed rehabilitation agreement and documented payments to the student loan creditor covered by ¶¶ 1.a-1.c, 1.g., and 1.i, and verification of payments made to creditors 1.h and 1.j.

For good cause shown, Applicant was granted seven days to supplement the record. Department Counsel was afforded two days to respond. Applicant did not furnish any post-hearing submissions.

Summary of Pleadings

Under Guideline F, Applicant allegedly (a) accumulated six delinquent Department of Education (DOE) student loans exceeding \$10,000; (b) accrued a delinquent student loan debt with her private educational institution; and (c) accumulated two other delinquent debts: one with a financial institution covered by ¶ 1.h and one with her landlord covered by ¶ 1.j. Allegedly, these debts remain outstanding.

Under Guideline H, Applicant allegedly (a) used marijuana from August 2007 to at least July 2011; (b) purchased marijuana from friends from April 2009 to at least February 2011; (c) was arrested in June 2011 and charged with marijuana possession/use and paraphernalia possession/use; and (d) tested positive for marijuana on a court ordered drug test screening in April 2011.

In her response to the SOR, Applicant denied all of the individual DOE student loan debts, claiming they were all part of the same loan. She denied the creditor 1.j

1. A memorandum from the Deputy Under Secretary of Defense for Counterintelligence and Security, titled "Adjudication of Trustworthiness Cases," covering the handling of trustworthiness cases under the Directive was issued on November 19, 2004. This memorandum directed DOHA to continue to utilize DOD Directive 5220.6 in ADP contractor cases for trustworthiness determinations (to include those involving ADP I, II, and III positions). (HE 1) Parenthetically, the Directive was designed to implement E.O. 10865.

debt, claiming she settled the \$720 balance owed by her roommate at the time. She admitted the debts covered by ¶¶ 1.d and 1.h.

Findings of Fact

Applicant is a 36-year-old military service representative for a medical health group who seeks 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

Applicant has never married and has no children. She attended college classes at a local art institute between April 2009 and March 2011, but claimed no degree or diploma. (GE 1) Applicant claimed no military service.

Applicant accepted employment with her current employer in May 2014. (Tr. 32) In her service representative position, she has serviced over 20,000 calls, offering assistance to beneficiaries and providers with questions regarding their medical coverage. (Tr. 32) She is often utilized as a mentor for new-member hires and on-the-job training and coaching. She was unemployed between February 2014 and May 2014. (GE 1) She was employed by another government contractor between October 2013 and February 2014, and by another contractor between December 2011 and June 2013, in medical sales representative positions. (GE 1) Applicant held temporary jobs, during her recurrent periods of unemployment between August 2007 and December 2011, and between June 2013 and October 2013. (GE 1; Tr. 41)

Finances

Applicant took out student loans from the DOE and a private lender between April 2009 and March 2011 to finance her art classes. (GEs 2-3; Tr. 46-48) Due to recurrent periods of unemployment and low-paying temporary jobs, Applicant fell behind with her student loans that exceeded \$15,000 in the aggregate. These loans went into default sometime in 2012, and the accounts have remained in default, except for two \$90 payments she made in 2013. (GEs 1-4 and AE C; Tr. 48-49)

Applicant has since entered into a payment program with the DOE pursuant to a consolidated agreement with the lender and currently carries an aggregate loan balance of \$15,186. (AE A; Tr. 35) To date, she has not provided any evidence of documented loan payment terms or credited DOE payments. Her March 2016 statement from the collection agent for her student loan lender recited only the consolidated loan balance and credit for a monthly \$5.00 payment. (AE A) Applicant's claims of making 10 such payments, beginning in September 2015, and proof of her being placed in the lender's rehabilitation program are not documented. (AE A; Tr. 35-37)

Applicant also incurred a separate student debt with her private educational institution in the amount of \$1,175 on a student loan she opened in November 2013. (GEs 1-4; Tr. 54) This debt remains unpaid and unsatisfied.

Applicant's accrued delinquent debts include a delinquent debt with creditor 1.h in the amount of \$1,052. (GEs 2-4 and AE B) Applicant opened a credit card account with creditor 1.h in November 2010, which she used for general purchases. (GE 2) This account became past due in July 2011 and was not addressed by Applicant in the ensuing three years. (GE 3) When interviewed by an agent of the Office of Personnel Management (OPM) in May 2014, she promised the agent she would begin making payments on the account in July 2014. When she did not initiate payments as promised, creditor 1.h's collection agent obtained a default judgment against Applicant in 2016 and commenced garnishment proceedings against her. (AE B; Tr. 56) Altogether, creditor 1.h caused earnings to be withheld from Applicant by her employer between December 2015 and March 2016 in the total amount of \$1,692. (AE B; Tr. 37) Creditor 1.h's series of garnishments left Applicant with a balance of \$500 to \$600 to pay off the debt. (Tr. 57) She provided no documentation, though, of her making any voluntary payment progress on this debt.

Applicant also remains indebted to creditor 1.j on a lease payment (\$1,068) that she continues to dispute. (Tr. 36) After paying her own share of the last month of the lease, she vacated the apartment unit without covering her roommate's \$350 share. (GEs 2-4; Tr. 36-37) She told the landlord that she should not be held responsible for her roommate's default. (GE 2; Tr. 37) Applicant provided no written evidence to document the basis of her dispute with creditor 1.j or verification of her father's paying the roommate's share of the final month of rent.

Applicant currently earns \$35,000 a year (Tr. 39-40), which is considerably more than what she earned with previous contractors. (Tr. 42) During her recurrent periods of unemployment, she received financial support from her parents and resided with her mother, rent-free. (Tr. 42-43)

Applicant provided no evidence of financial counseling or budgeting since she fell behind with her listed debts in 2011. She provided no financial plan for repayment of her delinquent debts, and at this point has failed to meaningfully address most of her delinquent debts with voluntary initiatives. Only the creditor 1.h debt has been addressed, and it was addressed through garnishment actions taken by the creditor on a default judgment, and not by any voluntary initiatives by Applicant.

Applicant's involvement with marijuana

From August 2007 to July 2011, Applicant smoked marijuana with her friends at the time. (GE 2; Tr. 38, 58) Her marijuana use varied, but typically, she would smoke it through a pipe, or in a cigarette form with her friends at parties. She neither bought or sold marijuana for a profit, but occasionally (approximately every two months) purchased marijuana for her friends to cost-share from April 2009 to February 2011. (GEs 1 and 3; Tr. 61-62)

In June 2010, Applicant was arrested and charged with (a) marijuana possession and use and (b) drug paraphernalia possession and use. (GE 3) She pled guilty to the misdemeanor charges, was placed on probation, and was ordered to take substance abuse classes on drug use and submit to random drug testing. (GE 1). In a random drug test administered to her by her substance abuse counselors in April 2011, she tested positive for marijuana and was dismissed from the program. (GE 2; Tr. 60) Permitted by the court to return to the program in April 2012, Applicant completed her court-ordered probation requirements in October 2013, and has since passed multiple random drug screening tests with her current employer. (GEs 1-2; Tr. 60)

Applicant assured she has not used marijuana or any illegal drugs since she ceased using marijuana in February 2011. (GE 2; Tr. 61) She no longer associates with individuals that use drugs and assures she will not return to illegal drug use in the future. (GE 2; Tr. 61) She assured also that her significant other does not use illegal drugs of any kind. (Tr. 64) Applicant's assurances satisfy credibility criteria and are accepted.

Endorsements

Applicant provided no endorsements or performance evaluations on her behalf. Nor did she provide any proof of community and civic contributions.

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA 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 protect classified [privacy] information. These guidelines include "[c]onditions that could raise a trustworthiness concern [public trust position] and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate [trustworthiness concerns]."

The AGs 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 public 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 guideline is pertinent in this case:

Financial Considerations

The Concern: 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. . . AG ¶ 18.

Drug Involvement

The Concern: Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. AG ¶ 24.

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 for a public trust position depends, in large part, on the relevance and materiality of that evidence. *See United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995). 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 obtain or maintain public trust position eligibility. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused privacy information 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 protect privacy information.

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 trustworthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Executive Order 10865 that all trustworthiness determinations be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her trust eligibility. “[T]rustworthiness] determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Trustworthiness concerns are raised over Applicant’s accumulation of delinquent student loan and consumer debts over a period of several years that she failed to address in material ways. Applicant’s recurrent problems with managing her finances over a period of years while fully employed reflect lapses of judgment in administering her financial responsibilities.

Applicant’s accumulation of delinquent debts warrant the application of two of the disqualifying conditions (DC) of the Guidelines. DC ¶ 19(a), “inability or unwillingness to satisfy debts;” and DC ¶19(c), “a history of not meeting financial obligation,” apply to Applicant’s situation.

Applicant’s pleading admissions with respect to her accumulated debts covered in the SOR negate the need for any independent proof (see *McCormick on Evidence*, § 262 (6th ed. 2006)). Each of Applicant’s listed delinquent debts are fully documented in her credit reports. Judgment problems persist, too, over Applicant’s insufficiently explained delinquent debts and her failure to demonstrate she acted responsibly in addressing all of her listed debts. See ISCR Case 03-01059 at 3 (App. Bd. Sep. 24, 2004).

Positions designated as ADP I and ADP II are classified as “sensitive positions.” See DOD Regulation 5200.2-R, *Personnel Security Program*, ¶ ¶ C3, 1.2, 1.1.7, and C3. 1.2.3 (Jan. 1987, as amended) (the Regulation). Holding a public trust position involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor.

Financial stability in a person cleared to protect privacy information is required precisely to inspire trust and confidence in the holder of the trust position. While the principal concern of a trust position holder’s demonstrated financial difficulties is

vulnerability to coercion and influence, judgment and trust concerns are explicit in cases involving debt delinquencies.

Although ADP I and ADP II positions are not expressly covered by Executive Order 10865 or the Directive, which apply to contractor personnel, historically, the same principles covering these positions have been applied in Regulation 5220.2 governing military and civilian personnel. The definitions used in the Regulation to define ADP I and ADP II positions have equal applicability to contractors covered by the Directive.

While some extenuating circumstances can be inferred from Applicant's listed periods of unemployment, too little information is documented to credit her with more than partial extenuating circumstances. Based on the developed record, it is unclear how her periods of unemployment between 2010 and 2011 played any role in her financial decision-making. Only recently did she complete a payment agreement with the collection agent for the listed medical creditors (creditors 1.i through 1.p) and has not provided any evidence of good-faith payments on these debts to establish a payment track record and solidify her payment commitments.

Further, Applicant provided no documented follow-up to her expressed commitments to work with the remaining listed creditors to pay off the remaining balances. Considering the available documented evidence, extenuating circumstances in this record are quite limited. Partially 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."

Applicant's payment efforts also lack payment proof. Her payment claims with her creditors contain only limited documented proof and have not resulted in any documented payoffs or resolution of any of her listed debts.

Without documentation of financial counseling and more specific steps Applicant is taking to address her outstanding debts, little mitigation credit is available to her. Based on the documented evidence in the record, none of the remaining mitigation conditions apply to Applicant's situation.

Whole-person assessment does not enable Applicant to surmount the judgment questions raised by his failure to resolve his delinquent debts. Resolution of her listed delinquent accounts is a critical prerequisite to his regaining control of his finances. Applicant failed to provide more specific explanatory material for consideration. Endorsements and performance evaluations might have been helpful, too, in making a whole-person assessment of his overall clearance eligibility, but were not provided.

Overall, public trust eligibility assessment of Applicant based on the limited amount of information available for consideration in this record does not enable her to establish judgment and trust levels sufficient to overcome trust concerns arising out of her lapses in judgment associated with her accumulation of delinquent student loan

and consumer debts for which she bears legal responsibility. Each of these debts remains outstanding with no developed payment plan for resolving the debts.

Taking into account all of the documented facts and circumstances surrounding Applicant's lack of more specific explanations for her debt accruals and evidence of payments made on her listed debts, it is still too soon to make safe predictive judgments about her ability to resolve her outstanding debts. Applicant fails to mitigate trust concerns related to her outstanding debt delinquencies and associated judgment lapses. More time is needed to facilitate Applicant's documenting the necessary progress with her debts to enable conclusions that her finances are sufficiently stabilized to grant her eligibility to hold a public trust position. Unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.j.

Drug Use Concerns

Applicant used marijuana on a recurrent basis between August 2007 and July 2011. While she never purchased or sold drugs for a profit, she occasionally (approximately every two months) purchased marijuana for her friends to cost-share from April 2009 to February 2011. Her marijuana involvement included an arrest in 2010 and ensuing charges of marijuana/use and drug paraphernalia/possession in 2010. After her case, the presiding court ordered her to take substance abuse classes on drug use and submit to random drug testing, which she completed in 2012. Thereafter, she ceased her use and involvement with marijuana and has not used marijuana in over five years.

On the strength of the evidence presented, two disqualifying conditions of the Adjudicative Guidelines for drug abuse are applicable: DC ¶ 25(a), "any drug abuse," and DC ¶ 25(c), "illegal possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia," Judgment concerns exist over Applicant's past drug use and purchases. She has some history of marijuana use (i.e., between August 2007 and July 2011) and small purchases for friends on a recurrent basis between April 2009 and February 2011, before ceasing her involvement with illegal drugs and disassociating with persons who use drugs.

Considering the lapse of time (approximately five years) since Applicant last used or possessed marijuana and over five year since she last purchased marijuana for friends, enough time has elapsed to facilitate safe predictable judgments that she will not return to illegal drug use in the foreseeable future. Pertinent mitigating conditions covered by AG ¶ 24 are available to Applicant. MC ¶ 24(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 MC ¶ 24(b), "a demonstrated intent not to use any drugs in the future, such as (1) disassociation from drug-using associates and contacts, and (3) an appropriate period of abstinence," apply to Applicant's limited and aged use and possession of marijuana.

From a whole-person perspective, Applicant has established independent probative evidence of her limited use and involvement with marijuana that she has

followed with sustained abstinence for close to five years. Applicant's acknowledgment of poor judgment and disassociation with persons who use illegal drugs help to reinforce favorable conclusions about her overall judgment, reliability and trustworthiness pertaining to involvement with illegal drugs.

Taking into account all of the facts and circumstances surrounding Applicant's limited and aged (approximately five years) drug use and judgment lapses, Applicant mitigates security concerns related to her drug use. Favorable conclusions warrant with respect to the allegations covered by subparagraphs 2.a-d of Guideline H.

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): AGAINST APPLICANT

Subparas. 1.a through 1.j:	Against Applicant
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GUIDELINE H (DRUG INVOLVEMENT): FOR APPLICANT

Subparas. 2.a through 2.d:	For Applicant
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Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility to hold a public trust position. Eligibility to hold a public trust position is denied.

Roger C. Wesley
Administrative Judge

