



**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. 15-01081

Appearances

For Government: Aubrey DeAngelis, Esq., Department Counsel
For Applicant: *Pro se*

07/11/2017

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, I conclude that Applicant did not mitigate trustworthiness concerns regarding her finances. Eligibility to hold a public trust position is denied.

History of the Case

On October 7, 2015, 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 (Exec. Or. 10865), *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).¹ These new Guidelines replaced the 2006 AGs placed in force on September 6, 2006, and are controlling for decisions issued on or after June 8, 2017.²

Applicant responded to the SOR on January 14, 2016, and requested a hearing. This case was assigned to me on February 9, 2017. The case was scheduled for hearing on April 5, 2017. 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 six exhibits (GEs 1-6); Applicant relied on one witness (herself) and no exhibits. The transcript was received on April 13, 2017.

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 documentation of a debt consolidation plan, character references, payment of her SOR debt ¶ 1.d, and satisfaction of a non-SOR debt. For good cause shown, Applicant was granted 14 days to supplement the record. Department Counsel was afforded two days to respond. Within the time permitted, Applicant provided a character reference, but furnished no documentation of covering her individual debts. Applicant's submission was admitted without objection as AE A.

Summary of Pleadings

Under Guideline F, Applicant allegedly accumulated 12 delinquent debts exceeding \$17,000. Allegedly, these debts remain outstanding.

In her response to the SOR, Applicant admitted all but SOR debt ¶ 1.I with explanations. She claimed she will address each of her admitted debts, either individually or through a debt consolidation plan.

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 for persons holding sensitive positions (to include those involving ADP I, II, and III positions). (HE 1)

² Effective June 8, 2017, by Directive 4 of the Security Executive Agent Directive (SEAD 4), dated December 10, 2016, *National Security Adjudicative Guidelines* for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position were established to supercede all previously issued national security adjudicative criteria or guidelines. Procedures for administrative due process for contractor personnel continue to be governed by DoD 5220.6, subject to the updated substantive changes in the guidelines, effective June 8, 2017. The new AGs are available at <http://ogc.osd.mil/doha/5220.6> R20170608.pdf

Findings of Fact

Applicant is a 53-year-old analyst for a defense medical health contractor 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 married in July 1989 and has two children from this marriage, ages 17 and 24. (GE 1; Tr. 22) She earned an Associate's degree in June 2000 and a Bachelor's degree in business administration in September 2016. (GE 1; Tr. 22-23) Applicant enlisted in her previous state's Army National Guard in June 1981 and served over 11 years of active duty. She re-enlisted in her current state's Army National Guard in July 1992 and served over 14 years of active duty in her Guard unit before receiving an honorable discharge in November 2006. (GE 1; Tr. 22-23)

Since March 2014, Applicant has been employed on a full-time basis for her current employer. (GE 1) Between 2006 and 2008, Applicant served as a military civilian. (GE 1; Tr. 23-24). From 2008 to 2010, she was a "stay-at-home mom." (Tr. 24) Between July 2010 and March 2014, she worked for a retail organization as a sales associate. (GE 1; Tr. 24-25) She held security clearances during her military enlistments. (GE 1 and AE A)

Finances

Applicant has a considerable history of problems with her finances. Between 2010 and 2016, she accumulated 12 delinquent consumer debts exceeding \$17,000. (GEs 2-6) She attributed her debts to insufficient income necessary to support her two daughters. (Tr. 26)

To date, Applicant has not addressed any of her debts covered by SOR debts ¶¶ 1.a (\$315); 1.b (\$132); 1.c (\$2,266); 1.e (\$4,150); 1.f (\$302); 1.g (\$106); 1.h (\$706); 1.i (\$1,178); 1.j (\$5,534); 1.k (\$2,284); and 1.l (\$124). (Tr. 32-43) While she claimed to have paid SOR debt ¶ 1.g, she furnished no payment documentation. (Tr. 34-35) Applicant pursued debt consolidation initiatives with a debt consolidation firm in February 2017, but never furnished the firm any list of debts to be consolidated, and never finalized a debt consolidation agreement (Tr. 36-37) Further, Applicant's claims of payments to non-SOR creditors are not supported by corroborating evidence. (Tr. 41-42) And finally, Applicant provided no documentation of payment arrangements she committed to making with some of her SOR creditors in the Electronic Questionnaires for Electronic Processing (e-QIP) she completed in March 2014. (GE 1; Tr. 42-43)

As a civilian in her Army National Guard unit, between September 2006 and September 2008, she grossed \$2,500 a month. (Tr. 27) Since 2006, she has supplemented her Army civilian income with her military pension of \$2,375 a month. (Tr. 29) She currently nets \$2,100 a month from her present employer. (Tr. 28-29) While

working for her non-DOD retail employer, she grossed between \$1,100 and \$1,200 a month. (Tr. 28) She estimates her husband's monthly gross income to be \$2,100. (Tr. 30)

Character References

Colleagues who served in the military with Applicant credited her with being trustworthy, hardworking, and a great asset to any company she works for. (AE A) Her supervising non-commissioned officer (NCO) in her National Guard unit noted her past military NCO status and attested to her attentiveness, fortitude, and professionalism. (AE A) He credited her with admirable qualities of honesty, loyalty, polished manners, a keen sense of humor, and a great personality. (AE A) He characterized Applicant as an NCO who consistently exhibited the highest degree of integrity, loyalty, and motivation.

Policies

The new AGs in SEAD 4 for use in contractor cases covered by the process provided by DOD 5220.6 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 sensitive information. These guidelines include conditions that could raise a trustworthiness concern and may be disqualifying, if any, and many of the conditions 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(a).

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 AGs are to be considered together with whole-person factors. The following AG ¶ 2(d) factors are to be considered along with the guidelines: (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 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. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . . 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 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 sensitive 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 Exec. Or. 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 debts over an extended number of years. For reasons not fully explained by Applicant, these debts remain outstanding.

Holding a public trust position involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor in protecting and guarding personally identifiable information (PII). DOD Manual 5200.02, which incorporated and canceled DOD Regulation 5200.2-R, covers both critical-sensitive and non-critical sensitive national security positions for civilian personnel. See 5200.02, Sec. 4.1, ¶ 3. Positions designated as ADP I and ADP II were previously classified as “sensitive positions.” under DOD Regulation 5200.2-R, *Personnel Security Program*, ¶¶ C3.1.2. 1.1.7, C3. 12.2.2, and C3. 1.2.3 (Jan. 1987, as amended) (the Regulation) are now covered by 5200.02, Sec. 4.1, ¶ 3.

Definitions for critical-sensitive and non-critical sensitive positions provided in 5200.02, Sec. 4.1, ¶ 3 utilize work descriptions similar to those used to define ADP positions under DOD Regulation (32 C.F.R. § 154.13 and Part 154, App. J) ADP positions are broken down as follows in 32 C.F.R. § 154.13 and Part 154, App. J): ADP-I (critical-sensitive positions covering the direction, design, and planning of computer systems) and ADP II (non-critical-sensitive positions covering the design, operation, and maintenance of computer systems). Considered together, the ADP I and II positions covered in 32 C.F.R. § 154.13 and Part 154, App. J define and explain the same critical-sensitive and non-critical-sensitive positions covered in 5200.02, Sec. 4.1, ¶ 3 and are reconcilable as included positions in 5200.02.

So, while ADP trustworthy positions are not expressly identified in DOD Manual 5200.02, they are implicitly covered as non-critical sensitive positions that require “access to automated systems that contain active duty, guard, or personally identifiable information or information pertaining to Service members that is otherwise protected from disclosure by DOD 5400.11-R. . . .” DOD 5200.02, Sec. 4.1, ¶ 3(c). See DOD 5220.6 ¶¶ D5(d) and D8. By a combination of implied retention of ADP definitions in DOD Manual 5200.02, DOD 5220.6, and the DOD Undersecretary’s November 2004 memorandum directing DOHA to continue to utilize DOD Directive 5220.6 in ADP contractor cases for trustworthiness determinations for persons holding sensitive positions (to include those involving ADP I, II, and III positions), ADP cases continue to be covered by the process afforded by DOD 5220.6.

Between 2010 and 2014, Applicant accumulated a number of delinquent debts that are reflected in her credit reports. Applicant's incurred delinquent debts warrant the application of two of the disqualifying conditions (DC) of the Guidelines. DC ¶ 19(a), "inability to satisfy debts;" and 19(c), "a history of not meeting financial obligations," 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 and create some judgment issues. See ISCR Case 03-01059 at 3 (App. Bd. Sep. 24, 2004).

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 non-critical sensitive position holder's demonstrated financial difficulties is vulnerability to coercion and influence, judgment and trust concerns are implicit in cases involving debt delinquencies.

Some extenuating circumstances are indicated in Applicant's assumed responsibilities for the care of her two daughters. Considering the available documented evidence, extenuating circumstances in this record account for some of Applicant's debt problems. Partially available to Applicant is MC ¶ 20(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."

Because Applicant did not address her debts while fully employed as a defense health contractor analyst and apparently able to address them with her available resources, either directly or through debt consolidation while caring for her two daughters, she cannot be credited with meeting the acting "responsibly under the circumstances" prong of MC ¶ 20(b). See ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. Nov. 29, 2005).

Applicant's payment efforts to date are not very encouraging. She has not provided any documentation of payment or otherwise resolving any of the listed SOR debts or non-SOR debts she claims to have paid. Debts she has disputed (SOR debts ¶ 1.d and 1.i) are not corroborated by any documentation in the record. Accordingly, neither MC ¶ 20(d), "the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts," nor MC ¶ 20(e), "the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue," are available to mitigate Applicant's delinquent debts.

Based on the evidence of record, none of the other mitigating conditions covered by Guideline F are available to Applicant. And while this case is now covered by the new AGs in force for cases decided after June 8, 2017, careful consideration was given to the pre-June 8, 2017 detailed mitigating conditions when weighing the facts and circumstances of Applicant's case. No different result would occur were the case to have been decided under the previous AGs in place at hearing.

In evaluating Guideline F cases, the Appeal Board has stressed the importance of a "meaningful track record" that includes evidence of actual debt reduction through voluntary payment of debts. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted) Applicant's lack of demonstrated debt repayment efforts while fully employed is a significant indicator of a lack of any meaningful plan to address her debts in a responsible manner.

Whole-person assessment in Applicant's case contains mixed considerations. Applicant's 26 years of active military service is worthy of considerable respect and appreciation. Her honored military service drew considerable praise from colleagues who worked with her and can attest to her character. Meriting favorable assessment, too, are her devoted commitments to her two daughters.

Applicant's positive contributions are outweighed, however, by her inability to restore her finances to respectable levels of stability. While committed to paying off her listed SOR debts, to date she has not been able to initiate meaningful efforts to address them, consistent with the criteria imposed on applicants seeking eligibility to hold a public trust position.

Overall, public trust eligibility assessment of Applicant based on the compiled documentation and her corroborating testimony does not enable her to establish judgment and reliability levels sufficient to overcome trust concerns associated with her accumulation of delinquent debts over a period of several years. Taking into account all of the documented facts and circumstances surrounding Applicant's debt accumulations and insufficient probative efforts to resolve her debts, conclusions are warranted that her finances are insufficiently stabilized at this time to grant her eligibility to hold a public trust position. Unfavorable conclusions are warranted 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): AGAINST APPLICANT

Subparagraphs 1.a-1.i:

Against Applicant

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

