



**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. 15-01960

Appearances

For Government: Andrew Henderson, Esq., Department Counsel
For Applicant: *Pro se*

08/25/2016

Decision

WESLEY, Roger C., Administrative Judge:

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

History of the Case

On September 25, 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. 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) implemented by the DOD on September 1, 2006.¹

Applicant responded to the SOR on October 27, 2015, and requested a hearing. This case was assigned to me on January 14, 2016. The case was scheduled for hearing on April 27, 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 eligibility to hold a public trust position. At the hearing, the Government's case consisted of five exhibits (GEs 1-5); Applicant relied on one witness (herself) and nine exhibits. (AEs A-I) The transcript was received on May 12, 2016.

Procedural Issues

Before the close of the hearing, Department Counsel, requested leave to submit a summary of Applicant's February 2013 interview with an agent of the Office of Personnel Management (OPM). There being no objection from Applicant, and for good cause shown, the Government's OPM summary of interview was admitted as GE 6.

Prior to the close of the hearing, Applicant requested the record be kept open to permit her the opportunity to supplement the record with payment initiatives. There being no objection from Department Counsel, and for good cause shown, Applicant was granted seven days to supplement the record. Department Counsel was afforded two days to respond. Within the time permitted, Applicant supplemented the record with a personal statement of actions taken, documented payments and payment agreements. Applicant's submissions were admitted as AEs J-P.

Summary of Pleadings

Under Guideline F, Applicant allegedly (a) accrued delinquent mortgage payments of \$1,233 on a total loan balance of \$72,408 and (b) accumulated eight delinquent consumer debts exceeding \$24,000. Allegedly, these debts remain outstanding.

Under Guideline E, Applicant allegedly (a) falsified her Electronic Questionnaires for Electronic Processing (e-QIP) of December 6, 2012 by concealing her delinquent debts covered by subparagraphs 1.c through 1.f of the SOR.

In her response to the SOR, Applicant admitted two of the allegations (creditors 1.b and 1.c), but denied each of the remaining allegations. She claimed she is a single, working woman from a loving family, who was laid off from her previous employment in

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.

2008 with no severance pay and only unemployment benefits to cover her expenses. She claimed she has continued to struggle with her consumer debts while taking care of her mortgage with her limited resources. She claimed she is exploring bankruptcy with a bankruptcy attorney, but is not sure this is the route she wants to go.

Findings of Fact

Applicant is a 46-year-old team assistant for a military health organization 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 claimed no post-high-school educational credits or military service. (GE 1)

Applicant has worked for her current employer since December 2008 as a team assistant. She listed unemployment between June 2008 and September 2008 in her e-QIP, following a June 2008 layoff from her previous employer (a title company) where she had worked for over three years. (GE 1)

Applicant's hearing claims of unemployment between 2007 and December 2008 (Tr. 29) are not reconcilable with the dates she provided in her e-QIP, which provide a better chronological employment history. Absent a more detailed explanation from Applicant of the discrepancies in the dates of her work history, the listed e-QIP dates of employment and unemployment are accepted for employment tracking purposes.

Finances

Applicant accumulated a number of delinquent debts between 2009 and 2015. (GEs 2-5) These debts included a defaulted mortgage with a past-due balance of \$1,233 on a total loan balance of \$72,408 and an additional seven delinquent debts exceeding \$20,000. (GEs 2-5) Applicant's listed consumer debts are comprised of the following: creditor 1.b (\$9,449); creditor 1.c (\$7,511); creditor 1.d (\$1,504); creditor 1.e (\$465); creditor 1.f (\$1,850); creditor 1.g (\$1,027); and creditor 1.h (\$2,246).

Before her lay-off in 2008, Applicant enjoyed good credit. (AE B; Tr. 29) She reported gross wages of \$30,457 on her 2007 W-2 and just \$13,042 on her 2008 W-2. Her reported 2008 earnings marked a considerable reduction from her reported 2007 earnings. (AE C) Applicant attributed most of her debt delinquencies to her 2008 layoff and ensuing unemployment (i.e., between June 2008 and September 2008), and low-paying jobs before her layoff. (Answer and AEs C and D) With little income to work with during her three months of unemployment (relying on unemployment benefits), she lacked the resources to address her old debts, some dating to 2009. (AE D Tr. 31)

Since the issuance of the SOR, Applicant has made some progress with most of the debts. Addressed debts include her creditor 1.a mortgage delinquency that she has brought into current status and avoided foreclosure. (AEs E, K-Q; Tr. 49-52) Additionally, she documented payment in full of her creditor 1.f debt with a structured settlement amount of \$1,100. (AE K; Tr. 37) Her payment submissions document payments on her creditor 1.d and 1.g debts with monthly payments of \$50 and \$25, respectively. (AEs L and P). Applicant also provided payment updates on two non-SOR debts. (AEs M, O, and Q)

Still, Applicant has failed to address three of the largest delinquent debts covered in the SOR. Her credit reports still reflect the lack of any payment initiatives with creditors 1.b (\$9,449 owing on a home equity account), creditor 1.c (\$7,511 owing), and creditor 1.e (\$465 owing). (GEs 2-6 and AE B; Tr. 36-38, 43-44) Altogether, the three remaining debts in the SOR that have not been addressed by Applicant total more than \$20,000.

Applicant began her employment with her current employer in December 2008 at an hourly rate of \$19. (AE F) She made good progress with her employer, and by February 2013, she was earning an annual salary of \$31,200. (AE G) She currently earns \$42,061 a year with her employer, with reported bi-weekly net earnings of \$1,324. (AE H) Because her take-home pay has not been enough to address all of her remaining debts, she briefly engaged a bankruptcy attorney in April 2016 to explore the benefits of petitioning for Chapter 7 bankruptcy relief. (AE I; Tr. 25) She has since expressed doubts about pursuing Chapter 7 relief, and to date has not sought Chapter 7 bankruptcy protection. (Tr. 25, 32-33)

Applicant provided no evidence of financial counseling or budgeting since she fell behind with her listed debts in 2008. She provided no specific financial plan for repayment of her remaining three delinquent debts, which collectively exceed \$20,000.

Applicant's s-QIP omissions.

Asked to complete an e-QIP in December 2012, Applicant omitted several of her delinquent debts listed in the SOR and covered by Section 26 of the e-QIP. In responding to questions posed in Section 26 of the e-QIP about debts placed in collection, charged off, cancelled, or which have been over 120 days delinquent, Applicant answered no to every question posed. (GE 1; Tr. 41-42) Debts in serious delinquent status at the time were the following: creditor 1.c (from March 2012); creditor 1.d (from October 2009); creditor 1.e (from April 2011); and creditor 1.f (from August 2009)

Applicant provided conflicting reasons for her e-QIP omissions. Alternatively, she claimed in her notarized answer that she was unaware of all of her delinquent debts, and in her hearing testimony that she misread the questions. Her answers cannot be reconciled and leave considerable doubts about her credibility.

In a follow-up interview with an OPM agent in February 2013 (arranged through her facility clearance officer), Applicant did not volunteer any other delinquent accounts

until she was shown a credit report by the interviewing OPM agent. (GE 6 and AE A; Tr 28-29, 47-48) Once she was shown her credit report and asked about her debts, she acknowledged them with explanations. (GE 6; Tr. 47-48) She offered no acceptable reasons why she failed to list them in her e-QIP. Without more persuasive explanations for her omissions of her SOR-covered debts in the e-QIP she completed in December 2012, inferences of knowing and wilful omission cannot be averted.

Endorsements and Evaluations

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.

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. AG, ¶ 15.

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 E.O. 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 consumer debts over a period of a number of years (some dating to 2009) that she failed to address in material ways. Applicant’s recurrent problems with managing her finances since becoming fully employed reflect lapses of judgment in administering her financial responsibilities. Trust concerns are also raised with respect to the omissions of her then delinquent debts in the e-QIP she completed in December 2012.

Financial Concerns

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 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. 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 E. O. 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 period of unemployment between June 2008 and September 2008 played any significant role in her financial decision-making. Only recently did she bring her mortgage account into current status, pay off her creditor 1.f debt, and arrange modest payment plans with creditors 1.d and 1.g. To date, she has not provided any evidence of good-faith payments or payment plans on her remaining debts, which are substantial in both number and amount.

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 remaining listed debts. Without documentation of financial counseling and more specific corrective steps that 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 her failure to take more concerted steps to resolve her delinquent debts. Resolution of her listed delinquent accounts is a critical prerequisite to her regaining control of her 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 her overall trustworthiness, 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 debts, some of which date to 2009. Most of her listed debts remain outstanding, with no developed payment plan for resolving them.

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 remaining 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.b through 1.c, 1.e through 1.f, and 1.h. Applicant is entitled to favorable conclusions with respect to the allegations covered by subparagraphs 1.a, 1.d, and 1.g.

Personal Conduct concerns

Trustworthiness concerns are raised as well over Applicant's failure to list her known delinquent debts in her 2012 security clearance application (i.e., creditors 1.c-1.f). Such concerns are raised when an applicant has committed conduct that reflects questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations.

Looking at the developed facts and circumstances in this case, two of the disqualifying conditions (DC) under the personal conduct guideline apply to Applicant's situation. DC ¶ 16(a), "deliberate omission, concealment, or falsification of relevant facts to 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," and DC ¶ 16(b), "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative." DC ¶ 16(a) applies to Applicant's 2012 e-QIP omissions.

While Applicant was not forthcoming with her delinquent debts in her ensuing 2013 OPM before she was confronted with a credit report, the SOR contains no allegations of Applicant falsification in her OPM interview. Still, DC ¶ 16(b) has some application to Applicant's situation. Because she denied being confronted by the OPM agent with her delinquent debts before she disclosed them, both her credibility and the quality of her extenuating circumstances and mitigation efforts are placed in issue. See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citing five circumstances in which conduct not alleged in an SOR may be considered: (a) to access an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person. Most of these cited circumstances apply to the facts in Applicant's case.

Under the facts and circumstances of this case, Applicant's omissions of her then known delinquent debts in the e-QIP she completed in December 2012 are

difficult to reconcile with her conflicting explanations of her omissions when asked about her delinquent debts in her e-QIP. Afforded an opportunity to correct her omissions in her follow-up OPM interview in 2013, she failed to provide any evidence of voluntary corrections before she was confronted with her listed delinquent accounts by the interviewing agent. Considering all of the circumstances, Applicant is not entitled to any of the benefits of the mitigating conditions of Guideline E.

From a whole-person perspective, Applicant's overall efforts are not sufficient to extenuate or mitigate questions about her demonstrated honesty and integrity arising from her e-QIP omissions and ensuing OPM interview before she was confronted. Unfavorable conclusions are warranted re: the allegations covered by Guideline E.

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.b-1.c, 1.e-1.f, and 1.h:	Against Applicant
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Subparas. 1.a, 1.d, and 1.g:	For Applicant
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GUIDELINE E (PERSONAL CONDUCT) AGAINST APPLICANT

Subpara. 2.a:	Against 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

