



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



In the matter of:

Applicant for Public Trust Position

)
)
)
)
)
)
)

ADP Case No. 15-02686

Appearances

For Government: Andrew Henderson, Esq., Department Counsel

For Applicant: *Pro se*

09/22/2016

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, I conclude that Applicant mitigated trust concerns regarding her finances. Eligibility for holding a public trust position is granted.

History of the Case

On November 10, 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 (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) implemented by the DOD on September 1, 2006.¹

Applicant responded to the SOR on December 29, 2015, and requested a hearing. This case was assigned to me on January 14, 2016. The case was scheduled for hearing on March 10, 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 four exhibits (GEs 1-4); Applicant relied on one witness (herself) and 14 exhibits. (AEs A-N) The transcript was received on May 10, 2016.

Procedural Issues

Before the close of the hearing, Department Counsel, requested leave to submit a summary of Applicant's January 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 5.

Summary of Pleadings

Under Guideline F, Applicant allegedly accumulated 12 delinquent medical and consumer debts exceeding \$60,000. Allegedly, these debts remain outstanding.

In her response to the SOR, Applicant admitted each of the allegations in the SOR. She claimed she paid or settled all of her listed debts.

Findings of Fact

Applicant is a 62-year-old administrative assistant for a defense 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 January 1972 and has two adult children from her marriage. (GE 1) She claimed no post-high school education credits or military service. (GEs 1 and 5)

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.

Before going to work for her current employer in 2012, Applicant was self-employed with her husband, who founded an appliance repair firm in 1984. (GE 1) In 2008, her husband was diagnosed with diabetes and other health problems. His health issues became so severe that they forced him to quit working in 2008 and go on disability. (Tr. 41) Applicant ended her employment with her husband's appliance repair firm in November 2012. (GE 5)

Finances

In October 2006, Applicant and her husband purchased a motor home for \$59,146 and financed it with creditor 1.a (GE 2). While they owned the motor home, they made 77 monthly payments of \$579 and made concerted efforts to persuade the lender to reduce the payments after the economy turned downward in 2008. (GE 5 and AE K; Tr. 42-43) However, they were unsuccessful in their payment restructuring efforts and lost the motor home to repossession in 2012. (Tr. 44-46)

Beginning in 2008 with the downturn of the economy, Applicant and her husband encountered difficulties keeping up with their bills. (GE 9) In 2008, they engaged a credit consulting service to assist them in paying their debts. (GE 9) Under the terms of her agreement with the counseling firm, Applicant agreed to pay the firm \$6,000 or thereabouts up-front, and \$600 a month for two years in return for the firm's using its best efforts to contact Applicant's creditors holding debts of almost \$28,000 (including over \$22,000 between creditors 1.b and 1.c alone) and make payments on her behalf. She completed her counseling service arrangements and settled her account with her debt counseling service in March 2016. (GE 9 and AE G; Tr. 53-54)

Included in Applicant's debt service arrangements were some of the debts covered by the SOR. In her January 2013 interview with an agent of the Office of Personnel Management (OPM), she acknowledged the additional debts covered in the SOR that she was addressing, and provided documentation of her payment efforts. (GE 5; Tr. 48-49) One of the debts (creditor 1.a) represents a deficiency on Applicant's repossessed motor home that was sold for around \$17,000, leaving a deficiency balance of \$37,714, which creditor 1.a charged off. (GEs 2-5 and AEs A and J; Tr. 44-47) and making a \$41,000 deficiency demand on Applicant and her husband. (AE A; Tr. 46-47)

Applicant's remaining debts listed in the SOR consist of a credit card debt with creditor 1.b (\$12,724), a credit card debt with creditor 1.c (\$10,383), a consumer account with creditor 1.d (\$4,219), a consumer account with creditor 1.e (\$931), a medical debt with creditor 1.f (\$756), a consumer account with creditor 1.g (\$530), a consumer account with creditor 1.h (\$519), a utility debt with creditor 1.i (\$88), a credit card debt with creditor 1.j (\$816), a consumer account with creditor 1.k (\$2,617), and a consumer account with creditor 1.l (\$723)

Applicant has since settled her listed debts in the SOR that were not previously resolved by her debt counseling service. She documented her settlement with creditor 1.a (on a revised deficiency balance of \$44,859, as of March 2016) for \$11,691. (AE A;

Tr. 44) Under the terms of Applicant's settlement with creditor 1.a, she agreed to 48 monthly payments of \$243. (AE A; Tr. 44) So far, she has made two monthly payments, one in March 2016 and another in April 2016. (AE A; Tr. 44) Applicant also settled her credit card debt with creditor 1.b for \$10,266. (AE N) Creditor 1.b, in return, discharged the remaining balance of almost \$10,000 and issued a Form 1099-C cancellation of debt for tax year 2012. (AE N; Tr. 54-57) Records document that Applicant settled her creditor 1.c debt and remaining listed debts that no longer appear on her most recent credit reports. (AEs B-E and L-M; Tr. 50-51)

Character References

Applicant provided several character references. Her manager described her as a conscientious employee who works well with her coworkers. (AE K) Applicant's DOD counterpart, who has worked closely with Applicant over the past three years on a DOD contract, credited her with being trustworthy, extremely honest, and a valuable DOD asset. (AE K; Tr. 66)

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.

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 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 medical and consumer debts during an extended period of business losses associated with the economic downturn that impacted Applicant and her husband between 2008 and 2012. Applicant’s has since addressed all of her listed debts and restored her finances to respectable levels.

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. 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 Exec. Or. 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.

Extenuating circumstances associated with the loss of income from the appliance repair service operated by Applicant and her husband between 2008 and 2012 can be inferred from the evidence presented. Considering the available documented evidence, 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,” is fully available to Applicant.

Applicant’s payment initiatives reflect responsible efforts in addressing her debts since engaging her debt counseling service and completing her repayment efforts with her remaining creditors. Based on the documented evidence in the record, Applicant is credited with making significant progress in resolving her delinquent debts and restoring her finances to stable levels. Applicable mitigating conditions are as follows: MC ¶ 20(c), “the person has received or is receiving 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.”

Whole-person assessment enables Applicant to surmount the judgment questions raised by her accumulation of her delinquent debts. Resolution of her listed delinquent accounts is a critical prerequisite to her regaining control of her finances. Applicant is well regarded by her manager and coworkers and has demonstrated significant progress in paying her debts and restoring her finances to respectable levels consistent with the criteria of eligibility for holding a position of public trust.

Taking into account all of the documented facts and circumstances surrounding Applicant’s accumulation of delinquent debts during an extended economic downturn spanning 2008 and 2012, safe predictive judgments can be made about her ability to manage her future finances. Favorable conclusions warrant regarding the allegations covered by subparagraphs 1.a through 1.l of the SOR under Guideline F.

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

Subparas. 1.a- 1.l:

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 to hold a public trust position is granted.

Roger C. Wesley
Administrative Judge

