



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



In the matter of:

ADP Case No. 15-02858

Applicant for Public Trust Position

Appearances

For Government: Gina L. Marine, Esquire, Department Counsel

For Applicant: *Pro se*

11/14/2016

Decision

WHITE, David M., Administrative Judge:

Applicant incurred more than \$16,000 in delinquent debt over the past decade that remains unresolved. She also deliberately failed to disclose her felony conviction for Breach of Trust with Fraudulent Intent, Value Greater than \$5,000 that resulted from her theft of about \$15,000 from a former employer. She did not mitigate resulting trustworthiness concerns. Eligibility for a public trust position is denied.

On January 24, 2013, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On November 19, 2015, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline F (Financial Considerations), and Guideline E (Personal Conduct). (Item 1.) The action was taken under DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DoD 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On December 26, 2015, Applicant answered the SOR in writing and elected to have the case decided on the written record in lieu of a hearing. (Item 2.) On February 8, 2016, Department Counsel prepared a File of Relevant Material (FORM), containing eight Items. The Defense Office of Hearings and Appeals (DOHA) mailed Applicant a complete copy of the FORM on February 8, 2016. Applicant received the FORM on February 17, 2016, and was provided 30 days from its receipt to file objections and submit additional information. She did not submit any information within the time provided, made no objection to consideration of any contents of the FORM, and did not request additional time to respond. On September 9, 2016, DOHA assigned the case to me.

Findings of Fact

Applicant is 40 years old. She has been married since November 1994, and has two adult children. She is a high school graduate, and has never served in the military or held Federal civilian employment. (Item 3.)

The SOR alleged that Applicant had 13 delinquent debts, totaling \$16,603.¹ In her response to the SOR, she denied the allegations in SOR ¶¶ 1.j, 1.l, 1.m, 1.n, and 1.o, on the basis that she was unable to verify them on her credit reports. She admitted the remaining eight delinquencies, totaling \$15,156. She also admitted SOR ¶ 1.p, alleging her felony charge and conviction for Breach of Trust with Fraudulent Intent, Value Greater than \$5,000. In response to SOR ¶ 2.a, Applicant admitted that she falsely answered, “No,” to the e-QIP question that asked whether she had ever been charged with a felony offense, but said that she was confused by the question. (Item 2.) Applicant’s admissions, including those made during her interview with an OPM investigator on February 26, 2013, and adopted by her under oath on October 23, 2015 (Item 4), are incorporated in the following findings.

All of the delinquencies alleged in the SOR are documented on Applicant’s February 2, 2013 full-data credit report obtained by the OPM. (Item 6.) The five debts that Applicant said, in 2015, she could not verify on her credit reports were older debts that may have no longer been eligible for reporting by that time. She did not provide copies of the credit reports to which she referred. There is substantial evidence to support the existence of all SOR-listed debts, and Applicant provided no evidence that any of them were either resolved or subject to legitimate dispute. Eleven of those debts involved less than \$700 and eight involved less than \$400. These debts became delinquent at various times over the past ten years. (Item 1; Item 2; Item 5; Item 6; Item 7.)

In 1997, Applicant and a coworker conspired to steal about \$15,000 in customer payments from their employer over the course of a month. They were caught, and in October 1999 Applicant pled guilty to, and was convicted of, Breach of Trust with Fraudulent Intent, Value Greater than \$5,000. She was sentenced to ten years

¹ Due to typographical error, the SOR omitted ¶¶ 1.h and 1.i.

confinement (all suspended), five years of probation, community service, and restitution of \$450 per month for five years. She did not pay the restitution, resulting in court-ordered service of 45 days in jail with daytime work release. (Item 4; Item 8.)

Applicant denied having ever been charged with a felony offense in responding to Section 22 on her January 2013 e-QIP. She continued to deny her conviction during her February 2013 interview with an OPM investigator until confronted with court records showing her arrest and conviction. She then said that she did not disclose this felony conviction because her public defender informed her that the offense was expunged and no longer on her record. (Item 4.) The conviction has not been expunged. (Item 8.) In her response to the SOR, for the first time, she said that she was confused by the question without further explanation. (Item 2.) Both the question, and the facts of her felony conviction, are clear and unambiguous. I find her false denial of the conviction on her e-QIP to have been a deliberate falsification.

Applicant submitted no evidence of financial counseling or budget estimates from which to analyze her current financial situation. No character witnesses described her judgment, trustworthiness, integrity, or reliability. I was unable to evaluate her credibility, demeanor, or character in person since she elected to have her case decided without a hearing.

Policies

Positions designated as ADP I and ADP II are classified as “sensitive positions.” (See Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.) “The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person’s loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security.” (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to the DoD and DOHA by the Defense Security Service and Office of Personnel Management. DoD contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. (See Regulation ¶ C8.2.1.)

When evaluating an applicant’s suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AGs. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in AG ¶ 2(a), describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the whole-person concept. The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable [trustworthiness] decision.”

A person who applies for access to sensitive information seeks to enter into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline F, Financial Considerations

The trustworthiness concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

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 [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 describes three conditions that could raise trustworthiness concerns and may be disqualifying in this case:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and

(d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust.

Applicant accumulated substantial delinquent debt over the past ten years that she has been unable or unwilling to repay. She also fraudulently stole or embezzled about \$15,000 from a former employer. This evidence raises trustworthiness concerns under these disqualifying conditions, thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline includes five conditions in AG ¶ 20 that could mitigate trustworthiness concerns arising from Applicant's financial difficulties:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(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.

Applicant accumulated more than \$16,000 in delinquent debts that were alleged in the SOR. She did not show that these debts arose from conditions beyond her control or that she acted responsibly under the circumstances. She documented no counseling to assist with debt resolution, nor did she demonstrate an ability to avoid recurrence of financial problems. According to the record evidence, the SOR-alleged debts remain unresolved and no documented basis to dispute the legitimacy of any of them was provided. Applicant therefore failed to establish mitigation of trustworthiness concerns under AG ¶¶ 20(a) through 20(e).

Guideline E, Personal Conduct

15: The trustworthiness concern for the Personal Conduct guideline is set out in AG ¶

Conduct involving questionable judgment, 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 [trustworthiness] clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a trustworthiness concern and may be disqualifying. The following disqualifying condition is established by the evidence in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from 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.

Applicant deliberately failed to disclose her 1997 charge, and 1999 felony conviction, for Breach of Trust with Fraudulent Intent, Value Greater than \$5,000 that resulted from her theft of about \$15,000 from a former employer. Trustworthiness concerns under AG ¶ 16(a) were established.

AG ¶ 17 provides conditions that could mitigate trustworthiness concerns. The following are potentially applicable:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

After considering the mitigating conditions outlined above in AG ¶ 17, it is apparent that none of them were established in this case. Applicant did not make prompt or good-faith efforts to correct her falsification or concealment. She waited until she was confronted with court documentation while being interviewed by an OPM investigator to admit to these facts. She provided no evidence that indicates she was ill-advised in completing her e-QIP. Falsifying material information is a serious offense and Applicant has done nothing to show that similar lapses in judgment are unlikely to recur. Further, she failed to take responsibility for her actions, claiming in her SOR response that she simply misunderstood the question. She has not provided sufficient evidence to meet her burden of proof concerning her personal conduct.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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.

According to AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a trustworthiness determination must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. Applicant is a mature individual who is accountable for the decisions and choices that led to her financial difficulties. She failed to demonstrate good judgment or permanent behavioral change. Her ongoing delinquent debts establish continuing potential for pressure, coercion, or duress, and make continuation of financial problems likely. Her fraudulent theft of funds from a

former employer led to a felony conviction that she intentionally attempted to conceal in connection with her application for a public trust position.

Overall, the record evidence leaves me with serious questions and doubts as to Applicant's present eligibility and suitability to occupy a public trust position. For these reasons, I conclude Applicant did not meet her burden to mitigate the trustworthiness concerns arising from her ongoing financial irresponsibility and her dishonest personal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a through 1.p:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility to occupy a public trust position. Eligibility for access to sensitive ADP information is denied.

DAVID M. WHITE
Administrative Judge