



**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. 15-04233

Appearances

For Government: Andrea Corrales, Esq., Department Counsel

For Applicant: *Pro se*

12/08/2016

Decision

WESLEY, Roger C., Administrative Judge:

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

History of the Case

On March 16, 2016, 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 in May 2016, and requested a hearing. This case was assigned to me on June 17, 2016. The case was scheduled for hearing on August 4, 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 three exhibits (GEs 1-3); Applicant relied on the one witness (herself) and no exhibits. The transcript was received on August 16, 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 forbearance on her student loans and debt consolidation of her listed debts. 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 three delinquent student loan debts with the Department of Education (DOE) exceeding \$17,000 and (b) accrued seven consumer debts exceeding \$800. Allegedly, these debts remain outstanding.

Under Guideline E, Applicant allegedly falsified material facts in the Electronic Questionnaires for Investigation Processing (e-QIP) she completed in July 2014 by omitting her delinquent debts detailed under Guideline F.

In her response to the SOR, Applicant admitted all of her alleged delinquent debts, but denied any intentional omission of her delinquent debts. She provided no explanations for her denials.

Findings of Fact

Applicant is a 39-year-old customer service professional for a health management 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. (GE 1; Tr. 24) Additional findings follow.

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.

Background

Applicant married in May 2000 and separated from her husband in December 2000. (GE 1) She has one adult child from a prior relationship. (GE 1) Applicant attended college classes between 2005 and 2009 but earned no degree or diploma. (GEs 1 and 3) She claimed no military service.

Applicant accepted employment with her current employer in August 2011. (GEs 1 and 3) She was unemployed for a short period between July 2011 and August 2011. (GEs 1 and 3) Between February 2008 and June 2011, she worked as a customer service professional for a national insurance carrier. (GEs 1 and 3)

Finances

Applicant took out five individual student loans from Sallie Mae in August 2005 and October 2006. (GE 3) Her five loans totaled \$17,500. When Applicant defaulted on three of the loans in July 2009, her lender transferred the loans to the DOE in March 2013. (GEs 2-3) The three transferred Sallie Mae loans totaled \$9,752 and remain in default with no documented payment action on the loans. (GE 3)

Besides her defaulted Sallie Mae student loans, Applicant defaulted on state student loans with creditors 1.d (\$4,136) and creditor 1.e (\$1,676) in 2013. The reported balances on these loans represent amounts still owing after enforced garnishment of Applicant's wages to cover portions of the defaulted loans. (GEs 2-3; Tr. 26-27) Applicant has not addressed this defaulted student loan, and the reported balance remains the same.

Other delinquent debts accumulated by Applicant between 2009 and 2012 that remain outstanding are comprised of the following: creditors 1.c (\$4,242); 1.g (\$2,189); 1.h (\$148); 1.i (\$90); and 1.j (\$60). Applicant's creditor 1.c account was opened in April 2009 with a high credit of \$15,124 for an automobile purchase and was charged off in October 2012 with a balance owing of \$4,062. (GE 2; Tr. 28-30) Applicant has not since addressed this debt. (Tr. 30-31, 47)

Applicant defaulted on her creditor 1.g furniture debt in August 2014 with a balance owing of \$2,189. (Tr. 28-30) Credit reports reveal that Applicant defaulted on her creditor 1.i utility account she has held since 2004. (GE 2; Tr. 31-32) Applicant has not addressed this debt in recent years. So, too, Applicant's individual account with creditor 1.j reflects a default in 2013 with no documented actions by Applicant to address this debt in several years. (GEs 2-3)

In 2009, Applicant was diagnosed with multiple sclerosis (MS) that has affected her energy levels. (Tr. 35) Her experiences in working two full time jobs for over ten years came to an end in 2014 after she became sick with MS. (Tr. 35-36) She currently nets \$1,800 a month and receives child support of \$500 a month to provide for the care of her youngest daughter. (Tr. 36-37) She has \$500 in her checking account and very

little in her 401(k) retirement account. (Tr. 37) She estimated her monthly expenses to be around \$700, which leaves her with a monthly remainder of about \$1,000. (Tr. 7-41)

Applicant assured that her finances have improved. (Tr. 42) However, she has not pursued credit counseling, developed a budget, or established a plan to address her SOR debts, either through debt consolidation or through working with her individual creditors. (Tr. 42-43) After the hearing, she expected to look into her student loans and set up payment plans. Afforded a post-hearing opportunity to do so, Applicant did not supplement the record

Applicant's e-Qip omissions

Asked to complete an e-QIP in July 2014, Applicant answered "no" to the questions in section 26 inquiring of whether in the past seven years she had any debts in collection, charged, or been or currently are 120 delinquent. (GE 1) Applicant denied intentionally omitting these debts from her e-QIP. She claimed that when she returned from a break to complete her e-QIP, she accidentally omitted her delinquent debts, and has no explanation of why she did so. (Tr. 19-21, 50-51)

When interviewed by an agent of the Office of Personnel Management (OPM) in October 2014, Applicant acknowledged her delinquent debts voluntarily without being confronted by the agent. (GE 3) Considering all of the circumstances surrounding Applicant's e-QIP's omissions, her denials of intentional falsification, and her ensuing voluntary corrections when interviewed by an OPM agent several months later, no inferences of falsification are warranted on this record.

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.

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 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 since 2011 while fully employed reflect lapses of judgment in administering her financial responsibilities. Trustworthiness concerns are also raised with respect to the omissions of her then delinquent debts in the e-QIP she completed in July 2014.

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 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 trustworthiness 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 period of unemployment in 2014, too little information is documented about her student loans and other debts to credit her with more than partial extenuating circumstances. Further, Applicant provided no documented follow-up to her expressed commitments to (a) pursue debt consolidation and (b) work with her student loan creditors in exploring the availability of forbearance or other payment arrangements to restore her student loan accounts to current status. 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. Without documentation of payment efforts, 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 her failure to employ more concerted actions 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 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.

Personal Conduct concerns

Trustworthiness concerns are raised as well over Applicant's failure to list her known delinquent debts in her 2014 security clearance application (i.e., creditors 1.a-1.j). 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, Applicant demonstrated by her testimony and voluntary disclosures of her delinquent debts in her October 2014 OPM interview that her omissions were inadvertent and manifested no deliberate intention to falsify her e-QIP. Based upon her manifest inadvertence in omitting her delinquent debts from her 2014 e-QIP and demonstrated overall honesty in her hearing testimony, favorable conclusions warrant with respect to the allegations covered by subparagraphs 2.a and 2.b 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 E (PERSONAL CONDUCT): FOR APPLICANT

Subparas. 2.a:	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

