



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



In the matter of:

Applicant for Public Trust Position

)
)
)
)
)
)
)

ADP Case No. 15-05522

Appearances

For Government: Adrienne Driskell, Esq., Department Counsel

For Applicant: *Pro se*

02/23/2017

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 April 18, 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 (Exec. Or. 10855), *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 May 23, 2016, and requested a hearing. This case was assigned to me on October 20, 2016. The case was scheduled for hearing on November 15, 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 five exhibits (GEs 1-5); Applicant relied on one witness (herself) and eight exhibits. (AEs A-H) The transcript was received on November 22, 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 an updated mortgage statement. 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 provided an updated mortgage statement covering SOR debt ¶ 1.a and payment summary concerning a non-SOR debt. Applicant's submissions are admitted without objection as AE's I-J.

Summary of Pleadings

Under Guideline F, Applicant allegedly accumulated four debts exceeding \$68,000. Allegedly, these debts remain outstanding.

In her response to the SOR, Applicant admitted all of the allegations with explanations. She claimed she is making monthly payments of \$400 and has reduced the debt to \$34,929 as of May 2016. She claimed her debts covered by SOR paragraphs ¶¶ 1.b-1.d were charged off. Addressing her debts covered by ¶¶ 1.c and 1.d, she claimed she received 1099-C cancellation of debt forms from these creditors.

Applicant also made general claims about her finances. She claimed she has worked for her employer for over 12 years and recently endured a challenging personal financial experience. She claimed she co-signed, along with her 10 siblings, for a new vehicle for her 82-year-old mother who was in need of dependable transportation. She claimed that each of the siblings was to make \$50 monthly payments to support the \$461 monthly payment on the vehicle, and when they all ceased making payments a few months later, she ended up assuming the entire bill. Applicant further claimed that she borrowed against her credit cards to make her monthly credit card payments with

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.

creditors 1.b-1.d and got behind with her bills and her mortgage with creditor 1.a. And she claimed that she has since paid off the car note and regularly pays her mortgage, utilities, and credit card each month.

Findings of Fact

Applicant is a 52-year-old information security analyst for a medical health group who seeks to retain her 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. (GE 1) She earned her high school diploma in June 1982 and claims no college credits or military service. (GE 1; Tr. 45-46) Applicant has been employed by her current employer as an information security analyst since February 2005 and maintains a good reputation with her supervisor.

Finances

Prior to 2007, Applicant enjoyed good credit. (GE 2; Tr. 47) She experienced adverse financial circumstances in 2007. (GEs 1-5) That year, she and her 10 siblings co-signed for a new vehicle for her mother (age 82), who needed good transportation for her volunteer work. (Tr. 29-30) Applicant's credit reports establish that she and her siblings co-signed for a vehicle in July 2007 for \$21,231. (GEs 2-5; Tr. 30) The loan on this vehicle was sold to another lender in March 2010 and was eventually paid off by Applicant with her credit cards, albeit without any assistance from her siblings. (GEs 2-5; Tr. 30-32, 49-50)

Struggling to make her \$461 monthly car payments without any help from her siblings, Applicant also fell behind with her second mortgage. After purchasing her home in 2003 and financing it with a \$367,500 first mortgage, she took out a \$50,000 second mortgage in 2006 to finance repairs to her home. (GEs 2-5; Tr. 50-51) Credit reports reveal that she became delinquent on her second mortgage with creditor 1.a in November 2010. Creditor 1.a charged off the loan in December 2009 with a balance owing of \$47,529. (GE 4)

Applicant has since made payment arrangements with creditor 1.a to make monthly payments of \$400. Since 2014, she has made regular monthly payments of \$400, reduced the balance owing on her second mortgage with creditor 1.a from \$47,833 to \$32,929, as of November 2016, and restored her mortgage to current status. (AEs A, H, and J; Tr. 33-39, 51-52) Records corroborate Applicant's assurances that she has never been delinquent on her first mortgage that was twice resold to other lenders. (GEs 2-5; Tr.41-42)

The three other debts listed in the SOR are comprised of the following: SOR ¶ 1.b (a credit card debt for \$9,448); SOR ¶ 1.c (a credit card debt for \$3,617); and SOR ¶ 1.d (a credit card debt for \$4,682). By her documented evidence, Applicant received 1099-C cancellation of debt forms on her creditor 1.c and 1.d debts and included the debts in her filed tax returns. (AEs C-F; Tr. 53) Her creditor 1.b credit card debt (opened in 2005) was charged off in 2010 (GE 4) She has made no documented attempts to address this account. (GEs 2-5; Tr. 32-35) She did, however, provide documentation of paying off a non-SOR debt. (AE I)

Applicant continues to bear all of the care responsibilities for her mother and without any financial assistance from her siblings. (Tr. 50, 53-54) She has never received any financial counseling and has no prepared financial budget. However, she has learned from her experiences and is frugal in managing her finances. (Tr. 59-60, 62-63) Applicant opened credit cards to build her credit and has \$2,500 in a savings account. (Tr. 43-44) Further, she has a 401(k) retirement account through her employer. (Tr. 56-58) She documented her current payment status with her other creditors and has no other major expenses. (AE I; Tr. 55-59)

Applicant spends a good deal of her private time with religious education projects that involve considerable travel. (Tr. 61) She finds different ways through her church to “giving back and helping people.” (Tr. 61)

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 [privacy] 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 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 a delinquent real estate debt and consumer debts over a period of several years between 2007 and 2014 that she has since comprehensively addressed. 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;” DC ¶19(c), and “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).

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 can be inferred from Applicant’s many years of bearing responsibility for the care of her 82-year-old mother without any assistance from her siblings. Considering the available documented evidence, extenuating circumstances in this record account for most of Applicant’s debt problems. Fully

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 to date are encouraging. She has paid down her creditor 1.a mortgage debt, has received 1099-C cancellations of debt forms from two of her remaining three creditors, and paid off two of her non-SOR debts. Only her creditor 1.b debt remains outstanding. MC ¶ 20(d), “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts,” applies to Applicant’s situation.

Whole-person assessment is favorable to Applicant. She has shown good progress in addressing and restoring her finances to stable levels and is fully committed to maintaining her debts in current status. She appears to be well-regarded by her supervisor and devotes a good deal of her private time to her church-related volunteer initiatives. Overall, public trust eligibility assessment of Applicant based on the compiled documentation and her corroborating testimony enable her to establish judgment and reliability levels sufficient to overcome trust concerns associated with her accumulation of delinquent mortgage and consumer debts.

Taking into account all of the documented facts and circumstances surrounding Applicant’s debt accruals and probative evidence of payments made on her listed debts, conclusions are warranted that her finances are sufficiently stabilized to grant her eligibility to hold a public trust position. Favorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.d.

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 through 1.d:

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

