



**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. 15-06503

Appearances

For Government: Adrienne Driskell, Esq., Department Counsel

For Applicant: *Pro se*

07/11/2017

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 15, 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. 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).¹ The new Guidelines replaced the 2006 AGs placed in force on September 6, 2006, and are controlling for decisions issued on or after June 8, 2017.²

Applicant responded to the SOR on May 23, 2016, and requested a hearing. This case was assigned to me on September 16, 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 security 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 no exhibits. 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 character references, monthly Chapter 13 payments, mortgage payments, student loan payments, and performance evaluations. 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 statement summarizing her contacts with her student loan creditor (SOR debt ¶ 1.g), a declaration in support of a motion to confirm her second modified Chapter 13 plan, a historical summary of student loan payments between July 2015 and October 2015, and a character reference. Applicant's submissions were admitted without objection as AEs A.-D

Summary of Pleadings

Under Guideline F, Applicant allegedly (a) petitioned for Chapter 13 bankruptcy relief in May 2003 (dismissed in September 2004); (b) petitioned for Chapter 13 relief in October 2003 (discharged in January 2008); (c) petitioned for Chapter 13 relief in May 2011 (dismissed in July 2013 for failure to make payments); (d) petitioned for Chapter 13 relief in August 2013 (dismissed in April 2015 for failure to make payments):

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 for persons holding sensitive positions (to include those involving ADP I, II, and III positions). (HE 1)

² Effective June 8, 2017, by Directive 4 of the Security Executive Agent Directive (SEAD 4), dated December 10, 2016, *National Security Adjudicative Guidelines for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position*, and by extension eligibility to hold a trustworthiness position, were established to supercede all previously issued national security adjudicative criteria or guidelines. Procedures for administrative due process for contractor personnel continue to be governed by DoDD 5220.6, subject to the updated substantive changes in the guidelines, effective June 8, 2017. The new AGs are available at <http://ogc.osd.mil/doha/5220.6R20170608.pdf>.

(e) petitioned for Chapter 13 relief in June 2015 declaring assets of \$235,267 and liabilities of \$265,897 (still pending); and (f) accumulated two delinquent debts: one for \$26,737 on a \$209,522 loan balance and another for \$20,550 past due. These alleged delinquent debts remain outstanding.

In her response to the SOR, Applicant admitted her Chapter 13 petitions and reported status on each of her petitions, and she admitted all of her alleged debts. She provided explanations for each of the admitted allegations. She claimed she filed for Chapter 13 relief on multiple occasions between 2003 and 2015 to keep her home and other property after she and her husband lost their jobs. She claimed she takes full responsibility for her actions.

Applicant further claimed that she and her husband got behind with their mortgage and filed again for Chapter 13 relief in 2011. She claimed that she and her husband refiled for Chapter 13 relief in 2015 after she and her husband failed to obtain a loan modification, and she claimed that they are currently making their mortgage payments. Further, Applicant claimed that her mortgage arrearage and delinquent student loan are included in her latest Chapter 13 bankruptcy petition.

Findings of Fact

Applicant is a 49-year-old training and development specialist for a defense health 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 December 1989 and has two adult children and one minor child from her marriage. (GE 1; Tr. 32, 35) She reported no post-high school education credits or military service in her security clearance application, but indicated at hearing that she took vocational classes in 2009 during her pregnancy with her youngest daughter in hopes of becoming a medical assistant. (GE 1; Tr. GEs 2-4; Tr. 45-46) She financed her classes with a government unsecured guarantee loan of \$15,950. (GEs 2-3)

Two of Applicant's children (including her minor daughter) reside with her. (GE 1; Tr. 35-36) Applicant cited cost-savings as the principal reason her son and his wife and family continue to reside with her. Although, both her son and daughter-in-law have jobs to sustain them. (Tr. 37). Altogether, Applicant has nine family members currently living with her and her husband. (Tr. 38) None of the family members contribute rent to the household. (Tr. 38)

Applicant reported no military service. (GE 1) Since September 2004, she has worked for her present employer as a training and development specialist. (GE 1) Previously, both she and her husband encountered periods of unemployment that created significant strain on their finances.

Finances

Between 2004 and 2015, Applicant and her husband encountered strains on their financial resources due to the pressures of providing financial assistance to their children. (Tr. 38-39) Compounding their financial problems was a fire in their home in February 2010 that consumed most of their home. (Tr. 33-34). Although the renovation costs associated with restoring their home were mostly covered by their home-owners insurance, the fire produced a good deal of collateral disruption to Applicant and her family. (Tr. 33-34)

Unemployed and behind with their bills (attributable in part to the added financial strains associated with parental care for their children), Applicant and her husband petitioned for Chapter 13 relief in May 2003. (GEs 2-4) Their petition was dismissed in September 2004 for failure to make plan payments. Applicant and her husband petitioned anew for Chapter 13 relief in September 2004 and received their discharge in February 2008. (GEs 4-5)

Applicant and her husband incurred delinquent mortgage and student loan debts in 2011. Committed to keeping their home, they petitioned again for Chapter 13 relief in May 2011. (GEs 2-5; Tr. 26, 29-30) Their petition was dismissed in July 2013 for failure to make payments.

Applicant and her husband refiled for Chapter 13 protection in August 2013; their petition was dismissed in April 2015 for failure to make payments. She and her husband continued to encounter financial problems after her April 2015 Chapter 13 dismissal and petitioned again for Chapter 13 relief in June 2015. (GEs 2-5; Tr. 27)

In her June 2015 petition, Applicant scheduled secured claims as follows: a \$220,000 first mortgage (originally obtained in 2001 and refinanced in 2008 with a new 30-year first mortgage) and a \$4,200 auto loan on a vehicle valued at \$2,500. (GEs 2-5; Tr. 45, 52) She scheduled unsecured non-priority claims of \$41,697 that included her unsecured delinquent student loan of \$20,150. (GE 5; Tr. 46-49) Applicant's Chapter 13 plan was approved in September 2015. (GE 5; Tr. 58)

In July 2015, Applicant's mortgage lender approved a loan modification for Applicant and her husband. Once their loan modification was completed, Applicant and her husband were able to petition the bankruptcy court in November 2016 for approval of a modified Chapter 13 plan. (AE B) The modification carved out the loan modification terms from Applicant's proposed Chapter 13 plan and served to reduce their Chapter 13 payments to \$313 a month. (AE B; Tr. 41) In support of her November 2016 petition, she cited her 14-month payment history reflecting \$313 monthly payments into the plan totaling \$25,058 as of August 2016. (AE B)

For a number of years, Applicant's student loan was covered by forbearance, and she lost track of her forbearance expiration after she moved to a new address. (Tr. 47) Out of caution, she included the student loan in her Chapter 13 petitions. Beginning in July 2015, she initiated payments on her student loan with the intention of restoring the loan to rehabilitation status. (AE C; Tr. 47) Among her post-hearing submissions is

a historical summary of the student loan payments she has made between July 2015 and October 2016. (AE C) Applicant's summary documented monthly payments of \$2,055 since July 2015 that total \$25,372. (AE C; Tr. 47-48) Applicant's assurances that her student loan payments freed her loan account from default status and rendered her eligible to work with her lender on a rehabilitation plan are well supported by her documented payment history and are accepted.

Applicant and her husband have continued to make their mortgage payments and restored their mortgage loan to current status. Applicant is current with both her trustee and mortgage payment obligations. (Tr. 41-42)

Applicant characterized her current financial situation as stable. (Tr. 53) She and her husband are able to keep up with their bills. (Tr. 53) Keeping up with her home payments poses her most urgent financial burden as she continues to provide financial help to her children to the best of her ability. (Tr. 53-55) Applicant reported total net monthly income of \$4,431 in her 2015 Chapter 13 petition. She reported total monthly expenses of \$2,376, leaving a net monthly remainder of \$2,055. (GE 5) She estimated her mortgage balance to be a little more than \$209,000. (Tr. 43)

Character references

Applicant is well-regarded by management coordinators who have worked closely with her in community volunteer programs for many years. (AE A) A coordinator who operates a children's center in Applicant's community credited Applicant with high ethical standards. (AE A) More specifically, she found Applicant to be consistently prompt, hard-working, honest, peace-loving, self-controlled, respectful, and always willing to go above and beyond what was required. (AE A)

Policies

The new AGs in SEAD 4 for use in contractor cases covered by the process provided by DOD 5220.6 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(a).

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 AGs are to be considered together with whole-person factors. The following AG ¶ 2(d) factors are to be considered along with the guidelines: (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 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] or sensitive information. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable 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 security 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 history of financial problems marked by a series of Chapter 13 petitions she and her husband filed between 2003 and 2015. She is presently current with her trustee payments on her most recent Chapter 13 plan. She is also current with her recently modified home mortgage and has cured the default in her student loan. Her track record for addressing her debts is an encouraging one.

Holding a public trust position involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor in protecting and guarding personally identifiable information (PII). DOD Manual 5200.02, which incorporated and canceled DOD Regulation 5200.2-R, covers both critical-sensitive and non-critical sensitive national security positions for civilian personnel. See 5200.02, Sec. 4.1, ¶ 3. Positions designated as ADP I and ADP II were previously classified as “sensitive positions.” under DOD Regulation 5200.2-R, *Personnel Security Program*, ¶¶ C3.1.2. 1.1.7, C3. 12.2.2, and C3. 1.2.3 (Jan. 1987, as amended) (the Regulation) are now covered by 5200.02, Sec. 4.1, ¶ 3.

Definitions for critical-sensitive and non-critical sensitive positions provided in 5200.02, Sec. 4.1, ¶ 3 utilize work descriptions similar to those used to define ADP positions under DOD Regulation (32 C.F.R. § 154.13 and Part 154, App. J) ADP positions are broken down as follows in 32 C.F.R. § 154.13 and Part 154, App. J): ADP-I (critical-sensitive positions covering the direction, design, and planning of computer systems) and ADP II (non-critical-sensitive positions covering the design, operation, and maintenance of computer systems). Considered together, the ADP I and II positions covered in 32 C.F.R. § 154.13 and Part 154, App. J refine and explain the same critical-sensitive and non-critical-sensitive positions covered in 5200.02, Sec. 4.1, ¶ 3 and are reconcilable as included positions in 5200.02.

So, while ADP trustworthy positions are not expressly identified in DOD Manual 5200.02, they are implicitly covered as non-critical sensitive positions that require “access to automated systems that contain active duty, guard, or personally identifiable information or information pertaining to Service members that is otherwise

protected from disclosure by DOD 5400.11-R. . . “. DOD 5200.02, Sec. 4.1, ¶ 3(c). See DOD 5220.6 ¶¶ D5(d) and D8. By a combination of implied retention of ADP definitions in DOD Manual 5200.02, DOD 5220.6, and the DOD Undersecretary’s November 2004 memorandum directing DOHA to continue to utilize DOD Directive 5220.6 in ADP contractor cases for trustworthiness determinations for persons holding sensitive positions (to include those involving ADP I, II, and III positions), ADP cases continue to be covered by the process afforded by DOD 5220.6.

Between 2003 and 2016, Applicant petitioned on multiple occasions for Chapter 13 relief and is currently covered by a modified Chapter 13 payment plan. She has two major debts that are covered by her plan and are being independently addressed. Applicant’s history of delinquencies and Chapter 13 petitions (with several dismissed for lack of payments) warrant the application of two of the disqualifying conditions (DC) of the Guidelines: DC ¶ 19(a), “inability to satisfy debts;” and 19(c), “a history of not meeting financial obligations.

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 series of Chapter 13 petitions and 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).

Financial stability in a person cleared to protect privacy information is required precisely to inspire trust and confidence in the holder of a non-critical sensitive position. While the principal concern of a non-critical sensitive position holder’s demonstrated financial difficulties is vulnerability to coercion and influence, judgment and trust concerns are implicit in cases involving debt delinquencies.

Extenuating circumstances have contributed to Applicant’s debt accumulations and her efforts to address them through a series of Chapter 13 petitions, beginning in 2003 and culminating in her most recent Chapter 13 plan modification. Applicant’s financial problems have been marked by periods of unemployment and heightened financial burdens associated with the financial support she has provided her children, while struggling to keep her home.

Considering the available testimonial and 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 financial problem were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce, or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances.”

Applicant’s responsible efforts in addressing her debts enable her to be credited with meeting the acting responsibly under the circumstances prong of MC ¶ 20(b). See ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. Nov. 29, 2005)). Accordingly, MC ¶ 20(d), “the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts,” is available, too, to mitigate Applicant’s delinquent debt

accumulations. No different result would occur were the case to have been decided under the previous AGs in place when this case was heard.

In evaluating Guideline F cases, the Appeal Board has stressed the importance of a “meaningful track record” that includes evidence of actual debt reduction through voluntary payment of debts. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted) Applicant’s demonstrated debt payments since 2015 is a significant indicator of a meaningful plan she has adopted to address her debts.

Whole-person assessment is favorable to Applicant. She has shown considerable progress in addressing her debts since 2015, She documented her current status with her Chapter 13 trustee and mortgage lender, and with her payment progress to date is credited with curing her student loan defaults. Important also to establishing her favorable whole-person status is the high regard in which she is held by her community service coordinator. Overall, public trust eligibility assessment of Applicant based on the compiled documentation and her corroborating testimony enables her to establish judgment and reliability levels sufficient to overcome trust concerns associated with her accumulation of delinquent debts over a period of several years marked by a series of Chapter 13 petitions and delinquent mortgage and student loan debts.

Taking into account all of the documented facts and circumstances surrounding Applicant’s Chapter 13 petitions debt accumulations and sufficient probative efforts to resolve her debts, conclusions are warranted that her finances are sufficiently stabilized at this time to grant her eligibility to hold a public trust position. Favorable conclusions are warranted with respect to the allegations covered by subparagraphs 1.a through 1.g of the SOR. Eligibility to hold a public trust position under the facts and circumstances is fully consistent with the national interest.

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

Subparagraphs 1.a-1.g:

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

