



**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. 17-00955

Appearances

For Government: Andrew Henderson, Esq., Department Counsel

For Applicant: *Pro se*

03/14/2018

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony. I conclude that Applicant did not mitigate trust concerns regarding her finances. Eligibility for holding a public trust position is denied.

History of the Case

On May 1, 2017, 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 (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 for Determining Eligibility for Access to Classified Information (December 29, 2005) (AGs).

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 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 DOD Directive 5220.6, subject to the updated substantive changes in the AGs, effective June 8, 2017. Application of the AGs that were in effect as of the issuance of the SOR would not change the decision in this case.

Applicant responded to the SOR on January 5, 2017, and requested a hearing. This case was assigned to me on August 8, 2017. The case was scheduled for hearing on September 26, 2017. 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 six exhibits (GEs 1-6); Applicant relied on one witness (herself) and no exhibits. The transcript was received on October 4, 2017.

Procedural Issues

Before the close of the hearing, Applicant requested the record be kept open to permit her the opportunity to supplement the record with documented discharge of her Chapter 7 bankruptcy petition and provide explanations of the status of the unsecured claims she listed in her bankruptcy petition. For good cause shown, Applicant was granted 14 days to supplement the record. Applicant did not supplement the record.

Summary of Pleadings

Under Guideline F, Applicant allegedly (a) incurred four adverse judgments exceeding \$14,000 and (b) accumulated an additional nine delinquent debts exceeding \$5,000. Allegedly, these debts remain outstanding.

In her response to the SOR, Applicant admitted each of the alleged debts with an explanation. She claimed she has petitioned for Chapter 7 bankruptcy relief and is awaiting receipt of her discharge.

Findings of Fact

Applicant is a 32-year-old military service representative employed by a TRICARE health provider who seeks eligibility to hold a public trust position. The allegations covered in the SOR and admitted by Applicant are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant has never married and has three children (ages 19, 18, and 11), including one in the Navy. (GEs 1-2; Tr. 19-20) She has attended college classes between January 2016 and the present but has not obtained a degree or diploma. She continues to take college classes and has student loans to finance her classes. (GEs 1-2; Tr. 33) Applicant has never served in the military. (GEs 1-2)

Applicant has worked for her current employer since July 2016. (GEs 1-2) She reported unemployment between February 2016 and July 2016. While unemployed, she supported herself with unemployment benefits. Between January and February 2016, she worked as a tax preparer for a tax firm and held jobs in the sales field for different employers between June 2008 and October 2014. (GEs 1-2) She is a product of a foster home system of the state of her current employment and moved to her current state at the age of 13 while pregnant with her first son. (Tr. 19)

Finances

Between 2011 and 2016, Applicant accumulated a number of delinquent debts. Four of the delinquent debts were taken to judgment by creditors ¶¶ 1.g (for \$1,173 in 2013); 1.h (for \$4,351 in 2014); 1.i (for \$3,627 in 2015); and 1.j (for \$5,269 in 2016) Applicant's remaining debts consist of delinquent consumer accounts exceeding \$6,000. (GEs 2-6)

Records confirm that in March 2017, Applicant petitioned for Chapter 7 bankruptcy relief. (GE 6) In her petition, she certified to completion of her required on-line financial counseling. (GE 6) Applicant scheduled secured claims of \$15,988 and unsecured claims totaling \$56,991. (GE 6; Tr. 29, 36) To date, she has not received her discharge. All of her listed SOR debts are included in her Chapter 7 bankruptcy petition. (GE 6; Tr. 37-38)

While not fully certain, Applicant believes that not all of the unsecured claims included in her bankruptcy (exclusive of her SOR debts) are delinquent. (GE 6; Tr. 40-41) She offered to seek clarification from her attorney on the status of the unsecured claims included in her Chapter 7 bankruptcy petition. (Tr. 41-42)

Afforded an opportunity to provide up-dates of her efforts to resolve her SOR debts with a bankruptcy discharge, or by other means, and clarification of unsecured claims included in her bankruptcy petition, Applicant failed to do so. Without more documented information from Applicant about the status of her bankruptcy or other measures to resolve her debts without the aid of a bankruptcy discharge, her listed SOR debts cannot be credited with resolving her debts.

In her Chapter 7 petition, Applicant listed current annual income of \$28,741 and nets \$900 bi-weekly after taxes. (GE 6) She currently resides with her godmother. (Tr.

34) Her reported monthly expenses consist of rent to her godmother (\$560); car payment (\$400); and split utility bills with her godmother to cover internet service and utilities (\$200 is Applicant's share); car insurance (\$300); and split bills with her godmother to cover food and clothing for herself and her children. (Tr. 35). She estimated she is able to save about \$100 a month. (Tr. 35) School loans that she has are currently deferred. (GEs 3-5; Tr. 33)

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 [sensitive] information.

The guidelines include conditions that could raise a trustworthiness concern [public trust position] and may be disqualifying" (disqualifying conditions), if any, and many of the conditions 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 classified 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 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 history of financial difficulties marked by four outstanding judgments exceeding \$14,000 and additional delinquent debts exceeding \$5,000. Her efforts to fully discharge her delinquent debts through chapter 7 bankruptcy protection remain pending and incomplete.

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, ¶ 4.1a(3)(c)3.

Definitions for critical-sensitive and non-critical sensitive positions provided in 5200.02, ¶ 4.1a (3)(c) contain descriptions similar to those used to define ADP I and II positions under DOD Regulation 5200.2-R. (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 DOD Regulation 5200.2-R refine and explain the same critical-sensitive and non-critical-sensitive positions covered in DOD Manual 5200.02, ¶ 4.1a (3)(c) and are reconcilable as included positions in 5200.02.

By virtue of the implied retention of ADP definitions in DOD Manual 5200.02, ADP cases continue to be covered by the process afforded by DOD 5220.6. For contractor cases covered by DOD 5220.6, the guiding charter for fair process proceedings initiated under DOD 5220.6 continues to be Exec. Or.10865.

Financial Concerns

Applicant's incurred judgments and accumulated delinquent debts warrant the application of three of the disqualifying conditions (DC) of the AGs: DC ¶ 19(a), "inability to satisfy debts," DC ¶ 19(b), "unwillingness to satisfy debts regardless of the ability to do so," and DC ¶ 19(c), "a history of not meeting financial obligations."

Applicant's pleading admissions with respect to her incurred judgments and accumulated delinquent debts negate the need for any independent proof (see *McCormick on Evidence*, § 262 (6th ed. 2006)). Each of Applicant's filing lapses and incurred tax liens are fully documented in her response, credit reports, and her interrogatory responses. 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 associated with her listed debts are limited. She did experience unemployment for a number of months in 2016 that may have contributed to some of her more recent debt delinquencies. Her incurred judgments, however, were recorded in years 2013 through 2016, and encompass financial issues attributable to other problems not accounted for.

Considering the available testimonial and documented evidence, extenuating circumstances in this record account for few identified debt problems. Partially available to Applicant is mitigating condition (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 failure to update the status of her Chapter 7 bankruptcy, or otherwise demonstrate her addressing of her outstanding judgments and other delinquent accounts, preclude her from satisfying 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). In the same vein, MC ¶ 20(d), "the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts," is not available to her either.

By certifying to completing her required on-line financial counseling in her pending bankruptcy petition, Applicant may take limited advantage of MC ¶ 20(c), "the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control." At this point in time, only the first prong of MC ¶ 20(c) is applicable to Applicant's situation.

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 incurred judgments and accumulated delinquent debts have not to date been resolved, either through a documented bankruptcy discharge or by other means and remain a security concern.

Whole-person Assessment

Whole-person assessment is unfavorable to Applicant. She has shown some progress in addressing her debts through initiated bankruptcy proceedings but has yet to provide probative evidence of a discharge or resolution of her debt delinquencies by

other means. Evidence of her performance standing at work, character references, and contributions to her community are not available either to assess her overall trustworthiness, reliability, and good judgment.

Overall, public trust eligibility assessment of Applicant based on available documentation and her testimony precludes her from establishing judgment and reliability levels sufficient to overcome trust concerns associated with her accumulation of delinquent debts over a multi-year span.

Taking into account all of the documented facts and circumstances surrounding Applicant's accumulation of adverse judgments and other delinquent accounts and insufficient probative efforts to resolve her debts, conclusions are warranted that her finances are insufficiently stabilized at this time to grant her eligibility to hold a public trust position. Unfavorable conclusions are warranted with respect to the allegations covered by subparagraphs 1.a through 1.m of the SOR. Eligibility to hold a public trust position under the facts and circumstances is not 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): AGAINST APPLICANT

Subparagraphs 1.a-1.m:

Against Applicant

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

