



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



In the matter of:

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ADP Case No. 17-03141

Applicant for Public Trust Position

Appearances

For Government: Brittany Meutzel, Esq., Department Counsel
For Applicant: Leon J. Schachter, Esq.

11/29/2018

Decision

Curry, Marc E., Administrative Judge:

Applicant's embezzlement of funds from her employer constituted an extraordinary violation of the public trust. However, upon considering the underlying pathology that precipitated the misconduct, the lengthy amount of time that has elapsed without any subsequent misconduct, her restitution, the testimony of her treating psychologist, and her current outstanding job performance, I conclude that her behavior no longer poses a public trust concern. Applicant's application for a public trust position is granted.

Statement of the Case

On November 20, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the public trust concerns under Guidelines J, E, and F, explaining why it was unable to find it clearly consistent with the national security to grant Applicant eligibility to work in a public trust position. The action was taken under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (AG), effective June 8, 2017.

On December 13, 2017, Applicant answered the SOR, admitting the single allegation and requesting a hearing, whereupon the case was assigned to me on July 20, 2018. DOHA issued a notice of hearing on September 18, 2018, scheduling it for October 3, 2018. The hearing was held as scheduled. I incorporated into the record a copy of the discovery letter (Hearing Exhibit I), three Government exhibits, marked as GE 1 to GE 3, and two exhibits from Applicant, marked as AE A and AE B. A third exhibit of Applicant, the resume of her psychologist, was marked, but no motion was made to move it into the record. Given that it was discussed at the hearing, and department counsel had no objections to the witness' qualification as an expert in the field of psychology after I provided her an opportunity to question him about his credentials (Tr. 29), I have incorporated AE C into the record post-hearing. DOHA received a transcript (Tr.) of the proceeding on October 12, 2018.

Findings of Fact

Applicant is a 62-year-old single woman. She has worked for her current employer since 2009 as a business analyst. Her job duties include writing policy and drafting standard operating procedures. She supervises approximately 30 people. (Tr. 69)

From 1980 to 2006, Applicant worked for a federal law enforcement agency as a forensic and fraud accountant. (Answer at 11) From approximately 1991 to 2006, she was responsible for the regional division's budget, bill payments, and financial operations. (Answer at 53) Also, she provided forensic evidence expertise in fraud cases. (AE D at 20) She held a security clearance.

From approximately 2000 to 2005, Applicant embezzled money from her employer. Specifically, as invoices were received, the agency would ordinarily cut corresponding checks to her, whereupon she would cash the checks, then convert them to money orders written to the respective creditors to pay the invoices. The turnaround time from when she received the personal check to cash and convert to money orders for the respective creditors was supposed to be quick. Instead, Applicant began cashing the checks written to her from the agency and using the cash for personal online shopping for clothes, jewelry, and high-end kitchen items, rather than to pay the creditors. (AE B at 4) Once she got paid, she would use her personal income to pay the bills.

Initially, Applicant paid the agency's bills in their totality with her personal money after receiving the follow-up, late notices from the creditors. Gradually, Applicant's misappropriation scheme began to fail, as she increasingly lacked the money to pay the agency's bills. (Tr. 46, 71)

Applicant's scheme was discovered by her successor in 2006 shortly after Applicant transferred to another division. (Tr. 75) Applicant took no steps to conceal her misconduct, as she "wanted to be found [and] punished." (Tr. 75) By then, she had stolen \$86,000. In January 2008, she was charged with embezzlement. (Answer at 192) In September 2008, Applicant pled guilty, as charged. (Answer at 187) She was found guilty and was later sentenced to three years of probation, running concurrently with six months of house

confinement, and ordered to pay restitution equal to the amount embezzled. (Answer at 190). Through the sale of her house and the cashing out of her retirement funds, Applicant paid the restitution, as ordered. She successfully completed probation by February 2011, and was released from probation nine months early for exemplary conduct. (Answer at 135)

In 2006, one of Applicant's coworkers, with whom Applicant confided, told Applicant that she may have an online shopping addiction, and suggested that she seek help. (Tr. 30) Shortly thereafter, Applicant sought treatment from a psychologist, referred to her by her coworker. She has continuously received therapy from him since then.

Applicant's psychologist testified at the hearing. He has been in practice for 20 years. Among other things, he conducts mental health and fitness evaluations in federal government security clearance cases, and works with military veterans with post-traumatic stress disorder. (AE C at 1) Per the psychologist, Applicant's criminal conduct was a "maladaptive coping mechanism" that stemmed from deep-seated and longstanding emotional problems that began in her childhood. (Tr. 40) Specifically, she was subjected to extreme emotional abuse from her parents, particularly her father, who never addressed her by name, or directly spoke with her, even when they were sitting in the same room. (Answer at 72) Her brother, who also experienced this abuse, characterized their childhood as "scary, cold, and totally shame-based." (Answer at 66) Applicant's problems were compounded after she was molested by a friend of her older brother when she was nine years old. Given the lack of parental attention or compassion, Applicant never reported the abuse, instead internalizing the resulting trauma. (GE 2 at 15)

Notwithstanding Applicant's troubled childhood, she was successful academically, completing college and nurturing a successful career. However, her dysfunctional childhood warped her emotional development, as she began to gradually define her personal identity through the things she owned. (Answer at 72) Moreover, her self-esteem remained extremely damaged, leading her into troubled relationships with men. (Tr. 34) During a particularly bad relationship, she was subjected to emotional, physical and sexual abuse for eight years, from 1992 to 2000. (Tr. 34, 67) Applicant's compulsive shopping began in the late 1990s during the nadir of this relationship.

Per Applicant's psychologist, her compulsive shopping became a form of "self-soothing behavior in times of distress." (Tr. 36) He testified that as with other compulsive shoppers, Applicant's anticipation of the arrival of the merchandise purchased online generated an endorphin rush, which inevitably resulted in a letdown when the merchandise eventually arrived, and the novelty faded, compelling her to make more online purchases. (Tr. 36) This ultimately generated a cycle which spiraled out of control. The psychologist concluded that Applicant's embezzlement was an offshoot of the shopping problem, as it constituted risky behavior that validated her extraordinarily low sense of self-esteem. (Tr. 52; GE 2 at 15)

When Applicant's psychologist first consulted with her in 2006, he referred her to a 12-step program for people with shopping addictions. (Answer at 73) She completed it, as recommended. (Tr. 34)

During the first few years after being charged with embezzlement, Applicant saw her psychologist once per week. Therapy sessions focused on wellness and self-esteem building exercises. Applicant's pathology was difficult to overcome because of the multi-faceted nature of its cause. (Tr. 40) It involved addressing core elements of her internal value system. (Tr. 40)

In August 2009, Applicant applied for her current job and provided a reference from her psychologist. He summarized the therapy that she had been receiving, expressed satisfaction with her progress, and noted that her risk of recidivism was extremely low. (Answer at 121) After reviewing this recommendation, Applicant's current employer hired her, conditioned on her not engaging in any further illegal activities, performing satisfactorily, and providing monthly written updates from her psychologist. (AE B at 41)

Applicant's psychologist sent written updates to Applicant's employer from September 2009 through February 2011, as requested. (Answer at 122-132) By January 2010, he reduced the frequency of the letters to approximately once every three months, noting that "progress in therapy, with any patient, is slow and methodical, and monthly updates are too frequent to be useful." (Answer at 125)

Currently, Applicant's psychologist wholeheartedly endorses her application for a public trust position, noting that he feels so strongly about the success of her rehabilitation that he is willing to stake his professional reputation on it. (Tr. 32-33) By 2017, he had discharged her from treatment, concluding that there was no remaining symptoms requiring treatment. Nevertheless, Applicant voluntarily chose to continue bi-monthly sessions to assure that she stayed healthy. (Answer at 133)

In September 2018, Applicant sought an evaluation from another psychologist. (AE B) He reviewed all of her previous mental health and court records, and conducted multiple diagnostic tests. He concluded that Applicant "has gained significant insight and self-understanding and is no longer repressing or unaware of the impact of her needs on her behaviors." (AE B at 7) Moreover, he noted that, consistent with her treating psychologist's opinion, her risk of recidivism was low, and there was no formal need for any continuing psychotherapeutic treatment or any other mental health service. (AE B at 10)

Since Applicant has worked for her current employer, her performance has ranged from commendable to outstanding. (Answer at 19-39) She has steadily received raises over the years. Currently, she earns \$100,000 annually. (Tr. 66)

Policies

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the adjudicative guidelines. In addition to brief

introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. 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 the adjudicative process. The administrative judge's overall adjudicative goal is a fair, impartial, and commonsense decision, keeping in mind that trustworthiness adjudications are not intended to be punitive in nature. (ISCR Case No. 03-24233 at 8 (App. Bd. Oct. 12, 2005)) 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 national security eligibility [and trustworthiness positions] will be resolved in favor of the 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. 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 applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain a favorable trustworthiness determination.

Analysis

Guideline J, Criminal Conduct

Under this guideline, "criminal activity creates doubt about a person's judgment, reliability and trustworthiness." In addition, "by its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations." (AG ¶ 30) For several years between 2000 and 2005, Applicant misappropriated and embezzled money from her employer, a federal agency. She was confronted after irregularities were identified, and was charged with embezzlement in 2006, leading to a charge and subsequent guilty plea in 2008. AG ¶ 31(b), "evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted or convicted," applies.

In the 12 years that have elapsed since Applicant was charged with embezzlement, she has paid restitution, completed the terms of probation early, and participated in years of intensive psychotherapy. She worked for her current employer for nine years, and in that time, has performed admirably. Her testimony was introspective and remorseful, demonstrating an understanding of the underlying pathology that led to the conduct. Humbled and shamed by her transgression, she has continued to attend therapy even though no longer required to do so. Both her treating psychologist who has worked with her continuously for 12 years, and the psychologist who conducted a one-time evaluation in 2017 conclude that the underlying pathology leading to Applicant's conduct is resolved,

and that a likelihood of recidivism is extremely low. The following mitigating conditions under AG ¶ 32 apply:

a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

e) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Under these circumstances, I conclude Applicant has mitigated the criminal conduct trustworthiness concern.

Guideline E, Personal Conduct

Under this guideline, "[c]onduct 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 or sensitive information." Applicant has mitigated this trustworthiness concern for the same reasons discussed in the criminal conduct section, above.

Guideline F, Financial Considerations

The security concerns about financial considerations are set forth in AG ¶ 18:

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 or sensitive information.

Applicant's conduct triggers the application of AG ¶ 19(b), "deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, expense account fraud, mortgage fraud, filing deceptive loan statements and other intentional financial breaches of trust." Applicant's conduct occurred 12 years ago, she paid restitution, and she has received intensive therapy. Under these circumstances, AG ¶ 20(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," applies. Applicant has mitigated the financial considerations trustworthiness concern.

Whole-Person Concept

From 2000 to 2005, Applicant embezzled money from her employer, a federal agency tasked with law enforcement. To compound the betrayal of the public trust, she was surreptitiously committing this crime while performing job duties that consisted, in part, of assisting in the prosecution of others for the same types of crime. Under these circumstances, the nature and seriousness of her criminal conduct was extraordinary.

The examination of the nature and seriousness of the crime does not complete the analysis. Under the whole-person concept, it is the first of nine factors that the fact-finder must evaluate together when assessing trustworthiness. (AG ¶ 2(d)) These additional factors include the following:

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.

Twelve years have elapsed since Applicant committed the crime. She has been working for the same employer, and has excelled on the job. Her misconduct stemmed from a disorder caused by profound and longstanding trauma that was exacerbated by the breakup of an abusive relationship. Through intensive, well-documented therapy, that she consistently attended, Applicant developed an understanding of the underlying pathology and began to address it. Applicant's psychologist unequivocally stated that Applicant, having completed years of therapy, together with a debtors anonymous class, is now an acceptable candidate for a public trust position. Applicant continues to attend therapy sessions, even though her psychologist concluded that it is no longer necessary.

Under these circumstances, I conclude that the negative inference generated by the nature and seriousness of the misconduct is outweighed by the surrounding circumstances, the amount of time that has elapsed, and the extensive presence of rehabilitation, rendering the likelihood of recurrence minimal. Applicant has mitigated the trustworthiness concern.

Formal Findings

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

Paragraph 1, Guideline J:

FOR APPLICANT

Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	For APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline F:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position. Eligibility for access to a public trust position is granted.

Marc E. Curry
Administrative Judge