



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



In the matter of:)
)
) ADP Case No. 14-06085
)
)
Applicant for Public Trust Position)

Appearances

For Government: Caroline Heintzelman, Esquire, Department Counsel
For Applicant: *Pro se*

10/06/2015

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant's eligibility to occupy a public trust position is granted.

Statement of the Case

Applicant completed a Questionnaire for Investigations Processing (e-QIP) on October 27, 2013, which she signed on October 29, 2013. The Department of Defense (DOD) Consolidated Adjudications Facility, (CAF) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F, Financial Considerations on February 5, 2015. The action was taken under 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* (AG) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR on April 8, 2015. She answered the SOR in writing on April 14, 2015, and she requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on May 28, 2015, and I received the case assignment on June 8, 2015. DOHA issued a notice of hearing on June 25, 2015, and I convened the hearing as scheduled on July 16, 2015. The Government offered six exhibits (GE), 1 through 6, which were received, marked, and admitted into evidence without objection. Applicant testified. Applicant did not submit any exhibits. DOHA received the transcript of the hearing (Tr.) on July 21, 2015. I held the record open until August 6, 2015, for the submission of additional matters. Applicant timely submitted Exhibit (AE) A through H, which were received, marked, and admitted without objection. The record closed on August 6, 2015.

Procedural Ruling

Notice

Applicant received the notice of the date, time and place of the hearing less than 15 days before the hearing. I advised Applicant of her right under ¶ E3.1.8. of the Directive to receive the notice at least 15 days before the hearing. Applicant affirmatively waived this right. (Tr. 10)

Findings of Fact

In her Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.c, 1.e, 1.g, 1.k, 1.n, and 1.o of the SOR, with explanations. She denied the factual allegations in ¶¶ 1.a, 1.b, 1.d, 1.f, 1.h - 1.j, 1.l, and 1.m of the SOR.¹

Applicant, who is 55 years old, works as a service representative in billing and enrollment for a DOD contractor. She began her current employment in November 2013. She recently received a promotion. Since January 2015, she has received four metric green stars, which are monthly awards, and two certificates of achievement for quality, one in March 2015 and a second in May 2015.²

¹When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

²GE 1; GE 2; AE A; AE F; AE G; Tr. 21.

Applicant graduated from high school. She received an associates degree in culinary skills in October 2011. She married in 1984 and divorced in 2001 because of spousal abuse. After her divorce, her former husband harassed her at work and outside of work. He threatened to kill her. She tried to keep her employment and residences secret from him. She also filed bankruptcy after her divorce because of her debts. The harassment has ceased. She has four daughters, ages 36, 30, 28, and 25. She is the legal guardian of her three-year-old grandson. He lives with her, and she provides for his support and welfare.³

In 1988, Applicant worked as a teller in a bank. At that time, she experienced financial difficulties because her husband was not working and refused to care for their daughters, forcing her to pay for daycare. She told a coworker about her problems. Since the following incident took place 27 years ago, Applicant's memory of the details is incomplete. On three occasions, her coworker signed slips to withdraw money from the bank vault to place in their counter drawer. Applicant signed her own name to one slip worth \$38,000. She did not sign her name to two other slips valued at \$1,000 and \$4,500. The money was not placed in their counter drawer. Instead, Applicant and her coworker split the \$38,000 after her coworker removed the money from the bank. Applicant denies taking any of the other money. Applicant knew that she was not allowed to take this money, but she did anyway. Initially, she hid the money at home. Eventually, she used some of the money to pay for a car and to buy beds for her children. The police arrested her and her coworker and charged them with embezzlement and aiding and abetting. Applicant pled guilty to both charges in October 1989. The court sentenced her to five years probation and ordered that she pay restitution of \$21,000. Applicant successfully completed her probation. Of the money she took, she returned to the bank the money she had not used at the time of her arrest, and the bank kept her last paycheck. She cannot remember how much money she returned to the bank. She has not paid further restitution due to a lack of money. At the hearing, Applicant acknowledged several times that she did this conduct and that it was wrong to do. She also admitted her arrest and conviction on her e-QIP. She has not been arrested or charged for any other criminal activity since 1989.⁴

Applicant did not work regularly during her marriage as her husband did not want her to work. From April 1996 until February 1998, she worked part-time as a housekeeper. From February 1998 until May 2002, she drove a van for a preschool. She worked as a customer care advocate from May 2002 until November 2006, when she began work as a pharmacy technician for a major drug store chain. She left this job in March 2009 to attend culinary school. She returned to work as an assistant manager for her then fiancé's business in November 2011. The business closed in July 2013, and she was unemployed until she started her current position four months later.⁵

³GE 1; GE 2; Tr. 17, 20, 22-23.

⁴GE 1; GE 6; Tr. 23-26, 49-63, 74.

⁵GE 1; GE 2; Tr. 27.

While she attended culinary school, Applicant lived with her former fiancé. He provided her with support, and she received medical care through a state-funded program. She, her former fiancé and her young grandson moved to another state in the summer of 2013 to help her sister fix up a large house. Two weeks after their arrival, her former fiancé left. She does not know where he now lives or works. When they moved out of state, she left most of her belongings from their apartment in a storage unit under her former fiancé's name. She returned to her current state of residence on the 2013 Labor Day weekend and has been unable to access the storage unit to retrieve her belongings, including relevant papers, because her name is not on the rental lease for the storage unit. In September 2013, she moved into one daughter's home, and later she lived with her youngest daughter and her daughter's boyfriend in their apartment. She moved from this apartment before her daughter and her daughter's boyfriend. After her daughter and her daughter's boyfriend were evicted from their apartment, they moved into Applicant's residence. She recently asked them to move from her residence as they did not assist with household expenses, but created more expenses for her.⁶

Applicant currently earns \$14.18 an hour regular pay and \$21.27 an hour for overtime. She provided a copy of her leave and earnings statements for June 2015 and July 2015. Because she is paid every two weeks, she received three paychecks in July.⁷ Her earnings statements reflect that she received pay for 83 hours twice, for 84, 88 and 90 hours once each. Her deductions include taxes, social security, medical, dental and vision insurance, and two contributions to her 401(k) savings plan.⁸ In June 2015, Applicant received \$1,747 in net pay, and in July 2015, she received \$2,776 in net pay based on three pay periods. Applicant's monthly expenses include \$828 for rent, \$195 for a car payment, \$95 for car insurance, \$20 for renter's insurance, \$60 for gasoline, \$85 for her cell phone, \$300 for food, \$54 for prescriptions, and \$80 for miscellaneous for total monthly expenses of \$1,717, leaving \$30 a month to pay debts. After she asked her daughter to move, she cancelled the cable service. She does not use credit cards, and she timely files her federal and state income tax returns each year. She does not owe additional income taxes. She did not explain how she used the additional \$1,050 of income in July only nor did she indicate if her salary would increase with her promotion. Applicant has a health savings account with a \$1 balance.⁹

The SOR identifies 13 past-due accounts, totaling \$14,831 based on the credit reports dated November 12, 2013 and September 15, 2014. The SOR also notes that she filed a Chapter 7 bankruptcy in 2005; her debts were discharged in 2008; and that the court ordered her to pay restitution of \$21,000 in 1989. The SOR debts include two vehicle repossessions, one judgment, one cable bill, six medical bills, one utility bill, and

⁶GE 2; Tr. 18-20.

⁷Since she is paid biweekly, she will receive three paychecks one other month this year.

⁸At the hearing, Applicant indicated that she thought she had two 401(k) loan payments. Tr. 68. Her earnings statements do not show such payments. AE B.

⁹AE B; AE C; AE E; Tr. 44-48, 69.

two cell phone bills. The May 28, 2015 credit report listed her bankruptcy, the judgment (1.f), and four other SOR debts (1.a, 1.c-1.e), plus one new medical bill and none of the remaining SOR debts. Likewise, the debts identified in SOR allegations 1.h through 1.o are not listed on the September 15, 2014 credit report.¹⁰

A careful review of the November 2013 credit report indicates that the debts in SOR allegations 1.a (\$7,103), 1.b (\$756), 1.c (\$446), 1.e (\$96), 1.k (\$200), and 1.l (\$44) became delinquent between April 2008 and July 2009. These debts are six to seven years old and legally barred from collection under the state statute of limitations.¹¹ Applicant provided documentation reflecting that she paid the \$44 debt in allegation 1.l in January 2015.¹²

Although not legally barred from collection under the state statute of limitations because they are recent, the debts in SOR allegations 1.h (\$2,922), 1.i (\$516), 1.j (\$147), and 1.m (\$517) are not listed on the recent credit reports. Applicant denied these debts. The debt in 1.h relates to a vehicle belonging to her former fiancé that was repossessed. She acknowledged cosigning the loan, but indicated that it is his debt.¹³ The debts in 1.i and 1.m reflect that she owes her current, and only, cell phone carrier over \$1,000. Applicant provided documentation from her cell phone carrier that shows she does not have an outstanding balance. Her bill reflects that the cell phone carrier owes her a small amount of money.¹⁴

In her response, Applicant denied the cable debt in SOR allegation 1.d (\$384). After the hearing, she investigated this debt and determined that it is her debt. The \$7,103 debt relates to a car purchased by Applicant. While she was attending culinary school, her former fiancé paid the monthly payment for her car. When it needed repairs, he declined to pay for the repairs and stopped paying the debt. She had no money at

¹⁰SOR; GE 3 - GE 5.

¹¹The statute of limitations clearly and unequivocally ends an Applicant's legal responsibility to pay the creditor after the passage of a certain amount of time, as specified in state law. In a series of decisions the Appeal Board has rejected the statute of limitations for debts generated through contracts, which is the law in all 50 states, as mitigating financial considerations concerns under AG ¶ 20(d). See ISCR Case No. 08-01122 at 4 (App. Bd. Feb. 9, 2009); ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008); ADP Case No. 07-13041 at 5 (App. Bd. Sep. 19, 2008); ISCR Case No. 07-11814 at 2 (App. Bd. Dec. 29, 2008); and ADP Case No. 06-14616 at 3 (App. Bd. Oct. 18, 2007) (stating, "reliance upon legal defenses such as the statute of limitations does not necessarily demonstrate prudence, honesty, and reliability; therefore, such reliance is of diminished probative value in resolving trustworthiness concerns arising out of financial problems. See, e.g., ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)."). This opinion does not assert that the statute of limitations provides any mitigation under Guideline F. The Appeal Board has not defined how long after the statute of limitations expires an Applicant must wait before receiving a fresh start similar to that received under Chapter 7 of the Bankruptcy Code.

¹²GE 5; AE H; Tr. 27-29, 42-43.

¹³As a cosigner, Applicant is legally liable for the debt.

¹⁴GE 3; GE 4; AE D; Tr.38-39.

the time to continue the payments. The November 2013 credit reports reflected that at the time the last payment was made, she owed \$3,088. Applicant denied owing the judgment in allegation 1.f (\$1,070). Her daughter and boyfriend signed the lease on the apartment. She later moved into the apartment, and at the request of management, she signed a document indicating that she was residing in the apartment, but she denied signing a lease. She moved out of the apartment several months before her daughter and boyfriend were evicted for nonpayment of the rent. When she moved, she advised the management office of her move and signed another document indicating that she no longer lived in the unit. The two documents are among her lost papers, and the creditor refused to provide her with a copy. She has talked and continues to talk with the creditor about removing her name from the judgment.¹⁵

Applicant's education loans are currently in deferment. She has been talking with the Department of Education about consolidating her loans into one loan. The process is underway to accomplish this goal. Her repayment of the loans will be based on her income and ability to pay.¹⁶

Policies

Positions designated as ADP I and ADP II are classified as "sensitive positions." Assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with national interests. The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made.

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AG. 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 over-arching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

¹⁵AE A; Tr. 19-20, 32-33, 36-38.

¹⁶GE 3; Tr. 65.

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 decision.

A person who seeks access to sensitive information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Analysis

Guideline F, Financial Considerations

The trustworthiness concern relating to the guideline for Financial Considerations is set out 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 [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 describes the disqualifying conditions that could raise trustworthiness concerns. I have considered all the conditions, and the following are potentially applicable:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust.

Applicant's bankruptcy filing and her subsequent unpaid debts reflect a history of not meeting financial obligations and an inability or unwillingness to satisfy debts. In 1989, Applicant pled guilty to embezzling funds from her employer, a bank. A trustworthiness concern has been established under the above disqualifying conditions.

The Financial Considerations guideline also includes examples of conditions that can mitigate trustworthiness concerns. I have considered mitigating factors AG ¶¶ 20(a) through ¶¶ 20(f), and the following are potentially applicable:

- (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;
- (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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;
- (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control; and
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

At the hearing, the Government focused its main concern in this case on Applicant's decision in 1988 to participate in the removal of money from the vault of her employer, a bank, with a coworker. The police arrested her, and she pled guilty to embezzlement and aiding and abetting. Applicant fully acknowledged her one-time behavior throughout this proceeding. In 1989, she knew that her decision and conduct were wrong. She continues to acknowledge that she was wrong when she made this decision, which was a serious breach of her responsibility to her employer and her employer's trust in her. This breach of trust is at the heart of this case. For the last 27 years, Applicant has avoided making more bad decisions that are criminal in nature. Over the years, she has faced financial difficulties time and again. She has not resorted to theft of any type to resolve these difficulties or to pay her bills. She showed good judgment when she decided to divorce her abusive husband and when she told her daughter and her daughter's boyfriend to move because they were creating more financial difficulties for her. Applicant is recognized at work for her exceptional performance and recently received a promotion. She has worked for 27 years to overcome one seriously bad decision to violate her employer's trust. She has not made such a decision again. AG ¶¶ 20(a) concerns conduct that happened a long time ago. Applicant acted dishonestly and irresponsibly one time in 1988. She has not made a

similar bad and irresponsible decision since 1988. Such conduct is unlikely to reoccur. This mitigating condition applies to SOR allegation 1.o.

Applicant incurred financial problems after her divorce, a factor beyond her control. She filed a Chapter 7 bankruptcy, a legal mechanism to resolve her debts. With the discharge of her debts, she had an opportunity to start fresh. Since then she has accumulated more debts, most during the time she attended culinary school and relied upon her former fiancé to pay her bills as she was not working. In 2013, he abandoned her, leaving her without income or a job. Several months later she found employment, which provided her just enough income to pay her customary living expenses. She has resolved the cell phone debts and the small utility bill. She lacks the resources to pay the larger debts, one of which is time barred and the others of which have been dropped from her credit report. She disputes the judgment and has tried to resolve this with the creditor. In 1988, she returned an unknown amount of the bank funds she had taken as part of her restitution, and the bank withheld her last paycheck as part of her restitution payment. Since then, she has not made any additional payments to the bank because she has lacked the financial resources to pay the debt. There has not been any attempt to garnish her wages to pay this debt. AG ¶¶ 20(b), 20(c) and 20(e) have some applicability to the remaining debts.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a public trust position by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

“(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) 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.”

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. The decision to grant or deny a trustworthiness determination requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a trustworthiness concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a public trust position should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of

record to decide if a nexus exists between established facts and a legitimate trustworthiness concern.

The evidence in support of granting a trustworthiness determination to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has just enough income to pay her living expenses. She does not use credit cards and lives austerely. She pays her rent and her car payment on time. She provides support for her grandson. She is responsible about her finances and has not resorted to any dishonest activity to obtain money to pay her bills now or since 1989. The two car repossessions occurred when her former fiancé refused, after helping her, to continue the payments on her car and then stopped paying his own car payments. He did not act responsibly, and she had no income at that time to assume the responsibility for payments he refused to make..

Applicant's embezzlement in 1988 is a serious breach of trust of her then employer. This conduct, even 27 years later, raises a serious concern on the issue of trust. In deciding this case, I must weigh the seriousness of this conduct against Applicant's behavior in the ensuing 27 years. Applicant knew then and knows now that what she did was wrong. She accepted responsibility for her conduct when she pled guilty in court in 1989. The court released her from probation five years later, when it concluded that she had completed the terms of her probation. With Applicant's current position, the Government expects that she exercise a high level of trust in protecting the records of all individuals with whom she has contact. Applicant learned a difficult lesson in 1989. For the last 27 years, she has worked to show that she is trustworthy. With the multiple difficulties she has experienced in these years, Applicant has made the right choice by not taking illegal or dishonest actions to resolve problems, particularly her financial problems. Since she has not been involved in additional criminal activity, she is viewed as rehabilitated under the criminal justice system. She is a responsible and productive member of society. There is no evidence of a compromise of sensitive information by her. She has shown that she can be trusted to manage the private information of individuals entrusted to her.

Applicant files and pays her federal and state income tax returns every year. She does not use credit cards to finance a lifestyle. Applicant's inability to fully resolve her debts stems from a two-year period of unemployment and a lack of current resources to pay her debts, as she earns less than \$30,000 a year. Many of the SOR debts are not legally collectible or no longer on her credit reports. Her debts are not the result of over spending, but simply an inability to meet expenses beyond her basic living needs. She paid the debt in SOR allegation 1.l (\$44). She showed that she does not owe her cell phone carrier any money as alleged in 1.i (\$516) and 1.m (\$517). These debts are no longer on her credit report. As for the debt in SOR allegation 1.h (\$2,922), Applicant indicated that this debt belonged to her former fiancé. Since it is no longer on her credit reports, an inference is drawn that the creditor is no longer seeking payment from her, and it is possible her former fiancé paid it. Based on a review of all the

