

8, 2015. The hearing was convened on that date. At hearing, the Government's case consisted of three exhibits (GEs 1-3). Applicant relied on one witness (herself) and eight exhibits (A-H). The transcript (Tr.) was received on January 21, 2015.

Procedural Issues

Before the close of the hearing, Applicant asked for leave to keep the record open to supplement the record with an historical accounting of payments to her debt consolidation firm, 1099C forms for all of her settled debts, and the correct account numbers on the debt covered by subparagraph 1.c. For good cause shown, Applicant was granted seven days to supplement the record.

Within the time permitted, Applicant documented the following: an email to Department Counsel, tax form 1099Cs covering creditor 1.a and 1.c settlements, documented records covering the 1.a judgment debt and 1.c account statement and settlement payment, creditor 1.b court records and payment documentation, account statement covering Applicant's 401(k) loan, mortgage accounting history, an historical accounting of Applicant's payments to her debt consolidation firm. Applicant's post-hearing submissions were admitted as AEs I-Q.

Summary of Pleadings

Under Guideline F, Applicant allegedly accumulated one judgment for \$13,757 and two consumer debts. The consumer debts exceeded \$28,000.

In her response to the SOR, Applicant denied the allegations covered in subparagraphs 1.a and 1.b, and admitted the allegation covered by subparagraph 1.c. She claimed the debts were business-related and prompted by the loss of a supplier. She claimed she enrolled in a debt-consolidation program administered by a law firm in February 2009 and has been making monthly deposits on time. She claimed, too, that she has only one claim left (i.e., the one covered by subparagraph 1.c) to be paid. And she claimed that she is a dedicated and responsible employee of a dental insurance company.

Findings of Fact

Applicant is a 56-year-old senior reporting analyst for a dental insurance company who seeks a determination of eligibility to hold a public trust position with a dental care insurance firm with whom she has been employed since February 1989. (GE 1; Tr. 40, 72-73) The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in June 1981 and divorced her husband in February 1988. (GE 1) She has one adult child from this marriage, age 32. (GE 1; Tr. 40-41) She remarried in January 1991 and has one adult child from this marriage (age 21) who currently resides with her. (GE 1; Tr. 40-41) Applicant earned an associate of arts

degree from a local community college in May 1977. (GE 1) She has no military service. (GE 1)

Applicant's finances

Between 2003 and 2008, Applicant owned a retail supply business that she operated in sole-proprietorship form. (Tr. 41, 77) After the recession gained momentum in 2008, Applicant experienced business-related losses with her business. (Tr. 42, 73) When she closed her business in 2008, she still had three business debts (i.e., creditors 1.a-1.c) on her company books that she could not address with her limited resources. She attributed all of her credit card debts to the business downturn that impacted her business in the 2008 time frame. (Tr. 42-43)

Before her three credit card debts (i.e., creditors 1.a-1.c) became delinquent, Applicant contacted a debt consolidation law firm to explore repayment options. (Tr. 73) In February 2009, Applicant enrolled in a debt consolidation program with the same law firm. (AE H; Tr. 43-46) Her initial payment schedule called for payments of \$600 a month. (Tr. 44) She consistently made her agreed \$600 monthly payments over a four-year period (i.e., February 2009 through September 2012). (AE Q)

Due to the increased expenses allocated to caring for her mother, Applicant asked her debt consolidation firm in late 2012 to lower her monthly payments to \$300 a month. (Tr. 44-46, 65-66) Her payment reduction was approved, and Applicant maintained this reduced payment schedule for all of 2013 and 2014. (AE Q; Tr. 45-49).

Applicant has since settled and paid all of the listed debts in the SOR (i.e., creditors 1.a-1.c). (AEs A-C, E, and H-Q; Tr. 51-58) The historical accounting furnished by her debt consolidation firm documented her \$600 monthly payments to the law firm between February 2009 and September 2012 and her \$300 monthly payments since January 2013. (AEs H and Q) Two of the three listed creditors (i.e., creditors 1.a and creditor 1.c), who settled with Applicant for less than the face amounts of the debts, have furnished 1099C forms to Applicant for inclusion with her federal tax returns. (AEs J-K; Tr. 48-52, 55-56-57)

To settle her creditor 1.b debt, Applicant obtained a loan from her 401(k) retirement account in December 2014 for \$20,000 and issued a check of \$12,261 to the creditor to cover the agreed settlement amount of the debt. (AEs E and O; Tr. 53-54, 60). Repayments on her 401(k) loan are \$350 a month. (Tr. 60-61)

Applicant is current with her federal and state taxes. (Tr. 58-59) She grosses \$77,000 annually from her employment and nets \$48,000 a year. (Tr. 76, 81) She is responsible for monthly expenses for home utilities (\$425), her cable service (\$260), her cell phone (\$350), and her trash collection (\$50), (Tr. 61-63) She has two credit cards, but no automobile to service or travel expenses. (Tr. 70) Applicant has \$120,000 in her 401(k) retirement account net of the \$20,000 loan she obtained to settle her creditor 1.b debt. (Tr. 67-68) She covers her daughter's health expenses and pays \$500 a month towards her mortgage, which runs \$2,200 a month and is in current

payment status. (AE P; Tr. 61-64) She estimates to have about \$100,000 of equity in her home and estimates a net monthly remainder of about \$200. (Tr. 63-67)

Endorsements

Applicant provided character references from her managers and colleagues (AE G) Her references characterize her as reliable and trustworthy and cite her selection as her firm's employee of the month in December 2012 as indicative of her commitment, dedication, and trustworthiness. (AE G) Applicant has received an employee of the month award in 2012 and earned exceptional performance evaluations for the years 2009 through 2013. (AE F)

Policies

Positions designated as ADP I and II are classified as "sensitive positions." (Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3) "The standard that must be met for 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 the interests of national security." (Regulation ¶ C6.1.1.1) DoD contractor personnel are afforded the right to the procedures contained in the directive before any final unfavorable access determination may be made. (Regulation ¶ C8.2.1)

The AGs list guidelines to be used by administrative judges in the decision-making process covering public trust eligibility 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 hold a public trust position. These guidelines include "[c]onditions that could raise a security concern [trustworthiness concerns] and may be disqualifying" (disqualifying conditions), as well as any of the "[c]onditions that could mitigate trustworthiness concerns."

The AGs must be considered before deciding whether or not eligibility to hold a public trust position should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable trust risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

Financial Considerations

The Concern: "Failure or inability to live within one's means, satisfy debts 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 [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts." 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 to hold a public trust position depends, in large part, on the relevance and materiality of that evidence. *See Kungys v. United States*, 485 U.S. 759, 792-800 (1988). 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 hold or maintain a public trust position. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused a position requiring trust and reliability 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 demonstrate good judgment and trustworthiness.

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 eligibility to hold a public trust position through evidence of refutation, extenuation, or mitigation. Based on the requirement of the Directive and the Regulation that all public trust positions be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her position of trust eligibility. Like security clearance determinations, public trust decisions, or decisions involving trustworthiness, “ should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Applicant is a senior reporting analyst who accumulated delinquent debts during a business downturn in the 2008 time period that adversely affected her retail supply business. During this period, she accumulated three business-related debts (inclusive of a judgment obtained by creditor 1.a) that exceeded \$31,000. Her debt accruals warrant the application of two disqualifying conditions (DC): ¶ 19(a), “inability or unwillingness to satisfy debts,” and ¶ 19(c), “a history of not meeting financial obligations.”

Holding a public trust position involves a fiduciary relationship between the Government and the public trust position holder. Quite apart from any agreement the trust holder may have signed with the Government, the nature of the public trust position holder’s duties necessarily imposes important duties of trust and candor on the holder that are considerably higher than those typically imposed on Government employees and contractors involved in other lines of Government business. See *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Failure of the applicant to make concerted efforts to pay or resolve her debts when able to do so raises concerns about whether the applicant has demonstrated the trust and judgment necessary to safeguard sensitive information.

Since February 2009, Applicant has been enrolled in a debt consolidation program and has settled and paid each of the three listed delinquent debts in the SOR. She is current with her mortgage, debt-free, and is able to maintain her finances in stable condition. She has ample reserves in her 401(k) retirement account, considerable equity in her home, and a net monthly remainder to draw upon in emergencies.

While the Appeal Board has never required an applicant to repay all of his or her debts in demonstrating a return to financial stability, it does require some good-faith payment initiatives. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). Applicant’s documented payment efforts fully meet all of the minimal criteria established by the Board.

Based on Applicant’s demonstrated business losses during a severe downturn in 2008, considerable extenuating circumstances are associated with her inability to pay off or otherwise resolve her outstanding business debts earlier in time. Available to Applicant is MC ¶ 20(b), “the conditions that resulted in the behavior were largely

beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce, or separation), and the individual acted responsibly under the circumstances."

Extenuating circumstances alone are not enough to enable Applicant to mitigate trust concerns over her past failures to address her debts. See ISCR Case No. 05-11366, at 4 n.9 (App. Bd. Jan. 12, 2007)(citing other ISCR case authorities)). In Applicant's case, she engaged a debt consolidation firm as soon as she recognized she would not be able to pay off her debts individually with her limited resources and has since settled each of the listed debts in the SOR. Her good-faith efforts meet both the good-faith and promptness prongs of MC ¶ 20(b).

Applicant's earnest repayment initiatives merit application of two of the mitigating conditions for financial considerations. MC ¶ 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," and MC ¶ 20(d), "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts," apply to Applicant's situation

A whole-person assessment enables Applicant to surmount the judgment questions raised by her accumulation of delinquent debts and failure to take earlier steps to address them. The three delinquent debts she accrued were all business-related and were attributable to the economic downturn that severely affected her retail sales business. Through her earnest repayment efforts, she has settled each of the listed debts and is currently debt-free with ample home equity available to her should an emergency arise.

Important to a whole-person assessment is the trust and confidence that Applicant has earned from her manager and colleagues who have worked with her and know her personally. She has received an employee of the month award in 2012 and earned exceptional performance evaluations. Worthy of additional credit are her working consultations to date with her debt consolidation firm who has been active in settling her debts and restoring her finances to respectable levels of stability, consistent with minimum eligibility criteria for holding a public trust position.

Considered together, Applicant has made major progress with her finances since she engaged her debt consolidation firm in 2009. Favorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a-1.c.

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.c:

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 is granted.

Roger C. Wesley
Administrative Judge

