

KEYWORD: Financial; Personal Conduct

DIGEST: Applicant is 57 years old, and works for a computer company on contract to a Government contractor in the health care industry. She has two delinquent debts for 2002 and 2003, which resulted from a divorce, a home business , and periods of unemployment. Applicant thought she used a legal method to resolve the debts in 2002 and 2003, but discovered she made an honest mistake as to the efficacy of a debt elimination “program” she purchased from a vendor. However, she mitigated the financial considerations, personal conduct, and criminal conduct trustworthiness concerns. Her eligibility for a trustworthiness position is granted.

CASENO: 06-25552.h1

DATE: 10/03/2007

DATE: October 3, 2007

In re:	)	
	)	
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SSN: -----	)	ADP Case No. 06-25552
	)	
Applicant for a Public Trust Position	)	
	)	

**DECISION OF ADMINISTRATIVE JUDGE  
PHILIP S. HOWE**

**APPEARANCES**

**FOR GOVERNMENT**

Caroline H. Jeffreys, Esq., Department Counsel

**FOR APPLICANT**

Jeffrey Grady, Personal Representative

**SYNOPSIS**

Applicant is 57 years old, and works for a computer company on contract to a Government contractor in the health care industry. She has two delinquent debts for 2002 and 2003, which resulted from a divorce, a home business , and periods of unemployment. Applicant thought she used a legal method to resolve the debts in 2002 and 2003, but discovered she made an honest mistake as to the efficacy of a debt elimination “program” she purchased from a vendor. However, she mitigated the financial considerations, personal conduct, and criminal conduct trustworthiness concerns. Her eligibility for a trustworthiness position is granted.

## STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a position of trust for Applicant<sup>1</sup>. On March 12, 2007, DOHA issued a Statement of Reasons<sup>2</sup> (SOR) detailing the basis for its decision—trustworthiness concerns raised under Guideline F (Financial Considerations), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct) of the revised Adjudicative Guidelines of the Directive issued on December 29, 2005, and implemented by the Department of Defense, effective September 1, 2006. Applicant answered the SOR in writing on March 30, 2007, and elected to have a hearing before an administrative judge. The case was assigned to me on June 20, 2007.

On August 6, 2007, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a trustworthiness determination for Applicant. The Government submitted exhibits that were admitted into evidence without objection. Applicant testified in her case. At the conclusion of the hearing, I left the record open until August 20, 2007, for the submission of exhibits. I received them in a timely manner. The Department had no objection, so I marked them as Exhibits A to E, and admitted them into evidence. DOHA received the hearing transcript (Tr.) on August 20, 2007.

## FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated as findings of fact. After a complete and thorough review of the evidence in the record, and full consideration of that evidence, I make the following additional findings of fact:

Applicant is 57 years old, divorced after 31 years of marriage, and works for a defense contractor in the computer business. Her current employer evaluates her as dependable and conscientious. She had periods of unemployment from August 1999 to July 2000, then November 2001 to October 2002, and November 2004 to April 2005. She was divorced in 2002. (Tr. 12, 41, 42, 53; Exhibit 1)

Applicant paid her bills and mortgage while married. She and her former husband had credit cards for 20 years and paid them in full. While unemployed, and moving around the U.S. between 2002 and 2006, to work on various contractual jobs, she borrowed money from her family upon which to live. She repaid the \$3,000 she borrowed from her mother, and the \$5,000 she borrowed from her father after 2005. She continues to owe her sister \$3,000, but her sister declines repayment. Applicant is committed to repaying that loan also. Applicant's credit record shows all credit card and other debts as paid in full or current, except for two credit card debts owed to two banks. The first delinquent debt is for \$11,487. The other delinquent debt is for \$9,532. These debts date from

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<sup>1</sup>Adjudication of trustworthiness cases for ADP I, II, and III positions are resolved using the provisions of DoD Directive 5220.6 (Directive), pursuant to the memorandum from Carol A. Haave, Deputy Under Secretary of Defense for Counterintelligence and Security to DOHA Director, *Adjudication of Trustworthiness Cases* (Nov. 19, 2004).

<sup>2</sup>Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and the Directive.

2002 when Applicant had a home business and was being divorced. (Tr. 15, 16, 19, 32, 41; Exhibits 2-5)

Applicant ceased paying these two accounts in 2002. She paid \$2,000 to obtain debt elimination “program” materials (CDs, books, course materials) from a company to learn how to get rid of these two debts. She sent letters using the “program” suggested formats to the two creditors, which letters stated, in part,

“I am disputing the amount because I believe that (the bank) failed to credit my account for money or credits accepted from me. I believe that (the bank) accepted my signed note(s) and other promises to pay into new bank money and credits, but failed to disclose those material facts to me. I believe that I am entitled to receive these new credits or (the bank) would be receiving something for nothing, while profiting from my fruit (*sic*) and labor.”

The form letter demanded the creditor bank provide an affidavit that it did not follow Generally Accepted Accounting Principles, did not follow Federal Reserve Bank policies and procedures, that the bank “prohibits the party that funds the loan or extension of credit to be repaid,” and that the bank “disclosed to me that they would create new money based on my note or similar instrument and that I am not entitled to those credits or money.” The letter then referred to the Fair Credit Reporting Act. (Tr. 17, 21, 31, 33, 35-39, 43; Exhibits 2-5, B-E)

Another form letter Applicant used cited 15 U.S. C. §1666 as authority for Applicant not repaying these debts. That section of the U.S. Code provides procedures for correcting billing errors on credit card statements. Applicant believes that because the banks did not contact her, the debts were eliminated and closed. One creditor sent her a IRS Form 1099-c for tax year 2006 for \$8,502 in cancelled debt, of the original \$11,487 listed in the SOR. Applicant paid tax for 2006 on that amount as income. Applicant does not have the CDs or other materials from the “program.” (Tr. 17, 21, 31, 33, 35-39, 43; Exhibits 2-5, B-E)

Applicant’s exhibits contained copies of the form letters and the letters she sent to the two banks. The justifications and statutes listed by Applicant in these form letters are not valid legal bases for avoiding repayment of debt when she merely ceased paying the debts. However, Applicant honestly believes she was following a legitimate “program” to rid herself of these two debts. She does not intend to repay these debts because she does not believe she owes them. Applicant could not remember where she obtained the \$2,000 to buy the debt elimination “program” while continuing to owe these two credit cards. (Tr. 17, 21, 31, 33, 35-39, 43; Exhibits 2-5, B-E)

Applicant did not list these two debts on her public trust application form (PTA) she completed on March 9, 2006, because she believed they were closed and did not have to be paid. She did not consider them as debts. She knew they were on her credit report at the time she completed the PTA. Question 22.b. on the PTA form requested an Applicant disclose any delinquent debts currently more than 180 days past due. Applicant answered “no” to that question. (Tr. 37-39; Exhibit 1)

## POLICIES

As Commander in Chief, the President has “the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information.” *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information with Industry* § 2 (Feb. 20, 1960). By direction of the Under Secretary of Defense for Counterintelligence and Security, adjudications of cases forwarded to DOHA by the Defense Security Service or the Office of Personnel Management (OPM) for a trustworthiness determination shall be conducted under the provisions of the Directive. Eligibility for a position of trust is predicated upon the applicant meeting the guidelines contained in the Directive and a finding it is clearly consistent with the national interest to do so. See Directive ¶ 2.3. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his trustworthiness determination.” See Directive ¶ E3.1.15

The adjudication process is based on the whole person concept. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline that must be carefully considered in making the overall common sense determination required. The decision to deny an individual eligibility to occupy a position of trust is not necessarily a determination as to the loyalty of the applicant. See Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a such a determination.

In evaluating the trustworthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual’s age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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 (See Directive, Section E2.2.1. of Enclosure 2). Because each case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible to occupy a position of trust. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant’s trustworthiness suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at \*\*6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut,

explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his trustworthiness determination. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). “Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.” Directive ¶ E2.2.2

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

**Guideline F: Financial Considerations: The Concern:** 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 could raise questions about an individual’s reliability, trustworthiness and ability to protect classified 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. ¶18

**Guideline E: Personal Conduct: The Concern:** Conduct 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. ¶15

**Guideline J: Criminal Conduct: The Concern:** Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations. ¶30

“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) Appendix 8 of the Regulation sets forth the adjudicative policy, as well as the disqualifying conditions (DC) and mitigating conditions (MC) associated with each guideline. DoD contractor personnel are afforded the adjudication procedures contained in the Directive. (Regulation ¶ C8.2.1)

## CONCLUSIONS

**Guideline F:** Applicant owed two credit card debts in 2002. While undergoing a painful divorce, and some unemployment, Applicant sought and found an advertised as legitimate way to rid herself of these two sizeable debts. Examining the exhibits offered by Applicant, it is clear to me that the arguments and reasons cited in the “program” letters are not legal, but are fallacious and delusive. Nonetheless, Applicant in her naivete and legal ignorance, paid \$2,000 for this instruction program and thought she had rid herself of these two debts. On creditor cancelled the debt in 2006 and Applicant had to pay the tax on that income. That debt (Subparagraph 1.a of the SOR) does not exist now because of the cancellation. The other debt continues to exist. Applicant and her former

husband had a history of paying debts, according to her testimony, which I find believable, and the credit reports submitted as exhibits.

The disqualifying condition applicable is Financial Considerations Disqualifying Condition (DC) ¶19.a. (inability or unwillingness to satisfy debts). Applicant was unable at the time to pay the debt. Now she honestly believes that the debt is not owed.

Applicant had financial difficulties in 2002, resulting from her divorce and unemployment. Her record of paying her current bills and responsibly managing her money in the past and present weighs heavily in her favor. Her honest belief in the correctness of the actions she took also count in her favor. The actions were five years ago and have not been repeated. Her debt problems in 2002 and 2003 were contrary to the record of payments on debts she made before and after that period of time. She thought she was using a legal method to dispute her debts and resolve them through that process. She was mistaken, but no one told her that at the time, nor apparently until the hearing on this issue was any dispute about the legitimacy of that “program” brought to her attention.

She relied on the representations and information sold to her by this “program” provider. She provided proof of her efforts to resolve the two largest debts according to the lessons in this “program.”

Therefore, Mitigating Conditions (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), ¶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, or a death, divorce or separation), and the individual acted responsibly under the circumstances), ¶20.d (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts), and ¶20.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) apply.

**Guideline E:** Applicant did not list the two debts set forth in Subparagraphs 1.a and 1.b of the SOR on her PTA form in 2006. She denied the allegations in Paragraph 2 of the SOR in her Answer. She effectively admitted at the hearing she did not list them, but explained her understanding that having followed the “program” she bought, the debts were no longer owed. Therefore, in her mind, they were not 180 days or more past due, so they did not exist, and she did not have to list them. Wrong though she was, she made an honest mistake. Her testimony and demeanor at the hearing convince me she truly believed what the “program” told her to do about the debts. With no further contact from the creditors, she thought they had accepted her explanations, and the debts were no longer collectible. Therefore, she did not deliberately falsify her answers to Question 22.b on the PTA form. None of the Disqualifying Conditions under Guideline E apply.

**Guideline J:** This guideline is applicable if Applicant willfully and knowingly made a false statement or representation to the U.S. Government. It works in tandem with the allegation of deliberate falsification under Guideline E. For the same reasons stated under that Guideline E, I conclude Applicant did not make a willful and knowing false statement on her PTA form in Question 22.b. No DC apply, and no MC need apply.

## **Whole Person Analysis**

“The adjudicative process is an examination of a sufficient period of a person’s life to make an affirmative determination that the person is eligible for a” trustworthiness decision. Directive E2.2.1. “Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.” *Id.* In evaluating Applicant’s case, I have considered the adjudicative process factors listed in the Directive ¶ E2.2.1.

In evaluating these factors, in addition to the DC and MC of the specific guidelines, I considered the totality of the evidence in view of the “whole person” concept. I considered Applicant’s age and length of marriage when her marriage dissolved. I looked at her past and present record of debt payments contained on the credit reports, noting that the period of her divorce and unemployment caused her financial problems and debt repayment problems out of the usual and customary pattern in her life. I considered that only two debts were at issue, and that Applicant honestly thought she was resolving them by using valid procedures under Federal law, which was her motivation for that conduct. Her lack of legal sophistication and the language of the “program” letters contributed to her belief that she was taking a legitimate avenue to dispute these two debts. The debt in SOR Subparagraph 1.a was cancelled by the creditor during the 2006 tax year, and Applicant paid income tax on the amount cancelled. The use of this “program” was a one-time occurrence by Applicant on only two debts. She has not repeated the use of that “program.” It is not likely she will use it again, based on her testimony. I do not believe she poses a trustworthiness concern or that similar conduct will recur in the future.

Therefore, I conclude the financial considerations trustworthiness concern for Applicant. Likewise, I conclude the personal conduct and criminal conduct trustworthiness concerns for Applicant. Finally, I conclude the “whole person” concept for Applicant.

## **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

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

## **DECISION**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for assignment to sensitive duties. Her application for eligibility for a public trust position is granted.

Philip S. Howe  
Administrative Judge