



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



In the matter of: )  
 )  
----- ) ADP Case No. 17-03014  
 )  
Applicant for Public Trust Position )  
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**Appearances**

For Government: Jeff Nagel, Esquire, Department Counsel  
For Applicant: *Pro se*

July 25, 2019

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**Decision**

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ROSS, Wilford H., Administrative Judge:

On October 15, 2015, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On September 15, 2017, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guidelines F, Financial Considerations and E, Personal Conduct. 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 (AG) effective within the DoD on June 18, 2017.

Applicant answered the SOR in writing (Answer) on October 16, 2017, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on November 13, 2017. The case was assigned to another administrative judge on July 10, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on July 11, 2018. The case was re-assigned to me on July 12, 2018. I convened the hearing as scheduled on August 21, 2018. The Government offered Government Exhibits 1 through 5, which were admitted without objection. Applicant testified on her own behalf, called two additional witnesses, and submitted Applicant

Exhibits A and B, which were also admitted without objection. DOHA received the transcript of the hearing (Tr.) on August 31, 2018. The record was left open at the request of Applicant until September 17, 2018, for the receipt of additional documentation. Applicant submitted additional information that was marked as Applicant Exhibits C through I and admitted without objection. The record then closed.

### **Findings of Fact**

Applicant is 66 years old and married. She has a Bachelor's degree. Applicant began work with her current employer in December 2015. She requires access to sensitive personal information in connection with her employment. (Government Exhibit 1 at Sections 12, 13A, and 17.)

The SOR contained 12 allegations under Guideline F, Financial Considerations. The allegations relate to unfiled tax returns (1.a), delinquent student loans (1.b) and consumer debts (1.c through 1.i). Applicant admitted all the allegations in the SOR under this paragraph.

Evidence for the existence of the debts set forth in the SOR is found in credit reports of Applicant dated November 21, 2015; August 24, 2017; and November 13, 2017. (Government Exhibits 3, 4, and 5.) The total amount of past-due indebtedness owed by Applicant is alleged to be approximately \$11,895. Past-due student loans account for \$3,470 of the delinquencies.

Applicant graduated from college in 2009. About that time she developed severe and continuing health problems that affected her ability to work and make a livable wage. Due to her medical issues Applicant was either unemployed or underemployed for several years.

Applicant was not making a livable wage until she obtained employment with a defense contractor beginning in December 2015. Between 2009 and 2015 Applicant's annual income ranged from a low of \$4,427 to a high \$18,245 as shown on her tax returns. Only after Applicant began current employment did she begin to make sufficient money to live, earning \$36,378 in 2017. (Applicant Exhibits H and I; Tr. 19-21, 23.)

Because Applicant was disabled she became a client of her state's Department of Rehabilitation (DOR) starting in 2009. Her counselor from that time until about 2016 testified, "We are a state agency that works with people with disabilities to help them become successfully employed and reach a more independent life." It was after several years of work with her counselor that Applicant was hired by a defense contractor that places people with disabilities with a Department of Defense entity. (Tr. 39-41.)

## **Paragraph 1 (Guideline F - Financial Considerations)**

1.a. Due to Applicant's disability affecting her memory, and the financial issues brought about by her unemployment and underemployment, she was unable to file her tax returns for several years. Because she was working with the Defense Department Applicant became eligible to use her employing agency's Volunteer Income Tax Assistance (VITA) coordinator. Working with the coordinator Applicant was able to prepare and submit all of her past-due tax returns. She is now current with her tax filings. Since filing her tax returns, Applicant has been in continual communication with the IRS and has entered into a payment arrangement for her past-due taxes. She made the first payment required under the agreement, as shown by documentation she provided. Given her current financial situation, Applicant intends to continue to pay off the IRS through installment payments before moving on to her delinquent consumer debts. (Applicant Exhibits C, H, and I; Tr. 22-23, 32-33, 45-46, 49.)

1.b. Applicant admitted owing past-due student loans. She has been in continual contact with the creditor on her student loans. Applicant has been in forbearance for several years because of her lack of income. Applicant made a payment arrangement with the student loan creditor and has been making consistent payments in accordance with that arrangement since February 2018. She has the payments for this creditor taken directly out of her bank account. (Applicant Exhibits B and F; Tr. 23, 28-29, 33-34, 50-51.)

1.c through 1.i. Applicant admitted that she owed these past-due debts and did not have the ability to pay them at the time of the hearing, given her current payments for back taxes and student loans. These debts are from the time before she obtained a job with the Defense Department. They consist mainly of medical debts and everyday expenses. Two members of the DOR who worked with Applicant testified that these kind of debt problems are often seen in people they work with, due to the nature of the person's disability and inability to obtain and retain a job. Applicant has entered discussions with her credit union to find ways to pay these debts off in a measured way. Her DOR counselors are assisting Applicant in these endeavors as part of their duties, which is to make sure their clients remain employed. (Applicant Exhibit G; Tr. 29-30, 42-44, 47-48, 51.)

## **Paragraph 2 (Guideline E - Personal Conduct)**

The Government alleges in this paragraph that Applicant is ineligible for clearance because she has engaged in conduct that shows poor judgment, untrustworthiness or unreliability. Applicant denied the single allegation under this guideline.

Applicant filled out her e-QIP on October 15, 2015. Section 26 of that questionnaire concerns Applicant's financial situation. Two subsections ask whether, within seven years of filling out the questionnaire, Applicant had debts turned over to a collection agency; or had an account suspended, charged off, or cancelled for failing to

pay as agreed. Applicant answered both questions, “No.” As stated, Applicant had past-due debts, so this was a false answer to a relevant question about her financial situation. (Government Exhibit 1.)

Another subsection of Section 26 concerns Applicant’s taxes. In that subsection Applicant fully informed the government of the situation concerning her unfiled and unpaid taxes from 2009 through 2014, as of the date of the questionnaire. (Government Exhibit 1.)

Applicant has consistently stated that she did not list her debts because she did not remember them. In her Answer she stated, “At the time, I did not realize the accumulation of debts. Otherwise, I would have said yes.” In addition, when questioned by an investigator with the Office of Personnel Management (OPM) in 2017, she fully discussed her taxes and debts. However, her memory was bad on the extent of her debt situation. She testified that the memory issues she had been suffering for several years also had an impact on her ability to remember her debts when filling out the questionnaire. Applicant’s testimony was credible. (Government Exhibit 2; Tr. 30-32, 52-55.)

### **Mitigation**

A coworker of Applicant, who is also the VITA coordinator, submitted a statement on Applicant’s behalf. She stated that Applicant has shown “exemplary professional character in the work she performs with her peer government staff.” (Applicant Exhibit D.)

As stated, two staff members of DOR, who have worked with Applicant, also testified. These people, who have known Applicant for some time, find her to be believable, truthful, honest, and trustworthy. (Applicant Exhibit E; Tr. 37-49.)

### **Policies**

Positions designated as ADP I/II/III are classified as “sensitive positions.” The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to the DoD and DOHA by the Defense Security Service and Office of Personnel Management. DoD 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 national security eligibility for a public trust position, the administrative judge must consider the disqualifying and mitigating conditions in the AGs. 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 AG ¶ 2(d), describing the adjudicative process.

The administrative judge's overarching 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.

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 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to 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 the applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable national security eligibility decision.

A person who applies for access to sensitive information seeks to enter 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**

### **Paragraph 1 (Guideline F - Financial Considerations)**

The trustworthiness concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

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. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personal security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An

individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

AG ¶ 19 describes three conditions that could raise trustworthiness concerns and may be disqualifying in this case:

(a) inability to satisfy debts;

(c) a history of not meeting financial obligations; and

(f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.

Applicant has a history of being unable to fully satisfy all of her debts, ten of which remain unresolved and delinquent. She also did not file her tax returns for several years. The evidence raises all three trustworthiness concerns, thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline includes five conditions in AG ¶ 20 that could mitigate trustworthiness concerns arising from Applicant's financial difficulties:

(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, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(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;

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

The evidence supports application of all of these mitigating conditions in this case. All of the financial issues in this case, including Applicant's unfiled taxes, were primarily due to her physical and mental health issues. These issues resulted in her becoming a client of her state's DOR, which worked diligently with a defense contractor who deals with people with disabilities, to place Applicant with a Defense agency. Applicant has been employed full-time since December 2015, and for the first time in many years she is making a livable wage. Applicant has begun resolving her student loans. She has also filed all her tax returns and made a workable payment arrangement with the IRS. She still has past-due debts, but credibly stated that she intends to pay them as she has funds available. The DOR continues to work with Applicant to assure that these financial issues are resolved. The DOHA Appeal Board has stated, "An applicant is not required to show that she has completely paid off her indebtedness, only that she has established a reasonable plan to resolve her debts and has taken significant actions to implement that plan." (ISCR Case No. 06-12930 at 2 (App. Bd. Mar. 17, 2008) (quoting ISCR Case No. 04-09684 at 2-3 (App. Bd. Jul. 6, 2006))). AG ¶¶ (a), (b), (c), and (d) apply.

Turning to her tax returns, I find that AG ¶ 20(g) applies to this case as well. Failure to file or pay taxes can be viewed as a serious problem that strongly favors denial of national security eligibility. However, the mitigating condition exists for situations such as this. The evidence clearly shows that Applicant's failure to file her tax returns was not willful. In other words, she did not intentionally fail to file them. Rather, as became obvious during the hearing, she was incapable of filing those returns due to her disabilities. It was only after working for the Defense Department, and having access to VITA, that she was able to get the help she needed to file them. Under the particular circumstances of this case, and viewing the evidence as a whole, I find Applicant has mitigated this allegation as well. Paragraph 1 is found for Applicant.

## **Paragraph 2 (Guideline E - Personal Conduct)**

The security concerns pertaining to the personal conduct guideline are set out in AG ¶ 15:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The Government alleged in SOR ¶ 2.a that Applicant falsified the e-QIP that she filled out on October 15, 2015, by not admitting that she had delinquent debts. I find that Applicant did not intend to falsify this questionnaire. I make this finding based on three factors. First, Applicant was fully forthcoming in the questionnaire about her tax status. Freely admitting other adverse information shows that Applicant lacked the requisite intent to falsify this financial information on the questionnaire.

Second, Applicant freely and openly discussed her debt situation with an investigator from OPM. In fact, it is telling and supports the statements about her memory situation that Applicant needed to be reminded by the investigator of her debts.

Third and finally, Applicant's testimony was subject to cross-examination by Department Counsel. Her testimony was credible on this point, particularly the memory issues and inability to recall the debts at the time she completed her e-QIP.

Based on my finding that Applicant did not falsify her questionnaire, none of the disqualifying or general Personal Conduct guideline concerns apply to Applicant's conduct. Paragraph 2 is found for Applicant.

### **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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility for a trustworthiness determination must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. Applicant submitted sufficient information from which to conclude that her financial obligations are being responsibly managed and that similar problems are unlikely to recur. She has overcome her disabilities with the help of her state DOR. She is now gainfully employed by the Defense contractor and in a position to continue resolving her debts. She did not deliberately falsify her questionnaire. Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a public trust position. For these reasons, I conclude Applicant met her burden to mitigate the trustworthiness concerns arising from her financial problems and alleged personal conduct.



### **Formal Findings**

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

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

### **Conclusion**

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 national security eligibility for a public trust position. Eligibility for access to sensitive ADP information is granted.

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WILFORD H. ROSS  
Administrative Judge