

SYNOPSIS

Applicant is a highly regarded claims associate for a defense contractor who accumulated a number of delinquent debts during periods her husband was out of work and unable to contribute to the payment of their family debts. With little financial help from her husband and barely enough income to support her family, she has been unable to make any meaningful inroads in paying her old acknowledged debts, many of which are apparently barred by applicable statutes of limitation. While she submitted a debt consolidation proposal after the hearing, she failed to certify to counseling or approve the proposal in writing. Although she is regarded as reliable and trustworthy by her friends and colleagues, her manifest reluctance to address her finances unconditionally precludes her from mitigating trustworthiness concerns at this time. Eligibility for an ADP I/II/III position is denied.

STATEMENT OF THE CASE

On August 17, 2006, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, and Department of Defense (DoD) Regulation 5200.2-R, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative determination of Applicant's eligibility for occupying an ADP I/II/III position, and recommended referral to an administrative judge to determine whether a trustworthiness determination clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on October 11, 2006, and requested a hearing. The case was assigned to me on November 22, 2006, and was scheduled for hearing on December 6, 2006. A hearing was convened on December 6, 2006, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's application for a trustworthiness determination. At hearing, the Government's case consisted of four exhibits. Applicant relied on two witnesses (including herself) and one exhibit. The transcript (R.T.) was received on December 21, 2006.

PROCEDURAL ISSUES

____ At hearing, Department Counsel moved to amend the Statement of Reasons (SOR). This proposed amendment entailed changing the reference from Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended to DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. In support of its proposed amendment, Department Counsel relied on a memorandum from the Deputy Under Secretary of Defense (Counterintelligence and Security) to Director, Defense Office of Hearings and Appeals (DOHA), dated November 19, 2004 that directs DOHA to utilize provisions of the Directive to resolve contractor cases involving trustworthiness determinations. The motion was granted. As construed, the procedural rules of the Directive will apply; while the substantive guidelines of the Regulation

will continue to control.¹ Although, in financial cases, there are no material differences in the treatment of financial considerations between the guidelines in the Directive and those in the Regulation.

Before the close of the hearing, Applicant asked for leave to keep the record open to afford her the opportunity to supplement the record with accreditation documentation of her online medical transcription school. There being no objection from the Government, and good cause being shown, Applicant was granted 14 days to supplement the record. The Government was, in turn, afforded seven days to respond. Applicant timely requested an additional 14 days to document her accreditation certification, as well as credit counseling assistance. This request for additional time was not objected to and was granted for good cause demonstrated. Applicant timely provided additional documentation covering her account of her ongoing efforts to repair her finances, her accreditation certification, and her credit counseling arrangements, to which the Government did not object. Applicant's post-hearing submissions are accepted as Applicant's exhibits H through K.

Because the submitted credit counsel proposal was not executed by Applicant, on February 5, 2007, I afforded her an additional ten days to provide an executed version and documented up-front fees and payments she made to the credit counseling firm. Department Counsel, in turn, was granted seven days to respond to any submission. Applicant did not supplement the record.

Informed by Department Counsel that Applicant never received my February 5, 2007 at her new address, I wrote to Applicant on February 27, 2007 at her new address with the same extended opportunity to provide an executed version of her credit counseling proposal and documented front fees and payments, and afforded her an additional ten days to provide the information.

By e-mail dated March 12, 2007, Applicant confirmed her receipt of my February 27, 2007 letter and acknowledged she had not executed the credit counsel proposal or made any up-front payments to the counseling firm. Applicant indicated she is still endeavoring to obtain account information on her creditors, and that her counseling contact can't do anything on the consolidation proposal until he obtains all of the original account numbers. Applicant confirmed, too, that she has not initiated any counseling with the debt counseling firm, presumably because she has not as yet formally enrolled in the program.

After reviewing Applicant's response, I provided her an additional week to provide an executed debt consolidation plan and documentation of any fee and debt payments to the consolidation firm. Applicant did not provide any additional documentation or progress updates, and Department Counsel's efforts to telephonically reach her concerning any additional documents were

¹ ADP III positions are not characterized as sensitive ones in DoD 5200.2-R (Appendix 10). To make ADP III positions subject to trustworthiness determinations, the Deputy Under Secretary of Defense approved use of the procedures in DoD Directive 5220.6 to resolve referred ADP III contractor cases for trustworthiness determinations. To apply the Directive's substantive guidelines to ADP III cases would require at least some covered nexus in the Directive itself, which neither Executive Order 10865 nor the procedural guidance in the Directive addresses. While not a perfect blend of procedural/substantive guidance, the combining of the Directive's procedures with the substantive guidelines in DoD 5200.2-R provides the best available framework under the circumstances for ensuring due process to ADPIII applicants seeking trustworthiness determinations.

not successful. With this confirmation from Department Counsel, I closed the record on March 28, 2007.

_____ Applicant waived her procedural entitlement to 15 days advance notice of the hearing. She received the notice within 15 days of the hearing (R.T., at 15).

SUMMARY OF PLEADINGS

Under Guideline F, Applicant is alleged to have incurred numerous delinquent debts: She is alleged to have incurred 12 delinquent debts altogether (with several charged off before 2002), which exceed \$12,000.00 in total. For her response to the SOR, Applicant admitted most of her debt-related allegations, and provided explanations about several of her debts.

FINDINGS OF FACT

_____ Applicant is a 37-year-old claims associate of a defense contractor who seeks a trustworthiness determination. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant is married and has three children. Her husband worked for a local manufacturer for 13 to 14 years before losing his job in 2001. He was out of work for over two years before finding new employment in October 2003 (R.T., at 26). During the two years her husband was unemployed, Applicant was the lone financial supporter of her household with her current job and had to make up for the 50 per cent contributions from her husband (R.T., at 26, 28-29). By the time her husband lost his job, Applicant already had two debts that had been charged off: credit card debt for \$1,562.00 (creditor 1.a) and loan for \$1,469.00 (creditor 1.b). Unable to stay current with her bills on her single income, she fell behind with her debts as well. Altogether, she accumulated 12 debts exceeding \$12,000.00, which were either charged off, or placed for collection, or carried on the creditor's books as a delinquent account.

Applicant separated from her husband in December 2003 but remains married to him (R.T., at 30). He provides financial support for their children, but not enough to enable Applicant to pay her current debts, contribute her share of child support on her youngest son, and pay off her old debts (R.T., at 31, 38). Of the listed debts in the SOR, she can point to just one that she is certain she paid (her creditor 1.I debt) after making agreed on monthly payments (*see ex. 4; R.T., at 36-37*). Her April 2005 personal financial statement reports a net remainder of just \$75.68 (*see 2*), and she has no feasible way of paying all of her debts at this time. The creditors she has contacted in the past (none within the last year) demanded payment of most the reported balances (R.T., at 38-39). Currently, two of her children live with their in-laws; they provide both physical and financial support for the children at a time when Applicant's finances are stretched way too thin. Her third child (a 19-year old step son of her husband's) is in school.

Before the hearing, Applicant had never sought credit counseling and never pursued a Chapter 13 plan (R.T., at 40). She attributes a lack of money to fund counseling and attorneys to her failure to pursue credit counseling and Chapter 13 relief (R.T., at 40, 44-45). She attempted to obtain loans to pay off her debts but was unsuccessful, and she has no available family support to help her with her debts (R.T., at 42-43).

Since her hearing, Applicant has inquired about a debt consolidation program (*see* exs. B and C). Under the debt payment agreement proposed to her in December 2006, her identified delinquent debts will be paid according to an amortized monthly payment schedule. The proposed plan calls for a monthly payment from Applicant in the amount of \$480.00. This payment is then allocated among her identified creditors holding claims totaling \$11,524.35 according to a monthly payment schedule (*see* ex. C). The proposed debt consolidated agreement is executed by the credit counseling agent, but not by Applicant. In her attached e-mail to Department Counsel, Applicant indicates only that the attached proposal "is the agreement that they are willing to set up with me" (*see* ex. B). She did not indicate any receipt of counseling or whether and under what circumstances she is prepared to go forward with this debt consolidation proposal.

Afforded an opportunity to provide documentation of her executing the debt consolidation proposal and proof of any fee and debt payments to debt consolidation firm (*see* ex. E), Applicant confirmed that she had not executed the proposal or made any payments to the consolidation firm (ex. F). She indicated the consolidation firm couldn't proceed with a payment plan until it had the original account numbers of her creditors, which she was endeavoring to obtain (*see* ex. F). Applicant was given an additional week to document her execution of the debt plan and provide proof of any payments to the firm, but failed to do so. The record closed without any documented payment plan, fee and debt payments, or received counseling.

Applicant is a team leader for her employee group and is highly regarded by friends and co-workers who know her (R.T., at 27). Her documented performance evaluations covering the years 2002 through 2005 report work efforts that either exceed or meet expectations (*see* ex. A).

POLICIES

_____ On April 9, 1993, the Composite Health Care Program Office (CHCSPO), the Defense Office of Hearing and Appeals (DOHA), and the Assistant Secretary of Defense for Command, Control, Communication and Intelligence (ASDC31), entered into a Memorandum of Agreement (MOA), which gave DOHA responsibility to provide trustworthiness determinations for contractor personnel working on unclassified Information Systems Positions as defined in DoD Regulation 5200.2-R.

_____ The Adjudicative Guidelines covered in both DoD Directive 5220.6 and DoD Regulation 5200.2-R list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a trustworthiness concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a trustworthiness determination should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines,

judges must take into account the pertinent considerations for making a whole person assessment of the individual seeking a trustworthiness determination. In determining whether the applicant qualifies for a sensitive position under the trustworthiness standards of DoD 5200.2-R, the applicant must be provided the due procedural protections contained in the Directive.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Financial Considerations

The Concern: An individual who is financially overextended is at risk at having to engage in illegal acts to generate funds. Unexplained influence is often linked to proceeds from financially profitable criminal acts.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's application for a trustworthiness determination 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 common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for an ADP I/II/III position depends, in large part, on the relevance and materiality of that evidence. As with all adversary 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 any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain an ADP I/II/III position. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually abused a trust relationship before it can deny or revoke a trustworthiness determination. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to adhere to principles of trust.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant to establish his or her trustworthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSIONS

Applicant is a highly regarded claims analyst for a defense contractor who accumulated a number of delinquent debts during periods of financial set backs primarily attributable to her

husband's loss of employment. With the limited resources available to her, she has barely been able to keep up with her current household expenses and debts and has not been able to pay on any of her old debts. To be sure, most of her old debts are barred by statutes of limitation. Still, she acknowledges the listed debts and has recently explored debt consolidation arrangements.

Security concerns are raised under the financial considerations guideline of the Adjudicative Guidelines where the individual applicant is so financially overextended that he or she is at risk of having to engage in illegal acts to generate funds. Applicant's accumulation of delinquent debts, which heretofore she has not been in a position to address, warrant the application of two of the disqualifying conditions (DC) of the Adjudicative Guidelines for financial considerations: DC 1 (*a history of not meeting financial obligations*) and DC 3 (*inability or unwillingness to satisfy debts*).

Extenuating circumstances are associated with Applicant's lack of anticipated support from her husband for a considerable period of time while he was out of work and the limited support he has provided since they separated in December 2003. MC 3 of the financial considerations guideline (*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)*) is clearly applicable to Applicant's situation.

Because of the limited income available to Applicant over the past six years, Applicant has not heretofore been in a position to address her old debts. Several of Applicant's listed debts were charged off before 2002. The remaining debts (save for one) have been charged off since November 2004, or earlier. None of Applicant's listed debts reflect any collection action by the individual creditors involved. Based on this record, all of Applicant's debts appear to be barred from collection by the pertinent statute of limitation in South Carolina for debts. *See* S.C. Code Ann. Sec. 15-3-530. While statutes of limitation in general are considered important policy tools for discouraging plaintiffs from pursuing stale claims and promoting finality in litigation, they have never been equated with good-faith efforts to repay overdue creditors. *See, e.g.,* ISCR Case No. 02-30304, at 3 (App. Bd. April 2004)(quoting ISCR Case No. 99-9020, at 5-6 (App. Bd. June 2001).

Applicant does not assert relevant statutes of limitation in South Carolina in her defense. She continues to work with her credit consolidation firm on identifying her old creditors in connection with the debt consolidation proposal she produced. Despite many months of trying to identify the original account numbers of these creditors, she has apparently been unable to do so. Without these original account numbers, she insists the credit consolidation firm is not prepared to move forward with its debt consolidation proposal. Without a formal plan presented to her by the consolidation firm, she has been unwilling to formally commit to the program with an executed agreement. Absent an formal agreement, she has not been willing to pay the required up-front fees and/or advance payments for ultimate disbursement to the creditors she hopes to identify.

Whatever the problems Appellant has encountered in identifying her old creditors, she has not articulated them sufficiently to permit assessments of the source of her difficulties, or when she can expect to provide the needed information. She provides no plausible reasons either for withholding her written approval of the consolidation proposal and paying the conditioned fees pending completion of a formulated repayment plan.

Without some type of documented repayment stream with her creditors, or at the very least an executed debt consolidation repayment/counseling t plan to reinforce her repayment commitments, she may not yet claim good faith mitigation benefits. MC 6 of the guidelines for financial considerations (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*) can have no application for Applicant in this case. Her failure to formally commit to counseling with the debt consolidation/counseling firm she has been corresponding with precludes her reliance on MC 4 (*the person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control*) of the guidelines as well.

Holding a favorable trustworthiness determination involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor. Financial stability in a person cleared to access information covered by privacy rights is required precisely to inspire trust and confidence in the holder of the trustworthiness determination.

Applicant's acknowledging her debts incurred during extenuating circumstances and exploring debt consolidation with financial counselors to address her debts reflects responsibility and an encouraging beginning for her. She failed to seal her debt consolidation efforts with a written agreement, however, and at this time remains uncommitted to a repayment program.

Taking into account all of the extenuating facts and circumstances surrounding Applicant's debt accumulations, the positive judgment and trustworthiness impressions she has made on her friends and colleagues, her solid performance evaluation, and her still incomplete repayment initiatives she is able to document at this time, Applicant fails to mitigate trustworthiness concerns related to her debts. Unfavorable conclusions warrant with respect to the allegations covered by the financial considerations guideline.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in the preamble of Appendix 8 of DoD Regulation 5200.2-R.

FORMAL FINDINGS

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions and guidelines listed above, this Administrative Judge makes the following formal findings:

FINANCIAL CONSIDERATIONS:

AGAINST APPLICANT

- | | |
|----------------|-------------------|
| Sub-para. 1.a: | AGAINST APPLICANT |
| Sub-para. 1.b: | AGAINST APPLICANT |
| Sub-para. 1.c: | AGAINST APPLICANT |
| Sub-para. 1.d: | AGAINST APPLICANT |
| Sub-para. 1.e: | AGAINST APPLICANT |
| Sub-para. 1.f: | AGAINST APPLICANT |
| Sub-para. 1.g: | AGAINST APPLICANT |
| Sub-para. 1.h: | AGAINST APPLICANT |
| Sub-para. 1.I: | FOR APPLICANT |

Sub-para. 1.j:	AGAINST APPLICANT
Sub-para. 1.k:	AGAINST APPLICANT
Sub-para. 1.l:	AGAINST APPLICANT

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility for a public trust position. Eligibility for an ADP I/II/III position is denied.

Roger C. Wesley
Administrative Judge