

KEYWORD: Financial

DIGEST: Applicant is a claims resolution processor for a government funded health care management company. She is married and 51 years old, with four adult children. She and her husband operated a small business in the 1990s providing psychological services that succumbed to government funding reductions and competition from larger providers. Applicant's delinquent debts resulted from the failure of that business. She mitigated the financial considerations trustworthiness concerns. Eligibility for an ADP I/II/III position is granted.

CASENO: 06-14258.h1

DATE: 04/24/2007

DATE: April 24, 2007

In re:)	
)	
-----)	
SSN: -----)	ADP Case No. 06-14258
)	
Applicant for ADP I/II/III Position)	

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

APPEARANCES

FOR GOVERNMENT

D. Michael Lyles, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a claims resolution processor for a government funded health care management company. She is married and 51 years old, with four adult children. She and her husband operated a small business in the 1990s providing psychological services that succumbed to government funding reductions and competition from larger providers. Applicant's delinquent debts resulted from the failure of that business. She mitigated the financial considerations trustworthiness concerns. Eligibility for an ADP I/II/III 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 Applicant¹. On August 17, 2006, DOHA issued a Statement of Reasons² (SOR) detailing the basis for its decision—trustworthiness concerns raised under Guideline F (Financial Considerations) of the Directive. Applicant answered the SOR in writing on November 9, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on December 18, 2006. On January 30, 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 and the Applicant submitted exhibits that were admitted into evidence. Applicant was given additional time to submit other exhibits. She did so and without objection from the Government they were admitted into the record and marked as Exhibits L to Z. The Government moved to amend the SOR to delete a reference to paragraph 3-614, DoD Regulation 5200.2-R in the precatory language of the SOR because it was not applicable to this proceeding. The Applicant having no objection, I granted the motion (Tr. 8). DOHA received the hearing transcript (Tr.) on February 8, 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 51 years old, married with four grown children, and employed by a defense contractor in the health care industry as a claims resolution processor. She has held that job since July 2004, and currently earns \$13.31 an hour. Her husband is 62 and will start receiving Social Security in June 2007 at \$1,400 monthly. He has a masters degree in psychology. He currently has a part-time teaching position with a local university. Both Applicant and her husband have health problems, including heart problems and other physical limitations. (Tr. 21, 23, 26, 76, 77, 86 ; Exhibits 1, C, D, F, L)

Applicant's husband lost his job at a local hospital in 1990. He sought another position, and could not find one that paid him as much as he made at his prior job. Then, Applicant and her husband opened a psychological counseling service and served a population that needed their services, relying on contracts with the state and local governments to fund those services. There were no other service providers operating when they started their business. Applicant worked as the business manager. In the late 1990s the governments reduced their reimbursement schedules, and competitors entered the field. Applicant's business started to decline until she and her husband closed it on May 24, 2002. While they were operating profitably in the mid-1990s, their total income

¹Adjudication 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).

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

was \$70,000 on a gross business income of \$220,000. She currently earns \$24,500, and last year her husband earned \$14,500, plus \$3,600 teaching a part-time course at a local college. During that period, in 1995, they purchased two lots in the surrounding countryside and built a house that cost, with the land, \$290,000. Their monthly mortgage payments were \$1,600. They refinanced the house several times to put money into their business to keep it going, with the mortgage balance eventually increasing to \$349,000. They later tried to sell the house and the adjoining lot to pay debts and keep their house. The bank eventually repossessed the house, and nothing is owed on that loan. After they closed the business, Applicant took what jobs she could find in her locale, and her husband did the same. He was laid off from his last job in October 2006, and due to his age and health has not been able to find other employment. He looks diligently for work. He draws unemployment of \$149 weekly when he can receive it, but has not been paid for 10 weeks presently. (Tr. 32, 33, 36, 38, 45, 48, 69, 71; Exhibits B, H)

During the time the business operated, Applicant and her husband opened a line of credit with a local bank and paid regularly the interest and any money borrowed on the line of credit. Applicant did not pay the full employment taxes to the state and federal governments in later years when the business income decreased because they paid their employees first. A portion of those taxes remain unpaid at present. She also charged some credit cards with business expenses to keep the business operating, and a balance is owed for those delinquent debts. Applicant's present net monthly income of \$1,050 leaves her with \$34 after payment of rent, utilities, food, and other normal expenses. Applicant and her husband used \$60,000 from an inheritance from his mother to repay business debts in 1998. (Tr. 40, 48, 56, 60, 61, 62-65, 75; Exhibit 2)

Applicant owes \$23,503 to a bank at which her business had its line of credit (SOR subparagraph 1.a). She was making monthly payments of \$200 from the beginning of 2004 until April, 2005, when her husband was falsely accused of some misconduct by one of their foster children. That accusation caused the foster care home they operated to close and that income was lost. She paid \$3,200 on that debt. In a debt not listed in the SOR but disclosed at the hearing, Applicant also owes \$14,000 to the state court for the fee of the court-appointed attorney who represented her husband in the false accusation charge, from which he was exonerated. She and her husband had a \$50 monthly repayment plan that they could not maintain when their income dropped due to his unemployment.

Applicant's debt to the Internal Revenue Service (IRS) for employment taxes is \$12,016 for which a lien was placed by the IRS (SOR subparagraph 1.b). Applicant had an installment agreement for \$200 monthly with the IRS in January 2004. She was unable to maintain those payments. The IRS took any income tax refunds due annually, and Applicant reduced her tax liability by \$6,800 through the offsets. Applicant claims she files an annual statement with the IRS and it deems her income so low that the debt is considered uncollectible except through the use of the offset procedure. In another debt not listed in the SOR but disclosed at the hearing, Applicant owes her state tax department employment taxes from the business. That tax department also offset her state tax liability with the annual tax refunds on her state taxes. That debt is currently \$9,819.91. In October 2003 the tax liability was \$22,460.82. Applicant reduced the tax liability in four years by over \$12,000.

Applicant owes \$51 to a collector (SOR subparagraph 1.c). She contacted the collector in October 2006. She contacted them again after receiving nothing for six weeks, and received information about the delinquent debt. She will pay it when she has the available money.

The credit card debts in SOR subparagraphs 1.d. (\$1,933), subparagraph 1.e. (\$581), and subparagraph 1.f. (\$1,498) were incurred for business and personal purchases. Applicant has not repaid these debts because of a lack of available funds, but she is seeking a settlement amount with the company to repay these debts. She does not now have any credit cards. She owes a mail-order business \$849 on its credit card (SOR subparagraph 1.g.). Her final delinquent debt is \$11,934 to a financial institution from which she borrowed money in 1997 for the business (SOR subparagraph 1.h.). Applicant does not want to declare bankruptcy, but tries to pay these debts when she has the income to do so. She reduced her expenses to the basics needed to survive, leaving her with the net monthly income of \$34. (Tr. 30, 56-68, 74, 100; Exhibits 1-3, G-R)

Applicant's employee performance report shows she works at or above expected production rates. Her co-workers and friends wrote several letters about Applicant's excellent work performance and trustworthiness. (Exhibits I, S-Z)

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 guideline most pertinent to an evaluation of the facts of this case:

Guideline F: Financial Considerations: *The Concern*: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. E2.A6.1.1

"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

Financial Considerations: Applicant's history of not being able to repay her debts goes back to the mid-1990's when the business she and her husband operated started to suffer a financial decline from government cut-backs and competition from larger organizations. As a result, she could not pay all of the employment taxes due on behalf of her employees in certain periods, as the business income decreased, preferring to pay her employees first. Applicant has been unable to repay her debts because of her low income and her husband's nearly non-existent job prospects due to his age and health problems. Disqualifying Conditions (DC) 1 (A history of not meeting financial obligations E2.A6.1.2.1), DC 2 (Deceptive or illegal financial practices such as income tax evasion E2.A6.1.2.2), and DC 3 (Inability or unwillingness to satisfy debts E2.A6.1.2.3) apply.

However, the conditions that resulted in Applicant's situation were beyond her control when the governments who provided the social service funding for her business reduced the funding and increased the reimbursement time schedule. She also faced competition from larger health care providers who provided the same psychological counseling services Applicant and her husband did. After operating the business for 12 years, they were forced to close it. The only jobs they could find were low paying, under \$25,000 annually, and her husband's heart and other physical ailments prevented him from finding consistent employment. His age also foreclosed many jobs from him as employers preferred younger persons. Applicant's husband will start collecting Social Security payments this year, and that money can be used to repay the debts listed in the SOR. Applicant has agreed to installment payment plans on several debts, but then her declining income prevented her from continuing to meet those scheduled payments. Through offsets by the IRS and state taxing bodies, she has reduced her tax liabilities resulting from the failed business. Mitigating Conditions (MC) 3 (Conditions resulting in the behavior were beyond Applicant's control because of a business downturn, competition from larger service providers, and unexpected medical conditions. E2.A6.1.3.3), and MC 6 (Applicant initiated a good-faith effort to repay overdue creditors or otherwise resolve debts E2.A6.1.3.6) apply. Applicant wants to repay her creditors, and has tried to do so within her financial means.

Whole Person Analysis

In evaluating Applicant's case, I considered the adjudicative process factors listed in the Directive ¶ E2.2.1. I used the nine factors listed in the Directive and set forth in **POLICIES** to evaluate the "whole person concept" as it applies to Applicant.

As a whole person, Applicant is credible and persuasive in her presentation of the history of her financial situation, and her commitment to repay her debts. She has not incurred any more debt since 2002, and lives simply with her husband. The Social Security payments starting this year will be a large boost to their joint income, enabling them to repay the smaller debts first, and then enter repayment schedules with the other creditors, as Applicant has committed to do. She will also try to compromise and settle the delinquent debts she cannot repay. Based on her record of repayment, she demonstrated good judgment and commitment to repay her debts resulting from the failed business. Her conduct will not recur because she is not now running, nor is it likely she ever will again, operate a private business where she could incur such debts. Her motivation, underlying the debt accumulation in the 1990s, was to make the business a success and serve a population that needed psychological services. I also weigh heavily the actions of the government funding agencies that initially supported Applicant's business, but then reduced the funding, causing the small business to fail. Applicant served a population the larger service providers did not touch until after

1996, and then the competition Applicant could not meet because she lacked the financial and marketing resources her competitors had.

Based on all the evidence presented, I conclude the financial considerations trustworthiness concern for Applicant. I also conclude that the whole person concept shows she is trustworthy, reliable, and is exercising good judgment.

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
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	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 an ADP I/II/III position is granted.

Philip S. Howe
Administrative Judge