

KEYWORD: Financial; Personal Conduct

DIGEST: Applicant was discharged through a 1998 Chapter 7 bankruptcy petition of debts left over from her divorce. She later experienced other financial difficulties that resulted in three delinquent debts totaling about \$14,800. Security concerns about her finances are mitigated because her debts arose through circumstances beyond her control. Applicant’s omission of some of her debts from her Public Trust Position Application (SF 85P) in May 2005 was an error and not intended to be a false answer or to mislead the government. Available information is sufficient to mitigate the security concerns about her personal conduct and her finances. Eligibility for an ADP I/II/III position is granted.

CASENO: 06-15509.h1

DATE: 05/07/2007

DATE: May 7, 2007

In re:)	
)	
)	
-----)	ADP Case No. 06-15509
SSN: -----)	
)	
Applicant for ADP I/II/III Position)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
MATTHEW E. MALONE**

APPEARANCES

FOR GOVERNMENT

Jennifer Goldstein, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was discharged through a 1998 Chapter 7 bankruptcy petition of debts left over from her divorce. She later experienced other financial difficulties that resulted in three delinquent debts totaling about \$14,800. Security concerns about her finances are mitigated because her debts arose through circumstances beyond her control. Applicant's omission of some of her debts from her Public Trust Position Application (SF 85P) in May 2005 was an error and not intended to be a false answer or to mislead the government. Available information is sufficient to mitigate the security concerns about her personal conduct and her finances. Eligibility for an ADP I/II/III position is granted.

STATEMENT OF THE CASE

On May 19, 2005, Applicant submitted a Public Trust Position Application (SF 85P). After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant a position of trust. On August 31, 2006, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise trustworthiness concerns addressed in the Directive under Guideline E (personal conduct) and Guideline F (financial considerations).

Applicant timely responded to the SOR, and requested a hearing. The case was originally assigned to another administrative judge, but transferred to me on November 20, 2006. I convened a hearing on January 9, 2007, at which the parties appeared as scheduled. The government offered seven exhibits, all of which were admitted without objection (Gx. 1 - 7). Applicant testified and introduced three exhibits (Ax. A - C), which were admitted without objection. DOHA received the transcript (Tr.) on January 17, 2007.

FINDINGS OF FACT

The government alleged in SOR ¶ 1 that Applicant was discharged of her debts through a Chapter 7 bankruptcy petition in February 1998 (SOR ¶ 1.a); she owes \$6,173 for a debt placed for collection in June 2002 (SOR ¶ 1.b); she owes \$8,552 for an unpaid account charged off in February 2003 (SOR ¶ 1.c); and she owes \$152 for an unpaid medical bill placed for collection in June 2003 (SOR ¶ 1.d). The government also alleged Applicant deliberately falsified her response to question 20 of her SF 85P (“Your Financial Record - 180-Day Delinquencies. Are you now over 180 days delinquent on any loan or financial obligation? (Include loans or obligations funded or guaranteed by the Federal Government.)”) by omitting the debts alleged in SOR ¶¶ 1.b through 1.d (SOR ¶ 2.a). Applicant admitted the allegations in SOR ¶¶ 1.a - 1.c, but denied the allegations in SOR ¶¶ 1.d and 2.a.

Applicant’s admissions are incorporated herein as facts. After a thorough review of the transcript and exhibits, I make the following findings of additional relevant fact:

Applicant is 60 years old and has worked since January 2005, first through a temporary agency and later as a permanent hire, for a health care and medical insurance company contracted to manage medical insurance claims and information for TRICARE, the Department of Defense (DoD) medical insurance system for military personnel and their families. She was gainfully employed during the previous six years except for periods of unemployment between December 2004 and January 2005, and two weeks in November 2004. Applicant was also unemployed from March 2002 until April 2004 after she was injured on the job and later contracted a thyroid disorder.

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

For about half that time she received disability and unemployment compensation totaling about \$700 a month.²

Applicant was married from 1971 until 1997. She and her husband have one child, now grown and living with Applicant. They divorced after her husband “ran off with his secretary.”³ While married, Applicant worked part-time for a local school district. After her divorce, she struggled financially and filed for Chapter 7 bankruptcy protection in November 1997. She was discharged of \$5,959 in debt (against \$3,617 in assets) in February 1998.⁴

On May 19, 2005, Applicant applied for a position of trust by submitting an SF 85P.⁵ In response to question 20 (debts currently more than 180 days past due), Applicant disclosed only an unpaid medical bill. During the ensuing background investigation, the government obtained two credit reports⁶ that showed she also owes \$6,173 for a delinquent credit card referred to the Palisades collection agency in June 2002 (SOR ¶ 1.b), and that she owes Americredit \$8,552 for a delinquent account charged off in February 2003 as a business loss (SOR ¶ 1.c).

Applicant denied intentionally omitting the Palisades and Americredit debts from her SF 85P. When she completed the form, she first filled out by hand a worksheet that listed all of the SF 85P questions.⁷ The worksheet is 21 pages in length and both of these creditors are listed on the last page. Applicant testified she had help transferring the information from the worksheet to the automated SF 85P form on a computer, but she has no explanation why these debts were not put into the automated form.

The debt Applicant listed in response to question 20 shows the creditor as “CHW Medical Foundation.” SOR ¶ 1.d alleges Applicant owes \$152 for an unpaid medical bill referred for collection in June 2002. At hearing she produced information to show that CHW is the same creditor as that listed in SOR ¶ 1.d. Her information also showed this debt was satisfied through insurance coverage not long after she received the medical services. Thinking she still owed the debt, she paid it in August 2005. The creditor reimbursed her in November 2006.⁸

The debt to Americredit is the balance of a used car loan remaining after Applicant returned the car in 2002 because it was a lemon. It broke down several times during and after the 90-day warranty was in effect, and either the dealer would not make the necessary repairs or Applicant could not afford to keep sending it to the garage because she was unemployed starting in 2002. Applicant

² Gx. 1; Tr., 42, 63 - 64.

³ Tr., 43, 66.

⁴ Tr.,

⁵ Id.

⁶ Gx. 4 and 5.

⁷ Ax. C; Tr., 51 - 52.

⁸ Ax. B.

has had no contact with this creditor, and it does not appear they have tried to collect this debt since 2002. She does not know how to have this debt removed from her credit history.⁹

Applicant's debt to Palisades is for a Providian credit card account that became delinquent during Applicant's unemployment due to injury in 2002. She relied too much on the card to cover some expenses during that time, but eventually could not keep up with the payments and meet her other expenses. Her attempts to negotiate a repayment plan with the collection agency were unsuccessful as they insisted full payment was her only option. Applicant would like to repay this debt, but can do so only if she can negotiate affordable payments.¹⁰

Applicant lives with her adult daughter, who has a job but is paying off her student loans and is able to contribute only marginally to Applicant's household expenses. When she responded to DOHA interrogatories in August 2006, Applicant submitted a personal financial statement (PFS) that showed she had a negative cash flow each month. This was based on a stated net monthly income of \$1,000.48. However, also attached to her response was a copy of her pay statement for a two-week pay period in March 2006 that showed her take home pay for two weeks was \$1,000.28, which meant she had a monthly net income of at least \$2,000.¹¹ An earlier pay statement from her employment with a temporary agency in September 2005 showed her one-week pay with eight hours of overtime was \$548, again resulting in a monthly net income of around \$2,000.¹² I find that the negative monthly cash flow reflected in her August 2006 PFS was erroneous.

POLICIES AND BURDEN OF PROOF

The Directive sets forth adjudicative guidelines¹³ to be considered in evaluating an applicant's suitability for access to sensitive information.¹⁴ Each trustworthiness determination must reflect consideration of both disqualifying conditions and mitigating conditions¹⁵ under each

⁹ Tr., 48 - 51.

¹⁰ Tr., 46 - 48.

¹¹ Gx. 2.

¹² Gx. 3.

¹³ Directive, Enclosure 2.

¹⁴ A memorandum from Carol A. Haave, Deputy Under Secretary of Defense for Counterintelligence and Security to DOHA Director, *Adjudication of Trustworthiness Cases* (Nov. 19, 2004), directed that adjudication of trustworthiness cases for ADP I, II, and III positions be resolved using the provisions of the Directive rather than, as originally drafted, DoD Regulation 5200.2-R, *DoD Personnel Security Program*, as amended (Regulation). Positions designated as ADP I or ADP II are classified as sensitive positions in section AP10.2.1 of the Regulation. ADP III positions are nonsensitive positions. (Regulation, AP102.3.1) By virtue of the aforementioned memorandum, however, even though they are nonsensitive positions, ADP III cases are treated in the same way and adjudicated under the same guidelines and procedures as ADP I and II cases.

¹⁵ The November 19, 2004, memorandum did not specify whether the guidelines contained in the Directive or the Regulation should be used in ADP cases. Appendix 8 of the Regulation sets forth essentially the same adjudicative policy, as well as the disqualifying conditions and mitigating conditions associated with each guideline, as is contained

adjudicative issue applicable to the facts and circumstances of each case. Each determination must also reflect a fair and impartial common sense consideration of all available relevant and material information,¹⁶ and it must reflect the adjudication process outlined in the Directive at Section E2.2.1.¹⁷ The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to sensitive information.

Trustworthiness determinations are intended solely to resolve whether it is clearly consistent with the interests of national security¹⁸ for an applicant to receive or continue to have access to sensitive information. The government bears the initial burden of producing admissible information on which it based the preliminary decision against the applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, the burden then shifts to the applicant to refute, extenuate or mitigate the government's case. As with security clearances, no one has a "right" to such access.¹⁹ Thus, an applicant bears a heavy burden of persuasion. Access to sensitive information is a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect sensitive information pertaining to the national interests as his or her own. Resolution of any reasonable doubt about an applicant's suitability for a public trust position should be resolved in favor of the government.²⁰

CONCLUSIONS

in Enclosure 2 of the Directive. DoD contractor personnel, such as this Applicant, are afforded the adjudication procedures contained in the Directive. Because it appears Applicant was given along with the SOR the adjudicative materials from the Directive, I have referred to the factors contained in the Directive rather than the Regulation in reaching this decision.

¹⁶ Directive, 6.3.

¹⁷ "The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:

- E2.2.1.1. The nature, extent, and seriousness of the conduct;
- E2.2.1.2. The circumstances surrounding the conduct, to include knowledgeable participation;
- E2.2.1.3. The frequency and recency of the conduct;
- E2.2.1.4. The individual's age and maturity at the time of the conduct;
- E2.2.1.5. The voluntariness of participation;
- E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes;
- E2.2.1.7. The motivation for the conduct;
- E2.2.1.8. The potential for pressure, coercion, exploitation, or duress; and
- E2.2.1.9. The likelihood of continuation or recurrence;"

¹⁸ Regulation, C6.1.1.1.

¹⁹ *Department of the Navy v. Egan*, 484 U.S. 518, at 528, 531(1988).

²⁰ *See Egan*; Directive, E2.2.2.

Personal Conduct. Under Guideline E, a security concern may arise if it is shown an applicant has exhibited questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct may indicate the person may not properly safeguard classified information.²¹ Here, the government questioned Applicant's trustworthiness by alleging she deliberately falsified her answer to question 20 of her SF 85P, wherein she listed one delinquent debt, but omitted the three debts listed in SOR ¶¶ 1.b - 1.d. (SOR ¶ 2.a). In response, Applicant denied intentionally omitting her debts from her application for public trust position, and demonstrated the SF 85P reflected her disclosure of the debt in SOR ¶ 1.d, albeit by a different name.

On its face, the government's evidence supports the allegation that Applicant omitted her debts, and Guideline E DC 2²² must be considered. However, Applicant demonstrated she lacked the intent to falsify or mislead, as required by the plain language of DC 2, when she completed her SF 85P. Her explanation of how she completed the questionnaire, when taken together with the documentary evidence she submitted, was both plausible and credible. In light of all of the information probative of this issue, Applicant's omission of relevant information was an error, no disqualifying conditions apply, and I conclude Guideline E for Applicant.

Financial Considerations. Under Guideline F, an applicant who is financially overextended through delinquent debt and poor personal financial management may be at risk of engaging in illegal acts to generate funds to resolve her fiscal difficulties.²³ In 1998, Applicant received relief in bankruptcy from debts left over from her failed marriage. But she later incurred other delinquent debts in 2002 and 2003. The credit card account listed in SOR ¶ 1.b remains unpaid as Applicant does not have the funds available to make the lump sum payment the creditor requires. The debt in SOR ¶ 1.c also remains unpaid for lack of adequate funds, and because Applicant thought the debt was no longer due after the car dealer re-sold the car. These facts warrant consideration of Guideline F disqualifying condition (DC) 1²⁴ and DC 3.²⁵

By contrast, available information shows the debt alleged in SOR ¶ 1.d was paid about a year before the SOR was issued. The debt in SOR ¶ 1.b became delinquent after Applicant lost most of her income from 2002 through 2004 because she was disabled and unable to work. The SOR 1.c debt arose when a car she bought turned out to be a lemon around the time she became disabled. Because neither creditor is actively pursuing repayment, the presence of these debts does not appear to be a

²¹ Directive, E2.A5.1.1.

²² Directive, E2.A5.1.2.2. The *deliberate* omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities. (Emphasis added)

²³ Directive, E2.A6.1.1.

²⁴ Directive, E2.A6.1.2.1. A history of not meeting financial obligations;

²⁵ Directive, E2.A6.1.2.3. Inability or unwillingness to satisfy debts;

source of pressure that may lead Applicant to do something illegal to generate funds so she can pay them off. Based on all of the foregoing, Guideline F mitigating condition (MC) 3²⁶ applies.

Applicant is also entitled to some benefit under MC1²⁷ in that, although two debts remain unpaid, she has not experienced any recent financial difficulties. She is meeting her current obligations, has a positive cash flow, and appears to live within her means. The government does not inquire about a person's finances to ensure she is debt free. Rather, this information must be viewed in its proper context; namely, to assess whether there is an unacceptable risk posed by an applicant's financial condition. The presence of unpaid debts, regardless of the amount, does not, without more, create such a risk. In light of all of the available information probative of this issue, I conclude this guideline for the Applicant.

Whole Person. In evaluating Applicant's case, I have also considered the adjudicative process factors collectively referred to as the "whole person" concept.²⁸ Applicant is a mature adult, who now has a measure of financial stability for the first time in several years. She also appears to be a productive employee, as shown by a past award for her work.²⁹ Although she clearly would like to be able to repay her two remaining debts, one of her creditors refused to work with her and the other never contacted her about the debt, leading to a reasonable conclusion that the resale of the car ended the matter. The financial problems that led to her bankruptcy and the two remaining debts no longer exist, and she has taken what steps she can to improve her financial standing so as to avoid similar problems in the future. As a matter of common sense, the facts presented in this case do not pose an unacceptable risk to the interests of national security.

²⁶ Directive, E2.A6.1.3.3. 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).

²⁷ Directive, E2.A6.1.3.1. The behavior was not recent.

²⁸ See note 17, *supra*.

²⁹ Ax. A.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline F (Financial):	FOR THE APPLICANT
Subparagraph 1.a:	For the Applicant
Subparagraph 1.b:	For the Applicant
Subparagraph 1.c:	For the Applicant
Subparagraph 1.d:	For the Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR THE APPLICANT
Subparagraph 2.a:	For the Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant a position of public trust.

Matthew E. Malone
Administrative Judge