

KEYWORD: Financial; Personal Conduct

DIGEST: Applicant is a 57-year-old computer programmer who works on contract for a defense contractor in the health insurance industry. She is divorced from her fifth husband. She has four adult children. She had 23 delinquent debts, including several state and federal tax liens. She mitigated the financial considerations and personal conduct trustworthiness concerns. Eligibility for an ADP I/II/III position is granted.

CASENO: 06-19692.h1

DATE: 06/30/2007

DATE: June 30, 2007

In re:)	
)	
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SSN: -----)	ADP Case No. 06-19692
)	
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

Vanessa B. Cantley, Esq.

SYNOPSIS

Applicant is a 57-year-old computer programmer who works on contract for a defense contractor in the health insurance industry. She is divorced from her fifth husband. She has four adult children. She had 23 delinquent debts, including several state and federal tax liens. She mitigated the financial considerations and personal conduct 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 September 26, 2006, DOHA issued a Statement of Reasons² (SOR) detailing the basis for its decision—trustworthiness concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal 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 November 8, 2006 and elected to have a hearing before an administrative judge. The case was assigned to me on February 16, 2007. On April 5, 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. DOHA received the hearing transcript (Tr.) on April 18, 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, married and divorced five times, and has four adult children. She is a computer programmer who is self-employed and has been since 1985. She suffered a loss of income from contractual work after September 11, 2001, until December 2001. After January 2002, she obtained some work, but in August 2002 contracted to perform computer work in a northwestern state at twice the rate she earned in her former contractual arrangement. That position lasted eight months instead of the eight years originally planned not due to Applicant's fault or actions. When she moved to her current state of residence, her income dropped by half again. Applicant has been gainfully employed since 2004 on a contractual basis with her current employer, a health insurance contractor for the federal government. Her work is rated highly, and her supervisor considers her very energetic and dependable. She also works as a pastor in her church. (Tr. 104, 107, 114-117, 186-193, 206, 228; Exhibits 1)

Applicant's sister, daughter, pastor, friend, and supervisor testified about her generous nature. Applicant purchased a used car for her mother, and gave money to friends and family when they had financial difficulty. No all of these people returned the money to Applicant. Applicant now realizes she has to help herself first and has reduced her donations and loans to other people. (Tr. 24-88)

The SOR alleges 23 delinquent debts owed by Applicant. These delinquent debts include five tax debts to different states and one to the Internal Revenue Service (IRS) arising from under

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.

payment of estimated taxes on her contractual income as her income rose in certain years, six education loans, and the remainder are debts owed to various creditors. After the SOR came to Applicant, she worked to pay these debts in full or on an installment plan, to dispute debts not owed by her, or settle for lesser amounts. Previously, Applicant petitioned for Chapter 13 bankruptcy protection on February 25, 2002, to resolve her delinquent debts. She was to pay \$2,000 for 60 months to the bankruptcy trustee to repay her delinquent debts. Applicant could not afford those payments and the bankruptcy order was amended on June 27, 2002, to require payments of \$1,500 per month. On August 1, 2002, the second amended order was signed by the bankruptcy judge changing the payments to \$2,200 per month. On November 6, 2003, the trustee filed a motion to dismiss the bankruptcy for “material default in plan payments.” Applicant was not making the \$2,200 monthly payments. On March 31, 2004, the bankruptcy judge dismissed the case on that basis and the case was closed. Between then and September 26, 2006, when the SOR was sent to Applicant, she did nothing to resolve the delinquent debts listed in the SOR, except for two small tax liens which she resolved. (Tr. 110-113, 116, 122, 126, 198-225; Exhibits 2, 3, A, B, C, L)

The results of Applicant’s actions on her delinquent debts are as follows:

SOR ALLEGATION AND AMOUNT	FINDING AND EVIDENCE
1.b. State tax lien, \$351, filed 1993	Paid 8/31/99; Tr. 126, Exhibits 2,3, D
1.c. State tax lien, \$1,250, filed 1993	Paid 8/31/99; Tr. 127, Exhibits 2, 3, D
1.d. Car loan, \$9,505, repossessed 2001	Included in Chapter 13 bankruptcy, settled for \$6,000, paid in full on 3/30/07; Tr. 128-133, Exhibits 2, 3, E and F
1.e. Credit union debt, \$717	Settled for \$500, paid 10/27/06; Tr. 134-137, Exhibits 2, 3, G and I
1.f. Credit union debt, \$5,037	Settled for \$3,700 and paid by April 4, 2007; Tr. 137-139, Exhibits 2, 3, H, I
1.g. Auto insurance bill, \$759	Disputes debt, contacted credit bureaus; Tr. 139-141, Exhibits 2, 3, J
1.h. State tax lien, \$8,174.93 for 1999 tax year	Applicant has an installment payment plan of \$321.30 monthly starting 3/22/07 for 36 months; Tr. 141, 142, Exhibits 2, 3, K
1.i. State tax lien for \$2,088 for 1999 and 2000 tax years	Installment payment agreement for debt of \$3,205.95 at \$200 monthly starting 1/20/07; Tr. 145, 146, Exhibits 2, 3, M
1.j. Collection agency for \$72	Disputes debt, will pay if determined to be legal debt, contacted credit bureaus; Tr. 141, Exhibits 2, 3, J
1.k. Telephone bill for \$99	Paid bill on 10/17/06; Tr. 148, 149, Exhibits 2, 3, N

1. l. Credit union debt for \$26	Paid 10/12/06; Tr. 149, 150, Exhibits 2, 3, O
1.m. University debt of \$191	Paid 10/17/06; Tr. 150-152, Exhibits 2, 3, P
1.n. University debt of \$709	Paid 11/13/06; Tr. 152-154, Exhibits 2, 3, Q, R
1.o. Collection agency debt on medical bill, \$175	Paid 10/17/06; Tr. 154-156, Exhibits 2, 3, S
1.p. IRS debt for tax years 1999 and 2000, \$28,116	Unpaid, but Applicant is submitting an offer and compromise with a 20% down payment by or after April 17, 2007, with current tax forms. If the offer and compromise is not accepted, then Applicant will arrange an installment payment agreement; Tr. 156-160, Exhibits 2, 3
1.q., 1.s., 1.t., 1.u., 1.v. U.S. Department of Education student loan debts of \$5,479, \$2,813, \$1,899, \$217, \$1,090, respectively	Loans are consolidated, and Applicant pays \$110 monthly, and has been paying for past nine months; Tr. 160-161, Exhibits 2, 3, T
1.r. Heating gas bill for \$76	Paid in full 10/4/06; Tr. 161-163, Exhibits 2, 3, U
1.w. Telephone bill for \$129	Paid in full by 10/28/04; Tr. 163, 164, Exhibits 2, 3, V
1.x. Water bill for \$12	Paid in full on 8/23/06; Tr. 164, 165, Exhibits 2, 3, W

Applicant's monthly income is about \$5,600, paid to her by her solely-owned company which has a contract with a defense contractor. She has \$763 remaining monthly after paying her expenses. The payments to her company are \$11,200 monthly, from which Applicant receives her personal income, the taxes are paid, and the company has \$2,870.50 in remaining income. (Tr. 166, 206, 228; Exhibits X, Y, Z)

Applicant completed her Questionnaire for a Public Trust Position (SF 85P) on May 14, 2004. She then resigned it on November 12, 2004. She certified that her answers were "true, complete, and correct to the best of (her) knowledge and belief and (were) made in good faith." Question 22 inquired of Applicant whether in the past seven years she or any company owned by her filed for bankruptcy, had been subject to a tax lien, or had a legal judgment rendered against her for a debt. Applicant answered "yes" to that question, and she listed the 2002 Chapter 13 bankruptcy she filed. Her tax liens were listed in her bankruptcy, and she did not list them separately in answer to Question 22.a. because she assumed she was making full disclosure by listing the bankruptcy. Also, Applicant claims she had difficulty reading the question and misunderstood it. She denied a deliberate falsification of information. Question 22.b. inquired if Applicant was over 180 days delinquent on any loan or financial obligation. Applicant answered "yes" and listed her student loan. She did not list her delinquent debts that are set forth in SOR subparagraphs 1.b. to 1.p. Applicant

understood the question to require listing of debts funded by the Federal Government, which would refer only to her student loans. (Tr. 172-176, 226; Exhibits 1, A)

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.

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.

"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: The Government showed Applicant has 23 delinquent debts. These debts include several tax liens for underpaid estimated taxes. The disqualifying conditions applicable are

Financial Considerations Disqualifying Condition ¶19.a. (inability or unwillingness to satisfy debts), and ¶19.c. (a history of not meeting financial obligations).

Applicant demonstrated that she has repaid all but two debts that she is disputing, and has installment payment agreements for state tax liens, her educational loans, and is making an offer and compromise for her federal tax lien debts. She also showed she did not spend frivolously, but was too generous with loans and gifts of money to her family and friends. She has now stopped that activity and is concentrating on her own finances. She also attempted to repay the debts in 2002 and 2003 through the Chapter 13 bankruptcy, but the payments were too much for her finances after about two years and paying approximately \$24,000 to the bankruptcy trustee. The trustee would have disbursed those payments to creditors, so some money would have been paid to them between 2002 and 2004. Applicant also lost her job in 2002 after she had married for the fifth time, and suffered decreased income after September 2001, both events adversely affected her ability to repay her debts. The mitigating conditions applicable are Paragraph 20.b. (the conditions that resulted in the financial problem were largely beyond the Applicant's control through a loss or diminution of employment, a business downturn, and divorce, and Applicant acted responsibly under the circumstances), Paragraph 20.d. (Applicant initiated a good-faith effort to repay overdue creditors or otherwise resolve debts), and Paragraph 20.e. (Applicant 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). Applicant meets all these mitigating conditions based on the evidence adduced at the hearing.

Guideline E: The Government alleged a potential disqualification under Personal Conduct Disqualifying Condition (PC DC) ¶16(a), (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 determines security clearance eligibility or trustworthiness, or award fiduciary responsibilities). Applicant did not disclose specifically her tax liens. Nor did she disclose all her delinquent debts .

When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004).

The Applicant disclosed her 2002 Chapter 13 bankruptcy which included her debts to that time, including her tax liens. She made payments into that bankruptcy for about two years. Applicant's explanation that she misunderstood that question and meant to disclose all her debts by disclosing her bankruptcy is reasonable and a credible explanation having observed her demeanor at the hearing. I reach the same conclusion about her answer to Question 22.b. I can understand how Applicant would have limited her answer to that question to her student loans because she understood the question to be limited to loans or debts funded or guaranteed by the Federal government. Between the two disclosures she made in answer to Question 22 in both its subparts, she made full disclosure to the Government that she had financial problems in the past, and there was no deliberate falsification.

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.

Under this analysis, I conclude Applicant’s financial situation was serious and she should have paid more attention to these matters. She should not have been so generous with friends and relatives in giving or loaning them money. She needed to monitor her income and expenses more closely, while making full use of her business accountant to avoid tax problems. Her conduct was frequent and recent. However, she did suffer economic loss in 2001 and 2002 from a business downturn, loss of employment, and a divorce and move to another state where she currently resides. Applicant exhibited she learned from her experiences and was embarrassed by them. Her current income is sufficient to pay her remaining debts and avoid the recurrence of such problems. She has made changes in her behavior also to prevent a repeat of such actions. I conclude there is no potential for pressure or coercion, nor for a recurrence of such behavior based on the changes she made in her business and personal life.

Therefore, I conclude the financial considerations trustworthiness concern for Applicant. I also conclude the personal conduct trustworthiness concern for Applicant on the basis of her credibility and lack of deliberate intent to falsify. Lastly, 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

 Subparagraphs 1.a to 1.x: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

 Subparagraphs 2.a to 2.b: 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