



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



In the matter of:

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Applicant for Public Trust Position

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ADP Case No. 12-04401

**Appearances**

For Government: Caroline H. Jeffreys, Esq., Department Counsel  
For Applicant: *Pro se*

04/02/2013

**Decision**

Harvey, Mark, Administrative Judge:

Applicant’s SOR alleges 15 delinquent debts or accounts, totaling \$21,128. She has a history of delinquent debt and did not make sufficient progress resolving her delinquent SOR debts. She failed to file her federal and state tax returns for tax year 2011. Financial considerations concerns are not mitigated. Her eligibility to occupy a public trust position is denied.

**Statement of the Case**

On December 7, 2011, Applicant submitted her Electronic Questionnaires for Investigations Processing (e-QIP) or Questionnaire for National Security Positions (SF 86). (Item 5) On August 31, 2012, the Department of Defense (DOD) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005. (Item 1)

The SOR alleged trustworthiness concerns under Guideline F (financial considerations). (Item 1) The SOR detailed reasons why DOD could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the

national interest to grant or continue Applicant's eligibility to occupy a public trust position and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. On September 19, 2012, Applicant was provided a copy of the SOR. (Item 3)

On October 31, 2012, the DOD received Applicant's response to the SOR allegations, and she requested a decision without a hearing. (Item 4) A complete copy of the file of relevant material (FORM), dated December 28, 2012, was provided to Applicant. She was afforded an opportunity to file objections and to submit material in refutation, extenuation, or mitigation.<sup>1</sup> Applicant did not respond to the FORM. The case was assigned to me on March 28, 2013.

### **Findings of Fact<sup>2</sup>**

Applicant's SOR response admitted responsibility for all of the SOR debts and for not filing tax returns for tax year 2011, and she said she was making \$192 monthly payments to the debt in SOR ¶ 1.o. (Item 4) Applicant's admissions are accepted as findings of fact.

Applicant is a 52-year-old employee of a defense contractor, who has worked as a warehouse specialist since February 2011. (Item 5) She was unemployed from July 2010 to February 2011; she was self-employed from March 2009 to July 2010; and she was unemployed from July 2007 to March 2009. (Item 5) She has never served in the military. (Item 5) She married in 1983 and was divorced in 1994. (Item 5) Her children were born in 1977 and 1985. (Item 5) In 1982, she earned a graduate equivalency diploma (GED). (Item 6 at I14)

### **Financial considerations**

Applicant's SOR and credit reports for January 21, 2012, June 1, 2012, and December 17, 2012, list 15 delinquent debts or accounts, totaling \$21,128. (Items 1, 4, 7-9) Applicant disclosed her tax problems on her SF 86 (Item 5), to an investigator from the Office of Personnel Management (OPM) (Item 6 at I14-I22), and in response to DOD interrogatories. (Item 6) She did not file her federal and state tax returns in 2011. (SOR ¶ 1.a) She has five tax liens filed against her, totaling \$15,703 as follows: \$1,954 in September 2007 (SOR ¶ 1.d); \$1,729 in January 2008 (SOR ¶ 1.c); \$516 in July 2008 (SOR ¶ 1.b); \$9,569 in December 2010 (SOR ¶ 1.f); and \$1,935 in February 2011 (SOR ¶ 1.e). (Items 1, 4)

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<sup>1</sup>The DOD transmittal letter is dated December 28, 2012, and Applicant's receipt is dated January 24, 2013. The DOD transmittal letter informed Applicant that she had 30 days after her receipt to submit information.

<sup>2</sup>Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Applicant provided her Internal Revenue Service (IRS) account transcripts dated July 2012 for tax years 2005-2010, which include the following information regarding her adjusted gross income (AGI), taxable income (TI) and IRS account balance (AB):

Tax Year	AGI	TI	AB
2005	\$45,555	\$37,355	\$6,704
2006	\$47,586	\$39,136	\$7,346
2007	\$20,315	\$9,032	\$0
2008	\$480	\$0	\$0
2009	\$8,954	\$0	\$2,404
2010	"RETURN NOT PRESENT FOR THIS ACCOUNT"		

(Item 6 at I17, I25 to I30)

Applicant has 10 other delinquent debts totaling \$5,425 in SOR ¶¶ 1.g to 1.p, including four medical debts in SOR ¶¶ 1.i to 1.l for \$35, \$87, \$50, and \$154. (Items 1, 4) She did not provide any documentary proof of payments to any SOR creditors or any written offers to or from creditors to set up payment plans.

Applicant completed a budget or personal financial statement (PFS) as part of her July 20, 2012 responses to DOD interrogatories. (Item 6 at I10) Her PFS lists 13 creditors and "past due" as the status for all of them, except she is making \$250 monthly payments to address a non-SOR debt of \$1,568. Her PFS shows monthly total net income of \$1,486, expenses of \$1,060, debt payments of \$470, and net monthly remainder of \$0. (Item 6 at I20) She shows \$120 monthly payments to address the past-due debt in SOR ¶ 1.b (\$1,505) and \$100 bi-weekly payments to address a non-SOR debt of \$1,168 owed to a bank. (Item 6 at I10) She has little money left at the end of each month to address her other SOR debts.

### Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Government's authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. See *Id.* at 527.

Positions designated as ADP I and ADP II are classified as "sensitive positions." Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3. "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. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. See Regulation ¶ C8.2.1.

When evaluating an applicant's suitability for a public trust position, an administrative judge must consider the disqualifying and mitigating conditions in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

A person who seeks access to sensitive information enters 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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to sensitive information. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security and trustworthiness suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance [or access to sensitive information]." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance [or trustworthiness] determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

The protection of the national security and sensitive records is of paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security." Section 7 of Executive Order (EO) 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

## Analysis

### Financial Considerations

AG ¶ 18 articulates the trustworthiness concern relating to financial problems:

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 can 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.

AG ¶ 19 provides three disqualifying conditions that could raise a trustworthiness concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts; . . . (c) a history of not meeting financial obligations, . . . [and] (g) failure to file annual Federal, state, or local income tax returns as required. . . ." In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

*Id.* (internal citation omitted). Applicant's history of delinquent debt and her failure to file her state and federal tax returns for tax year 2011 are documented in her credit reports, her OPM interview, her SOR response, and her response to DOD interrogatories. Applicant's SOR alleges 15 delinquent debts or accounts, totaling \$21,128. Some tax debts have been delinquent for about six years. The Government established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(g) requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

(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), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;<sup>3</sup> and

(e) the individual 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's financial conduct does not warrant full application of any mitigating conditions to all of her SOR debts. I have credited Applicant with mitigating the SOR debt in ¶ 1.o (\$1,159) because she said she was making \$192 monthly payments in her SOR response.

Applicant fell behind on her debts because of unemployment and low-paying employment. She did not describe receipt of any financial counseling. She provided a budget or a PFS. She showed some good faith when she admitted responsibility for her SOR debts in her SOR response.

Applicant has not taken reasonable actions to resolve most of her SOR debts. She has four unresolved medical debts of less than \$200 in SOR ¶¶ 1.i to 1.l for \$35, \$87, \$50, and \$154. The circumstances beyond her control were significant; however, she did not adequately explain why she had not made more progress resolving her SOR debts. She did not provide documentation proving that she maintained contact with her SOR creditors, and she did not provide any documentation showing her attempts to negotiate payment plans with her SOR creditors.<sup>4</sup> There is insufficient

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<sup>3</sup>The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

<sup>4</sup>"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is

evidence that her financial problem is being resolved and is under control. She did not establish her financial responsibility.

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

(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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There are some facts supporting mitigation of trustworthiness concerns under the whole-person concept; however, they are insufficient to fully mitigate trustworthiness concerns. Applicant is a 52-year-old employee of a defense contractor, who has worked as a warehouse specialist since February 2011. Some circumstances beyond her control, such as insufficient income and unemployment adversely affected her financial circumstances. She was unemployed from July 2010 to February 2011; self-employed from March 2009 to July 2010; and unemployed from July 2007 to March 2009.

Applicant disclosed her tax problems on her SF 86 and thoroughly discussed her debts in her OPM PSI and in response to DOD interrogatories. She knows what she must do to establish her financial responsibility. She is making payments to address one of her SOR debts. Additionally, her PFS indicates she is making payments on one SOR debt and two non-SOR debts. There is no evidence of violations of her public trust position or disloyalty. She has made some important progress towards mitigation of financial considerations concerns related to her public trust position.

The evidence against approval of Applicant's clearance is more substantial at this time. Applicant's SOR alleges 15 delinquent debts or accounts, totaling \$21,128. According to her SOR response, she is making payments on the debt in SOR ¶ 1.o, and

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whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

I have credited her with mitigating this debt. Some tax debts have been delinquent about six years. She failed to file her state and federal tax returns in 2011 as required by law. She failed to prove that she could not have made greater progress resolving and documenting resolution of her SOR debts. Four unresolved SOR debts are less than \$200 each and three delinquent SOR debts are less than \$100 each. She failed to provide documentation showing attempts to establish payment plans. Her failure to make greater progress paying her debts shows lack of judgment and raises questions about her reliability, trustworthiness and ability to protect classified information. See AG ¶ 15.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 12968, the Directive, the Regulation, the AGs, and other cited references to the facts and circumstances in the context of the whole person. I conclude more documented progress addressing Applicant's debts is necessary before she will be eligible to occupy a public trust position.

### **Formal Findings**

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

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a to 1.n:	Against Applicant
Subparagraph 1.o:	For Applicant
Subparagraph 1.p:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

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MARK HARVEY  
Administrative Judge