



**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. 13-01292

**Appearances**

For Government: Melvin A. Howry, Esquire, Department Counsel  
For Applicant: *Pro se*

06/24/2014

**Decision**

WESLEY, Roger C., Administrative Judge:

Based upon a review of the case file, pleadings, and exhibits, Applicant did not mitigate financial concerns. Eligibility for holding a public trust position is denied.

**Statement of Case**

On December 30, 2013, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing reasons why the DoD could not make the affirmative determination of eligibility for holding a public trust position and recommended referral to an administrative judge to determine whether eligibility to hold a public trust position should be granted, continued, denied, or revoked. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DoD regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation); and the Adjudicative Guidelines (AGs), implemented by the Department of Defense on September 1, 2006.

Applicant responded to the SOR on January 16, 2014, and requested a hearing. The case was assigned to me on March 13, 2014, and was scheduled for hearing on

April 22, 2014. The hearing was convened on that date. At hearing, the Government's case consisted of five exhibits (GEs 1-5). Applicant relied on one witness (herself) and three exhibits. The transcript (Tr.) was received on April 30, 2014.

### **Procedural Issues**

Before the close of the hearing, Applicant requested leave to keep the record open to permit her the opportunity to supplement the record with documented payment of her smaller creditors, along with pay stubs reflecting her deductions. (Tr. 44-49) For good cause shown, Applicant was granted 14 days to supplement the record. The Government was afforded two days to respond. Within the time permitted, Applicant supplemented the record with a debt consolidation offer of monthly payments of \$460, which was designed to pay off her debts within two years. Applicant furnished no response to the payment offer, and furnished no documented payments to her debt consolidation firm or any of her other listed creditors. Applicant's debt consolidation offer was admitted as AE D.

### **Summary of Pleadings**

Under Guideline F, Applicant allegedly accumulated 12 delinquent debts. These debts exceeded \$16,000.

In her response to the SOR, Applicant admitted each of the allegations in the SOR with explanations. She claimed her creditor 1.a account is in the process of being settled. She attributed each of the debts to unemployment and divorce and claimed she has been unable to pay any of the debts.

### **Findings of Fact**

Applicant is a 28-year-old customer relations representative who seeks a determination of eligibility to hold a public trust position. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

#### **Background**

Applicant married in October 2008. She separated from her husband in July 2013 and is currently pursuing a final divorce. (Exs. GEs 1 and 3; Tr. 60, 71) Applicant has three children from this marriage. (GEs 1 and 3 and AE C; Tr. 54) She earned three years of college credits and has no military service. (GE 1)

#### **Applicant's finances**

Between 2006 and 2007, Applicant was unemployed for the most part and held only part-time jobs. She held a full-time position as a customer service representative for a short time in 2012. However, she was unemployed between July 2012 and October 2013 and was supported by her husband while she cared for her children and attended college. (GE 3)

Applicant had no health insurance between 2006 and 2009. After acquiring health insurance in 2009, she encountered complications with her pregnancy with her second daughter. (GE 3;Tr. 54-56) She incurred a number of medical bills in connection with her pregnancy with this daughter and never disputed them. (Tr. 55-56) Altogether, she accrued 11 delinquent medical debts exceeding \$6,000 (most of them aged).

Recently, Applicant initiated inquiries with her creditors and hoped to take care of them "fairly quickly," starting with the smaller debts first before proceeding with a payment plan to cover the larger ones (i.e., creditors 1.k and 1.l). (Tr. 44-47) To date, she has been unable to address these debts with her own income and receives no child support or other financial assistance from her husband. (Tr. 62, 75-76)

Besides her delinquent medical debts, Applicant accumulated a delinquent consumer debt with creditor 1.j on a financed auto purchase. Her credit reports reveal she and her husband purchased a vehicle in July 2011 and financed their purchase with a \$10,903 car loan. (GEs 2 and 5) The account became delinquent, and her car was repossessed in 2013. (Tr. 57-58) The reported charged-off balance in both credit reports was \$10,903. (AEs 2 and 5; Tr. 56-58) While Applicant claims a noted \$673 past due balance in her April 2014 credit report represents "the amount owed on the account," she provided no explanation of how the final post-repossession deficiency was calculated by the creditor. (GE 5 and AE D) Nor did Applicant challenge the offered settlement figure (\$5,346) in any way. Whether the offered settlement takes account of the proceeds generated from the sale of Applicant's repossessed vehicle is not clear.

Applicant has since received an offer of settlement from creditor 1.j for the reduced amount of \$5,346. (AE B) Scheduled payments under the terms of the settlement are \$200 a month from April 2014 through August 2014, with a balloon payment of \$4,346 due in September 2014. Granted an opportunity to supplement the record, Applicant has not furnished any documentation of her acceptance of the offer or payments remitted to the creditor. (Tr. 39-42)

Afforded additional time to explore debt repayment plans, Applicant contacted a debt consolidation firm and hopes to complete a debt consolidation agreement in the near future. (Tr. 80-82) She documented a post-hearing debt consolidation offer that calls for payments of \$460 a month under a program that is designed to pay off her listed debts in 24 months. (AE D) It is not clear whether Applicant ever completed a consolidation agreement. She provided no documentation of the steps she has taken to perfect her agreement or remit progress payments.

Based on the personal financial statement Appellant submitted in April 2014, she nets \$2,128 a month and has monthly expenses of \$1,815. (AE A) Applicant pays \$50 a month on her listed \$10,690 of debt and claims a small remainder of less than \$300. (AE A)

### **Endorsements**

Applicant provided character references from a friend and her ex-mother-in-law who have known her for a number of years. (AE C) They credit her with responsible

parenting of her three daughters. Her evidentiary submissions did not include any performance evaluations or endorsements from past supervisors or co-workers.

## **Policies**

Positions designated as ADP I and 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) DoD contractor personnel are afforded the right to the procedures contained in the directive before any final unfavorable access determination may be made. (Regulation ¶ C8.2.1)

The AGs list guidelines to be used by administrative judges in the decision-making process covering public trust eligibility cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to hold a public trust position. These guidelines include "[c]onditions that could raise a security concern [trustworthiness concerns] and may be disqualifying" (disqualifying conditions), as well as "[c]onditions that could mitigate trustworthiness concerns" (mitigating conditions). These guidelines must be considered before deciding whether or not eligibility to hold a public trust position should be granted, continued, or denied.

The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole-person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable trust risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

### **Financial Considerations**

*The Concern:* “Failure or inability to live within one’s means, satisfy debts 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 [sensitive] 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.” AG, ¶ 18.

### **Burden of Proof**

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant’s eligibility to hold a public trust position 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 commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant’s eligibility to hold a public trust position depends, in large part, on the relevance and materiality of that evidence. *See Kungys v. United States*, 485 U.S. 759, 792-800 (1988).

As with all adversarial 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 by substantial evidence any controverted facts alleged in the SOR; and (2) it must demonstrate that the facts proven have a material bearing to the applicant’s eligibility to hold or maintain a public trust position. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused a position requiring trust and reliability before it can deny or revoke eligibility to hold a public trust position. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to demonstrate good judgment and trustworthiness.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her eligibility to hold a public trust position through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all public trust positions be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her trust eligibility. Like security clearance determinations, public trust eligibility decisions“ should err, if they

must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

### **Analysis**

Applicant is a customer relations representative who accumulated delinquent debts exceeding \$16,000 (mostly medical debts) during recurrent periods of unemployment and underemployment. Her debt accruals warrant the application of two disqualifying conditions (DC): ¶ 19(a), “inability or unwillingness to satisfy debts,” and ¶ 19(c) “a history of not meeting financial obligations.”

Holding a public trust position involves a fiduciary relationship between the Government and the public trust position holder. Quite apart from any agreement the trust holder may have signed with the Government, the nature of the public trust position holder’s duties necessarily imposes important duties of trust and candor on the holder that are considerably higher than those typically imposed on Government employees and contractors involved in other lines of Government business. See *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Failure of an applicant to make concerted efforts to pay or resolve her debts when able to do so raises concerns about whether the applicant has demonstrated the trust and judgment necessary to safeguard sensitive information.

Since regaining full-time employment in 2013, Applicant has been unable to address her debts individually and only recently explored a repayment plan with her largest creditor (creditor 1.j) and debt consolidation with a debt consolidation firm to address her remaining debts. Both creditor 1.j and a separate debt consolidation firm offered her structured repayment plans that would permit her to make monthly payments, respectively, of \$200 to creditor 1.j and \$460 to the debt consolidation firm. To date, Applicant has not provided any proofs of finalizing either her repayment offer from creditor 1.j or her debt consolidation offer. Nor has she documented any up-front payments to either creditor 1.j, the consolidation firm that offered her payment terms, or any of her smaller creditors she committed to paying.

At this time, it is unclear whether Applicant can meet the required monthly payments of either of the offered payment plans with the income sources available to her. While the Appeal Board has never required an applicant to repay all of his or her debts in demonstrating a return to financial stability, it does require some good-faith payment initiatives. And Applicant’s documented payment efforts do not reflect any good-faith payment plan or payment attempts with her individual creditors. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008).

Based on Applicant’s demonstrated years of unemployment and underemployment, considerable extenuating circumstances are associated with her inability to pay off or otherwise resolve her debts. Available to Applicant is MC ¶ 20(b), “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, and the individual acted responsibly under the circumstances.”

Extenuating circumstances alone are not enough to enable Applicant to mitigate trust concerns over her past failures to address her debts. See ISCR Case No. 05-11366, at 4 n.9 (App. Bd. Jan. 12, 2007)(citing other ISCR case authorities)). To date, she has not documented any progress with the repaying of any of her smaller debts or her larger ones. Under the circumstances, none of the remaining mitigating conditions covered by the financial considerations guideline are available to her.

A whole-person assessment does not enable Applicant to surmount the judgment questions raised by her accumulation of delinquent debts and failure to take steps to address them. Quite clearly, recurrent unemployment and underemployment problems played a considerable role in her accumulation of so many delinquent debts and are a source of some continuing trustworthiness and judgment concerns. At this point, it is important for her to be able to show some progress in addressing her debts, individually and collectively to demonstrate she has a sustaining plan to restore her finances to stable levels necessary to satisfy minimum eligibility criteria for holding a public trust position.

Taking into account all of the documented facts and circumstances surrounding Applicant's debt accumulations and absence of documented good-faith repayment initiatives, it is too soon to make reliable predictive judgments about Applicant's ability to restore her finances to stable levels commensurate with the minimum requirements for holding a public trust position. Unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.i.

### **Formal Findings**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

#### **GUIDELINE F (FINANCIAL CONSIDERATIONS): AGAINST APPLICANT**

Subparagraphs. 1.a through 1.i:	Against Applicant
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### **Conclusions**

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 to hold a public trust position. Eligibility is denied.

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Roger C. Wesley  
Administrative Judge

