



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



In the matter of:	)	
	)	
	)	ADP Case No. 14-00346
	)	
	)	
Applicant for Public Trust Position	)	

**Appearances**

For Government: Braden M. Murphy, Esquire, Department Counsel  
For Applicant: *Pro se*

11/12/2014

**Decision**

DAM, Shari, Administrative Judge:

Since 2007 Applicant accumulated over \$286,250 of delinquent debts, including two judgments and a \$163,000 mortgage. They remain unresolved. She presented evidence that she filed her 2012 Federal income tax return, thereby mitigating that allegation. She failed to rebut or mitigate the trustworthiness concerns raised under Guideline F, Financial Considerations. Her eligibility for a public trust position is denied.

On July 8, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On March 18, 2014, the Department of Defense (DoD) issued Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline F, Financial Considerations. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On May 5, 2014, Applicant answered the SOR (Response) in writing and elected to have the case decided on the written record in lieu of a hearing. On July 2, 2014, Department Counsel prepared a File of Relevant Material (FORM),<sup>1</sup> and mailed Applicant a complete copy on July 9, 2014. Applicant received the FORM on September 24, 2014, and had 30 days from its receipt to file objections and submit additional information. On October 7, 2014, Department Counsel confirmed receipt of additional materials submitted by Applicant. They included a letter and attachments which I marked as Applicant's Exhibit (AE) A, and eight exhibits that are marked as AE 1 through 8. Department Counsel had no objection to these exhibits. They are admitted into the record. On October 20, 2014, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me.

### **Procedural Matters**

Contained in the FORM is Department Counsel's Motion to Amend the SOR to strike all references to a security clearance, and instead insert references to a position of public trust. According to the case file, Applicant applied for a public trust position and not a security clearance. Applicant did not file an objection to the Motion and the amendment is granted.

### **Findings of Fact**

Paragraph 1 of the SOR contains 20 allegations. In her Response Applicant admitted all allegations, except that in Paragraph 1.a, relating to the failure to file a 2012 Federal income tax return. (Item 3.) Her admissions are incorporated into the findings below.

Applicant is 53 years old and was divorced in 2002. She has two children from that marriage. Since October 2009 she has worked as a contract mail carrier for the U.S. Postal Service. In July 2013 she began a position with a health care company, which is sponsoring her for a public trust position. She stated that she works over 90 hours a week. She also works as a personal trainer. (Items 3, 4.)

From 1992 to August 2009, Applicant was self-employed as a general contractor in the housing industry. Until her divorce in 2002, she and her former husband jointly owned the business. She subsequently used monies from her divorce settlement to establish a business in real estate development. She continued to purchase properties, intending to build custom homes on them. Her business was profitable until the real estate recession began around 2007, at which time the properties rapidly decreased in

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<sup>1</sup>The Government submitted eight items in support of the SOR allegations. Item 6 is a copy of the Subject Interview from the Office of Personnel Management Report of Investigation (Report) for which Department Counsel offered no authenticating evidence, and which Applicant did not adopt. Department Counsel provided Applicant an opportunity to revise or correct any of the information contained in the Report, or object to its introduction into evidence. Applicant did not respond to that opportunity in her subsequent Response to the FORM. Directive ¶ E3.1.20 requires that the Report be authenticated in order to be received and considered. Since it was neither authenticated nor adopted by Applicant, Item 6 is excluded from evidence in this case and will not be considered.

value and started her financial problems. She later sold all investment properties, her home, and personal items in order to support herself and children. (Item 3, AE A.) She submitted documents confirming that she and her former husband had a successful business, and that she continued the success and maintained a good credit rating for a couple years after the divorce. (AE 2 to 6.)

On July 15, 2014, Applicant filed a Chapter 7 bankruptcy petition. She went to court on August 21, 2014, and anticipated that a discharge of the delinquent debts would occur within 60 to 90 days. She participated in credit counseling courses as a pre-requisite for filing bankruptcy. (AE A, 7.) In response to the status of the delinquent debts Applicant listed on her July 2013 e-QIP, Applicant stated she intended to file bankruptcy within the next month to resolve them. (Item 4.)

Based on credit bureau reports (CBRs) dated July 17, 2013, and July 2, 2014, the SOR alleged 19 delinquent debts that totaled \$286,250, and included two judgments, and a \$163,166 mortgage. The debts began accumulating between February 2009 and June 2014. All 19 delinquent debts remain unresolved. The SOR also alleged that Applicant did not file her 2012 Federal income tax return. (Items 5, 7.) Applicant provided evidence that she filed the return late, on February 28, 2014, and reported an adjusted gross income of \$26,949. (Item 3.)

Applicant did not submit a Personal Financial Statement regarding the current status of her finances. Nor did she provide any evidence of her work performance.

### **Policies**

Positions designated as ADP I and ADP II are classified as “sensitive positions.” (See 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.” (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to the DoD and DOHA by the Defense Security Service and Office of Personnel Management. 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, the administrative judge must consider the disqualifying and mitigating conditions in the AGs. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in AG ¶ 2(a), describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of

variables known as the whole-person concept. The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

A person who applies for access to sensitive information seeks to enter 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.

Section 7 of Executive Order 10865 provides that “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

## **Analysis**

### **Guideline F, Financial Considerations**

The trustworthiness concerns relating to the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

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 describes three conditions that could raise trustworthiness concerns 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 or the fraudulent filing of the same.

Since 2007 Applicant has been accumulating delinquent debts that she has been unable or unwilling to satisfy. She also failed to timely file her 2012 Federal income tax return. The evidence raises the above security concerns, thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns.

The guideline includes five conditions in AG ¶ 20 that could mitigate trustworthiness concerns arising from Applicant's financial difficulties:

- (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; 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 delinquent debts began accumulating in 2007, the bulk of which remain unresolved. She did not provide sufficient information to demonstrate that such

problems are unlikely to continue or recur, calling into question her reliability and trustworthiness. The evidence does not support the application of AG ¶ 20(a).

Applicant's financial problems arose as a consequence of the real estate recession that began in 2007 and continued thereafter. Those were circumstances beyond her control. She provided some evidence that she attempted to responsibly address her delinquent debts as they were accumulating by working more than one job and disposing of personal and real properties. Thus, AG ¶ 20(b) has partial application.

Applicant participated in credit counseling as a pre-requisite for the Chapter 7 bankruptcy she filed in July 2014. She did not submit documentation verifying that the 19 debts listed in the SOR are included in that bankruptcy or are resolved. Hence, AG ¶ 20(c) has limited application, as there are not clear indications that her financial problems are under control. She has, however, filed her 2012 Federal income tax return in February 2014 and anticipated a refund. AG ¶ 20(c) has application to that allegation (SOR ¶ 1.a). Applicant did not provide evidence that prior to filing bankruptcy, she made a good-faith effort to resolve any of the 19 debts, including the small debts alleged in SOR ¶¶ 1.q for \$73, 1.r for \$73, 1.s for \$73, and 1.t for \$49, as required under AG ¶ 20(d). Because Applicant admitted owing the 19 alleged debts, there is no evidence to support the application of AG ¶ 20(e).

### **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 relevant 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.

According to AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a trustworthiness determination must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case. Applicant is a 53-year-old divorced, hard-working mother of two children. Until 2007 she was a successful businesswoman, operating a real estate development company. As a consequence of the real estate recession, she experienced numerous financial problems and accumulated a significant

amount of debt that remains unresolved. Although she provided evidence that she filed a Chapter 7 bankruptcy in July 2014, she did not indicate which debts are included in that bankruptcy or submit evidence that she is establishing a track record of financial stability. Overall, the record evidence leaves me with questions as to Applicant's eligibility and suitability for a public trust position. For these reasons, I conclude Applicant did not meet her burden to mitigate the trustworthiness concerns arising from her financial problems.

### **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
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b through 1.t:	Against Applicant

### **Conclusion**

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

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SHARI DAM  
Administrative Judge