



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



In the matter of:	)	
	)	
[NAME REDACTED]	)	ADP Case No. 14-00672
	)	
Applicant for Position of Trust	)	

**Appearances**

For Government: Richard Stevens, Esq., Department Counsel  
For Applicant: *Pro se*

11/05/2014

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**Decision**

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MALONE, Matthew E., Administrative Judge:

Applicant’s financial problems were caused, in part, by circumstances beyond her control. However, she has only acted in the past month to try to improve her finances. None of the debts alleged has been paid or otherwise resolved. Applicant also deliberately withheld information about past criminal charges from her application for a position of trust. Her request for eligibility to occupy a position of trust is denied.

**Statement of the Case**

On June 27, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to obtain eligibility for an ADP I/II/III position<sup>1</sup> for her

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<sup>1</sup> As defined in Chapter 3 and Appendix 10 of DOD Regulation 5220.2-R, as amended (Regulation).

job with a defense contractor. After reviewing the results of the ensuing background investigation, DOD adjudicators were unable to determine that it is clearly consistent with the interests of national security to grant Applicant's request for a position of trust.<sup>2</sup>

On March 26, 2014, DOD issued to Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise trustworthiness concerns addressed through the adjudicative guidelines (AG)<sup>3</sup> for financial considerations (Guideline F) and personal conduct (Guideline E). On June 16, 2014, Applicant responded to the SOR (Answer) and requested a hearing.

The case was assigned to me on August 5, 2014, and I convened a hearing on September 12, 2014. Department Counsel for the Defense Office of Hearings and Appeals (DOHA) presented Government Exhibits (Gx.) 1 - 5. Applicant testified and presented Applicant's Exhibit (Ax.) A. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on September 29, 2014.

### **Findings of Fact**

Under Guideline F, the Government alleged that Applicant was discharged of her debts through Chapter 7 bankruptcy in December 2004 (SOR 1.a). It was also alleged she has since accrued another 19 delinquent or past-due debts (SOR 1.b - 1.s<sup>4</sup>) totaling \$11,094. Applicant admitted, with explanations, the allegations at SOR 1.a, 1.b, 1.e, 1.h, 1.o and 1.p. She denied any knowledge of the remaining SOR allegations.

Under Guideline E, the Government alleged Applicant deliberately made false statements in her EQIP by failing to disclose that she was arrested in November 1996 and charged with felony cruelty towards a child (SOR 2.a(1)) and felony aggravated battery (SOR 2.a(2)); that she was arrested in September 2006 and charged with unemployment fraud by false statement, a 3<sup>rd</sup> degree felony (SOR 2.a(3)); and that she was arrested in February 2010 and charged with battery domestic violence (SOR 2.a(4)). At hearing, Department Counsel moved to amend the SOR 2.a allegation by substituting the word "arrests" at the end of the main body of that allegation with the word "charges." Without objection, I granted the motion. (Tr. 14 - 15)

Applicant admitted SOR 2.a(2), but said she did not remember SOR 2.a(1) or 2.a(4). As to SOR 2.a(3), Applicant simply stated that there was no result from the charge. A fair reading of her responses under Guideline E is that she admitted certain

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<sup>2</sup> Required by the Regulation, as amended, and by the Directive, as amended.

<sup>3</sup> The adjudicative guidelines were implemented by DOD on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

<sup>4</sup> Due to a typographical error, the SOR contains two allegations at 1.j. At hearing, I amended the SOR to correct this error by renaming the first SOR 1.j as "1.j(1)," and the second SOR 1.j as "1.j(2)." (Tr. 14)

facts but has denied the gravamen of the allegations; namely, that she intended to deceive the Government about her arrest record. (Tr. 15 - 18)

In addition to the facts established by Applicant's admissions, and based on all available information, I make the following findings of fact:

Applicant is 43 years old and was hired as a customer service representative by her current employer in August 2013. Her duties require that she have access to the personally identifiable information (PII) of her DOD health care customers. Applicant was unemployed for about six months before starting her current job. From October 2012 until February 2013, she worked in customer service positions after working in various data entry and administrative positions since January 2000. (Gx. 1; Gx. 2)

Applicant was married from September 2002 until she obtained a divorce in October 2011. She cohabited with a boyfriend from February 2013 until May 2014, when she left because the relationship was physically abusive. Applicant has three children between the age of 14 and 25. A fourth child died in 2012 at the age of 24. (Gx. 1; Gx. 2; Tr. 5 - 23)

When Applicant submitted her EQIP, she disclosed that she owed an estimated \$1,200 debt for unpaid rent that was being enforced through a civil judgment entered against her in October 2011. She also disclosed that she was arrested in February 2013 for failing to pay a traffic ticket. Records obtained by investigators during the ensuing background investigation showed that Applicant also was arrested or charged with the offenses alleged in SOR 2.a(1) - (4); that she filed a Chapter 7 bankruptcy petition in August 2004, as alleged in SOR 1.a; and that she owed the debts alleged in SOR 1.a - 1.s. (Gx. 1; Gx. 3 - 5)

Applicant was interviewed by a Government investigator on August 7, 2013. She was asked about her arrest record and confirmed the 2013 arrest for an unpaid traffic ticket, but she denied any other arrests or charges. She then was confronted with the information the investigator had obtained about her other arrests, and she was asked why she did not disclose them as required by the questions at EQIP Section 22. Applicant explained that she did not disclose all of her arrests either because she did not agree with the charges and felt they should not have been brought, or because the charges in one instance were eventually dropped. At her hearing, Applicant recalled in detail the circumstances of her arrests or the events leading to criminal charges. For example, she recalled that she was represented by a public defender in multiple court appearances, and that she was physically detained by police at least twice after domestic violence allegations or after she was investigated for fraudulently obtaining unemployment benefits. Applicant further stated that she only listed the one arrest because that was the only one for which she was handcuffed and transported in a police car. (Gx. 2; Tr. 42 - 56, 86 - 88)

Applicant's 2004 bankruptcy was necessitated by loss of income when she became pregnant with her youngest child. Thereafter, she and her ex-husband fell

behind on their mortgage and other credit obligations. Additionally, Applicant claimed her ex-husband abused her and stole money from her. After they divorced, her ex-husband did not pay child support as required. Applicant's mortgage was eventually foreclosed and she declared \$134,509 in liabilities against \$17,622 in assets when she filed her Chapter 7 petition. Applicant also encountered financial problems in the late 1990s when her cousin stole her personal information and obtained credit using Applicant's name. However, she also co-signed a car loan for her brother, who eventually defaulted on the loan, leaving the obligation to Applicant. (Gx. 2; Gx. 4; Gx. 5; Tr. 36 - 44, 64 - 76)

Applicant was involved in an auto accident in 2010. She received a \$60,000 settlement from a suit she filed against the other driver's insurance company. After attorney's fees and other expenses,<sup>5</sup> Applicant received \$18,203. Applicant testified she was under the impression that many of the debts alleged in the SOR were from the settlement before she received any money. However, a review of the closing statement, which Applicant signed in April 2012, shows there was no payment to any of the creditors listed. Applicant used the settlement funds to repair the car she was driving when she had the accident. She also paid past-due day care bills for her daughter's children, and paid other expenses she had at that time. In 2014, Applicant used her 2013 tax year refund to buy a used car to replace the car that was in the accident. (Gx. 2; Tr. 57 - 60)

Applicant has not paid or otherwise resolved any of the debts alleged in SOR 1.b - 1.s. She is able to meet all of her current obligations, in part, because she and her daughter live together and split expenses. Each month, she has about \$500 remaining after paying rent, utilities, and other regular expenses. However, in May 2014, she suffered a stroke and lost income because she missed work. In January 2014, Applicant established a repayment plan to satisfy a past-due debt for a furniture purchase.<sup>6</sup> Under the plan, she pays \$102 monthly on a \$740 debt. As of the hearing, the remaining balance was \$180.40. In August 2014, Applicant spoke with a credit union debt management specialist to get help with repaying her debts. Applicant opened a savings account into which she deposits \$150 from each paycheck. She intends to save enough money to use in negotiating settlements with her various creditors. (Gx. 2; Ax. A; Tr. 67 - 89)

## **Policies**

Positions designated as ADP I/II/III are classified as "sensitive positions."<sup>7</sup> In deciding whether a person should be assigned to an ADP position, it must be determined that his or her loyalty, reliability, and trustworthiness are such that it is

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<sup>5</sup> Among those expenses were costs associated with finalizing Applicant's divorce. (Gx. 2)

<sup>6</sup> This debt was not alleged in the SOR.

<sup>7</sup> Regulation, ¶ C3.6.15.

“clearly consistent with the interests of national security” to do so.<sup>8</sup> The Regulation also requires that DOD contractor personnel are entitled to the procedural protections in the Directive before any adverse determination may be made.<sup>9</sup>

The Directive requires that each decision be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,<sup>10</sup> and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. 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 eligibility for a position of trust.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a position of trust for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government's case. Because no one is entitled to a position of trust, an applicant bears a heavy burden of persuasion. A person who has access to sensitive information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring applicants possess the requisite judgment, reliability, and trustworthiness of one who will protect sensitive information as his or her own. Any reasonable doubt about an applicant's suitability for access should be resolved in favor of the Government.

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<sup>8</sup> Regulation, ¶ C6.1.1.1.

<sup>9</sup> Regulation, ¶ C8.2.1.

<sup>10</sup> Directive. 6.3.

## Analysis

### Financial Considerations

Available information is sufficient to support all of the SOR allegations. The facts established raise a trustworthiness concern about Applicant's finances that is addressed at AG ¶ 18, as follows:

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. 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.

More specifically, available information requires application of the disqualifying conditions at AG ¶¶ 19(a) (*inability or unwillingness to satisfy debts*); and 19(c) (*a history of not meeting financial obligations*). As to AG ¶ 19(a), the record shows Applicant has been unable, not unwilling, to repay her past-due debts.

I have also considered the following pertinent AG ¶ 20 mitigating conditions:

(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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

The mitigating condition at AG ¶ 20(a) does not apply. Applicant's financial problems continue, in that she has only begun to address her financial issues and all of the debts attributable to her through the Government's information remain unpaid. I have also considered the mitigating condition at AG ¶ 20(b). Applicant's debts arose from a combination of circumstances beyond her control. To her credit, she contacted a credit union for help in starting to address her debts, and she has begun saving money to use in negotiations with creditors. However, these actions are very recent and Applicant has not yet established a meaningful track record of repayment and financial

responsibility. For these reasons, neither AG ¶¶ 20(b) or (d) apply. In light of all available information, I conclude she has not presented sufficient information to mitigate the Government's concerns under this guideline.

## **Personal Conduct**

Available information is sufficient to support the SOR 2 allegations and raise a concern under this guideline. That concern is addressed through Guideline E at AG ¶ 15 as follows:

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.

Applicant recalled in sufficient detail the events leading to the criminal charges that she omitted when she completed her EQIP. During her background interview, she and the investigator reviewed her answers to all of the criminal history questions in the EQIP. Aside from the 2013 arrest for an unpaid traffic ticket, Applicant claimed she had not had any other arrests or criminal charges. When she was confronted by the information that supports SOR 2.a(1) - (4), she did not deny those events and stated that she did not list some of them because she did not agree with the charges. Others she did not list because the charges were eventually dismissed. Overall, the record shows that Applicant was deliberately selective about how much adverse information she was willing to disclose, both in her EQIP and in during her background interview. The foregoing requires application of the following AG ¶ 16 disqualifying conditions:

- (a) deliberate omission, concealment, or falsification of relevant 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; and
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Of the mitigating conditions listed under AG ¶ 17, the following are pertinent to these facts and circumstances:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual

specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully; and

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

I conclude the record does not support any of these mitigating conditions. Applicant had to be confronted with information about her arrests before she acknowledged them. Although not alleged in the SOR, the same was true for her unlisted delinquencies. Thus, there is no indication she made a good-faith attempt to correct her EQIP answers. Nor did Applicant present any information or make any argument that suggests she received improper or inaccurate guidance regarding the questions posed or her obligations to disclose the information at issue. Finally, multiple deliberate false statements in response to questions in an EQIP or during a background interview are not minor acts. The Government must be able to rely on Applicant's willingness to be candid and forthright at all times in protecting the sensitive information entrusted to her. If she is shown, as here, to be unwilling to be honest about her own background information, it is reasonable to conclude that she may also be unwilling to properly perform her duties in this regard. Applicant has not presented sufficient information to show she has mitigated the Government's concerns under this guideline.

### **Whole-Person Concept**

I have evaluated the facts and have applied the appropriate adjudicative factors under Guideline F. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant's financial problems arose through circumstances not entirely of her own making. However, her lack of action in response to her financial problems until very recently reflects poorly on her judgment and reliability. She has also demonstrated that she is willing to make false statements to the Government about information required to properly assess her suitability for a position of trust. Applicant has not demonstrated that she understands the gravity of the Government's concern or that such conduct will not recur. Doubts about her judgment and trustworthiness remain. Because protection of the interests of national security is the focal point of these adjudications, those doubts must be resolved against the individual.

### **Formal Findings**

Formal findings 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 - 1.s:	Against Applicant



Paragraph 2, Guideline E:                    AGAINST APPLICANT

Subparagraph 2.a:                            Against Applicant

**Conclusion**

In light of all of the foregoing, it is not clearly consistent with the interests of national security for Applicant to occupy a position of trust. Applicant's request for ADP eligibility is denied.

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MATTHEW E. MALONE  
Administrative Judge