



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



In the matter of: )  
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----- ) ADP Case No. 14-04132  
 )  
Applicant for Public Trust Position )

**Appearances**

For Government: Ray T. Blank Jr., Esq., Department Counsel  
For Applicant: Ryan C. Nerney, Esq.

10/30/2015

**Decision**

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny her eligibility for a public trust position. She has a history of financial problems or difficulties related to defaulted mortgages loans, which led to foreclosure and sale of a residential property about five years ago in 2010. She presented sufficient evidence to explain and mitigate her problematic financial history. Accordingly, this case is decided for Applicant.

**Statement of the Case**

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 Format) on February 28, 2013.<sup>1</sup> After reviewing the application and information gathered during a background investigation, the Department of Defense (DOD) sent Applicant a statement of reasons (SOR), dated December 5, 2014,

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<sup>1</sup> Exhibit 1.

detailing a trustworthiness concern under Guideline F for financial considerations.<sup>2</sup> The action was taken under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Review Program* (Jan. 2, 1992), as amended (Directive); Department of Defense Regulation 5200.2-R, *Personnel Security Program* (Jan. 1987), as amended (Regulation); and the adjudicative guidelines (AG)<sup>3</sup> implemented by the DOD on September 1, 2006. The SOR recommended submission of Applicant's case to an administrative judge to determine her eligibility to occupy an automated data processing (ADP) position to support a contract with the DOD.

Applicant answered the SOR on or about January 2, 2015, and she requested a hearing.

The case was assigned to another administrative judge on April 22, 2015, and then reassigned to me on May 1, 2015. The hearing was held as scheduled on June 4, 2015. Department Counsel offered Exhibits 1–5, and they were admitted. Applicant offered Exhibits A–M, and they were admitted. Other than Applicant, no witnesses were presented. The hearing transcript (Tr.) was received on June 11, 2015.

### **Ruling on Procedure**

The parties agreed that the mortgage loan alleged in SOR ¶ 1.a duplicated the mortgage loan alleged in SOR ¶ 1.c.<sup>4</sup> Because of the duplication, SOR ¶ 1.a is decided for Applicant, and it will not be discussed further.

### **Findings of Fact**

Applicant is a 39-year-old registered nurse who is employed by a health care contractor for the Defense Department. She has worked for her current employer since February 2013, and she has a good employment record.<sup>5</sup> Before that, she worked full-time for about ten years in an intensive-care unit of a large hospital and medical center. Her educational background includes a bachelor of science degree (major in psychology) and an associate in applied science degree in nursing.<sup>6</sup> She is licensed to practice nursing by a state board of nursing, and her fitness or suitability to hold that

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<sup>2</sup> The SOR was issued by the DOD Consolidated Adjudications Facility, Fort Meade, Maryland. It is a separate and distinct organization from the Defense Office of Hearings and Appeals, which is part of the Defense Legal Services Agency, with headquarters in Arlington, Virginia.

<sup>3</sup> The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

<sup>4</sup> Tr. 14–16.

<sup>5</sup> Exhibits G and H.

<sup>6</sup> Exhibits J and K.

license has never been challenged.<sup>7</sup> She is seeking to obtain eligibility to occupy a position of public trust for her current job responsibilities. Eligibility is necessary because her job involves access to sensitive but unclassified information known as personally identifiable information (PII).

Applicant is married, and she and her husband have two sons, ages ten and eight. Her husband is currently working as a licensed practical nurse, and he is also studying to become a registered nurse. Together, they have a net monthly income of about \$6,283, which produces a net remainder of about \$776.<sup>8</sup> She has a 401(k) account and a Roth IRA account with a total balance of about \$115,000.<sup>9</sup> She estimated her checking account balance at \$750 to \$1,000, and her savings account balance at \$2,000.<sup>10</sup>

Applicant has a history of financial problems or difficulties related to defaulted mortgages loans for residential real estate, which led to a foreclosure about five years ago in 2010. The SOR consists of two allegations involving the first and second mortgage loans. The first was subject to foreclosure and resulted in a deficiency balance of about \$11,792, and the second was charged off with a balance of about \$19,600.<sup>11</sup>

In early 2004, Applicant and her husband bought a home, although the purchase was made in her name because her husband had some credit issues. To finance the purchase of the home, Applicant used two mortgage loans, the so-called 80-20 mortgages commonly used to avoid paying private mortgage insurance. The first mortgage loan was for \$115,150, and the second was for \$21,550, for a total of \$136,700. In 2008, the then mortgage lender was acquired by another bank, and the two mortgage loans became the bank's mortgages. In September 2010, the bank foreclosed on the first mortgage via a trustee's sale of the home for the purchase price of \$67,300.

It is Applicant's understanding and belief, based on a written legal opinion she obtained, that the two mortgage loans were non-recourse loans that were concluded by the 2010 foreclosure, and there remains no legally enforceable delinquency on the

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<sup>7</sup> Exhibit L; Tr. 58–59.

<sup>8</sup> Exhibit C.

<sup>9</sup> Exhibit C; Tr. 38.

<sup>10</sup> Tr. 37.

<sup>11</sup> Exhibits 2–4.

loans under state law.<sup>12</sup> <sup>13</sup> If the mortgages were enforceable, Applicant stated that she would “absolutely” try to pay or otherwise settle the debt.<sup>14</sup>

Applicant provided an explanation for the defaulted mortgage loans during her 2013 background investigation, and she provided a detailed written explanation during the hearing.<sup>15</sup> She also discussed it and answered multiple questions during the hearing. She and her husband moved into the home in 2004 and lived there until mid–2008. During this period, she gave birth to her two sons. Also during this time, they became concerned about the quality and safety of the neighborhood and eventually decided to move so they could raise their sons in a better, safer neighborhood.

They found tenants to rent the home, and they purchased a second home in mid–2008. This arrangement worked until sometime in 2009 or 2010 when the tenants vacated the property, leaving it in a state of disrepair, including ruined carpet and theft of appliances. Their efforts to track down the tenants for reimbursement were to no avail. They were unable to afford the necessary repairs, and so enlisted a realtor to sell the home. Those circumstances were playing out after the 2008 financial crisis, which included the fact that high home prices in the United States turned decisively downward. They received one offer for much less than they owed on the mortgage loans, the bank declined to agree to a short sale.

In the meantime, Applicant and her husband had difficulty paying the mortgage loans for their primary residence and their rental property, and they fell behind on the payments. Her husband was laid off from his job with the state prison system, which resulted in a loss of income of about \$2,200 monthly. He was then unemployed for about a year.<sup>16</sup> In addition, her monthly income decreased by about \$1,000 monthly due to a cutback at the hospital. They kept the rental home on the market without success until they received the foreclosure notice, and the home was then sold in September 2010.

In addition to losing the rental home, Applicant and her husband sold their primary residence via a short sale after a protracted effort to refinance through a federal program.<sup>17</sup> The short sale of the second home resolved or settled the mortgage loan for

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<sup>12</sup> Exhibit A.

<sup>13</sup> Tr. 31–35.

<sup>14</sup> Tr. 35.

<sup>15</sup> Exhibits 5 and B.

<sup>16</sup> Tr. 47–48.

<sup>17</sup> Tr. 62–65. (The short sale was not alleged in the SOR, and I have considered it for the limited purpose of having a full picture of Applicant’s history of financial problems with real estate).

less than the full amount.<sup>18</sup> The short sale took place in about May 2011, and Applicant and her family have since resided in a rental home.

Since moving into a rental home, Applicant and her husband have worked to restructure their finances. They traded in both of their cars for less expensive cars, which resulted in lower monthly payments. They stopped taking family vacations. They have rented their residence for about the last four years and intend to continue doing so until they are financially able to own a house again. They pay about \$1,400 monthly in rent.<sup>19</sup> They have a net remainder of about \$776 monthly as well as \$1,077 in monthly consumer debt payments. A recent credit report from December 2014 shows a credit score of 640, which is considered fair.<sup>20</sup> They went through a financial counseling session in May 2015, which consisted of a review of current income, living expenses, assets, and liabilities to help them manage their financial situation.<sup>21</sup>

### Discussion

Under Guideline F for financial considerations,<sup>22</sup> the suitability of an applicant may be questioned or put into doubt when that applicant has a history of excessive indebtedness or financial problems or difficulties.<sup>23</sup> The overall concern is:

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 [sensitive] information.<sup>24</sup>

The concern is broader than the possibility that a person might knowingly compromise sensitive information to obtain money or something else of value. It encompasses concerns about a person's self-control, judgment, and other important qualities. A

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<sup>18</sup> Exhibit E at 2.

<sup>19</sup> Exhibit C.

<sup>20</sup> Exhibit E.

<sup>21</sup> Exhibit D.

<sup>22</sup> AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

<sup>23</sup> ISCR Case No. 95-0611 (App. Bd. May 2, 1996) (It is well settled that "the security suitability of an applicant is placed into question when that applicant is shown to have a history of excessive indebtedness or recurring financial difficulties.") (citation omitted); and see ISCR Case No. 07-09966 (App. Bd. Jun. 25, 2008) (In security clearance cases, "the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner.") (citation omitted).

<sup>24</sup> AG ¶ 18.

person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding sensitive information.

The evidence supports a conclusion that Applicant has a history of financial problems or difficulties. Like many Americans during the pre-2008 financial-crisis period, Applicant and her husband entered into a real estate market that many people believed would always go up. They overextended and got caught when things collapsed. As a result, they paid a heavy price by losing a home to foreclosure in 2010 and sold a second home via a short sale in 2011. They also earned a negative credit history, which has stayed with them to date. Taken together, the evidence indicates inability (as opposed to unwillingness) to satisfy debts<sup>25</sup> and a history of not meeting financial obligations<sup>26</sup> within the meaning of Guideline F.

In mitigation, I have considered six mitigating conditions under Guideline F,<sup>27</sup> and the following are most pertinent:

AG ¶ 20(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 [person's] current reliability, trustworthiness, or good judgment;

AG ¶ 20(b) the conditions that resulted in the financial problems were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or death, divorce, or separation), and the [person] acted responsibly under the circumstances; and

AG ¶ 20(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.

First, the mitigating condition in AG ¶ 20(a) applies because the foreclosure occurred several years ago in 2010. The foreclosure also occurred under unusual circumstances that are unlikely to recur and do not cast doubt on Applicant's current suitability for a public trust position. Applicant has lived in a rental home since 2011, and she and her husband are in the process of regaining their financial footing.

Second, the mitigating condition in AG ¶ 20(b) applies because Applicant's financial problems or difficulties are related to circumstances largely beyond her control. Those circumstances were as follows: (1) the reprobate tenants who vacated the rental

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<sup>25</sup> AG ¶ 19(a).

<sup>26</sup> AG ¶ 19(c).

<sup>27</sup> AG ¶ 20(a)–(f).

property leaving it in a state of disrepair; (2) the loss of employment of Applicant's husband; (3) the loss of income from Applicant's nursing job due to a cutback by the hospital; and (4) the unexpected downturn in the real estate market and economy in general caused by the 2008 financial crisis. Taken together, those circumstances had a measurable negative effect on Applicant's ability to pay the mortgage loans. Moreover, Applicant acted responsibly under the circumstances by first seeking reimbursement from the tenants and then attempting to sell the rental home, albeit in a difficult real estate market, which nearly occurred but for the bank's disapproval of the short sale.

Third, the mitigating condition in AG ¶ 20(c) applies because Applicant has received some financial counseling in May 2015, and, moreover, there are clear indications that the financial problems related to the defaulted mortgage loans are resolved or under control. Applicant understands, based on a written legal opinion prepared by an attorney in her state of residence, that the two mortgage loans were non-recourse loans that were concluded by the 2010 foreclosure, and there remains no legally enforceable delinquency on the loans under state law. Although state law is not binding or controlling in a federal administrative proceeding such as this, it is relevant circumstance to the extent that it shows that the financial problem that led to the concern is not ongoing.

To conclude, the evidence leaves me with no doubt or concern about Applicant's eligibility and suitability for a public trust position. I am persuaded that Applicant acted in a reasonable, responsible, and mature way in dealing with a difficult financial situation several years ago. Her behavior relating to the 2010 foreclosure was not frivolous, unconcerned, or grossly negligent. Although her current financial situation is not stellar (e.g., there is too much consumer debt being repaid), it is improving and on a favorable upward trend. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I gave due consideration to the whole-person concept.<sup>28</sup> For all these reasons, I conclude Applicant mitigated the financial considerations concern.

### **Formal Findings**

The formal findings on the SOR allegations are:

Paragraph 1, Guideline F:	For Applicant
Subparagraphs 1.a–1.c:	For Applicant

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<sup>28</sup> AG ¶ 2(a)(1)–(9).

## **Conclusion**

In light of the record as a whole, it is clearly consistent with the interests of national security to grant Applicant eligibility for an ADP position. Eligibility for access to sensitive information is granted.

Michael H. Leonard  
Administrative Judge