



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



In the matter of:

ADP Case No. 07-09708

Applicant for Public Trust Position

**Appearances**

For Government: Emilio Jaksetic, Esquire, Department Counsel

For Applicant: *Pro Se*

February 6, 2008

**Decision**

LOUGHRAN, Edward W., Administrative Judge:

Applicant failed to mitigate the trustworthiness concerns raised by her history of not meeting her financial obligations. Eligibility for access to sensitive information is denied.

On October 15, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F, Financial Considerations, Guideline E, Personal Conduct, and Guideline J, Criminal Conduct. 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); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on November 5, 2007, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel

submitted the Government's written case on November 30, 2007. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on December 10, 2007. As of January 24, 2008, she had not responded. I received the case assignment on January 28, 2008.

### **Findings of Fact**

Applicant is 63 years old. She attended college for a period of time but did not graduate. She is divorced with two adult children.<sup>1</sup> Applicant has an extensive amount of delinquent debt. Individual debts are addressed below.

SOR ¶ 1.a alleges a state tax lien of \$1,760 filed in 1995, for unpaid individual taxes, interest and/or penalties due for tax year 1992. Applicant admitted to this debt. It is also listed on the credit bureau reports (CBR) in the FORM.<sup>2</sup>

Applicant stated she paid the debts to a cable company for \$195 and to a utility company for \$140, as alleged in SOR ¶¶ 1.b and 1.e. The most recent CBR lists these debts with a zero balance.<sup>3</sup> I find Applicant has paid these debts.

SOR ¶ 1.c alleges a debt of \$7,101 to a financial institution. The debt was charged off in 2003, but a judgment of \$5,160, with interest, attorney fees and costs, was awarded to the financial institution in April 2004. The financial institution requested the court to order garnishment of Applicant's wages, but it is unclear how much was collected. The CBRs in the FORM report the balance of the underlying debt as \$7,101 and \$8,039. Applicant stated that "[d]ue to the charge-off [she] was under the impression that the debt was satisfied."<sup>4</sup> I find the debt has not been satisfied.

Applicant admitted to the debt of \$2,832 to a financial institution, as alleged in SOR ¶ 1.d. She also admitted to a debt of \$7,848 to a collection company on behalf of a financial institution, as alleged in SOR ¶ 1.f. The debts are reported on the CBRs in the FORM. There is no evidence that either debt has been paid.<sup>5</sup>

SOR ¶ 1.g alleges a debt of \$6,948 to a financial institution. Applicant stated that "[d]ue to the charge-off [she] was under the impression that the debt was satisfied." The CBRs list this debt to a financial institution and include the name of the financial

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<sup>1</sup> Item 4.

<sup>2</sup> Items 3, 7, 9

<sup>3</sup> Items 3, 9.

<sup>4</sup> Items 3, 5, 7, 9.

<sup>5</sup> Items 3, 7, 9.

institution in SOR ¶ 1.f. The CBRs also list this debt as transferred or sold.<sup>6</sup> I find the debt in SOR ¶ 1.g to be a duplicate of the debt in SOR ¶ 1.f.

Applicant stated in her response to Interrogatories and in her response to the SOR that she fell on hard times. While attempting to keep her body and soul together, her financial situation became overwhelming. She provided no additional information as to how or why she got into financial trouble. She indicated she had a small amount of money saved, but that she would lose her job if she received an adverse determination. She was reluctant to use the money to pay her debts, as she would need the money if she became unemployed again. She stated that if she receives a favorable determination and remains employed, she has every intention of fulfilling her financial obligations. She also noted that she has no criminal record.<sup>7</sup>

Applicant submitted her Questionnaire for Public Trust Positions (SF 85P), on June 6, 2006. Applicant answered “No” to Question 22b, which asked, “Are you now over 180 days delinquent on any loan or financial obligation? Include loans or obligations funded or guaranteed by the Federal Government.” Applicant did have delinquent debts more than 180 days old when she submitted the SF 85P. Question 22a asked, “In the last 7 years, have you or a company over which you exercised some control, filed for bankruptcy, been declared bankrupt, been subject to a tax lien, or had legal judgment rendered against you for a debt?” Applicant answered “Yes,” and listed the 2004 judgment in favor of the financial institution as alleged in SOR ¶ 1.c. Applicant also reported that she left two jobs under unfavorable circumstances. Applicant denied intentionally falsifying the questionnaire.<sup>8</sup> After considering all the evidence, including the SF 85P which lists adverse financial information, I find Applicant did not intentionally falsify her Questionnaire for Public Trust Positions.

### **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 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.)

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<sup>6</sup> *Id.*

<sup>7</sup> Items 3, 5.

<sup>8</sup> Items 3, 4.

When evaluating an Applicant's suitability for a public trust position, the 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 the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense 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 applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

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.

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." See *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

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

The concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

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.

The guideline notes several conditions that could raise concerns. Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly under AG ¶ 19(c), "a history of not meeting financial obligations" may raise security concerns. The evidence of Applicant's delinquent debts is sufficient to raise these potentially disqualifying conditions.

The guideline also includes examples of conditions that could mitigate concerns arising from financial difficulties. I have considered all the potential mitigating conditions, and especially considered 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 individual's current reliability, trustworthiness, or good judgment," AG ¶ 20(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," 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," AG ¶ 20(d) "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts," and AG ¶ 20(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 paid the two debts in SOR ¶¶ 1.b and 1.e, totaling about \$335. The debt in SOR ¶ 1.g is a duplicate of the debt in SOR ¶ 1.f. There is no evidence that Applicant paid any of the other debts as alleged in the SOR. The payment of these two small debts is insufficient evidence to conclude Applicant made a good-faith effort to repay overdue creditors or otherwise resolve debts. Applicant stated she fell on hard times, but there is no evidence as to what caused Applicant's financial problems. Nor is there evidence of financial counseling. I do not find any of the mitigating conditions applicable.

### **Guideline E, Personal Conduct**

The concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying, including AG ¶ 16(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.” Applicant omitted information from her Questionnaire for Public Trust Positions; however, it was not a deliberate omission. No Personal Conduct disqualifying condition is raised by the evidence.

### **Guideline J, Criminal Conduct**

The concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Appellant’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.

The potential disqualifying conditions are AG ¶ 31(a) “a single serious crime or multiple lesser offenses” and AG ¶ 31(c) “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.” It is a criminal offense under 18 U.S.C. § 1001 to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the executive branch of the Government of the United States. Applicant’s omission of information on her SF 85P was not knowing or willful. She did not violate 18 U.S.C. § 1001 and no Criminal Conduct disqualifying condition has been established.

### **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) 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has a history of financial delinquencies. She stated she fell on hard times, but provided no explanation as to what caused her financial problems. She paid two small debts and indicated she would pay her other debts if she received a favorable determination and remained employed. She does not have a criminal record, but she provided very little additional information about herself.

Overall, the record evidence leaves me with questions and doubts as to Applicant’s eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant did not 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:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline J:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

### **Conclusion**

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

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EDWARD W. LOUGHRAN  
Administrative Judge