



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



In the matter of: )  
 )  
 ) ADP Case No. 08-03329  
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 Applicant for Position of Public Trust )

**Appearances**

For Government: Kathryn D. MacKinnon, Esquire, Deputy Chief Department Counsel

For Applicant: *Pro se*

April 20, 2009

**Decision**

O'BRIEN, Rita C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant has mitigated the concerns raised under the guideline for Financial Considerations. Accordingly, her request for a position of public trust is granted.

Applicant submitted a Questionnaire for Public Trust Positions (SF 85P) on June 29, 2007 to apply for a position involving access to sensitive information. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding<sup>1</sup> that it is clearly consistent with the national interest to grant Applicant's request.

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<sup>1</sup> Required by Executive Order 10865, as amended, and DoD Directive 5220.6 (Directive), as amended.

On August 5, 2008, DOHA issued to Applicant a Statement of Reasons (SOR) specifying that its decision was based on concerns addressed in the Directive under Guideline F (Financial Considerations) of the Revised Adjudicative Guidelines (AG).<sup>2</sup> In her Answer to the SOR, signed and notarized on August 23, 2008, Applicant requested a hearing before an administrative judge. She also admitted all SOR allegations except 1.b., 1.d., 1.i. and 1.m. At the hearing, the government moved that allegation 1.i. be dismissed, and I granted that motion.

Department Counsel was prepared to proceed on September 14, 2008, and the case was assigned to me January 14, 2009. DOHA issued a Notice of Hearing on January 29, 2009, and I convened the hearing as scheduled on February 18, 2009. During the hearing, the government's exhibits, marked as Government Exhibits (GE) 1 through 6, were admitted without objection. Applicant testified and presented the testimony of one witness. She also offered six exhibits, which were marked as Applicant's Exhibits (AE) A through F and admitted without objection.<sup>3</sup> DOHA received the transcript on February 24, 2009. I held the record open to allow Applicant to submit additional documentation. She timely submitted four documents, which Deputy Chief Department Counsel forwarded without objection. I admitted them as AE G through J. and the record closed on March 4, 2009. Applicant was unable to obtain a document from a state Department of Revenue by deadline. However, on March 31, 2009, the Deputy Chief Department Counsel forwarded the additional document that Applicant had been unable to obtain earlier. The Deputy Chief Department Counsel had no objection to admission of the document, and I re-opened the record and admitted it as AE K.

### **Findings of Fact**

After a thorough review of the pleadings, Applicant's response to the Statement of Reasons, and the record evidence, I make the following additional findings of fact.

Applicant is a 37-year-old Travel and Training Coordinator. She married in 1999, and earned a bachelor's degree in 2001 (GE 1). When she was a college student, between 1992 and 1998, she responded to the numerous credit card offers that she received and soon realized that she was unable to pay the debt she had accrued. She filed a Chapter 7 bankruptcy petition, which was discharged in 1999. Before becoming a

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<sup>2</sup> Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. The Revised Adjudicative Guidelines supersede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

<sup>3</sup> AE A through F were originally attached to Applicant's Answer to the SOR. At hearing, they were severed from the Answer and admitted as exhibits for administrative convenience.

travel and training coordinator, Applicant was employed as a driver for a florist and as an administrative assistant for a retail store, and later, for two temporary agencies. She lived in five states between 1999 and 2004 (GE 1).<sup>4</sup>

In 2004, Applicant and her husband operated a business, which failed to generate income. They had applied for and received the appropriate state business license, but before leaving the state, they failed to file their state business tax return. Applicant accepts blame for this failure, as she believed that she was not required to file a business tax return because the business had not earned a profit. She notified the state Department of Revenue in 2004 that she had moved and had not filed the return. She also contacted the department in 2006, but did not resolve the issue, and has not been in contact since then. Mail from the department could have been lost because of her relocations to several other states (Tr 40-43). Applicant paid \$165 in February 2009 (AE H), and the state lien was discharged the following month (AE K).

In 2004, when Applicant lived in Seattle, her husband was employed, but his income was sufficient to meet only their rent and basic living expenses. Applicant was employed as a temporary worker (GE 1). They used credit cards for medical and other expenses, and eventually could not meet the credit card payments (Tr 23-24). Applicant's husband received a job offer in another state and they moved in late 2004. Applicant was unable to find employment for seven months. At least four of the alleged debts became delinquent in this period (allegations 1.d., 1.e., 1.f., and 1.g.) Applicant and her husband realized that, without two incomes, they would not be able to pay their debts. They contacted a financial counseling service and started a monthly payment plan of \$350 per month. Applicant found work the following month, when she was hired as a travel and training coordinator in July 2005 (GE 1). According to the counseling service, Applicant and her husband "...made considerable progress demonstrating the intent to pay the unsecured debt." (AE B). Over a period of almost two years, from June 2005 to April 2007, they paid into the plan a total of approximately \$8,300 (GE 4; AE B).

While they were both employed, from July 2005 to Fall 2006, they tried to keep up their car payments to avoid repossession. However, in November 2006, Applicant's husband was laid off. They could no longer make the car payments and they allowed their cars to be voluntarily repossessed. They were able to obtain high-interest "bad credit" loan, and purchased a car. They share the one car and use public transportation (Tr 27-28). They continued making payments to the counseling service for several months after Applicant's husband became unemployed. However, they could not meet both their daily living expenses and the monthly payments on a single income (Tr 22). They discontinued the payment plan in April 2007. The credit bureau reports show that at least four debts (allegations 1.i., 1.j., 1.k., and 1.m.) became delinquent in 2007 when

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<sup>4</sup> These dates are listed in Applicant's security clearance application. She testified to slightly different dates, but admitted she was uncertain of the exact years (Tr 60-62).

Applicant's husband was unemployed (GE 2). Applicant's husband remained unemployed for approximately nine months.

In July 2007, Applicant's husband found a position,<sup>5</sup> but was underemployed (Tr 63). Their joint incomes were insufficient to cover their expenses, and they had a negative cash flow (GE 3; Tr 30). Applicant made changes to their lifestyle to reduce expenses, including shopping at less expensive grocery stores, limiting and then ending their entertainment expenses, and having one take-out pizza per month instead of eating out. Since May 2008, they also cut their miscellaneous expenses in half, from \$200 per month to \$100 per month, and reduced their car expense from \$800 to \$565 per month (GE 3; Tr 64-65). They used the utility company's budget plan that offers a set utility payment each month, but they were unable to pay the excess amounts that occasionally were required (Tr 31-32). They cancelled their credit accounts, and currently have no credit cards (Tr 67).

Applicant's husband again became unemployed in June 2008 (Tr 28). However, he had started his own private investigation business the previous December. He could not accept clients until in June 2008, when he received his license (Tr 21; 35). The income sheet for her husband's business shows his net income between December 2008 and February 2009 was \$12,332 (AE I). He is also seeking any possible outside employment, but because of the poor job market, his health, and his high education level, he has not been successful (Tr 36-37).

Applicant's husband has chronic medical problems including diabetes, high blood pressure, and heart disease. His job from July 2007 to June 2008 required standing for long hours on concrete floors. His current business requires less physical effort and places less strain on his heart (Tr 63). Applicant was approved for an employer-sponsored program that provides reimbursement of the cost of her husband's prescriptions, which cost \$300 per month.

The 14 debts alleged in the SOR include four judgments, the state tax lien, several credit card debts, the balance on a car loan, and past-due rent. Applicant admits the debts, except for allegations 1.b., 1.d., 1.l., and 1.m. Allegation 1.b., involves a judgment of \$171 owed to an animal hospital. She stated that she paid this debt but, because of its age, she no longer has supporting documentation. The judgment was entered in 1998, and does not appear on her 2008 credit bureau report (GE 2). Applicant also denies allegation 1.d., the state tax lien, and has provided proof that it has been

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<sup>5</sup> The record is ambiguous on when Applicant's husband returned to work. On page 23 of the transcript, and in GE 3, Applicant states her husband found employment in July 2007; on page 28-29 she states he returned to work in November 2007. As GE 3 is dated May 2008, which is closer in time to the event in question, I find that the date provided there, July 2007, is most likely accurate.

discharged (AE K). She denies allegation 1.l., and the government has withdrawn this allegation (Tr. 7). Finally, she denies the judgment at allegation 1.m., which involves unpaid rent. Applicant paid the judgment, and subsequently, in July 2008, her lease was renewed by the same lessor who filed the judgment (AE D). She also provided proof that as of February 17, 2009, she owed only the current month's rent (AE A).

Applicant has made efforts to deal with her debts. She has tried to work out plans with individual creditors directly by telephone, but most demanded full payment and were unwilling to agree to payment plans. She can no longer use the credit counseling service because the service will not consider her husband's self-employment income, and her income alone is insufficient to cover a payment plan (Tr 34-35). She has also approached her supervisor for assistance. When she and her husband were facing eviction proceedings, she turned to her coworkers. According to her supervisor, they first considered a car wash, but decided to ask for donations from Applicant's team of 12 coworkers. They responded, and the eviction was avoided. (Tr 73-74). Applicant also sought to convert her unused vacation hours to a cash payment, but this request was refused because it was against company policy. Applicant and her husband have considered bankruptcy, but hope to avoid it by resolving their debts once her husband's business generates more income (Tr 22).

Applicant's supervisor testified that her job performance has consistently earned excellent reviews. Her supervisors received an unsolicited letter from a military officer attesting to Applicant's "flawless" work and her "outstanding, sustained high quality performance." (AE F). She was graded "exceeds our expectation" in numerous categories of her 2007 through 2009 evaluations (AE E). Her supervisor noted that Applicant is open about her financial problems, logical in her approach, and is working hard to bring her debts under control. She is extremely trustworthy, strict about following rules, and seeks to maintain confidentiality. For instance, Applicant requested a privacy screen over her computer monitor so that people in the immediate area would not be able to see clients' confidential information on her computer screen (Tr 51).

Applicant's wage statement for December 1 through December 15, 2008, showed gross wages of \$2,624. After deductions, her net income was \$1,814. At the hearing, she estimated her monthly income at approximately \$3,600. Her net income for the year, as of December 15, 2008, was \$41,885 (AE J). In May 2008, she and her husband had a negative monthly net remainder of \$22 (GE 3). She estimates that they are now "starting to break even" (Tr 66). Periodically, they receive help from the family of about \$200 per month (Tr 66).

### **Policies**

Each trustworthiness decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,

and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG).<sup>6</sup> Decisions must also reflect consideration of the “whole person” factors listed in ¶ 2(a) of the Guidelines.

The presence or absence of a disqualifying or mitigating condition under any guideline does not determine a conclusion for or against an Applicant. 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 access to sensitive information.

A trustworthiness decision is intended only to resolve the question of whether it is clearly consistent with the national interest<sup>7</sup> for an Applicant to either receive or continue to have access to sensitive information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke an Applicant’s access to sensitive information. 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.

A person who has access to sensitive information enters into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability and trustworthiness to protect the national interests as hers or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an Applicant’s suitability for access in favor of the government.<sup>8</sup>

## **Analysis**

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

AG ¶18 expresses the concern pertaining to financial considerations:

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

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<sup>6</sup> Directive. 6.3.

<sup>7</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>8</sup> See *Egan*; Revised Adjudicative Guidelines, §2(b).

regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially over-extended 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.

The facts presented support application of two disqualifying conditions: AG ¶19(a) (*inability or unwillingness to satisfy debts*) and AG ¶19(c) (*a history of not meeting financial obligations*). Applicant started with a clean financial slate after her bankruptcy in 1999. However, a series of circumstances occurred over the past ten years that resulted in mounting delinquencies. Applicant's inability to satisfy these debts stemmed from unemployment/underemployment, and her husband's serious medical problems. The record shows no evidence that her debts resulted from frivolous spending, drug or alcohol abuse, gambling, or other such factors.

The financial considerations guideline includes factors that can mitigate disqualifying conditions. Three mitigating conditions are relevant:

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.

When an Applicant's indebtedness results primarily from events that she could not control, mitigating condition AG ¶20(b) might apply. Here, Applicant's indebtedness did not stem from negligence toward her debts, but from repeated periods of unemployment, and her husband's medical problems. Between 2004 and 2008, either Applicant or her husband was unemployed or underemployed during five separate periods. In 2004, Applicant's husband was underemployed and Applicant had a temporary job. They were only able to meet their basic living expenses. Later that year, her husband found employment in another state, but after they moved, Applicant was unemployed for seven months. In November 2006, Applicant's husband was laid off, and remained unemployed for nine months. Although he found a position at that time,

he was underemployed and they had a negative cash flow. Again, in June 2008, Applicant's husband lost his job. Finally, Applicant's husband's medical expenses for three major chronic diseases added medical bills, prescription costs, and limitations on the types of work he could perform. Despite these situations, Applicant and her husband acted responsibly by reducing their living expenses wherever possible, and establishing a payment plan during the time when they had sufficient income to meet it. Mitigating condition AG ¶20(b) applies.

Mitigating Conditions 20(c) and 20(d) also apply. Although Applicant's debts are not paid, she made good-faith efforts to resolve them. In 2005, when both she and her husband were employed, they realized that they could not solve their financial problems on their own, and contacted a counseling service. They established a plan to pay their creditors. The fact that they consistently met the large monthly payment for almost two years shows their desire to meet their obligations, and demonstrates a prolonged good-faith effort. Based on Applicant's reasonable efforts in the face of persistent difficulties, I find for the Applicant on Guideline F.

### **Whole Person Analysis**

Under the whole person concept, an administrative judge must evaluate the Applicant's eligibility by considering the totality of the Applicant's conduct and all the circumstances. An 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant access to sensitive information must be an overall common-sense judgment based upon careful consideration of the guidelines and the whole person concept. Under the appropriate guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

The record shows that Applicant accrued significant debt over the past ten years, which raises security concerns about irresponsibility and the possibility for coercion. However, Applicant's efforts to meet her obligations, in the face of the continual challenges of unemployment and her husband's serious medical problems, demonstrate her reliability and mature response to a difficult situation. She made



consistent payments toward her debts for almost two years, when she was financially able, showing that she is concerned about meeting her obligations. She cut the family's expenses as much as possible. She testified candidly about her debts and her efforts to resolve them, and her co-workers are aware of her situation, relieving concerns about susceptibility to coercion. Applicant credibly testified that she is conscientious about protecting her clients' personal information. Applicant's supervisor confirmed that she follows company rules, and despite her financial problems, is an outstanding and valued employee. Her trustworthiness and good judgment are not at issue.

Overall, the record evidence satisfies the doubts raised about Applicant's suitability for access to sensitive information. For all these reasons, I conclude Applicant has mitigated the concerns arising from the cited adjudicative guideline.

### **Formal Findings**

Paragraph 1, Guideline F	For Applicant
Subparagraph 1.a. - 1.k:	For Applicant
Subparagraph 1.l:	(withdrawn by the government)
Subparagraph 1.m - 1.o.	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant access to sensitive information. Applicant's request for a position of public trust is granted.

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RITA C. O'BRIEN  
Administrative Judge