



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ADP Case No. 08-03450
SSN: XXX-XX-XXXX)	
)	
Applicant for Public Trust Position)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

June 26, 2009

Decision

TUIDER, Robert J., Administrative Judge:

Applicant successfully mitigated security concerns under Guidelines F (Financial Considerations), and E (Personal Conduct). Eligibility for access to sensitive information is granted.

Statement of the Case

Applicant submitted her Public Trust Position Application (SF-85P), on September 5, 2007. On October 17, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guidelines F (Financial Considerations), and E (Personal Conduct) for Applicant.

The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), 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 January 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.

She answered the SOR in writing on November 21, 2008, and requested a hearing before an Administrative Judge. DOHA received the request on November 26, 2008. Department Counsel was prepared to proceed on January 22, 2009, and I received the case assignment on February 11, 2009.

DOHA issued a notice of hearing on March 4, 2009, scheduling the case for April 7, 2009. The hearing was held as scheduled. The Government offered Government Exhibits (GE) 1 through 4, which were received without objection. The list of Government Exhibits was marked as Exhibit (Ex.) I. Applicant testified on her own behalf, and offered Applicant Exhibits (AE) A through D, which were received without objection.

I held the record open until April 21, 2009 to afford the Applicant an opportunity to submit additional material. On April 17, 2009, Applicant submitted an e-mail request, which she resubmitted on April 21, 2009, seeking an extension of her submission deadline until May 5, 2009.¹ The Government objected to Applicant's extension request stating that Applicant "has had more than ample time to establish payment plans on her past due debts." After due consideration, I granted her request for an extension until April 28, 2009.² Applicant timely submitted AE E through I without objection.³ DOHA received the hearing transcript (Tr.) on April 15, 2009.

Findings of Fact

In her Answer to the SOR, Applicant admitted the factual allegations in SOR ¶¶ 1.c., 1.j., and 1.p., and denied the remaining allegations. After a complete and thorough review of the evidence, I make the following additional findings of fact:

Applicant is a 54-year-old production quality clerk, who has been employed by her defense contractor employer since September 2007. GE 1, Tr. 15. She seeks to retain access to sensitive information in conjunction with a public trust position, which is a condition of her employment. Tr. 16-17.

Applicant completed high school in February 1985, and attended one semester of college. Tr. 13-14. Applicant was previously married three times, and has three adult children. Applicant is currently not married, but was involved in a four-year relationship that ended in April 2006. Tr. 96.

¹ Applicant sent her initial e-mail request to Department Counsel using an incorrect e-mail address, which caused a delay in processing her request.

² The e-mails documenting Applicant's extension request were marked Ex. II.

³ The Government's forwarding Memorandum, dated April 29, 2009, was marked Ex. III.

Applicant's background investigation addressed her financial situation and included the review of her September 2007 SF-85P, her July 2008 Answer to DOHA Interrogatories, and her September 2007 and September 2008 credit reports. GE 1 – 4.

The Government alleged in the SOR and established by Applicant's admissions and/or evidence presented that Applicant has/had 18 delinquent debts approximating \$51,000.00. The debts consist of one federal tax lien, and the remaining debts consist of a combination of delinquent, charged off or collection accounts.

The following chart summarizes debts alleged in Applicant's SOR, status, record cites, and comments as appropriate.

SOR DEBT	STATUS	RECORD	COMMENTS
1.a. Federal tax lien for \$1,251 filed 7/90.	Paid/released 3/92.	Tr. 17-19, Response to SOR, AE B, AE C, AE F, AE G.	"Believes" incurred from small business owned with ex-husband.
1.b. Charged off account (medical provider) \$50.	Disputed/deleted from credit report.	Tr. 19, 28-33, Response to SOR, AE B, AE C, AE F, AE G.	N/A.
1.c. Collection account (utilities) \$232.	Settled for lesser amount. Paid/deleted from credit report.	Tr. 30, 33-36, Response to SOR, AE B, AE C, AE F, AE G.	Debt incurred during relationship with ex-fiancé.
1.d. Charged off account (medical provider) \$50.	Disputed/deleted from credit report.	Tr. 36-37, Response to SOR, AE B, AE C, AE F, AE G.	N/A.
1.e. Collection account (medical provider) \$1,434.	Initially claimed not her debt/disputed. Made \$15 payment on 4/17/09.	Tr. 38-40, Response to SOR, AE B, AE C, AE F, AE G.	N/A.
1.f. Collection account (medical provider) \$300.	Initially claimed not her debt/disputed. Made \$100 payment on 4/24/09.	Tr. 40-42, Response to SOR, AE B, AE C, AE F, AE G.	N/A.
1.g. Collection account (time share fee) \$519.	Disputed. Claims former fiancé owes.	Tr. 42-47, Response to SOR, AE B, AE C, AE F, AE G.	Former fiancé submitted notarized statement stating he is responsible for this debt.
1.h. Collection account (medical provider) \$30.	Initially claimed not her debt/disputed. Paid debt in full 4/17/09.	Tr. 47-49, Response to SOR, AE B; AE C, AE F, AE G.	N/A.

1.i. Collection account (time share) \$5,843.	Disputed. Claims former fiancé owes.	Tr. 49, Response to SOR, AE B, AE C, AE F, AE G.	Former fiancé submitted notarized statement stating he is responsible for this debt.
1.j. Collection account (voluntary repossession of van) \$5,538.	Made timely payments until 12/07 when lost job. Returned van to dealer/dealer sold vehicle. Making payment arrangements.	Tr. 49-54, Response to SOR, AE B, AE C, AE F, AE G, AE H.	Debt reduced to \$3,331 after dealer sold vehicle. Dealer filed suit 4/09.
1.k. Delinquent joint auto debt (involuntary possession) \$31,795.	Disputed. Claims former fiancé owes and refinanced two vehicles without her knowledge. Retained counsel to challenge debt.	Tr. 54-63, 97-101, 108-110, Response to SOR, AE B, AE C, AE D, AE F, AE G, AE I.	Former fiancé submitted notarized statement stating he is responsible for this debt. On day she separated from fiancé, he took car.
1.l. Collection account (phone) \$1,911.61.	Settled for lesser amount.	Tr. 63-65, Response to SOR, AE B, AE C, AE F, AE G.	N/A.
1.m. Charged off (credit card) account \$321.	Claims account not hers and opened without her authorization. Disputing debt.	Tr. 65-67, Response to SOR, AE B, AE C, AE F, AE G.	N/A.
1.n. Collection account (insurance co.) \$198.	Disputed/removed from credit report.	Tr. 67-68, Response to SOR, AE B, AE C, AE F, AE G.	N/A.
1.o. Collection account (cable co.) \$149.	Made payment arrangements. Paid \$30 4/17/09.	Tr. 68-69, Response to SOR, AE B, AE C, AE F, AE G.	N/A.
1.p. Collection account (utility co.) \$223.	Made payment arrangements. Paid \$10 4/17/09.	Tr. 69-71, Response to SOR, AE B, AE C, AE F, AE G.	N/A.
1.q. Charged off account (credit card) \$393.	Claims account not hers and opened without her authorization. Disputed/removed from credit report.	Tr. 71, Response to SOR, AE A, AE B, AE C, AE F, AE G.	N/A.

1.r. Collection account (cable co.) \$811.	Claims account not hers. Disputed/removed from credit report.	Tr. 72-73, Response to SOR, AE A, AE B, AE C, AE F, AE G.	N/A.
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As the above chart demonstrates, Applicant has addressed each and every debt alleged by a variety of means to include settlement and/or payment arrangements for full amount or settlement amount, or by good-faith dispute/removal from credit report.

Applicant’s indebtedness is primarily attributable to several periods of unemployment, and the financial fallout after a long-term relationship ended with her fiancé. During this relationship, Applicant and her former fiancé commingled a significant portion of their finances and household expenses. Her periods of unemployment were from January 2005 to August 2006, December 2006 to February 2007, and May 2007 to September 2007. She has been continuously employed since she began her current position in September 2007. GE 1. Applicant’s former fiancé had three small children and asked Applicant to quit her job to care for his children. Three and one-half months after Applicant quit her job, “he (former fiancé) decided he didn’t want to get married” Tr. 73-76. Applicant stated, “[i]n April of 2006 [her fiancé] threw me literally physically out of the house.” Tr. 96. The results of Applicant’s commingling of finances during her long-term relationship are reflected in the chart above.

Applicant’s monthly take-home pay is \$1,250.00 per month. She lives with her parents to save rent and pays them a modest amount to cover expenses. For transportation, she drives her aunt’s car and pays her car-related expenses. She makes a modest contribution to a 401k retirement account, and maintains a small savings account. Her net monthly remainder is \$290.00. Tr. 76-81.

When Applicant completed her SF-85P, and executed it on September 5, 2007, she failed to disclose any loan or financial obligation over 180 days delinquent. (SOR ¶ 2.a.) Applicant explained, she “did not know about them.” Tr. 82. In response to Department Counsel’s questions, she stated:

Q. So you’re stating now at the time that you filled out the application you were not aware that you had any delinquent debts at all?

A. I did not know about the –

Q. That were over 180 days delinquent?

A. No.

Q. When did you first become aware that you did have those debts?

A. When I received the paperwork from you, the first set of paperwork from the Government, from you. Tr. 83.

As noted in the above chart, Applicant's former fiancé has submitted a notarized statement acknowledging responsibility for debts in SOR ¶¶ 1.g., 1.i., and 1.k. These debts total \$38,157.00. Applicant further explained that all of her mail to include bills were going to her former fiancé's house. She estimates that she did not receive mail "probably 18 months" until he provided her with a "yellow envelope" in "early 2008" with all of her mail since they separated. Tr. 103. Applicant submitted a change of address with the post office when she left her fiancé's house, but claims no mail was forwarded. She added that many of the bills on the SOR were household related commingled accounts, which her fiancé had been paying, and when she left her fiancé's home, presumed he would continue to pay those accounts. Tr. 103-105. She stated she paid her debts in a timely manner "before [her fiancé] came along, and [she is] doing that again." Tr. 120.

Applicant did not submit any character references or employee evaluations. She did emphasize that she "loves" her job, that she is "doing the best [she] can [a]nd without [her] job [she] can't do that." She added that she would rather lose her job than do anything illegal. Tr. 94, 121.

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.)

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 trustworthiness 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 [sensitive] 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 trustworthiness 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. Applicant accumulated 18 delinquent accounts, totaling \$51,000.00 as noted *supra*. Her indebtedness began in 1990 with her tax lien and the other accounts have been in arrears for several years and have been ongoing. The

evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The Guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from financial difficulties. Applicant experienced several periods of unemployment after a long-term failed relationship in which she and her former fiancé had commingled many of their household and personal accounts. Three potential mitigating conditions apply under this concern.

Under AG ¶ 20(b), it may be mitigating where “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.” As noted, Applicant was involved in a long-term relationship that ended. During this relationship, Applicant’s finances became commingled with those of her fiancé. When Applicant left her fiancé’s home, she presumed or believed he was responsible for the majority of the debts incurred they had acquired together. To her fiancé’s credit, he acknowledged responsibility for a majority of debts alleged against Applicant. For the remaining debts, Applicant has struggled to address them. On a practical level, Applicant’s position is understandable, but legally, as she found out, creditors pursue debtors if they have a legal basis to do so. Additionally and after her break-up, Applicant experienced significant periods of unemployment, the first occurring in 2005 and the most recent ending in 2007. She has been continuously employed since September 2007. Given the facts as presented, I am able to give Applicant partial credit under this mitigating condition.

AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” I note Applicant’s financial problems are not recent, and she has been employed since September 2007. While it took some time for Applicant to address her indebtedness, I note that she did file a change of address after leaving her fiancé’s home and claims she did not receive any forwarded mail. She first became aware of the full extent of her indebtedness after the Government initiated these proceedings. Since these proceedings began, I note Applicant has become fully engaged in addressing her indebtedness. While she has work to do, she has made considerable progress in addressing each and every debt alleged. Her post-hearing submissions shored up missing or incomplete information not presented in her hearing. Full credit under this mitigating condition is warranted.

AG ¶ 20(e) applies where “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.” As the above chart demonstrates, Applicant has successfully challenged/disputed a number of her debts and had them removed from her credit report. She has also challenged three debts identified and acknowledged by her former fiancé as debts for which he is legally responsible. While Applicant is not totally exonerated from her legal responsibility as it pertains to these debts, her former fiancé’s notarized statement provides her with a reasonable basis to claim she is not

responsible for paying these debts. Lastly, she retained counsel to dispute the debt in SOR ¶ 1.k. Full credit under this mitigating condition is also warranted.

Guideline E, Personal Conduct

Under Guideline E (Personal Conduct), the Government's concern is 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. AG ¶ 15.

AG ¶ 16 indicates two conditions that could raise a security concern and may be disqualifying in this case, including:

(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

(e) personal conduct, or concealment of information about one's conduct, that creates vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Posing potential security concerns are Applicant's documented omissions of her debts over 180 days from her SF-85P submitted in September 2007. Her omissions are attributable to her belief that her former fiancé had assumed responsibility for the debts she and he had incurred together and those debts that were commingled when they were sharing a household. Adding credence to Applicant's explanation was her having filed a change of address, which unfortunately did not result in her mail being forwarded to her.

Having had an opportunity to observe Applicant testify, I found her explanation credible in light of the rather unfortunate and unique circumstances she found herself in. Adding to the credibility of her explanation is the fact her state of financial responsibility was stable before and after her relationship with her former fiancé. I found Applicant to be credible and that she acted in good faith. While Applicant could reasonably have been expected to be more diligent and thorough when answering Question 20, her judgment lapses and confusion are not enough to impute knowing and willful falsification under Guideline E.

Applicant's explanation of her omissions is persuasive enough to avert inferences of knowing and willful omission. There being no misconduct substantiated, discussion of Personal Conduct Mitigating Conditions is not warranted.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance 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 security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

As a dedicated employee, Applicant has been willing to do whatever is necessary to achieve the state of financial responsibility. She has addressed each creditor and successfully mitigated the majority of her debts. She lives a modest lifestyle and does not spend extravagantly. She is doing her level best to recover from the financial fallout of a failed relationship. While Applicant's financial state is not where it should be, it is clear from her actions that she takes this process very seriously and is determined to resolve her relatively recent adverse credit. Considering her demeanor and testimony, I believe Applicant has learned from her mistakes, and it is unlikely she will incur future debt that she is unable to pay.

Also noteworthy is Applicant's past behavior, which serves as a reliable indicator of future behavior. In particular, the adverse financial history alleged in her SOR arose during her long-term relationship with her former fiancé and was exacerbated as a result of the way she and her then fiancé commingled their finances. When her engagement ended, so did her support. She struggled to find employment for approximately 18 months and during that time period, her debts and those debts purported to be hers fell behind. Applicant is living a modest lifestyle and at age 54 finds herself living with her parents and driving her aunt's car to make ends meet. She enjoys her job and emphasized she would not do anything inappropriate to net an unlawful gain. Her modest income in this current economy is her lifeline to achieving and maintaining financial responsibility.

I also considered the facts of the case and nine adjudicative process factors listed at AG ¶ 2(a) *supra* relating to Personal Conduct concerns. Falsifications are a core security concern. Inasmuch as Applicant's behavior was not deliberate or willful, no misconduct was established precluding the necessity of further discussion under the Whole Person Concept.

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant met her ultimate burden of persuasion to obtain a favorable public trust position determination. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"⁴ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude she is eligible for a public trust position.

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:	FOR APPLICANT
Subparagraph 1.a. – r.:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a.:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to sensitive information is granted.

ROBERT J. TUIDER
Administrative Judge

⁴See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).