



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



In the matter of:	)	
	)	
	)	ADP Case No. 08-04201
SSN:	)	
	)	
Applicant for Public Trust Position	)	

**Appearances**

For Government: Paul M. DeLaney, Esq., Department Counsel  
For Applicant: *Pro Se*

March 23, 2009

**Decision**

LAZZARO, Henry, Administrative Judge

Applicant mitigated the trustworthiness concern that arose from financial problems she experienced which are directly attributable to her February 2006 divorce. She has satisfied most of her delinquent creditors and she is making payments under a repayment agreement she entered into with the Internal Revenue Service.

On October 17, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing to Applicant its trustworthiness concerns.<sup>1</sup> The SOR alleges a security concern under Guideline F (financial considerations). Applicant submitted a response to the SOR that was received by DOHA on November 12, 2008. She admitted the allegation contained in SOR subparagraph 1.e, denied the allegations contained in subparagraphs 1.a - 1.d, and requested a hearing.

---

<sup>1</sup> This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive), DoD Regulation 5200.2-R, dated January 1987, as amended (Regulation), and the revised adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

The case was assigned to me on December 15, 2008. A notice of hearing was issued on December 22, 2008, scheduling the hearing for January 15, 2009. An amended notice of hearing was issued on January 5, 2009, rescheduling the hearing to February 12, 2009. The hearing was rescheduled to coordinate it with the scheduling of additional hearings I received that were to be heard in the same general area. The government submitted four documentary exhibits that were marked as Government Exhibits (GE) 1-4 and admitted into the record without objection. Applicant testified and submitted twelve documentary exhibits that were marked as Applicant's Exhibits (AE) 1-12 and admitted into the record without objection. The record was held open to provide Applicant the opportunity to submit additional documentation in support of her case. Eighteen documents were timely received, marked as AE 13-30 and admitted into the record without objection. Department Counsel's forwarding memorandum was marked as App. Ex. 1<sup>2</sup> and is included in the file. The transcript was received on February 24, 2009.

### **Findings of Fact**

Applicant's admission to the one SOR allegation is incorporated herein. In addition, after a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is 49 years old. She has been employed as a project manager by a defense contractor since 2007. She was employed outside the defense industry as a senior business analyst by an insurance company from 1982 until 2002, and by a state educational association from August 2003 to 2007. She cleaned houses from 2002 to 2003. Applicant was earning \$35-40,000 annually at the insurance company when she lost her job due to the company downsizing. She was earning about \$85,000 at the education association when she left to take her present position to avoid the possible loss of employment as her employer was reorganizing. Her current salary is about \$72,500 annually.

Applicant graduated from high school in 1977. She attended college from 1977-80, but did not obtain a degree. She has been married and divorced three times. Her first marriage was terminated on September 8, 1987; her second marriage was terminated on July 10, 1996; and her last marriage was terminated on February 14, 2006. Applicant has two children. Her daughter, born of her first marriage, is 23 years old; and her son, born of her third marriage, is eight years old. Applicant shares joint custody of her son with his father. The joint custody arrangement includes an equal division of time spent by the boy residing with each parent, and requires the boy's father to pay Applicant \$127 per month for child support.

---

<sup>2</sup> Department Counsel did not object to the admission of any document submitted by Applicant, but did ask that I limit the weight to be given to those items I have marked as AE 22 and AE 24-28 because they are not signed by either Applicant or her ex-husband. AE 22 has no bearing on my decision. AE 24-28 are copies of individual and corporate tax returns, each of which were prepared and/or signed by an accountant. While I do not find it unusual that the copy of a tax return prepared by an accountant and retained by an individual would be unsigned, I will consider the fact that they are unsigned and accord them the appropriate weight they deserve in arriving at my decision.

Applicant's ex-husband lost his job with a trucking company in September 2000. They downsized, including selling their house and moving to a smaller residence. In May 2002, Applicant's ex-husband purchased a trucking business with another couple who were apparently only investors in the enterprise. The business was set up as a Subchapter S Corporation with Applicant, her ex-husband and the other two parties each allocated a 25% interest in the corporation. Applicant's ex-husband was installed as the president of the company and he solely operated the business while Applicant and the other couple functioned as no more than silent partners.

The trucking business tax return for the year 2002 (AE 25) lists gross receipts of \$1,184,233, compensation paid to officers of \$20,000, salaries and wages of \$462,640, and taxable income of \$25,902. Applicant's individual tax return for 2002 (AE 24), filed jointly with her ex-husband, lists wages of \$77,454, unemployment compensation of \$13,299, and adjusted gross income of \$91,180.

The trucking business tax return for the year 2003 (AE 28) lists gross receipts of \$1,329,013, compensation paid to officers of \$80,000, salaries and wages of \$385,887, and taxable income of \$66,333. Applicant's individual tax return for 2003 (AE 26), filed jointly with her ex-husband, lists wages, etc., of \$113,818, an IRA distribution of \$78,404, pensions and annuities of \$231,403, and adjusted gross income of \$209,191.

Applicant's 2004 individual tax return (AE 30) was filed as head of household and separate from her ex-husband. It lists wages, etc., of \$76,349, taxable pension of \$10,000, Subchapter S Corporation income of \$45,195, and adjusted gross income of \$132,359. It also indicates an underpayment of federal income tax in the amount of \$5,877.

SOR subparagraph 1.a lists a delinquent credit card debt owing in the amount of \$45,424 that was charged off as a bad debt. The account was opened in July 2003, and the date of last activity listed in Applicant's CBRs for the account is September 2005. Applicant satisfied this account fully in September 2008, by paying the creditor a negotiated settlement in the amount of \$14,100.

The debt listed in SOR subparagraph 1.b is a credit card debt owing in the amount of \$9,676 that was charged off as a bad debt. This account was opened in July 2004, and the date of last activity listed in Applicant's CBRs for the account is September 2005. Applicant satisfied this account fully in October 2008, by paying the creditor a negotiated settlement in the amount of \$3,300.

SOR subparagraph 1.c lists another credit card debt owing in the amount of \$22,863 that was charged off as a bad debt. This account was opened in September 2004, and the date of last activity listed for this account is September 2005. Applicant satisfied this account fully in January 2008, by paying the creditor a negotiated settlement in the amount of \$6,700.

The debt listed in SOR subparagraph 1.d is another credit card debt owing in the amount of \$8,104. This account was transferred from a department store to the collection agency that is listed as the creditor in the SOR. The account was opened with the store in

February 2003, and the date of last activity on the account with the store, as listed in Applicant's CBR dated January 11, 2008 (GE 4), is September 2005.

The last debt listed in the SOR is for Applicant's unpaid federal income taxes, penalties and interest for the tax year ending December 31, 2005, owing in the amount of \$20,564. Applicant has entered into a repayment agreement with the Internal Revenue Service under which she is making monthly payments of \$301. As of February 4, 2009, the amount owing had been reduced to \$19,802.36.<sup>3</sup>

Applicant obtained the funds to settle the debts listed in SOR subparagraphs 1.a - 1.d by withdrawing money from her retirement accounts and as a gift from a friend. She is under no obligation to repay the gift, but testified she will when and if she has the funds available. She still has approximately \$35,000 in retirement accounts, but virtually no other savings. Her monthly expenses leave her with very little discretionary income.

Applicant attributes her financial problems to the separation from her now ex-husband, the ensuing divorce, the legal expenses and debt allocation she incurred from the divorce, and her anticipation of a sizable settlement from the divorce that was not forthcoming. Specifically, Applicant expected to receive as much as \$500,000 as her share of the trucking business. Instead, she received nothing from the business. She was assigned all personal debt while her ex-husband was assigned the business debt. Her attorney's fees in connection with the divorce were over \$38,000.

Applicant testified the credit card debt she accumulated was incurred because payment of her legal expenses did not leave her with sufficient funds on which to live. Because she had expected to receive a sizable distribution from the business, she was not concerned about the debt she was accumulating. The letter from her attorneys, dated October 28, 2005 (AE8), corroborates her testimony, particularly where they wrote: "The business valuation was lower than we had hoped. . . . When we received the business valuation, we had a very difficult turning point in your case." Further supporting Applicant's claim of her overall financial responsibility and the situational nature of the delinquent debt listed in the SOR is the fact that her January 11, 2008 CBR (GE 4), lists 47 accounts that were opened between January 1987 and December 2006, in which the method of payment is described as "Pays as Agreed."

## POLICIES

Positions designated as ADP I and ADP II are classified as sensitive positions.<sup>4</sup> The standard to 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

---

<sup>3</sup> Applicant actually owed \$24,387.45 on this debt as of January 7, 2008 (GE 2). Thus, she has reduced this indebtedness by substantially more than is indicated by simply comparing the amount listed in the SOR with the balance that was still owing in February 2009.

<sup>4</sup> Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3.

person to sensitive duties is clearly consistent with the interests of national security.<sup>5</sup> Trustworthiness adjudications apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management.<sup>6</sup> Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination is made.<sup>7</sup>

An Administrative Judge must consider the disqualifying and mitigating conditions in the Adjudicative Guidelines when evaluating an Applicant's suitability for a public trust position. The Administrative Judge must also consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. The entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The protection of the national security is the paramount consideration, and any doubt concerning personnel being considered for access to sensitive information will be resolved in favor of national security. Decisions are made in terms of the national interest and are not determinations as to the loyalty of the applicant concerned.<sup>8</sup>

The Government is required to present evidence to establish controverted facts alleged in the SOR.<sup>9</sup> 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.<sup>10</sup> The Applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

## **Analysis**

### **Guideline F, 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 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. . . . (Adjudicative Guideline [AG] 18)

Applicant had four delinquent credit card debts that were either charged off as bad debts or submitted for collection. The amount owing on those accounts was over \$85,000.

---

<sup>5</sup> Regulation ¶ C6.1.1.1.

<sup>6</sup> Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004.

<sup>7</sup> Regulation ¶ C8.2.1.

<sup>8</sup> Section 7 of Executive Order (EO) 10865.

<sup>9</sup> Directive ¶ E3.1.14.

<sup>10</sup> Directive ¶ E3.1.15.

She also had delinquent federal income taxes for the tax year ending December 31, 2005, that were owing in the amount of \$20,564. Disqualifying Conditions (DC) 19(a): *inability or unwillingness to satisfy debts*; and DC 19(c): *a history of not meeting financial obligations* apply.

Applicant properly attributes her financial problems to her separation from her now ex-husband and their ensuing 2006 divorce. She reasonably anticipated a large settlement from the business she and her ex-husband owned with another couple. She reasonably did not anticipate the very large attorney's fees she incurred in obtaining the divorce or the allocation of all personal debt to her. She has now satisfied all debt listed in the SOR with the sole exception of the delinquent taxes. She has entered into a repayment agreement with the IRS and she reduced the amount she owed to the IRS by about \$4,500 between January 2008 and February 2009.

Applicant has a long history of steady employment in very responsible positions. During the brief period she was between jobs in those responsible positions, Applicant supported her family by cleaning houses. Most significantly, Applicant has a long history of living a financially responsible lifestyle and paying her bills in a timely manner as documented in her January 2008 CBR.

Mitigating Conditions (MC) 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*; MC 20(b): *the conditions that resulted in the financial problems were largely beyond the person's control (. . . divorce or separation), and the individual acted responsibly under the circumstances*; and MC 20(d): *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts* apply.

The objective of a trustworthiness determination is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to sensitive information. Indeed, the "whole person" concept recognizes we should view a person by the totality of her acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has mitigated the financial considerations security concern. She has overcome the case against her and satisfied her ultimate burden of persuasion. It is clearly consistent with the interests of national security to grant Applicant access to sensitive information. Guideline F is decided for Applicant.

## **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

Subparagraphs 1.a-e:       For Applicant

## **Conclusion**

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

Henry Lazzaro  
Administrative Judge

