



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



In the matter of:

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) ADP Case No. 10-04781  
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Applicant for Public Trust Position

**Appearances**

For Government: Candace L. Garcia, Esquire, Department Counsel

For Applicant: *Pro se*

April 29, 2011

**Decision**

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HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to sensitive information is denied.

Applicant submitted her Questionnaire for Public Trust Position (SF 85P) on July 9, 2009. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR), detailing trustworthiness concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) on October 18, 2010. The action was taken under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the *Adjudicative Guidelines For Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant answered the SOR in writing on November 2, 2010, and requested a hearing before an Administrative Judge. DOHA received her request on November 8, 2010. Department Counsel was prepared to proceed on January 24, 2011, and I

received the case assignment on February 1, 2011. DOHA issued a notice of hearing on February 23, 2011, and I convened the hearing as scheduled on March 10, 2011. The Government offered exhibits marked as GE 1 through GE 5, which were received and admitted into evidence without objection. Applicant testified. DOHA received the hearing transcript (Tr.) on March 18, 2011. I held the record open until March 31, 2011 for Applicant to submit additional matters. Applicant timely submitted AE A through AE T, which was admitted into the record without objection. The record closed on March 31, 2010.

## **Procedural Ruling**

### **Notice**

At the hearing, Applicant indicated she did not receive the hearing notice. (Tr. at 12.) I advised Applicant of her right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived her right to 15 days notice. (Tr. at 12.)

## **Findings of Fact**

In her Answer to the SOR, dated November 2, 2010, Applicant admitted the factual allegations in the SOR. She denied the Guideline F concern.

Applicant, who is 49 years old, works as a patient care advocate for a Department of Defense contractor. She began her current employment in April 2009.<sup>1</sup>

Applicant graduated from high school in 1979. She married in 1979 and divorced in 2000. She has six children and seven grandchildren. Her daughters are ages 30, 28, 26, and 25, and live independently. Her sons are ages 20 and 17 and reside with her, as does her boyfriend.<sup>2</sup>

Applicant began working about three years before her divorce at minimum wage jobs. In 1999, she started working at a gasoline station, which included a fast food restaurant. She eventually became the manager of this business. She resigned her position in October 2007 because the financial issues of the business caused her severe stress. In December 2007, she started working as a customer service representative for a financial services company. Four months later, she left this job and began working as an administrative assistant at a manufacturing business. She worked at this job for six months. After four to six weeks of unemployment, she began working as a customer service representative for a retail business. She left the retail job for her current position. She did not collect unemployment benefits during her periods of unemployment.<sup>3</sup>

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<sup>1</sup>GE 1; Tr. 24.

<sup>2</sup>GE 1; Tr. 24, 39-41, 49-50.

<sup>3</sup>GE 1; Tr. 33, 44-48.

Applicant earned \$34,000 a year when working as the gasoline station manager. She earned more than \$10,000 a year less at her subsequent jobs. Her federal and state tax returns indicate an adjusted gross income of \$34,879 for 2007, \$20,119 for 2008, and \$23,478 for 2009.<sup>4</sup>

Applicant currently earns \$12.32 an hour and \$18.48 an hour for overtime. Her net monthly pay averages \$1,652 without overtime. Her net earnings are larger when she works overtime.<sup>5</sup> Her sons are now working, but do not contribute to household expenses. This summer, she will ask them for financial assistance with the electric bill. Her boyfriend contributes \$500 a month to household expenses, and she receives \$200 a month in food stamps. Her monthly expenses average \$2,100. When she has extra money, she transfers the money to her savings account to help with extra costs, such as car maintenance, tires, and summer electric bills. She recently received her 2010 tax refund of \$2,400, which she placed in her savings account for unanticipated or one-time expenses.<sup>6</sup>

Applicant owns a 2002 Ford vehicle. She does not have a loan on this car. She has not taken a vacation since she left her gasoline station position. Last summer, her boyfriend took her on an overnight trip, for which he paid. She does not use credit cards.<sup>7</sup>

While reviewing the SOR debts at the hearing, Applicant advised that she does not recognize the creditors for the debts listed in SOR allegations 1.b, 1.g, 1.h, 1.i, and 1.p, which are debts now owned by credit collection companies. She acknowledged the remaining debts as hers. When she worked as a manager, she acquired credit cards. When her income declined, she encountered problems with paying her credit cards and other bills. She stated that she still did not have any money to pay these overdue debts and has not paid the debts.<sup>8</sup>

Applicant saved her money and purchased a house in 2003 for approximately \$120,000. Three years later, her car stopped operating and required expensive repairs. Because she did not have the money to repair her car, she decided to refinance her house, which she now regrets. She refinanced her house in 2006 for \$157,000 with a two-year interest-only loan. She tried to refinance the house a second time, but when the house appraised at lower than her mortgage debt, she could not get a loan. At the same time, she encountered problems paying her interest-only loan because her income had declined by one-third. The mortgage company eventually foreclosed on her

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<sup>4</sup>AE N - AE T; Tr. 44-46.

<sup>5</sup>AE L. In January 2011, Applicant's net pay was \$2,141. In February 2011, her net pay was \$2,113. In March 2011, her net pay was \$1,579. *Id.*

<sup>6</sup>Tr. 39-40, 49-51.

<sup>7</sup>Tr. 69-71.

<sup>8</sup>Tr. 35-38, 56.

house. She has not received any deficiency notices from the mortgage company, and her most recent documentation from the company does not indicate that she has an unpaid balance on her mortgage. In 2008, the mortgage company provided her with a 1099-A form for acquisition or abandonment of secured property, which was included as a document with her 2008 federal and state tax returns, but was not computed as income on her tax returns for that year.<sup>9</sup>

At the hearing, Applicant indicated that she had not received financial counseling. She also stated that she was seriously considering filing bankruptcy. Subsequent to the hearing, Applicant submitted a copy of a contract showing that she retained the services of a company to help her prepare the necessary documents to file a Chapter 7 bankruptcy petition on her own.<sup>10</sup> She also completed the financial counseling course required for filing bankruptcy.<sup>11</sup> She pays her current bills each month.<sup>12</sup>

When she completed her SF 85P, Applicant answered “no” to Question 22b, which asked if she had any loans or financial obligations more than 180 days delinquent. She denies that she intentionally mislead the Government or tried to hide her past debts from the Government. At the hearing, she did not provide a reason for her actions, as she could not explain what she was thinking when she completed her SF 85P. She said she focused primarily on making sure her addresses and dates of residency were correct.<sup>13</sup>

Applicant’s immediate supervisor testified on her behalf. She understood that the reason for the hearing related to Applicant’s debts, which were not a concern to her. She described Applicant as a great worker, who is dependable, reliable, trustworthy, and honest, and who works well with others. As for Applicant’s honesty, Applicant’s supervisor described an incident which Applicant brought to the supervisor’s attention. Applicant advised her supervisor that she was receiving top scores on all her calls, which Applicant thought this was incorrect. Applicant’s supervisor checked out the information and agreed with Applicant. Applicant’s employer pays a bonus based these scores. By notifying her supervisor of the problem. Applicant negatively impacted the amount of her bonus. In her supervisor’s opinion, this action of Applicant showed that Applicant is not deceptive for monetary gain. Applicant recently received a merit increase in pay, as well as a DoD-mandated increased in pay. She recommended Applicant for a trustworthiness determination.<sup>14</sup>

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<sup>9</sup>AE H; AE N; Tr. 28-33, 60-62.

<sup>10</sup>AE F; Tr. 52-55, 64.

<sup>11</sup>AE G.

<sup>12</sup>AE B; AE C; AE D; AE E; AE M.

<sup>13</sup>Tr. 41-42, 66-67.

<sup>14</sup>*Id.* 73-82.

## 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 commonsense 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 *also* 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 experienced problems with paying her bills when she left her manager position in 2007, causing her to accumulate delinquent debts. She has been unable to pay her obligations. 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. Under AG ¶ 20(a), the disqualifying condition may be mitigated where “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.” Applicant's financial worries arose about three years ago when her income declined by one-third. Her income continues to remain significantly below her 2007 earnings. She pays her current bills and manages her limited income carefully. Her current financial management does not raise a security concern, but her past debts do. This mitigating condition has some applicability.<sup>15</sup>

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.” Applicant's financial problems began when she left her manager position due to stress created by the

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<sup>15</sup>ISCR Case No. 09-08533 (App. Bd. Oct. 6, 2010)

financial decisions of the business owner. Applicant had no control over the actions of the business owner. Applicant found new employment within two months, but she took a significant decrease in salary. Her income has not improved, so she has been unable to pay her overdue debts. She can only pay her current bills. This mitigating condition is partially applicable.

Evidence that “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” is potentially mitigating under AG ¶ 20(c). After the hearing, Applicant received financial counseling when she took the first steps towards filing for bankruptcy. Under her state’s anti-deficiency statutes, she is not be liable for any unpaid mortgage debt following the sale of her property because her loan was a purchase money mortgage. See State Statutes 33-701 *et seq* and 33-801 *et seq*. Not only is she not liable for her mortgage under state law, the mortgage company did not make a demand for payment when she recently contacted the mortgagor for information on her debt. Thus, her mortgage debt is resolved. This mitigating condition has limited application.

AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Applicant has not contacted the creditors to establish a payment plan nor has she paid her overdue debts. This mitigating condition is not applicable.<sup>16</sup>

## **Guideline E, Personal Conduct**

AG ¶ 15 expresses the trustworthiness concern pertaining to personal conduct:

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 ¶ 16(a) describes a condition that could raise a trustworthiness concern and may be disqualifying:

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.

For AG ¶ 16(a) to apply, Applicant’s omission, concealment or falsification in her answer must be deliberate. The Government established that Applicant omitted a material fact from her SF 85P when she answered “no” to Question 22b about debts

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<sup>16</sup>AG ¶¶ 20(e) and 20(f) are not applicable in this case.

over 180 days delinquent. This information is material to the evaluation of Applicant's trustworthiness to hold a position of public trust and to her honesty. In her response, she agreed to the facts set out in SOR allegation 2.a. However, at the hearing, she denied that she had an intent to mislead or to hide this information from the Government. When a falsification allegation is controverted, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.<sup>17</sup>

When she completed her SF 85P in 2009, Applicant focused on providing accurate information about her residential addresses and length of residency at these addresses. She did not pay careful attention to the financial questions and readily admits that she has no explanation for her answer. Her supervisor testified about how Applicant advised her about problems with Applicant's top rating scores. Applicant did not believe her scores were correct, and Applicant was right. Applicant's actions resulted in a lower bonus. Her supervisor considered her actions a reflection of her honesty. Applicant made no excuses for her failure to read the questions carefully, an indication of her honesty. After consideration of Applicant's credible testimony and the record evidence, I find that Applicant did not intentionally falsify her SF 85P. The Government has not established intentional falsification. Guideline E is found in favor of Applicant.

### **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. The decision to grant or deny a trustworthiness determination requires a careful weighing of all relevant factors,

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<sup>17</sup>See ISCR Case No. 09-07551 (App. BD. Mar. 1, 2011); ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).



both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a trustworthiness concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a public trust position should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate trustworthiness concern.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant married young. She raised six children. The last 10 years she did so on her own. She works hard, but does not earn a high salary. She pays her current bills and carefully manages her limited financial resources. Her financial problems began when she left a highly stressful job, resulting in a one-third loss of income, making it difficult to pay her bills. She regrets refinancing her house because eventually she could not pay her mortgage and lost her house to foreclosure. She fell behind in other bills because she over-extended herself when she had more income. She has been unable to pay her overdue debts. Of course, the issue is not simply whether all her debts are paid;-it is whether her financial circumstances raise concerns about her fitness to hold a position of public trust. She is just beginning the process to file bankruptcy and resolve these debts. At the present, her debts remain unresolved, and she lacks the financial means to pay these debts. Thus, she has not mitigated the Government's trustworthiness concerns arising from her finances. She is an honest person. Her failure to list her debts resulted from carelessness, not a deliberate intent to mislead or hide information from the Government.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant mitigated the trustworthiness concerns arising from her personal conduct, but she has not mitigated the trustworthiness concerns raised about her finances.

### **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
Subparagraphs 1.a-1.l:	Against Applicant
Subparagraph 1.m:	For Applicant
Subparagraphs 1.n-1.r:	Against 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 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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MARY E. HENRY  
Administrative Judge