



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



In the matter of: )  
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----- ) ADP Case No. 12-03447  
 )  
Applicant for Public Trust Position )

**Appearances**

For Government: Gina Marine, Esq., Department Counsel  
For Applicant: *Pro se*

06/19/2014

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges six delinquent debts, totaling \$7,922. She is credited with resolving one debt for \$224, reducing the delinquent debt total to \$7,698. She received a substantial pay raise in March 2014 and a \$5,000 tax refund in April 2014; however, she did not make any payments to the five remaining SOR creditors over the last 12 months. Her efforts to resolve these five debts are insufficient. Financial considerations concerns are not mitigated. Her eligibility to occupy a public trust position is denied.

**Statement of the Case**

On November 15, 2011, Applicant submitted a Questionnaire for National Security Positions version of an application for a public trust position. (GE 1) On February 26, 2014, the Department of Defense (DOD) issued an SOR to Applicant, pursuant to Department of Defense Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program (Directive), dated January 2, 1992, as amended, and modified; Department of Defense (DoD) Regulation 5200.2-R, Personnel Security Program, dated January 1987, as amended (Regulation); and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleges trustworthiness concerns under Guideline F (financial considerations). (HE 2) The SOR detailed reasons why DOD was unable to find that it is clearly consistent with the national interest to grant or continue Applicant's eligibility to occupy a public trust position, which entails access to sensitive information. (HE 2) DOHA recommended referral to an administrative judge to determine whether such access to sensitive information should be granted, continued, denied, or revoked.

On April 11, 2014, Applicant responded to the SOR. (HE 3) On May 13, 2014, Department Counsel indicated she was ready to proceed on Applicant's case. On May 15, 2014, the Defense Office of Hearings and Appeals (DOHA) assigned Applicant's case to me. On May 23, 2014, DOHA issued a hearing notice, setting the hearing for June 10, 2014. (HE 1) Applicant's hearing was held as scheduled.

At the hearing, Department Counsel offered four exhibits, and Applicant offered six exhibits. (Tr. 18-19, 22-24; GE 1-4; AE A-F) There were no objections, and I admitted GE 1-4 and AE A-F. (Tr. 20, 24) On June 18, 2014, DOHA received the transcript of the hearing.

### **Findings of Fact<sup>1</sup>**

Applicant's SOR response admitted responsibility for the SOR debts in ¶¶ 1.a-1.f. She also provided some mitigating information. Applicant's admissions are accepted as findings of fact.

Applicant is a 32-year-old customer service representative employed by a defense contractor since January 2012. (Tr. 7, 9, 65; GE 1) In 2000, she graduated from high school. (Tr. 8) She has attended some college classes. (Tr. 8) She has never held a security clearance, and she has not served in the military. (Tr. 7; GE 1)

Applicant has never married, and she has two children ages one and five. (Tr. 61) She receives \$50 monthly in child support for her oldest child, and her monthly daycare expense is \$500. (Tr. 61, 71)

### **Financial Considerations**

Applicant's history of delinquent debt is documented in her credit reports, her August 14, 2012 Office of Personnel Management (OPM) personal subject interview (PSI), her November 18, 2013 responses to DOHA interrogatories, her SOR response, and her hearing record. (GE 2-4; SOR response) Her OPM PSI, responses to DOHA interrogatories, and SOR response provided specific notice to her of the debts causing trustworthiness concerns.

Applicant's SOR alleges six delinquent debts, totaling \$7,922 as follows: (1) ¶ 1.a (\$4,810) resulted from a vehicle loan and repossession in 2009; (2) ¶ 1.b (\$373) is a

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<sup>1</sup>Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

collection account; (3) ¶ 1.c (\$1,624) is a vehicle rental collection; (4) ¶ 1.d (\$757) is a bank debt; (5) ¶ 1.e (\$224) is a telephone company debt; and (6) ¶ 1.f (\$134) is an insurance company debt. (Tr. 26-35; GE 2-4) Applicant admitted responsibility for the six debts in her SOR response; however, at her hearing she said she believed her mother paid the debt in SOR ¶ 1.e (\$224—telephone company debt). (Tr. 32-34) I have credited her with mitigating the debt in SOR ¶ 1.e (\$224).

Applicant conceded that she spent money irresponsibly and generated delinquent debt. (Tr. 52-53; SOR response) In October 2013, she employed a credit repair and counseling company (CRCC) to help her with her finances. (Tr. 28-32; AE E) She paid CRCC \$89 a month, and CRCC attempted to and was successful at having at least one debt (non-SOR telecommunications debt for about \$600) removed from her credit report. (Tr. 26-32, 49-50) In her April 11, 2014 SOR response, Applicant indicated for each debt, “payment or arrangement[s] are in the process of negotiation.” These negotiations by CRCC have not yet resulted in any settlement agreements or any payments to any SOR creditors. (Tr. 62-64) Applicant said CRCC may have evidence of offers made to the creditors and settlement negotiations. (Tr. 31-32)

In April 2013, Applicant received a \$4,000 federal income tax refund, and she used the \$4,000 to purchase a vehicle. (Tr. 45) In April 2014, she received a \$5,000 federal income tax refund, and she used most of it to repair the vehicle (including transmission and air conditioning) purchased the previous year. (Tr. 43-45) She also spent \$1,000 to purchase clothing for her two children. (Tr. 44-45)

In 2010, Applicant’s landlord obtained three judgments against her for unpaid rent. (AE F; GE 2 at 6-7, 12-13) Applicant satisfied the three judgments, and the creditor indicated the debts were resolved. (AE F; GE 2 at 6-7, 12-13) In November 2013, she paid \$150 towards an old water bill for \$300. (Tr. 48) The judgments and water bill are non-SOR debts.

Applicant’s personal financial statement (PFS) showed the following monthly amounts: gross salary \$2,182;<sup>2</sup> net income \$1,640; expenses \$2,237; debts \$0;<sup>3</sup> and net remainder negative \$55. (GE 2 at 18) When she completed her PFS, her hourly wage was \$14. (Tr. 38) In March 2014, her hourly wage was increased to \$17, and she currently has a positive net remainder of about \$300. (Tr. 38-40) Applicant received some financial counseling or advice from CRCC. (Tr. 40)

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<sup>2</sup>Applicant listed monthly gross salary of \$2,182, monthly deductions of \$542, and monthly net salary of \$2,182. (GE 2 at 18) Her monthly net income might actually be \$1,640, which would substantially increase her negative net remainder to almost \$600.

<sup>3</sup>She did not disclose any delinquent debts or her vehicle repossession on her Questionnaire for National Security Positions version of an application for a public trust position because she did not want to delay to collect the necessary information for this form. (GE 1, 2)

## Character Evidence

Three coworkers and friends and Applicant's father provided statements supporting her access to sensitive information. (AE A-D) They described her as dependable, friendly, helpful, intelligent, and enthusiastic about her work and family. (AE A-D)

There is no evidence that Applicant abused alcohol or used illegal drugs. She contributes to her company and the Department of Defense. There is no evidence of criminal offenses, disloyalty, or that she would intentionally violate national security.

## Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Government's authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. *See Id.* at 527.

Positions designated as ADP I and ADP II are classified as "sensitive positions." 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." Regulation ¶ C6.1.1.1. 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, an 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 an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to sensitive information. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security and trustworthiness suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance [or access to sensitive information].” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance [or trustworthiness] determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

The protection of the national security and sensitive records is of 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.” 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.”

## **Analysis**

### **Financial Considerations**

AG ¶ 18 articulates the trustworthiness concern relating to financial problems:

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.

AG ¶ 19 provides two disqualifying conditions that could raise a trustworthiness concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts;” and “(c) a history of not meeting financial obligations.” In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

*Id.* (internal citation omitted). Applicant's history of delinquent debt is documented in her credit reports, August 14, 2012 OPM PSI, November 18, 2013 responses to DOHA interrogatories, SOR response, and hearing record. Applicant's SOR alleges six delinquent debts, totaling \$7,922. Her largest debt, resulting from a repossessed vehicle, has been delinquent since 2009. I have credited her with mitigating the debt in SOR ¶ 1.e (\$224), reducing the number of delinquent debts to five, and the total to \$7,698. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

(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;

(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;

(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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;<sup>4</sup> and

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<sup>4</sup>The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good faith" mitigating condition].

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Applicant's conduct in resolving her delinquent debt does not warrant full application of any mitigating conditions to all of her SOR debts; however, she provided some mitigating information. She stated her mother paid the debt in SOR ¶ 1.e (\$224), and she is credited with resolving this debt.

Applicant did not act responsibly under the circumstances. She received ample notice of her delinquent debts raising trustworthiness concerns. She responded to DOHA interrogatories on November 18, 2013, which included a summary of her August 14, 2012 OPM PSI. Applicant did not provide sufficient information about her finances to establish her inability to pay her SOR creditors anything, especially after her pay raise in March 2014, and her tax refund in April 2014. Applicant received some financial counseling from CRCC, and she is paying CRCC \$89 monthly.

In sum, Applicant conceded that she did not make any payments in the last 12 months to any of her five remaining SOR creditors with unresolved debts. She received a substantial pay raise in March 2014 and she could have at least settled and paid the debts in SOR ¶¶ 1.b (\$373) and 1.f (\$134). There is no financial documentation relating to five SOR creditors showing maintenance of contact with creditors<sup>5</sup> or other evidence

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ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001); internal citation and footnote omitted).

<sup>5</sup>"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012

of progress or resolution of these five SOR debts. She receives some credit for working with CRCC; however, she failed to ensure CRCC was diligently negotiating payment plans or settlements with her creditors. After she responded to the SOR, she should have had some payment plans started. There is insufficient evidence that her financial problems are being resolved, are under control, and will not occur in the future.

### **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) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress;
- and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

There is some evidence supporting approval of Applicant's clearance. Applicant is a 32-year-old customer service representative employed by a defense contractor since January 2012. She graduated from high school, and she has attended some college classes. She has two children ages one and five. Beginning in October 2013, she paid \$89 monthly CRCC to help her with her finances. Three coworkers and friends and Applicant's father described her as dependable, friendly, helpful, intelligent, and enthusiastic about her work and family. There is no evidence that Applicant abused alcohol or used illegal drugs. She contributes to her company and the Department of Defense. There is no evidence of criminal offenses, disloyalty, or that she would intentionally violate national security.

The financial evidence against approval of Applicant's clearance is more substantial at this time. Applicant has a history of financial problems. Her largest debt for her repossessed vehicle became delinquent in 2009. After crediting her with her mother's payment of the debt in SOR ¶ 1.e (\$244), she still has five unresolved

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at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or he maintained contact with creditors and attempted to negotiate partial payments to keep debts current.



delinquent debts totaling \$7,698. She was well aware of her financial problems as the OPM investigator discussed them with her during her August 14, 2012 OPM PSI, and this notice of trustworthiness concerns was repeated in the DOHA interrogatories and SOR. She could have made greater progress resolving or attempting to resolve those five remaining SOR debts. Her reliance on CRCC without follow-up to ensure CRCC was obtaining settlement amounts and payment plans showed insufficient effort to resolve her financial problems. In March 2014, she received a substantial pay raise. In April 2014, she spent \$1,000 to buy clothing for her two young children. Her failure to show greater progress by at least paying her two smallest SOR debts shows lack of financial responsibility and judgment and raises unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect sensitive information. See AG ¶ 18. More financial progress is necessary to mitigate trustworthiness concerns.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Financial considerations concerns are not mitigated. For the reasons stated, I conclude Applicant is not eligible for access to classified information at this time.

### **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 to 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	Against Applicant

### **Conclusion**

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

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Mark Harvey  
Administrative Judge