



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



In the matter of:	)	
	)	
[Name Redacted]	)	
	)	
	)	ADP Case No. 14-04252
	)	
Applicant for Position of Trust	)	

**Appearances**

For Government: Eric Borgstrom, Esq., Department Counsel  
For Applicant: *Pro se*

05/22/2015

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**Decision**

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HOGAN, Erin C., Administrative Judge:

Applicant did not mitigate the financial considerations trustworthiness concerns. Eligibility for access to sensitive information is denied.

**Statement of the Case**

On October 23, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guideline F, financial considerations. The action was taken under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant answered the SOR on November 20, 2014, and requested that her case be decided on the administrative record. On February 18, 2015, Department Counsel prepared a File of Relevant Material (FORM). The FORM was forwarded to Applicant on February 24, 2015. Applicant received the FORM on April 15, 2015. On

April 17, 2015, Applicant responded to the FORM and submitted additional matters. Her response to the FORM is marked and admitted as Item 8. In a memorandum dated April 22, 2015, Department Counsel indicated no objection to Applicant's Response to the FORM. (Department Counsel's memorandum is marked as Hearing Exhibit A (HE A)). The file was forwarded to the DOHA Hearing Office on April 30, 2014. The case was assigned to me on May 1, 2015.

### **Rulings on Evidence**

Item 7 of the FORM is a portion of the Report of Investigation (ROI) from the background investigation of Applicant. The five-page document is a summary of an interview of Applicant on April 26, 2013, in conjunction with her background investigation. DoDD 5220.6, enclosure 2, ¶ E3.1.20 states, "An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence." (see ISCR Case No. 11-13999 (App. Bd., February 3, 2014)). Item 7 is not authenticated.

Although Applicant, who is representing herself, has not raised the issue via an objection, I am raising it *sua sponte*. While it is clear that Department Counsel is acting in good faith, having highlighted the issue in a footnote in the FORM. (See Government's FORM, at 2, footnote 1) Applicant's failure to mention this issue in a response to the FORM is not a knowing waiver of the rule. Waiver means "the voluntary relinquishment or abandonment – express or implied – of a legal right or advantage, the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it. *Black's Law Dictionary*, 1717 (Bryan A. Garner ed., 9<sup>th</sup> ed., West 2009).

Applicant was not expressly informed of the requirement in ¶ E3.1.20 of the Directive requiring that an ROI be received into evidence with an authenticating witness. I cannot conclude she expressly waived this rule. She did not mention Item 7 in her response to the FORM. She may not have read the footnote advising her to review Item 7 for accuracy. I cannot conclude that Applicant's failure to address the accuracy of Item 7 in her Response to the FORM was a knowing waiver of the rules outlined in the Directive, enclosure 2, ¶ E3.1.20. Item 7 is not admissible and will not be considered in this Decision.

### **Findings of Fact**

Applicant is a 52-year-old employee of a defense contractor. She has worked for her current employer since April 2000. She submitted an application for a public trust position on January 30, 2013. She is married and has two adult daughters. (Item 3)

A subsequent background investigation revealed that Applicant has nine delinquent debts with an approximate total balance of \$130,894. The debts include: a charged-off second mortgage account in the amount of \$86,584, delinquent since March 2008 (SOR ¶ 1.a: Item 5 at 1; Item 6 at 4); a \$17,637 charged-off account, delinquent since January 2008 (SOR ¶ 1.b: Item 5 at 2; Item 6 at 4); a \$6,448 charged-

off account, delinquent since December 2007 (SOR ¶ 1.c: Item 5 at 2; Item 6 at 5); a \$6,185 collection account, delinquent since January 2008 (SOR ¶ 1.d: Item 5 at 2; Item 6 at 5); and a \$5,106 collection account, delinquent since April 2008 (SOR ¶ 1.e: Item 5 at 2; Item 6 at 10).

Additional delinquent accounts include: a \$1,685 charged-off credit card account, delinquent since October 2011 (SOR ¶ 1.f: Item 4 at 2; Item 5 at 1); a \$6,838 outstanding judgment filed against Applicant in October 2012 (SOR ¶ 1.g: Item 4 at 1; Item 5 at 4; Item 6 at 4); a \$229 collection account, delinquent since August 2010 (SOR ¶ 1.h: Item 6 at 10); and a \$182 collection account, delinquent since September 2011. (SOR ¶ 1.i: Item 6 at 11).

In response to the SOR, Applicant admits all of the alleged debts. She and her husband started a small printing paper and supplies business in 2002. In July 2004, their largest customer went out of business and filed for bankruptcy. As a result, the business lost \$300,000. Their largest customer never repaid the debts owed to them. Applicant and her husband used their personal credit cards and their second mortgage to fund the business. They kept the business open for three years. In October 2007, they closed the business. They made payments on their outstanding debts until January 2008. As a result of the housing crisis, Applicant's home was valued at less than the amount of the first and second mortgages. The home went to foreclosure and was sold for the value of the first mortgage. The second mortgage remains outstanding. (Item 2 at 3)

Applicant has worked for her employer for 15 years. She always exceeded the expectations of her managers and is considered a valued asset to the company. She loves her job and states it is an honor to serve the men, women, and their families who served our nation. (Item 2 at 4; Item 8)

In her response to the FORM, Applicant states that her credit defaults occurred during the 2008 financial crisis, which was the worst financial crisis since the Great Depression. She provided comments from her performance evaluations over the past 12 years to show that she is a valued employee. They all rate her as "exceeding expectations." Comments also include that Applicant can "be counted on to get the job done." She "consistently strives for excellence and fosters the same drive in all others on the team." She has shown "team leadership, mentoring ability, professionalism, drive and initiative." (Item 8). She is a valued employee who is held in high esteem by her supervisors.

As of April 17, 2015, Applicant admits that she has not taken steps toward resolving the debt. After reading the Government's FORM, she agrees it is something that she should do. She would like additional time so that she can begin contacting creditors regarding steps to resolve the debt. She would like to take any steps needed in order to obtain her security clearance. Her job is important to her and she is proud of her job. (Item 8)

## 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 overarching 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.”

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 to obtain 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 safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

## Analysis

### Guideline F, Financial Considerations

The trustworthiness concern 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 classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The concern is broader than the possibility that a person might knowingly compromise sensitive information to obtain money or something else of value. It encompasses concerns about a person's self-control, judgment, and other important qualities. A person who is financially irresponsible may also be irresponsible, unconcerned, or careless in properly handling and safeguarding sensitive information.

Here the evidence supports a conclusion that the Applicant has a history of financial problems or difficulties. The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 19. Two are potentially applicable in this case:

AG ¶ 19(a): inability or unwillingness to satisfy debts; and

AG ¶ 19(c): a history of not meeting financial obligations.

Applicant accumulated delinquent debts and was unable or unwilling to pay her financial obligations. The debts total approximately \$130,894. Most of the debts have been delinquent since 2008. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate financial considerations trustworthiness concerns are provided under AG ¶ 20. The following are potentially applicable:

AG ¶ 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;

AG ¶ 20(b): the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

AG ¶ 20(c): the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control; and

AG ¶ 20(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's financial problems were the result of a failed printing business which closed in 2008. However, Applicant has taken no initiative with regards to resolving the delinquent debts. During this time, she has been consistently employed with her current employer. AG ¶ 20(a) does not apply because Applicant's financial problems are ongoing. None of the delinquent debts are resolved. AG ¶ 20(b) does not apply because although Applicant's financial problems were the result of a business downturn, I cannot conclude she acted responsibly under the circumstances. Applicant took no steps to resolve the financial delinquencies over a period of six years, even the debts in SOR ¶¶ 1.h and 1.i which were for the minimal amounts of \$229 and \$182 respectively. AG ¶ 20(c) does not apply because Applicant's financial problems are unlikely to be resolved in the near future. Finally, AG ¶ 20(d) does not apply because Applicant has not made a good-faith effort to resolve her delinquent debts.

The concerns under financial considerations are not mitigated.

### **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 relevant 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. 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.

I considered Applicant's favorable employment history, her candor in admitting her financial problems, and the failure of her and her husband's printing business. While the financial problems were caused by circumstances beyond her control, Applicant did not develop a plan to resolve her delinquent debts. Most of the debts have been delinquent since 2008. An applicant is not required to establish that he or she has paid every debt listed in the SOR. All that is required is that applicant establish a plan to resolve the financial problems and take significant actions to implement the plan. Applicant failed to establish a plan to resolve her financial problems and pay her delinquent debts.

Overall, the record evidence leaves me with questions or doubts about Applicant's eligibility and suitability for a public trust position. For these reasons, I conclude Applicant's application for a trustworthiness position should be denied.

### **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.i:	Against 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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Erin C. Hogan  
Administrative Judge