



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



In the matter of:

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Applicant for Public Trust Position

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ADP Case No. 14-04079

**Appearances**

For Government: Tovah Minster, Esq., Department Counsel  
For Applicant: *Pro se*

10/20/2015

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**Decision**

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HARVEY, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges her debts were discharged under Chapter 7 of the Bankruptcy Code in October 2005. Her SOR also alleges two judgments and eight delinquent or collection accounts, totaling \$19,560. On August 29, 2014, she and her husband filed for discharge of their nonpriority unsecured debts under Chapter 7 of the Bankruptcy Code. Most of the debts listed in the 2014 bankruptcy are medical debts and student loan debts. Assuming her nonpriority unsecured debts were discharged in December 2014 or early 2015, three SOR debts are student loan debts, totaling \$10,143, and there is no evidence they have been brought to and retained in current status. Financial considerations concerns are not mitigated. Her eligibility to occupy a public trust position is denied.

**Statement of the Case**

On May 16, 2014, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of an application for a public trust position (SF 86). (Item 2) On September 26, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, and modified; DOD Regulation 5200.2-R,

*Personnel Security Program*, dated Jan. 1987, as amended (Regulation); and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleges trustworthiness concerns under Guideline F (financial considerations). (Item 1) The SOR detailed reasons why DOD was unable to find that it is consistent with the national interest to grant or continue Applicant's eligibility to occupy a public trust position, which entails access to sensitive information. (Item 1) The DOD CAF recommended referral to an administrative judge to determine whether access to sensitive information should be granted, continued, denied, or revoked.

Applicant provided an undated response to the SOR allegations, and she did not request a hearing. (Item 1) A complete copy of the file of relevant material (FORM), dated July 18, 2015, was provided to her on August 13, 2015.<sup>1</sup> Applicant did not respond to the FORM. The case was assigned to me on October 15, 2015.

### **Findings of Fact<sup>2</sup>**

In her Answer to the SOR, Applicant admitted the SOR allegations in ¶¶ 1.a-1.k. (Item 1) She also provided mitigating information. Her admissions are accepted as findings of fact.

Applicant is a 47-year-old licensed practical nurse (LPN) who has been employed by a defense contractor since December 2013.<sup>3</sup> In 1986, she graduated from high school. In 2004, she received a degree or diploma from a technical college. In 1987, Applicant married her spouse. In 1987 and 1999, her sons were born, and in 1992 and 1995, her daughters were born. She has never served in the military. She was unemployed from February to May 2013 and from July 2009 to December 2009. There is no evidence of felony or misdemeanor charges, alcohol abuse, use of illegal drugs, or security or rule violations.

### **Financial Considerations**

Applicant's May 16, 2014 SF 86 disclosed two negative financial issues: (1) An estimated \$20,000 medical debt accrued because she and her children did not have medical insurance. She made \$250 monthly payments until the debt went into collections and the payments increased; and (2) In August 2013, her home was sold at

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<sup>1</sup>The Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated July 23, 2015, and Applicant's receipt is dated August 13, 2015. The DOHA transmittal letter informed Applicant that she had 30 days after her receipt to submit information.

<sup>2</sup>Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

<sup>3</sup>The source of the information in this paragraph and the next paragraph is Applicant's May 16, 2014 Electronic Questionnaires for Investigations Processing (e-QIP) version of an application for a public trust position (SF 86). (Item 2)

foreclosure after she and her husband were unable to make the required payments under their adjustable rate mortgage (ARM).

Applicant's SOR ¶ 1.a alleges her debts were discharged under Chapter 7 of the Bankruptcy Code in October 2005. Her May 28, 2014 credit report and SOR also allege two judgments and eight delinquent or collection accounts, totaling \$19,560. The SOR allegations are as follows: ¶ 1.a (Chapter 7 bankruptcy discharged her debts in October 2005), ¶ 1.b (judgment for \$403), ¶ 1.c (judgment for \$7,920), ¶¶ 1.d to 1.f (three delinquent student loans for \$5,194; \$3,170; and \$1,779, and her May 28, 2014 credit report indicates the status is 120 days or more past due), ¶ 1.g (delinquent debt for \$355), ¶ 1.h (collection account for \$574); ¶ 1.i (collection account for \$89); ¶ 1.j (collection account for \$40); and ¶ 1.k (collection account for \$36).

In August 2014, Applicant filed for protection under Chapter 7 of the Bankruptcy Code. On Schedule F of Applicant's August 2014 bankruptcy filing, Applicant and her husband disclosed \$107,785 in unsecured nonpriority debt, and some of the largest debts are as follows: (1) a judgment for \$7,920 on April 20, 2012; (2) six student loans for \$10,143; \$9,257; \$27,633; \$4,375; \$10,751; and \$6,419;<sup>4</sup> (3) two medical judgments in 2012 for \$1,004 and \$1,703; and (4) a medical debt for \$26,000.<sup>5</sup> (Item 5) For most accounts, she indicated the amount of the claim was "unknown." (Item 5)

On Schedules I and J of Applicant's August 2014 bankruptcy filing, Applicant and her husband provided their budget. (Item 5) She disclosed income of \$3,074, and her husband, a truck driver, disclosed income of \$3,673. (Item 5) Their family net monthly income was \$5,116; their monthly expenses were \$4,777; and their net monthly remainder was \$339. (Item 5) Their 2014 income up to August 29, 2014 was \$47,580; their 2013 income was \$53,053; and their 2012 income was \$69,000. (Item 5) Beginning on August 1, 2014, the medical creditor seeking payment of a \$26,000 debt

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<sup>4</sup>Applicant's May 28, 2014 credit report indicates the status is pays as agreed for most of her student loans, but not the three student loans alleged in SOR ¶¶ 1.d through 1.f.

<sup>5</sup>Applicant's SOR does not allege that she failed to disclose several delinquent debts on her May 16, 2014 SF 86 or that she had delinquent debts in addition to those listed on her SOR as possibly indicated on her 2014 bankruptcy filing on Schedule F. Listing a debt on Schedule F does not establish the debt is delinquent; however, it does show the existence of a debt. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

*Id.* (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). The allegation that financial information was not included on her SF 86 will not be considered for any purpose because Applicant has not had adequate notice and a full opportunity to collect and present evidence of mitigation. Discussion of the contents of her 2014 bankruptcy filing will be limited to the five criteria specified by the Appeal Board.

began garnishing \$808 monthly from Applicant's pay. (Item 5) Applicant received financial counseling in connection with her bankruptcy. (Item 5)

Applicant explained that her delinquent debts resulted from limited income and lack of health insurance.<sup>6</sup> Her family did not have health insurance from July 2009 to February 2014. She and her husband were both employed; however, their employers did not provide health insurance. They made payments for several years to their medical clinic; however, the collection agent sought larger payments. She did not provide specific information about how many payments were made or the amount of those payments. The medical creditor obtained an \$800 monthly garnishment of Applicant's salary, and she, in turn, filed for protection under Chapter 7 of the Bankruptcy Code. Her current employment provides health insurance for Applicant and her four children. She assured she would conscientiously protect sensitive information, and she is following a strict budget.

Applicant's FORM noted the absence of other mitigating information. The FORM explained that Applicant had 30 days from the receipt of the FORM "in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. If you do not file any objections or submit any additional information . . . your case will be assigned to an Administrative Judge for a determination based solely" on the evidence set forth in this FORM. (FORM at 2)

The DOHA letter conveying the FORM to Applicant reiterated that Applicant had a 30-day opportunity to submit evidence supporting her approval or continuation of access to sensitive information. Applicant did not file a response to the FORM.

### **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 ¶

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<sup>6</sup>The source for the information in this paragraph is Applicant's SOR response. (Item 1)

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." This decision is based on national security and is not a determination as to the loyalty of the applicant.

## 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." Applicant's SOR alleges her debts were discharged under Chapter 7 of the Bankruptcy Code in October 2005. Her SOR also alleges two judgments and eight delinquent or collection accounts, totaling \$19,560. 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. (internal citation omitted).

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>7</sup> and

(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. Her family did not have health insurance from July 2009 to February 2014. She was unemployed from February to May 2013 and from July 2009 to December 2009. These are circumstances largely beyond her control that adversely affected her finances; however, she did not provide sufficient evidence that she acted responsibly under the circumstances. She did not provide a clear financial history of her payments to her medical creditors and on her student loans.

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<sup>7</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].

(internal citation and footnote omitted) 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)).

Applicant obtained a discharge of her nonpriority unsecured debts under Chapter 7 of the Bankruptcy Code in October 2005. (SOR ¶ 1.a) This resolution of her debts is not recent, and she is credited with mitigating this SOR allegation. It remains relevant as an indicator of a lengthy history of delinquent debt.

Applicant is credited with mitigating the debts in SOR ¶¶ 1.b, 1.c, and 1.g through 1.j because those debts are nonpriority unsecured debts, and I presume they were discharged under Chapter 7 of the Bankruptcy Code in December 2014 or early 2015.

Applicant's student loans and other debt payments were stayed when she filed for bankruptcy in August 2014. She did not provide evidence of the payment history of her student loans before August 2014, or after her debts were discharged. Her three student loan debts in SOR debts in ¶¶ 1.d through 1.f, totaling \$10,143, probably survived her bankruptcy, as they are probably priority debts. Her May 28, 2014 credit report indicates their status is 120 days or more past due. There is no evidence they have been brought to and retained in current status after her 2014 bankruptcy.

Applicant did not act responsibly under the circumstances. She received ample notice of her delinquent debts raising trustworthiness concerns. Aside from the bankruptcy schedules, there is no financial documentation relating to her SOR creditors showing maintenance of contact with creditors,<sup>8</sup> establishment of payment plans, disputes of debts, payments to creditors, or other evidence of progress or resolution of her SOR debts. She received financial counseling; however, mitigation is limited because there is insufficient evidence that her financial problems are being resolved, are under control, and will not occur in the future. Financial considerations concerns 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 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

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<sup>8</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 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 she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

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 access to sensitive information. Applicant is a 47-year-old LPN who has been employed by a defense contractor since December 2013. In 2004, she received a degree or diploma from a technical college. She was unemployed from February to May 2013 and from July 2009 to December 2009. She and her husband have four children. Her family did not have health insurance from July 2009 to February 2014, and the family generated over \$25,000 in medical debt, which eventually resulted in judgments and garnishment of Applicant's salary. Her SOR alleges two judgments and eight delinquent or collection accounts, totaling \$19,560. On August 29, 2014, she and her husband filed for discharge of their debts under Chapter 7 of the Bankruptcy Code, and I have presumed that her nonpriority unsecured debts were discharged in December 2014 or early 2015. Most of the debts listed on Schedule F of the bankruptcy are medical debts and student loan debts. Applicant is credited with mitigating the SOR allegations in SOR ¶¶ 1.a through 1.c and 1.g through 1.k. There is no evidence of felony or misdemeanor charges, alcohol abuse, use of illegal drugs, or security or rule violations. She contributes to her company and the Department of Defense.

The financial evidence against approval of Applicant's access to sensitive information is more substantial at this time. Applicant has a history of financial problems. Her nonpriority unsecured debts were discharged under Chapter 7 of the Bankruptcy Code in October 2005. Assuming her nonpriority unsecured debts were again discharged in December 2014 or early 2015, three SOR debts are student loan debts, totaling \$10,143, and there is no evidence they have been brought to and retained in current status or resolved. She failed to provide sufficient documentation of her progress resolving her financial problems, which 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 evidence of financial progress is necessary to mitigate trustworthiness concerns.

It is well settled that once a concern arises regarding an applicant's eligibility for a public trust position, there is a strong presumption against the grant or renewal of a public trust position. Unmitigated financial considerations concerns lead me to conclude that grant or reinstatement of a public trust position to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary to justify the award of a public trust position in the future. With more effort towards resolving her past-due debts, and a documented track record of behavior consistent with her obligations, she may well be able to demonstrate persuasive evidence of her worthiness for access to sensitive information.

I have carefully applied the law, as set forth in *Egan*, 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 sensitive 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 through 1.c:	For Applicant
Subparagraphs 1.d through 1.f:	Against Applicant
Subparagraphs 1.g through 1.k:	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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Mark Harvey  
Administrative Judge