



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



In the matter of: )  
 )  
 ----- ) ADP Case No. 18-01096  
 )  
 Applicant for Public Trust Position )

**Appearances**

For Government: Michelle Tilford, Esq., Department Counsel  
For Applicant: *Pro se*

01/04/2019

**Decision**

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a public trust position. Applicant did not present sufficient evidence to explain, extenuate, or mitigate the trustworthiness concern stemming from his problematic financial condition. Accordingly, this case is decided against Applicant.

**Statement of the Case**

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on February 8, 2017. On June 13, 2018, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility sent Applicant a statement of reasons (SOR), detailing trustworthiness concerns under Guideline F for financial considerations.<sup>1</sup>

<sup>1</sup> This action was taken under Executive Order (E.O.) 10865, Safeguarding Classified Information within Industry (February 20, 1960), as amended, as well as Department of Defense Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program (January 2, 1992), as amended (Directive). In addition, the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG), effective within the Defense Department on June 8, 2017, apply here.

Applicant answered the SOR on July 8, 2018, and requested a decision based on the written record without a hearing.

On August 7, 2018, Department Counsel submitted a file of relevant and material information (FORM).<sup>2</sup> Included in the FORM were six items of evidence. Items 1 and 2 are the SOR and Applicant's Answer to the SOR, respectively. Since those are the pleadings, they are already part of the record.<sup>3</sup> Items 3 through 5 are admitted without objection. Item 6 is discussed below. The FORM was mailed to Applicant on August 8, 2018, who received it August 12, 2018. Applicant's response to the FORM was due on September 26, 2018. Applicant did not respond to the FORM. The case was assigned to me on December 10, 2018.

### **Procedural Matters**

The FORM included Item 6, which is a report of investigation (ROI) summarizing Applicant's interview that took place during the June 2018 background investigation. The ROI is not authenticated as required under ¶ E3.1.20 of the Directive.<sup>4</sup> Department Counsel's written brief includes a footnote advising Applicant that the summary was not authenticated and that failure to object may constitute a waiver of the authentication requirement. The footnote is prominently prefaced with a bolded, upper case notice to Applicant and flagging for Applicant the importance of the footnote, which then explains the concepts of authentication and waiver. Nevertheless, I am not persuaded that a *pro se* applicant's failure to respond to the FORM, which response is optional, equates to a knowing and voluntary waiver of the authentication requirement. The record does not demonstrate that Applicant understood the concepts of authentication, waiver, and admissibility. It also does not demonstrate that he understood the implications of waiving an objection to the admissibility of the ROI. Accordingly, Item 6 is inadmissible, and I have not considered the information in the ROI.

### **Findings of Fact**

Applicant is 45 years old and married with two biological children and a grown step-child. He has an associate's degree, and since November 2015, Applicant has been employed by a federal contractor. He reported periods of unemployment from November 2007 to June 2010, while he attended school, and another from February to June 2002. Applicant is seeking to obtain eligibility to occupy a position of public trust, because his

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<sup>2</sup> The file of relevant material consists of Department Counsel's written brief and supporting documentation.

<sup>3</sup> I have marked the attachments to the Answer as Applicant's Exhibits (AE) A through E.

<sup>4</sup> See *generally* ISCR Case No. 12-10933 (App. Bd. Jun. 29, 2016) (In a concurring opinion, Judge Ra'anani notes the historical concern about reports of investigation in that they were considered by some to present a heightened problem in providing due process. Judge Ra'anani raises a number of pertinent questions about using an unauthenticated ROI in a non-hearing case with a *pro se* applicant.).

sponsor is the Defense Health Agency. Eligibility is necessary because a job with his sponsor would involve access to sensitive but unclassified information.<sup>5</sup>

Under Guideline F, the SOR alleged 13 delinquent debts totaling about \$46,928, made up of \$32,919 in consumer debt and about \$14,032 in student loan debt.<sup>6</sup> Applicant admitted all of those debts.<sup>7</sup> Four attachments to Applicant's answer documented that he had resolved four SOR debts. Those debts are SOR ¶¶ 1. i, j, k, and l (\$548, \$430, \$410, and \$350, respectively, totaling \$1,738).<sup>8</sup>

The status of Applicant's delinquent student loans warrants discussion, as that status is unclear. SOR ¶¶ 1. c, d, and g alleged three delinquent student loans (\$6,841, 5,809, and \$1,362, respectively, totaling \$14,012). One of the attachments to Applicant's answer notified Applicant on March 12, 2018, that his student loans had been assigned to a collection agency. That attachment set forth a plan whereby Applicant would arrange for automatic withdrawals of \$5.00 per month to be made beginning March 15, 2018, through November 15, 2018. As of March 12, 2018, the current balance (including interest, fees, and costs) was \$28,250.<sup>9</sup> It is unclear which of the student loans this arrangement addressed, or whether this was a consolidation of those three loans. In addition, Applicant submitted no documentation showing that he adhered to that plan.

Putting aside the student loans and the four SOR debts that Applicant has resolved (totaling \$15,750), there remains \$31,178 of unresolved delinquent debts. Those debts remain unresolved as recently as April 3, 2018.<sup>10</sup>

## **Policies**

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." (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

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<sup>5</sup> Item 3.

<sup>6</sup> Item 1.

<sup>7</sup> Item 2.

<sup>8</sup> AE B through E.

<sup>9</sup> AE A. The loan amounts alleged in the SOR are taken from the April 3, 2018 credit report. Item 5.

<sup>10</sup> Item 5.

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.

## **Discussion**

### **Guideline F – Financial Considerations**

Under Guideline F for financial considerations,<sup>11</sup> the suitability of an applicant may be questioned or put into doubt when that applicant has a history of excessive indebtedness or financial problems or difficulties. The overall concern is:

Failure 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

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<sup>11</sup> AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.<sup>12</sup>

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 negligent in handling and safeguarding sensitive information.

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions or factors:

AG ¶ 19(a) inability to satisfy debts;

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

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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

AG ¶ 20(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control; and

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

The evidence supports a conclusion that Applicant has had a problematic financial condition sufficient to raise a trustworthiness concern under Guideline F. AG ¶¶ 19(a) and (c) apply. A trustworthiness adjudication is not a proceeding aimed at collecting an applicant's debts. Rather, it is a proceeding aimed at evaluating an applicant's judgment,

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<sup>12</sup> AG ¶ 18.

reliability, and trustworthiness.<sup>13</sup> The next inquiry is whether any of the mitigating conditions apply.

Applicant has resolved four of the debts (SOR ¶¶ 1. i, j, k, and l). They have, therefore, been mitigated under AG ¶ 20(d). As to the remaining unresolved debts, there is no evidence that they were infrequent, or were caused so long ago, that they were caused by conditions largely beyond Applicant's control, or that he has received credit counseling. Therefore, AG ¶¶ 20(a), (b), (c), and (d) do not apply.

The record creates doubt about Applicant's trustworthiness, good judgment, and ability to protect sensitive information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.<sup>14</sup> Accordingly, I conclude that Applicant did not meet his ultimate burden of persuasion to show that it is clearly consistent with the interests of national security to grant him eligibility for access to sensitive information.

### **Formal Findings**

The formal findings on the SOR allegations are:

Paragraph 1, Guideline F:	Against Applicant
Subparagraphs 1.a.- h.:	Against Applicant
Subparagraphs 1.i.- l.:	For Applicant
Subparagraph 1.m.	Against Applicant

### **Conclusion**

In light of the record as a whole, it is not clearly consistent with the interests of national security to grant Applicant eligibility for access to sensitive information.

Philip J. Katauskas  
Administrative Judge

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<sup>13</sup> ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008).

<sup>14</sup> AG ¶ 2(a)(1)-(9).

