



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



In the matter of:

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ADP Case No. 19-01626

Applicant for Public Trust Position

**Appearances**

For Government: Gatha Manns, Esq., Department Counsel  
For Applicant: *Pro se*

02/06/2020

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant provided insufficient corroborating documentation about his efforts to resolve 11 of 13 delinquent debts alleged in the statement of reasons (SOR) totaling \$31,617. Financial considerations trustworthiness concerns are not mitigated. Eligibility for a public trust position is denied.

**Statement of the Case**

On December 28, 2018, Applicant completed and signed a Questionnaire for National Security Position (SF 86). (Item 3) On July 19, 2019, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Item 1)

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue eligibility for a public trust position for Applicant and recommended referral to an administrative judge to determine whether access to sensitive information should be granted, continued,

denied, or revoked. Specifically, the SOR set forth trustworthiness concerns arising under Guideline F (financial considerations). (Item 1)

On August 13, 2019, Applicant provided a response to the SOR, and he requested a decision without a hearing. (Item 2) On October 18, 2019, Department Counsel completed the File of Relevant Material (FORM). On November 8, 2019, Applicant was served with a copy of the FORM. Applicant's response, if any, was due on December 8, 2019. No response was received. On January 23, 2020, the case was assigned to me.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

### **Findings of Fact**

In Applicant's SOR response, he admitted the SOR allegations in SOR ¶¶ 1.a, 1.c through 1.k, and 1.m. He also provided extenuating and mitigating information. His admissions are accepted as findings of fact.

Applicant is a 53-year-old senior systems analyst who has worked for the same employer since January 2007. (Item 3) In 1984, he graduated from high school. (*Id.*) He has no military service. (*Id.*) In 1984, he married, and his five children were born in 1984, 1985, 1987, 1992, and 2000. (*Id.*)

### **Financial Considerations**

In December 1999, Applicant was having financial problems, and he filed for bankruptcy under Chapter 13 of the Bankruptcy Code. (Item 5) The bankruptcy enabled him to develop a plan under the bankruptcy court's supervision to repay all or part of his debts. In March 2006, his unsecured nonpriority debts were discharged under Chapter 13. (Item 5) He received financial counseling as part of the bankruptcy process. This bankruptcy was not listed on his SOR.

Applicant's December 28, 2018 SCA shows no periods of unemployment after 2007. (Item 3) He also disclosed several financial issues in his SCA. (*Id.*) He said:

Two and [a] half to three years ago we took on full financial responsibility of two grandkids unexpectedly. The burden has taken a toll on us financially. We tried to work with our creditors but none of them were willing to work with us. The everyday burden of our normal lives, which included our own 16 year old son and helping to put our 4<sup>th</sup> son through college, was a tight squeeze, but we were managing it. When we took on a then [three to four] year old and a then [six to seven] year old, it just broke the bubble. As I stated, we tried to work with our creditors, but none were willing to budge. It was an option of feed/support our new growing responsibility and let our finances suffer . . . or not take care of the family. We are still in full custody/care of the grand kids and our youngest son is a senior ready to head off to college.

(*Id.* at 33) He listed delinquent debts on his SCA as follows: \$1,267; \$6,642; \$7,562; \$3,269; \$1,167; \$1,060; \$427; \$779; \$8,184; \$4,976; and \$3,255. (*Id.* at 32-43) In response to the question on his SCA about actions to resolve debts, he said that he was working to file bankruptcy. (*Id.*)

The SOR alleges 13 delinquent debts totaling \$32,035, as follows: 1.a (\$427); 1.b (\$28); 1.c (\$3,269); 1.d (\$1,060); 1.e (\$4,976); 1.f (\$6,699); 1.g (\$1,167); 1.h (\$1,267); 1.i (\$3,255); 1.j (\$799); 1.k (\$1,136); 1.l (\$390); and 1.m (\$7,562). (Item 1) The support for the SOR allegations is found in Applicant's credit report and Officer of Personnel Management personal subject interview. (Items 4, 6)

In his August 13, 2019 SOR response, Applicant said he did not recognize the debt in SOR ¶ 1.b for \$28. (Item 2) He said he was paying the debt in SOR ¶ 1.h for \$1,267. (*Id.*) He thought the debts in SOR ¶ 1.a for \$427 and 1.l for \$390 were the same debt, as they both originated from the same bank. (*Id.*) He explained that his spouse was unable to work outside their home because she needed to care for their two grandchildren. (*Id.*) Part of their financial pressure resulted from their efforts to fund their fourth child's college education. (*Id.*) He reiterated his plan was to file for bankruptcy under Chapter 13 of the Bankruptcy Code; however, he had not yet discussed this plan with an attorney. (*Id.*) He indicated that he enjoyed providing support to service members and wished to do so in the future. (*Id.*) He is dedicated to providing that support and wanted to give service members "the best service possible." (*Id.*)

In the FORM, Department Counsel noted the absence of corroborating or supporting documentation of resolution of the SOR debts. Aside from Applicant's uncorroborated statements, there is no documentary evidence that Applicant paid, arranged to pay, settled, compromised, or otherwise resolved any of the SOR debts. The FORM informed Applicant that he 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 4) He did not respond 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 [or a public trust position]." *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.

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. 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.

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 Directive presumes there is a nexus or rational connection between proven conduct under any of the Guidelines and an applicant's security eligibility. Direct or objective evidence of nexus is not required." ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020) (citing ISCR Case No. 15-08385 at 4 (App. Bd. May 23, 2018)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. 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.” Decisions are in terms of the national interest and not a determination as to the loyalty of the applicant concerned.

## **Analysis**

### **Financial Considerations**

AG ¶ 18 articulates the trustworthiness concern raised by financial problems:

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 classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security [or trustworthiness] 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 [or trustworthiness] concern insofar as it may result from criminal activity, including espionage.

The Appeal Board explained the scope and rationale for the financial considerations trustworthiness concerns in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise classified [or sensitive] information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant's financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's security eligibility [or eligibility for a public trust position].

AG ¶ 19 includes two disqualifying conditions that could raise a trustworthiness concern and may be disqualifying in this case: “(a) inability 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) (internal citation omitted), 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.

The record establishes the disqualifying conditions in AG ¶¶ 19(a) and 19(c) requiring additional inquiry about the possible applicability of mitigating conditions.

Five financial considerations mitigating conditions under AG ¶ 20 are potentially applicable in this case:

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

(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;

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

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA 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 [or eligibility for a public trust position], there is a strong presumption against the grant or maintenance of a security clearance [or eligibility for a public trust position]. 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 [or trustworthiness] concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance [and public trust] decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified [or sensitive] information will be resolved in favor of the national security." Directive, Enclosure 2, [App. A] ¶ 2(b).

The SOR alleges 13 delinquent debts totaling \$32,035. A debt that became delinquent several years ago is still considered recent because “an applicant’s ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions.” ISCR Case No. 15-06532 at 3 (App. Bd. Feb. 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sept. 13, 2016)).

Applicant’s SOR does not allege his debts were discharged under Chapter 13 of the Bankruptcy Code in 2006. 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)). See also ISCR Case No. 12-09719 at 3 (App. Bd. Apr. 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). The non-SOR allegations will not be considered except for the five purposes listed above.

In his August 13, 2019 SOR response, Applicant said he did not recognize the debt in SOR ¶ 1.b for \$28. He said was paying the debt in SOR ¶ 1.h for \$1,267; however, he did not provide any documentation showing such payments. He thought the debts in SOR ¶ 1.a for \$427 and 1.i for \$390 were the same debt, as they both originated from the same bank. I have credited Applicant with mitigating the debt in SOR ¶ 1.b because Applicant denied responsibility and due to the size of the debt (\$28), it is de minimis. The debt in SOR ¶ 1.i for \$390 is mitigated as a duplication.

Applicant said his delinquent debts resulted from the unanticipated necessity of caring for two grandchildren. His spouse was unable to work outside his home because she needed to care for their grandchildren. In addition, he wanted to pay for college education for a child.

“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. He does not receive full mitigating credit under AG 20(b) because he did

not provide enough information about his finances to establish that he acted responsibly under the circumstances.

Applicant received financial counseling as part of his 2006 bankruptcy. He subsequently accrued the delinquent debts listed in the SOR. He did not establish under AG ¶ 20(c) that “there are clear indications that the problem is being resolved or is under control.” He did not provide a budget, and it is not possible to assess whether he is living within his means.

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 did not prove he acted in good faith.

Applicant did not provide documentation relating to his SOR debts such as: (1) proof of payments, for example, checking account statements, photocopies of checks, or a letter from the creditor proving that he paid or made any payments to the creditor; (2) correspondence to or from the creditor to establish maintenance of contact; (3) copies of credible debt disputes sent to the creditor and/or credit reporting companies indicating he did not believe he was responsible for the debt and why he held such a belief; (4) evidence of attempts to negotiate payment plans, for example, settlement offers or agreements to show that he was attempting to resolve this debt; or (5) other evidence of progress or resolution.

Applicant did not provide sufficient documentation about why he was unable to make greater documented progress resolving 11 debts in SOR ¶¶ 1.a, 1.c through 1.k, and 1.m. There is insufficient assurance that his financial problems are being resolved and will not recur in the future. Under all the circumstances, he failed to establish mitigation of financial considerations trustworthiness concerns.



## 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(d):

(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), "[t]he 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. My comments under Guideline F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 53-year-old senior systems analyst who has worked for the same employer since January 2007. In 1984, he graduated from high school. In 1984, he married, and his five children were born in 1984, 1985, 1987, 1992, and 2000. He and his spouse are caring for two grandchildren. He has successfully been employed by the same employer for more than 12 years. There is no evidence that he has violated his employer's rules involving protection of sensitive information.

The evidence against grant of access to sensitive information is more substantial. Applicant has a long history of financial problems going back to his Chapter 13 bankruptcy in which his debts were discharged in 2006. Applicant currently owes 11 delinquent debts that were alleged in the SOR totaling \$31,617. There is no corroborating documentation of progress after the SOR was issued in the resolution of 11 of these debts. His actions raise unmitigated questions about Applicant's reliability, trustworthiness, and ability to protect sensitive information. See AG ¶ 18.

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 granting access to sensitive information. See *Dorfmont*, 913 F. 2d at 1401. 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 trustworthiness concerns are not mitigated. Unmitigated financial considerations trustworthiness concerns lead me to conclude it is not clearly consistent with the interests of national security to grant Applicant eligibility for a public trust position 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c through 1.k:	Against Applicant
Subparagraph 1.l:	For Applicant
Subparagraph 1.m:	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's eligibility for a public trust position. Eligibility for access to sensitive information is denied.

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Mark Harvey  
Administrative Judge