

DATE: October 9, 2007

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In re: )	
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----- )	ADP Case No. 06-13528
SSN: ----- )	
)	
Applicant for Public Trust Position )	
_____ )	

**DECISION OF ADMINISTRATIVE JUDGE  
MARK W. HARVEY**

**APPEARANCES**

**FOR GOVERNMENT**

Richard A. Stevens, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant had 14 delinquent debts, totaling \$21,567. He admitted the 14 debts were delinquent, and that he was unable to pay or resolve them. He did not offer any explanation for his delinquent debts. The trustworthiness concerns pertaining to financial considerations are not mitigated. Eligibility for a public trust position is denied.

## **STATEMENT OF THE CASE**

On August 19, 2004, Applicant submitted a Questionnaire for Public Trust Positions (SF 85P).<sup>1</sup> On November 27, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him,<sup>2</sup> under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised.<sup>3</sup> The SOR alleges trustworthiness concerns under Guideline F (Financial Considerations). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a eligibility for a public trust position for him, and recommended referral to an administrative judge to determine whether such eligibility should be granted, continued, denied, or revoked.

In an answer dated January 8, 2007, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing.<sup>4</sup> A copy of the file of relevant material (FORM), dated July 11, 2007, was provided to him on July 27, 2007, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.<sup>5</sup> Submissions were due by August 26, 2007.<sup>6</sup> Applicant did not provide any submissions. The case was assigned to me on September 26, 2007.

## **FINDINGS OF FACT**

In his response to the SOR, Applicant admitted the debts in SOR ¶¶ 1.a – 1.n. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

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<sup>1</sup>Item 5 (Standard Form (SF) 85P, Questionnaire for Public Trust Positions, dated August 19, 2004). There is no allegation of falsification of this SF 85P.

<sup>2</sup>Item 1 (Statement of Reasons (SOR), dated November 27, 2006).

<sup>3</sup>On August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended, in which the SOR was issued on or after September 1, 2006. The revised Adjudicative Guidelines apply to this case.

<sup>4</sup>Item 4 (Applicant's response to SOR, dated January 8, 2007).

<sup>5</sup>Defense Office of Hearings and Appeals (DOHA) transmittal letter is dated July 12, 2007, and Applicant's receipt is dated July 27, 2007.

<sup>6</sup>*Id.* The DOHA transmittal letter informed Applicant that he had 30 days after Applicant's receipt to submit information.

Applicant is 47 years old.<sup>7</sup> He married in September 1987. He has two children, who were born in 1990 and 1995. He was on active duty in the Air Force from 1981 to 1984. He received his high school diploma in 1978. From April 1999 until he completed his SF85, he was employed by the same company.

### **Financial Considerations**

The SOR listed 14 delinquent debts, ranging from \$60 to \$9,606, and totaling \$21,567. In his response to interrogatories, dated September 7, 2006, Applicant said he could not make any payments on his delinquent debts. Department Counsel asked for any information that might assist in making a trustworthiness clearance determination, Applicant responded:

I realize my credit is bad, but I will get it under control. But I would never do anything to hurt my company, my country, and the people I work with. I would never do anything to make my company mistrust me. I am loyal to my company and to my country. This is my oath. I love my job and I will not do anything to ever jeopardize my job. I want to keep my job! I promise I am worthy of my company's trust, and my country's trust. I have a Honorable Discharge from the USAF. I faithfully served my country then, and as for my job now, I will likewise faithfully serve my company and my country.

In the FORM at page 4, Department Counsel stated:

To date, he has taken no action to resolve [his delinquent debts], even [though] more than eight months [have elapsed] after it was formally brought to his attention as a security concern. Moreover, Applicant's debts remain unresolved and there is no evidence that he is making progress toward mitigating concerns to support a favorable trustworthiness determination.

As indicated previously, Applicant did not respond to the FORM. He did not offer any explanation for how his debts became delinquent, or explain why he had not made any payments or describe other efforts to resolve his delinquent debts.

### **POLICIES**

In an evaluation of an applicant's trustworthiness determination, an administrative judge must consider the "Adjudicative Guidelines for Determining Eligibility For Access to Classified Information" (AG). In addition to brief introductory explanations for each guideline, the AGs are divided into Disqualifying

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<sup>7</sup>Item 5, *supra* n. 1, is the source for the facts in this paragraph, unless otherwise stated.

Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified or sensitive information.

These AGs are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these AGs in conjunction with the factors listed in the adjudicative process. AG ¶ 2. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable. AG ¶ 2(c).

An 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) 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."

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." AG ¶ 2(b). In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the Government has the initial burden of establishing controverted facts by "substantial evidence,"<sup>8</sup> demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. The burden of disproving a mitigating

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<sup>8</sup> "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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).

condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).<sup>9</sup>

A person seeking access to classified or 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. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to such information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified or sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of such information.

The scope of an administrative judge's decision is limited. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. Executive Order 10865, § 7.

## **CONCLUSIONS**

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

### **Guideline F (Financial Considerations)**

AG ¶ 18 articulates the Government's concern concerning 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 classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds."

Two Financial Considerations Disqualifying Conditions raise a trustworthiness concern and may be disqualifying in this case: "inability or unwillingness to satisfy debts," and "a history of not meeting financial obligations." AG ¶¶ 19(a) and (c).

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<sup>9</sup>The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

Applicant admitted he had 14 delinquent debts, totaling \$21,567, as of September 2006. The amount of delinquent debt was substantial, and Applicant did not contest the assertion in the FORM that he did not pay or otherwise resolve any of the delinquent debts.

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20(a)-(e) 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; 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.

After careful consideration, I conclude none of these mitigating conditions apply. He did not show unusual circumstances caused his financial problems. His overall conduct with his creditors casts some doubt on his reliability, trustworthiness, and good judgment. He did not indicate he was unemployed or underemployed. He did not prove his debts resulted from medical problems. He did not disclose any information indicating his actions were in good faith. He did not provide evidence of aggressive and responsible efforts to resolve his delinquent debt. He has not provided evidence showing he maintained communications with his SOR creditors. There was no evidence of "clear indications that the problem is being resolved or is under control." He did not provide "documented proof to substantiate the basis of the dispute or [provide] evidence of actions to resolve the issue" with respect to his delinquent debts. In sum, he has failed to demonstrate sufficient effort to resolve financial concerns, or that his debts resulted from circumstances beyond his control.

### **"Whole Person" Analysis**

In addition to the facts discussed in the enumerated disqualifying and mitigating conditions, I have considered the general adjudicative guideline related to the whole person concept under AG ¶ 2(a). There is no reason to believe his actions with respect to his debts were not knowledgeable and voluntary. He is 47 years old, sufficiently mature to be fully responsible for his conduct. The most probable motivation for his failure to pay his debts is insufficient income. Failure to pay debts is not prudent or responsible.

The current process has made him aware of the necessity to ensure his finances are not delinquent. “Applicant is now alert to the [trustworthiness] concerns presented by his circumstances and the responsibilities incumbent on him as a result.” ISCR Case No. 04-07360 at 3 (App. Bd. Sep. 26, 2006). The absence of evidence of any prior violation of his employer’s rules or requirements weighs in his favor.

After considering all the circumstances, however, his delinquent debts significantly increase the trustworthiness concerns. The minimal evidence he presented of rehabilitation is insufficient to resolve my doubts about his reliability, trustworthiness, and good judgment.

After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude Applicant has not mitigated the trustworthiness concerns pertaining to financial considerations. The evidence leaves me with doubts as to his eligibility and suitability for a public trust position.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors”<sup>10</sup> and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the AGs. Applicant has not mitigated or overcome the government’s case. For the reasons stated, I conclude he is not eligible for a public trust position.

### **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.n.:   Against Applicant

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<sup>10</sup>See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

## **DECISION**

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

Mark W. Harvey  
Administrative Judge