



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



In the matter of:	)	
	)	
	)	ADP Case No. 14-00183
	)	
Applicant for Public Trust Position	)	

**Appearances**

For Government: Carolyn E. Heintzelman, Esq., Department Counsel  
For Applicant: *Pro se*

05/27/2014

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**Decision**

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O'BRIEN, Rita C., Administrative Judge:

Based on a review of the record evidence, I conclude that Applicant failed to mitigate trustworthiness concerns raised under the guidelines for financial considerations and personal conduct. His request for access to sensitive information is denied.

**Statement of the Case**

On March 13, 2014, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) citing concerns under Guidelines F (financial considerations) and E (personal conduct) of the Adjudicative Guidelines (AG).<sup>1</sup> In his Answer to the SOR, signed March 29, 2014, Applicant admitted seven of the nine debts listed in the SOR, and also admitted the two allegations regarding falsification of his

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<sup>1</sup> Adjudication of the case is controlled by Executive Order 10865, as amended; DOD Directive 5220.6 (Directive), as amended; and the Adjudicative Guidelines, which supersede the guidelines listed in Enclosure 2 to the Directive. They apply to all adjudications or public trust position determinations in which an SOR was issued on or after September 1, 2006.

public trust application. He requested a decision based on the written record, in lieu of a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA).

Department Counsel for DOHA prepared a presentation of the Government's case in a file of relevant material (FORM) dated April 17, 2014. It contained the Government's argument and documents (Items 1-7) to support the preliminary decision to deny Applicant's request for access to a sensitive position. Applicant received the FORM on May 7, 2014, and was given 30 days from the date he received it to file a response. He timely submitted a response and ten documents. (Items 9-18) Department Counsel did not object to Applicant's submission. (Item 8) The case was assigned to me on May 20, 2014.

### **Findings of Fact**

Applicant's admissions to the SOR allegations are incorporated as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact.

Applicant is 47 years old, unmarried, and does not have children. He earned a bachelor's degree in 1989. Starting in 1998, he worked full-time as an analyst at a telecommunications company, until he was laid off in 2007. He was unemployed for 11 months in 2007-2008. He worked full-time as a support agent from 2008 to 2010. He was unemployed for six months in 2010-2011. He served as a general manager at an antiques shop for six months in 2011-2012, and was then unemployed for six months. During his periods of unemployment, he was supported by savings and a trust fund set up by his parents.<sup>2</sup> He worked as a customer service representative for one year, from 2012 to 2013. He holds the same position in his current job, which he began in August 2013. Applicant also operates a business selling items online. It is registered in his home state. He worked at the business an estimated 40 hours per week when he was unemployed. He said he did not list the self-employment on his public trust application because he does not receive substantial income from it. (Items 4, 5)

### **Guideline F, Financial Considerations**

An agent of the Office of Personnel Management (OPM) interviewed Applicant in October 2013 as part of his investigation. During Applicant's interview, he explained that he had problems meeting his expenses because he had periods of unemployment or underemployment, and his expenses were more than he earned. However, he believed he was capable of meeting his financial obligations at the time. (Item 5)

The nine debts in the SOR include two Internal Revenue Service (IRS) tax liens totaling \$52,449, and seven smaller delinquent debts ranging from \$119 to \$1,108.

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<sup>2</sup> During his investigation, Applicant stated he has borrowed approximately \$15,000 from his trust fund, and he is not required to repay the borrowed funds. (Item 5)

Each of the nine debts appears in Applicant's credit reports dated September 2013 and April 2014 provided by the Government. The SOR alleges the following debts. (Items 1, 6, 7)

**UNRESOLVED. Federal Tax Liens: \$27,976, filed 2008 (allegation 1.b); \$24,473, filed 2009 (allegation 1.a):** When Applicant was laid off in 2007, he was paid \$50,000 in severance pay, a bonus, and stock. Taxes were not deducted. He believes he owed approximately 50 percent tax on the income from the severance package. In 2008, when he filed his 2007 return, he could not afford the taxes due. He did not realize at the time that he could discuss his situation with the IRS, and did not contact the agency. (Item 5)

At his investigative interview in October 2013, Applicant informed the agent of his federal tax delinquency. He stated that he retained a company to help him resolve the liens, and paid the company \$3,000, but the company did not resolve the lien. He did not provide the name of the company, the dates he worked with it, or documentation supporting his claim. In August 2012, Applicant contacted the IRS. In December 2012, he offered to pay \$5,000. At his interview, he stated he had not received a response from the IRS. (Item 5)

Applicant believes the IRS has filed only one tax lien, which relates to tax year 2007. However, both his 2013 and 2014 credit reports show two tax liens, filed on different dates (September 2008 and December 2009), with two different case numbers. He noted in his response that he has disputed the \$27,976 lien with two credit reporting agencies and has filed a dispute through his local court. Applicant has not provided evidence that these two liens are duplicates. (Items 6, 7, 9)

**PAYMENT PLANS.** Applicant provided evidence in his response (Item 9) that he recently initiated payment plans for five debts, as follows.

- **Allegation 1.c – \$1,108:** Applicant has a payment plan for \$160 monthly from April to July 2014. He provided a letter from the collection agency showing one payment was to be processed on April 26, 2014. (Item 10)
- **Allegation 1.d – \$692:** Applicant provided documentation from the creditor showing a payment plan of \$138.42, to be deducted monthly from Applicant's bank account between April and August 2014. The creditor provided letters showing the April and May payments were about to be withdrawn from Applicant's account. (Item 11)
- **Allegation 1.e - \$653:** Applicant provided documentation from the creditor showing \$53.92 was deducted from his account on March 31, 2014, and two payments of \$100 were to be deducted on April 25 and May 9, 2014.<sup>3</sup> (Item 13)

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<sup>3</sup> Applicant's response (Item 9) confused the payment plans for the debts at allegations 1.e and 1.f. According to his documentation, he will be paying \$5.00 monthly on the debt of \$508 at allegation 1.f

- **Allegation 1.f - \$508:** Applicant established a payment plan for monthly deductions of \$5 from his bank account between April and August 2014. He provided creditor letters showing the payments made in April and May 2014. (Item 12)
- **Allegation 1.g - \$212:** Applicant made an initial payment of \$11.59 in March 2014. The payment plan requires \$50 per month from April through July, 2014. He provided documentation showing payments in April and May 2014. (Item 14)

**PAID. Insurance debt, \$155 (allegation 1.h)** - Applicant provided documentation showing payments of \$77.67 in April and May 2014 on this insurance debt. (Item 15)

**UNRESOLVED. Unknown debt, \$119 (allegation 1.i)** – Applicant stated in his response that he has made arrangements to pay this debt in three monthly installments of \$41.26 from May to July 2014. He provided no documentation to support the payment plan. (Item 9)

In his response, Applicant stated he has set up payment plans for two other debts not listed in the SOR. He also provided documentation showing he consulted a credit counseling service in May 2014. The counseling appears to have been informational, including an estimate of Applicant's monthly income and expenses. The financial summary showed Applicant earns \$1,746 net monthly income. After expenses, Applicant had a negative monthly remainder of \$137. The budget did not include Applicant's payment plans for allegations 1.c through 1.g. The documentation did not indicate Applicant had established a debt management plan with the counseling service. (Items 9, 16)

### **Guideline E, Personal Conduct**

When Applicant completed his public trust application in September 2013, the financial section asked whether he had failed to file or pay federal, state, or other taxes within the previous seven years (2006-2013); Applicant answered “No.” During his interview the following month, he told the agent that he did not disclose the federal tax liens because he was not thinking of his past taxes at the time, and because he was working with the IRS on an offer in compromise. (Item 5) In his Answer, he stated,

I thought I had clarified with [name], the investigator, why I answered this question the way I did. I admitted that I had not paid the Tax due to working out a payment plan via the Offer in Compromise Form with the IRS. [Name] was supposed to note this in his report. (Item 3)

Applicant also answered “No” when the public trust application asked if, within the previous seven years, any of his debts were turned over to a collection agency or

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(see Item 12) and \$100 per month on the debt of \$653 at allegation 1.e (see Item 13), and not vice versa.

were delinquent more than 120 days. He stated to the OPM agent that he answered “No” because he thought his debts were paid, and he did not realize he had to list them. In his Answer to the SOR, Applicant admitted the falsification allegations, but with explanation. (Item 5) Regarding his failure to disclose his delinquent debts, he stated in his Answer,

I thought I had clarified with [name], the investigator, why I answered this question the way I did. I had explained to him that I had made arrangements with the various collection agencies and Am [sic] currently in the process of paying off these debts; which I thought was noted on the report. (Item 3)

Applicant's file contains no character references or performance evaluations. However, he submitted several documents showing praise from customers and from his current employer for his work performance. (Answer)

### **Policies**

Each decision regarding a public trust position must be a fair, commonsense determination based on all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Adjudicative Guidelines (AG).<sup>4</sup> Decisions must also reflect consideration of the “whole-person” factors listed in ¶ 2(a) of the guidelines. The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed when a case can be measured against them because they represent policy guidance governing the grant or denial of access to sensitive information. In this case, the pleadings and the information presented by the parties require consideration of the adjudicative factors addressed under Guidelines F and E.

A trustworthiness decision is intended only to resolve the questions of whether it is clearly consistent with the national interest<sup>5</sup> for an applicant to either receive or continue to have access to sensitive information. The Government bears the initial burden of producing admissible information on which it based the decision to deny or revoke access to sensitive information for an applicant. Additionally, the Government must prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government's case. Because no one has a “right” to a sensitive position, an applicant bears a heavy burden of persuasion.<sup>6</sup> A person who has access to sensitive information enters into a fiduciary

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<sup>4</sup> Directive. 6.3.

<sup>5</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>6</sup> See *Egan*, 484 U.S. at 528, 531.

relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness to protect the national interest as her or his own. The “clearly consistent with the national security” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government.<sup>7</sup>

## **Analysis**

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

AG ¶18 expresses the concerns pertaining to financial considerations:

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.<sup>8</sup> An individual who is financially over-extended is at risk of having to engage in illegal acts to generate funds.

The concern under Guideline F is broader than the possibility that an applicant might knowingly compromise sensitive information in order to obtain money. It encompasses concerns about an individual’s reliability, judgment, and other qualities essential to protecting sensitive information. One who is financially irresponsible might also be irresponsible, negligent, or unconcerned in handling and safeguarding sensitive information.<sup>9</sup>

Applicant has failed to establish a record of meeting his financial obligations. He remains approximately \$52,000 in debt to the federal government for unpaid income taxes. Until recently, he had seven delinquent debts, with no plan in place to pay them. The record supports application of the following disqualifying conditions under AG ¶19:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

The financial considerations guideline also contains factors that can mitigate trustworthiness concerns. I have considered the mitigating factors under AG ¶ 20, especially the following:

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<sup>7</sup> See *Egan*; Adjudicative Guidelines, ¶ 2(b).

<sup>8</sup> The same guidelines apply to trustworthiness determinations as classified information.

<sup>9</sup> ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

(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.

Applicant's debts are both numerous and recent. The IRS tax liens, his largest debts, are unpaid. Applicant's lack of substantial efforts to meet his obligations, until the SOR was issued, casts doubt on his trustworthiness and reliability. AG ¶ 20(a) cannot be applied.

AG ¶ 20(b) applies where an individual experiences events over which he had no control, and which affected his finances. Here, Applicant receives some mitigation because he has been unemployed or underemployed several times between 2007 and 2012. However, for full mitigation, an applicant must act responsibly in the face of these circumstances. Applicant did not make substantial efforts to deal with his tax liens until 2012, four years after the first lien was filed. His payment plans have all been established within the past two months. Applicant did not act responsibly, and receives only partial mitigation under AG ¶ 20(b).

Applicant consulted a credit counseling agency in May 2014. The budget he developed with the counselor shows he has a negative monthly remainder, and the budget did not include the monthly payments he has set up for five SOR debts. His documentation does not show he has retained the agency or established a debt management plan. Applicant receives limited mitigation under AG ¶ 20(c).

Applicant receives some mitigation for recently establishing payment plans, and making payments over the past two months. However, he has not brought his finances

under control. His tax liens are not resolved, nor is there any payment plan in place for it. His recent payments, made after receiving the SOR, are insufficient to establish a track record of meeting his obligations. Evidence of past failure to meet financial obligations is not mitigated by payment of debts motivated primarily by the pressure of qualifying for a public trust position. Applicant stated he disputed the second tax lien with the credit reporting agencies and his local court. However, he did not provide any evidence of these actions, or documentation to support his claim that the second lien is a duplicate. AG ¶ 20(d) applies in part, and AG ¶ 20(e) does not apply.

### **Guideline E (Personal Conduct)**

AG ¶ 15 expresses the concern about personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The Government alleges that Applicant deliberately failed to disclose facts related to his financial status, implicating the following under AG ¶ 16:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

In his 2013 public trust application, Applicant answered “No” in response to questions asking if he had failed to pay federal taxes, or had any debts that were in collection status or 120 days or more delinquent. In his Answer, he admitted to the allegations that he deliberately failed to disclose his financial delinquencies. However, his explanations indicate that Applicant did not admit to deliberately intending to falsify.

As to his failure to disclose taxes, Applicant stated during his interview that he was not thinking of the taxes, but also that he was working with the IRS. These two contradictory statements cannot both be true—either he was not thinking about the taxes, or he was thinking of them and of his offer in compromise. In addition, his explanations regarding his delinquent debts during his interview and in his Answer contradict each other. During the interview, he stated he thought his debts were paid, but in his Answer, he stated he had told the agent that he was working on payment plans. Applicant's contradictory explanations are not credible. I conclude that he deliberately failed to disclose his true financial status during his investigation. AG ¶ 16(a) applies.



Among the mitigating conditions under AG ¶ 17, the following are relevant:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

Applicant's failure to be candid with the Government during his investigation is not minor. It is also recent, as he completed his public trust application only eight months ago. His actions reflect poorly on his reliability and judgment. In addition, there is no evidence that Applicant made efforts to change or correct the answers on his application at any time during the adjudication process. AG ¶¶ 17(a) and (c) cannot be applied.

### **Whole-Person Analysis**

Under the whole-person concept, an administrative judge must evaluate the Applicant's eligibility for a public trust position by considering the totality of the Applicant's conduct and all the circumstances. 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant access to sensitive information must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant's history includes positive factors, such as his education and work performance. In addition, he made some efforts to work with the IRS in 2012, and he recently set up payments plans. However, the negative factors are more substantial. He has not followed through with the IRS to resolve his most substantial debt, the unpaid income taxes. His payment plans are so recent that I cannot determine if he will follow through. Moreover, his negative monthly remainder will likely prevent him from

being able to make the payments. Finally, Applicant's trustworthiness is undermined because he did not disclose his significant debts on his public trust application, and his explanations were not credible. Doubts remain about Applicant's reliability and judgment.

Overall, the evidence fails to satisfy the doubts raised about Applicant's suitability for a public trust position. For all these reasons, I conclude Applicant has not mitigated the security concerns raised by the financial considerations guideline.

**Formal Findings**

Paragraph 1, Guideline F	AGAINST APPLICANT
Subparagraphs 1.a – 1.i	Against Applicant
Paragraph 2, Guideline E	AGAINST APPLICANT
Subparagraphs 2.a – 2.b	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 allow Applicant access to sensitive information. Applicant's request for a public trust position is denied.

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RITA C. O'BRIEN  
Administrative Judge