



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



In the matter of:	)	
	)	
[Redacted]	)	ADP Case No. 14-00911
	)	
Applicant for Public Trust Position	)	

**Appearances**

For Government: Candace Le'i Garcia, Esquire, Department Counsel  
For Applicant: *Pro se*

10/31/2014

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**Decision**

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FOREMAN, LeRoy F., Administrative Judge:

This case involves trustworthiness concerns raised under Guideline F (Financial Considerations). Eligibility for a public trust position is granted.

**Statement of the Case**

Applicant applied for eligibility to occupy a sensitive automated data processing (ADP) position on August 29, 2013. On April 28, 2014, the Department of Defense (DOD) sent him a Statement of Reasons (SOR), citing trustworthiness concerns under Guideline F. DOD acted under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); DOD Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended (Regulation); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant received the SOR on May 13, 2014; answered it on May 23, 2014; and requested a decision on the record without a hearing. On August 14, 2014, Department Counsel submitted the Government's written case and sent a complete copy of the file of relevant material (FORM) to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. The FORM consisted of Department Counsel's brief and six documents,

which have been admitted as Government Exhibits (GX) 1 through 6. Applicant timely submitted Applicant's Exhibit (AX) A, which was received in evidence without objection. The case was assigned to me on October 20, 2014.

### **Findings of Fact**

Applicant admitted the three delinquent debts alleged in the SOR. His admissions are incorporated in my findings of fact.

Applicant is a 53-year-old employee of a federal contractor. He served in the U.S. Air Force from January 1983 to December 1986 and was honorably discharged. He held a security clearance while in the Air Force. He attended college from June 1987 to February 1990 and received a bachelor's degree.

Applicant owned and operated his own business from January 1999 to August 2011. He also held a second part-time job from January 2003 to August 2011. He drew a salary from his business and reported it annually on his federal and state income tax returns. He filed quarterly returns for his business, but the Internal Revenue Service (IRS) returned them, stating that it could not locate his business. He did not contact the IRS about the problem with his quarterly returns.

In August 2011, Applicant closed his business due to declining income, and he quit his part-time job to accept a full-time position in the private sector. In February 2013, he began working for his current employer. In July 2013, he was briefly unemployed for about a month, because his employer's federal contract expired and was then renewed in August 2013. (GX 3, PSI at 1.)

Applicant married in April 1983. He and his wife separated in July 2000 and divorced in August 2011. He has a 30-year-old son.

In 2006, the IRS audited Applicant's business and determined that he owed taxes for tax years 2000 to 2002 and 2005 to 2008. The IRS filed a tax lien in 2005 for \$72,227 (SOR ¶ 1.b) and a second tax lien in 2008 for \$4,085 (SOR ¶ 1.a). Applicant contacted the IRS after closing his business and finding a full-time job. He entered into a payment agreement with the IRS in July 2012, in which he paid \$100 per month and his ex-wife paid \$50 per month. In July 2013, he entered into another payment agreement to pay \$230 per month. He has produced evidence that he paid as agreed through September 2014. Because they are divorced, Applicant and his ex-wife each receive separate statements for one-half of the total taxes owed. (AX A at 2.)

Applicant used student loans to help pay for his college education. Repayment of the loans was deferred for several years after he graduated because of his low income. He began making payments after his business was established, but he fell behind when his business income declined. His delinquent student loans, alleged in SOR ¶ 1.c, were referred to a collection agency in June 2012. (GX 6.) In 2013, Applicant disputed the amount of the delinquent student loans on the ground that he had not been given credit for payments he had made. (GX 3, PSI at 4.) He decided not to pursue the dispute after

he was accepted into a loan rehabilitation program in February 2014. The rehabilitation program required payments of \$350 per month until October 2014, and he made the payments as agreed. As of August 2014, he owed \$121,950, of which \$41,691 was interest, and \$23,872 was for fees. (AX A, Attachment B.)

## **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 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 ¶ C6.1.1.1. DOD contractor personnel are entitled to the procedural protections in the Directive before any final unfavorable access determination may be made. Regulation ¶ C8.2.1.

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. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard sensitive information.

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 an evaluation of the whole person. The 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.

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. The Government must present substantial evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. 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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). An applicant has the ultimate burden of demonstrating that it is clearly consistent with national security to grant or continue eligibility for access to sensitive information.

## Analysis

The concern under this guideline is set out in AG ¶ 18:

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.

This concern is broader than the possibility that an individual might knowingly compromise sensitive information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting sensitive information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding sensitive information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's admissions, corroborated by his credit bureau report, establish two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations.") The following mitigating conditions are potentially relevant:

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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

AG ¶ 20(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; and

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

AG ¶ 20(a) is partially established. Applicant's delinquent debts are numerous and not fully resolved. However, the federal income tax debts were the result of his unfamiliarity with the federal tax laws applicable to his business. These circumstances are not likely to recur. The delinquent student loans are not likely to recur because it is unlikely that Applicant will pursue further education or need to borrow money for his education.

AG ¶ 20(b) is partially established. Applicant's errors in computing his tax liability were due to his own mistakes and failure to obtain sound tax advice, not circumstances beyond his control. His brief period of unemployment in July 2013 was after his debts were already delinquent. His separation and divorce do not appear to have contributed to his financial problems. To the contrary, his ex-wife has contributed to repayment of the tax debt. However, the downturn in his business was a major factor in his inability to timely repay his student loans or to pay the federal taxes due after his business was audited. He acted responsibly by working a second part-time job when his income from his business declined. He began making payments on his tax debt in July 2012, has complied with his payment agreement, and has successfully completed a rehabilitation program for the student loans.

AG ¶ 20(c) is partially established. There is no evidence that Applicant has sought or received financial counseling, but there is clear evidence that his financial problems are being resolved.

AG ¶ 20(d) is established. Applicant has established payment agreements for his tax debt and student loans and has established a track record of compliance with the payment agreements.

### **Whole-Person Concept**

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. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a public trust position by considering the totality of the applicant's conduct and all relevant 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) 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.

I have incorporated my comments under Guideline F in my whole-person analysis. After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the trustworthiness concerns based on financial considerations. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with national security to grant him eligibility for a public trust position.

**Formal Findings**

Guideline F (Financial Considerations): FOR APPLICANT

Subparagraphs 1.a-1.c: For Applicant

**Conclusion**

I conclude that it is clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for a public trust position is granted.

LeRoy F. Foreman  
Administrative Judge