



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



In the matter of: )  
 )  
----- ) ADP Case No. 14-01282  
 )  
Applicant for Public Trust Position )

**Appearances**

For Government: Alison O'Connell, Esquire, Department Counsel  
For Applicant: *Pro se*

10/28/2014

**Decision**

Harvey, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) alleges seven delinquent collection debts for \$17,093. Two debts are disputed; and five debts are paid. If the two disputes are unsuccessful, he promised to pay the debts. He has a track record of paying his debts. Financial considerations concerns are mitigated. Eligibility for a public trust position is granted.

**Statement of the Case**

On November 6, 2013, Applicant signed an Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (GE 1) On May 8, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, and modified; DOD Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation); and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleges trustworthiness concerns under Guideline F (financial considerations). (HE 2) The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant or continue Applicant's

eligibility to occupy a public trust position, which entails access to sensitive information. (HE 2) The DOD CAF recommended referral to an administrative judge to determine whether such access to sensitive information should be granted, continued, denied, or revoked.

On June 26, 2014, Applicant responded to the SOR allegations and requested a hearing. (HE 3) On September 4, 2014, Department Counsel was ready to proceed. On September 4, 2014, the case was assigned to me. On September 10, 2014, DOHA issued a hearing notice, setting the hearing for October 2, 2014. The hearing was held as scheduled. At the hearing, Department Counsel offered three exhibits, and Applicant offered seven exhibits, which were admitted without objection. (Tr. 17-19; GE 1-3; AE A-G) On October 3, 2014, Applicant provided four exhibits, which were admitted without objection. (AE G-J). On October 10, 2014, I received the transcript of the hearing. On October 24, 2014, Applicant provided one exhibit, which was admitted without objection. (AE K)

### **Findings of Fact<sup>1</sup>**

In his Answer to the SOR, Applicant admitted the SOR allegations in ¶¶ 1.a to 1.g; however, he explained that the debt in SOR ¶ 1.g duplicated the debt in SOR ¶ 1.e. He also provided mitigating information on the other debts. His admissions are accepted as findings of fact.

Applicant is a 25-year-old hospital worker employed by a defense contractor. (Tr. 5) In 2007, he graduated from high school. (Tr. 6, 16) He received a bachelor of art degree in mathematics in 2013. (Tr. 6) He has not served in the military. (Tr. 7) He has never been married; however, he is engaged to be married. (Tr. 6) He does not have any children. (Tr. 6) He came to the United States from a country in Africa in 2007. (Tr. 15) His parents reside in the United States. (Tr. 16) In 2010, his father had a stroke and is in a nursing home. (Tr. 16) There is no evidence of reportable criminal offenses, alcohol or drug abuse, or violations of his employment rules.

### **Financial Considerations**

Applicant's history of delinquent debt is documented in his November 20, 2013 credit report, SOR response, and hearing transcript. His SOR alleges seven delinquent collection debts for \$17,093 as follows: ¶ 1.a (\$7,663) from a car repossessed in 2010; ¶ 1.b (\$30) store debt; ¶ 1.c (\$1,560) bank debt; ¶ 1.d (\$3,282) telecommunications debt; ¶ 1.e (\$956) bank debt; ¶ 1.f (\$2,564) credit card debt; and ¶ 1.g (\$1,038) bank debt.

Applicant was unemployed in 2009 and 2010, and he was unable to pay his debts. (Tr. 22-23; SOR response) He returned to college and obtained part-time

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<sup>1</sup>Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

employment. (Tr. 24-25) In 2009 and 2010, his accounts fell into arrears. He received financial counseling. (Tr. 21) He has been employed since October 2013 with a defense contractor. (Tr. 21) His current annual salary is \$64,000. (Tr. 22)

In 2007, Applicant purchased a vehicle. (Tr. 26) He was unable to make the payments, and the vehicle was repossessed in 2010. (Tr. 26) At the time the vehicle was repossessed, he thought that he would not owe anything after they sold the vehicle. (Tr. 31) In June, 2014, Applicant paid the creditor in SOR ¶ 1.a \$1,916, and the creditor wrote that the debt was reduced to \$5,747. (SOR response at 17-23) On August 1, 2014, the creditor wrote that the debt was paid and settled. (Tr. 31-32; AE K at 8)

On June 23, 2014, he paid the creditor in SOR ¶ 1.b \$30, and resolved the debt. (Tr. 32-33; SOR response at 24) On June 19, 2014, Applicant paid the creditor in SOR ¶ 1.c \$1,091 and resolved the debt. (Tr. 33-34; SOR response at 12-13)

On June 25, 2014, the creditor wrote that Applicant owes \$3,282 on the debt in SOR ¶ 1.d. (AE H) Applicant disputed the debt, but said if his dispute was unsuccessful, he would pay the debt by the end of 2014. (Tr. 34-35; AE H, I) On June 20, 2014, Applicant paid the creditor in SOR ¶ 1.e \$352 and resolved the debt. (Tr. 37-38; SOR response at 15)

On June 20, 2014, Applicant received a settlement agreement from the creditor in SOR ¶ 1.f suggesting several payment options to address a debt for \$2,618. (Tr. 38-39; AE G) On October 24, 2014, the creditor wrote, stating the “account is now considered settled in full” in return for one \$2,000 payment. (AE K) Applicant said in an October 24, 2014 email that he had paid the debt. (AE K)

Applicant believed the debt in SOR ¶ 1.g was the same debt as the debt in SOR ¶ 1.e. (Tr. 39-40) The two debts are for approximately the same amount and owed to the same creditor. Applicant said the creditor verified to him that they were the same account. I conclude they are one and the same debt, and it is paid.

## **Character Evidence**

Applicant’s colleague in a graduate department and a teaching colleague and professional writing tutor describe him as cheerful, positive, patient, organized, determined, goal oriented, dedicated, and responsible. (AE B, C) His brother describes him as dedicated, energetic, positive, generous, and conscientious. (AE F) His fiancé and two friends said he is dedicated, responsible, energetic, generous, and trustworthy. (AE A, D, E) His six character references support his access to sensitive information and assignment to a public trust position. (AE A-F)

## **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 [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.

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." Regulation ¶ C6.1.1.1. 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. See Regulation ¶ C8.2.1.

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 guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's suitability for a public trust position. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her 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.” Section 7 of Executive Order (EO) 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

## Analysis

### Financial Considerations

AG ¶ 18 articulates the trustworthiness concern relating to 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 [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 provides two disqualifying conditions that could raise a trustworthiness concern and may be disqualifying in this case: “(a) inability or unwillingness 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), 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.

(internal citation omitted). Applicant’s history of delinquent debt is documented in his credit report, SOR response, and hearing transcript. His SOR alleges seven delinquent collection debts for \$17,093. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 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;<sup>2</sup> 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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's eligibility [for a public trust position], there is a strong presumption against the grant or maintenance of 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 [trustworthiness] concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in [public trust position] decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being

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<sup>2</sup>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)).

considered for access to [sensitive] information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶¶ 20(d) is partially applicable, and 20(e) is applicable to the debt in SOR ¶ 1.g. The debt in SOR ¶ 1.g duplicates the debt in SOR ¶ 1.e. They are approximately the same amount and owed to the same creditor. Applicant said the creditor verified to him that they were the same account. Applicant provided evidence that he maintained contact with his creditors.<sup>3</sup>

A recent Appeal Board decision illustrates the analysis for applying AG ¶¶ 20(a) and 20(b). In ISCR Case No. 09-08533 (App. Bd. Oct. 6, 2010), the applicant had \$41,000 in delinquent credit card debt and defaulted on a home loan generating a \$162,000 delinquent debt. *Id.* at 2. That applicant filed for bankruptcy the same month the Administrative Judge issued her decision. *Id.* at 1-2. The applicant in ISCR Case No. 09-08533 was recently divorced, had been unemployed for 10 months, and had childcare responsibilities. Her former husband was inconsistent in his payment of child support to her. The Appeal Board determined that AG ¶ 20(a) was “clearly applicable (debt occurred under such circumstances that it is unlikely to recur and [the debt] does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment)” even though that applicant’s debts were unresolved at the time the Administrative Judge’s decision was issued. *Id.* at 3. The Appeal Board also decided that the record evidence raised the applicability of AG ¶ 20(b) because of the absence of evidence<sup>4</sup> of irresponsible behavior, poor judgment, unreliability, or lack of trustworthiness. *Id.* at 4.

Applicant’s conduct in resolving his debts warrants full application of AG ¶¶ 20(a), 20(b), and 20(c). He paid five debts, and he received financial counseling. He promised to resolve all of the SOR debts by the end of 2014.

Applicant’s loss of employment and underemployment are circumstances largely beyond his control. He understands what he must do to establish and maintain his financial responsibility.<sup>5</sup> The Appeal Board explained that circumstances beyond one’s

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<sup>3</sup>“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.

<sup>4</sup> Applicant has the burden of proving the applicability of any mitigating conditions, and the burden to disprove a mitigating condition never shifts to the Government.

<sup>5</sup>The Appeal Board has indicated that promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner. ISCR Case No. 07-13041 at 4 (App. Bd. Sept. 19, 2008) (citing ISCR Case No. 99-0012 at 3 (App. Bd. Dec. 1, 1999)).

control can cause unresolved debt, and are not necessarily a bar to having access to sensitive and classified information stating:

However, the Board has previously noted that an applicant is not required to be debt-free nor to develop a plan for paying off all debts immediately or simultaneously. All that is required is that an applicant act responsibly given his [or her] circumstances and develop a reasonable plan for repayment, accompanied by “concomitant conduct,” that is, actions which evidence a serious intent to effectuate the plan. See ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008).

ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009).

Applicant admitted responsibility for and took reasonable and responsible actions to resolve his SOR debts by disputing two debts, and paying five debts. There are clear indications the problem is being resolved and is under control. He has made substantial progress in the last six months of resolving his delinquent debts. His financial problems are unlikely to recur. His history of delinquent debt does not cast doubt on his current reliability, trustworthiness, or good judgment. His efforts are sufficient to fully mitigate 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(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.

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. AG ¶ 2(c). I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a 25-year-old hospital worker employed by a defense contractor since October 2013. He is a high school graduate and was awarded a bachelor of art degree in mathematics in 2013. Applicant’s six character statements lauded his cheerful positive attitude, patience, organization skills, determination, responsibility, and



reliability. They supported his access to sensitive information and assignment to a public trust position. (AE A-F) There is no evidence of reportable criminal offenses, alcohol or drug abuse, or violations of his employment rules. He is sufficiently mature to understand and comply with his public trust responsibilities. There is every indication that he is loyal to the United States, the DOD, and his employer.

Applicant's loss of employment and underemployment caused him to have financial problems. These are all circumstances largely beyond his control. Nevertheless, he disputed two debts; and he paid five debts. The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

In evaluating Guideline F cases, the Board has previously noted that the concept of meaningful track record necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has . . . established a plan to resolve his financial problems and taken significant actions to implement that plan. The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination). There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations and quotation marks omitted).

Applicant is an intelligent person, and he understands what he needs to do to establish and maintain his financial responsibility. He has made reasonable decisions under his particular financial circumstances. His overall financial history shows a "meaningful track record" of debt repayment. I am confident he will establish and maintain his financial responsibility.<sup>6</sup>

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<sup>6</sup>Of course, the Government can re-validate Applicant's financial status at any time through credit reports, investigation, and additional interrogatories. Approval of access to sensitive information now does not bar the Government from subsequently revoking it, if warranted. "The Government has the right to reconsider [trustworthiness] significance of past conduct or circumstances in light of more recent conduct having negative [trustworthiness] significance." ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012). Violation of a promise made in a [trustworthiness] context to pay legitimate debts also raises judgment concerns under Guideline E, and may support future revocation of a public trust position. An administrative judge does not have "authority to grant an interim, conditional, or probationary clearance." ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012) (citing ISCR Case No. 10-03646 at 2 (App. Bd. Dec. 28, 2011)). See *also* ISCR Case No. 04-03907 at 2 (App. Bd. Sep. 18, 2006) (stating, "The Board

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude financial considerations concerns are mitigated. Eligibility for a public trust position is granted.

### **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: FOR APPLICANT

Subparagraphs 1.a to 1.g: For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

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Mark Harvey  
Administrative Judge

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has no authority to grant [a]pplicant a conditional or probationary [public trust position] to allow her the opportunity to have a [public trust position] while she works on her financial problems.”). This footnote does not imply that this Applicant’s public trust position is conditional.