



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



In the matter of:

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Applicant for Public Trust Position

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ADP Case No. 14-02516

**Appearances**

For Government: John Bayard Glendon, Esquire, Department Counsel  
For Applicant: *Pro se*

01/12/2016

**Decision**

HOWE, Philip S., Administrative Judge:

On March 20, 2013, Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP). On October 28, 2014, the Department of Defense Consolidated Adjudications Facility issued to Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns under Guideline F. The action was taken under Department of Defense Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR in writing on November 12, 2014. He requested his case be decided on the written record in lieu of a hearing. (Item 2.)

On June 23, 2015, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM), consisting of Items 1-6, was provided to the Applicant on July 15, 2015. He was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the file on August 5, 2015. He filed a Response to the FORM within the 30-day time allowed that would have expired on September 4, 2015. Department Counsel had no objection to the submission of this information. I marked these documents as Items 7 to 12 and they are part of the Response.

I received the case assignment on October 19, 2015. Based upon a review of the pleadings and exhibits, eligibility to occupy a public trust position and access to sensitive information is denied.

### **Findings of Fact**

Applicant admitted the six financial allegations in Paragraph 1. He submitted documents to support his assertions that his debts are paid or he has an explanation for them not being paid. (Items 1-3)

Applicant is 63 years old, married with two children. He is a software engineer for a defense contractor since March 2007. (Items 2, 3)

Applicant owes the Internal Revenue Service (IRS) for two tax liens (Subparagraphs 1.a and 1.b). One lien was filed against him in July 2008 because as stated in his Answer he withdrew retirement funds from an account prematurely and owed the penalty for such action. That debt is \$36,969. The second lien is for \$11,961 for a similar 401(k) withdrawal in 2014, according to Applicant's statements. These amounts total \$48,930. Applicant contends in his Answer and Response that he has an installment payment agreement with the IRS to pay these taxes. He did not submit a copy of the installment agreement nor did he provide specific information about the agreements. He did not submit any proof that his two tax liens were for retirement fund withdrawals, the amounts, and date of these actions. (Answer; Items 1, 8, 11)

However, in his Response Applicant enclosed a document from the IRS showing he is required to make a monthly payment of \$873. The document is labelled as an installment agreement monthly payment due bill from the IRS. It shows only a June and July 2015 payment on debt of \$88,855.19. The document lists \$57,039.17 as the original amount owed. The balance is penalties and interest. The reverse side of this IRS document shows that Applicant owes this debt for unpaid income taxes for tax years 2006 to 2009, and 2011 to 2013. That information on a government form varies from Applicant's Answer and Response as to the source of the debt. The printed IRS

document is more persuasive than Applicant's assertions. Therefore, the debts set forth in Subparagraphs 1.a and 1.b are not explained fully and are not resolved. (Items 1-6, 8, 11; Answer; Response)

Applicant owes a collector for a medical account \$212 placed in collections in 2011 (Subparagraph 1.c). This debt, he contends, is disputed by him because he does not recall doing business with the collector. This debt appears on his credit reports and is recorded as unpaid. This debt is not resolved. (Items 1-6; Answer; Response)

Applicant owed \$163 on a medical account from 2011 (Subparagraph 1.d). The June 2015 credit report in the file shows this debt as paid as of November 2014. Applicant's Answer and Response state he disputes the account because he has no record of doing business with the collector on the account. This debt is resolved. (Items 1-6; Answer; Response)

Applicant owed a collector \$1,745 on a medical account (Subparagraph 1.e). The June 2015 credit report shows this debt as paid in November 2013. Applicant's Answer and Response state the debt arose from an emergency room visit for hypertension. His insurer would not pay it because it determined that the tests done at the hospital were unnecessary and/or expensive. Applicant contends he settled the debt for \$705 as evidenced by a letter dated October 21, 2013, from Applicant to the lawyers representing the medical provider. No settlement agreement was submitted by Applicant. This debt is resolved as shown on the latest credit report. (Items 1-6, 7, 8, 12; Answer; Response)

Applicant owed a collector \$661 on a medical account dating from 2011 (Subparagraph 1.f). The June 2015 credit report shows this debt is paid as of November 2013. Applicant's documents contend this debt was part of the debt for \$1,745 that was paid. This debt is resolved. (Items 1-6; Answer; Response)

Applicant also contends he was a victim of the recession of 2008. His e-QIP shows he was unemployed from March 2003 to November 2004; March 2005 to May 2005; September 2005 to February 2006; and November 2006 to March 2007. His documents claim he needed to use his retirement funds for living expenses during those periods. Those withdrawals would add to his income in the years made an increase in taxes on his income for 2006 to 2009 and 2011 to 2013. (Answer; Response; Item 11; e-QIP)

## Policies

Positions designated as ADP I/II/III are classified as “sensitive positions.” (See 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.” (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004, indicates trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. 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, the administrative judge must consider the disqualifying and mitigating conditions in the AG (AG ¶ 2(a)). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2 (c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

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.” 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

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.

## **Analysis**

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

The trustworthiness concern relating to the guideline for Financial Considerations 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 classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline at AG ¶ 19 contains nine disqualifying conditions that could raise trustworthiness concerns. From these nine conditions, two conditions are applicable to the facts found in this case:

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

From 2006 to the present, Applicant accumulated six delinquent debts, totaling \$51,711, some of which remain unresolved. The tax debts total \$48,930. The debts were unpaid or unresolved at the start of the trustworthiness determination review. These two disqualifying conditions are established.

The guideline in AG ¶ 20 contains six conditions that could mitigate trustworthiness concerns arising from financial difficulties. Only three mitigating conditions might have partial applicability:

(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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolved.

Applicant was unemployed intermittently for a total of 21 months between March 2003 and March 2007. This was a condition beyond his control. Applicant stated he used retirement fund withdrawals during those periods to support his family. He incurred tax liabilities for such withdrawals as set forth in the SOR Subparagraphs 1.a and 1.b. He did not act responsibly under those circumstances by failing to pay taxes on the withdrawals in each year as he made them. AG ¶ 20 (b) applies only partially.

AG ¶ 20(c) requires financial counseling and/or clear indications of resolution of the financial problems. Applicant has not had any financial counseling so that component of the mitigating condition is not present. Three of his debts are resolved. His tax debts and one medical debt are not resolved, demonstrating that his financial delinquencies are not under control. The AG ¶ 20(c) mitigating condition applies only partially.

Applicant paid three relatively small delinquent medical debts. He claims the IRS debt arose from withdrawals from his retirement accounts to use for support of his family when he was unemployed. However, the IRS document references unpaid income taxes for seven years and not a penalty for a withdrawal from his retirement account. Applicant does not explain the discrepancy. He claims his installment payment agreement with the IRS resolves these two tax liens filed in 2008 and 2014, but he does not explain with specificity the basis for the liens. It appears he negotiated that agreement recently and has only made two payments. He failed in his burden of proof on those allegations. The monthly payment of \$873 on the \$88,855.19 tax debt stated in the document will take at least nine years to repay. But more importantly his version of the debt is not supported by any documents he submitted. AG ¶ 20(d) partially applies to the three smaller medical debts he made a good-faith effort to repay.

## **Whole-Person Concept**

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

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a position of trust must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. Applicant was an adult when he incurred the debts. His explanations of the nature of the debts and how he is repaying them do not match the documents submitted or the credit reports in the file. At this time his delinquent debts create the potential for pressure, coercion, exploitation, and duress, and demonstrate a lack of judgment. His financial problems are likely to continue in the future. His explanations, because they are not corroborated by the facts in the financial documents, are not given much credibility. That credibility is encompassed by the trustworthiness and reliability standard in this case.

Overall, the record evidence leaves me with questions and substantial doubts as to Applicant's eligibility and suitability for a position of trust. For all these reasons, I conclude Applicant did not mitigate the concerns arising under the guideline for Financial Considerations.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a to 1.c:	Against Applicant
Subparagraphs 1.d to 1.f:	For Applicant

### **Conclusion**

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

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PHILIP S. HOWE  
Administrative Judge