



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



In the matter of:

XXXXXXXXXXXX, XXXXX  
SSN: XXX-XX-XXXX

Applicant for Public Trust Position

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ADP Case No. 07-05388

**Appearances**

For Government: Braden M. Murphy, Esq., Department Counsel  
For Applicant: *Pro Se*

September 25, 2008

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guidelines F (Financial Considerations), E (Personal Conduct), and J (Criminal Conduct). Clearance is denied.

**Statement of the Case**

Applicant submitted his Questionnaire for Public Trust Position (SF 85P), on May 13, 2006. On May 7, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guidelines F (Financial Considerations), E (Personal Conduct), and J (Criminal Conduct) for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation), and the revised adjudicative guidelines (AG) promulgated by the President on

December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

In an undated Answer, received by DOHA on June 2, 2008, Applicant responded to the SOR allegations. He elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated July 29, 2008, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.<sup>1</sup> Submissions were due by September 7, 2008. Applicant timely submitted additional material. On September 4, 2008, Department Counsel interposed no objection to Application's submissions. The case was assigned to me on September 9, 2008.

### **Findings of Fact**

Applicant admitted all of the SOR allegations contained in ¶¶ 1.a. – 1.f., 2.a. – 2.e., and neither admitted or denied 3.a. After a complete and thorough review of the evidence, I make the following findings of fact:

Applicant is a 33-year-old employee of a defense contractor, and has worked for this employer since March 2006. He graduated from high school in June 1994, and attended a university from September 1996 to December 1997. Applicant has never been married and has no dependents.<sup>2</sup>

Applicant's background investigation included the review of his SF 85P,<sup>3</sup> local police department's December 2007 response to DOHA's request for records,<sup>4</sup> his February 2008 Response to DOHA's Interrogatories,<sup>5</sup> his second February 2008 Response to DOHA's Interrogatories,<sup>6</sup> his July 2006 and April 2008 credit bureau reports,<sup>7</sup> and his July 2006 FBI Identification Record.<sup>8</sup>

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<sup>1</sup> DOHA transmittal letter is dated July 29, 2008; and Applicant received the FORM on August 8, 2008. The DOHA transmittal letter informed Applicant that he had 30 days after Applicant's receipt to submit information.

<sup>2</sup> Item 4.

<sup>3</sup> *Id.*

<sup>4</sup> Item 5.

<sup>5</sup> Item 6.

<sup>6</sup> Item 7.

<sup>7</sup> Items 8 and 9.

<sup>8</sup> Item 10.

The Government established by Applicant's admissions and evidence presented that Applicant had or has six delinquent debts totaling approximately \$3,804. (SOR ¶¶ 1.a. – 1.e.) Of those debts, one was a defaulted student loan for \$1,926. (SOR ¶ 1.a.) The remaining five debts consist of five collection accounts in the amounts of \$718, \$745, \$209, \$136, and \$70. (SOR ¶¶ 2.b. – 2.f.) His record of indebtedness goes back to at least 2000 and has been ongoing.<sup>9</sup>

In his Response to SOR, Applicant offered no documentation that any of his debts have been paid, that he had set up payment plans, nor has he submitted any evidence that he contacted any creditors or sought credit counseling or that his debts are or will be resolved. In his Response to FORM, he submitted a letter from the U.S. Department of Education dated February 6, 2008, stating that his student loan has been transferred from the Default Resolution Group back to the Direct Loan Servicing Center. The letter further advised that his student loan had been rehabilitated and that the national credit bureaus were notified to delete the record of default from his credit record. Applicant's Response to FORM contains no further documentation regarding any other debts identified in the SOR.

Applicant was interviewed in January 2007 by an Office of Personnel Management (OPM) Investigator. During that Interview, Applicant stated that all of his accounts became delinquent "because he was not making any money due to being in between jobs a lot."<sup>10</sup>

In December 2002, Applicant was cited for speeding and reckless driving, and was convicted in the same month and year of reckless driving. He was fined \$100, ordered to pay court costs, and to attend traffic school. (SOR ¶ 2.a.) In January 2004, Applicant was fired from his job for engaging in inappropriate e-mail/internet activities. (SOR ¶ 2.b.) He explained that he responded to a sexually explicit e-mail that he received, adding that no images were transmitted, just inappropriate language.<sup>11</sup>

In December 2004, Applicant was cited for a seatbelt violation. This ticket was reported past due in January 2005. (SOR ¶ 2.c.) In August 2005, Applicant was charged with 1<sup>st</sup> degree wanton endangerment and 4<sup>th</sup> degree domestic violence minor injury assault. In February 2006, he was convicted of the 4<sup>th</sup> degree assault, and sentenced to time served (two days), and ordered to pay court costs. He was placed on two years probation (one year supervised), and completed his probation in February 2008. (SOR ¶ 2.d.)

In February 2006, he was arrested and cited for having an expired registration and for failing to maintain the required insurance. He was ordered to pay \$130 in court costs. (SOR ¶ 2.e.)

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<sup>9</sup> Items 8 and 9.

<sup>10</sup> Item 7 at p. I-13.

<sup>11</sup> Item 6.

Applicant did not submit any reference or character evidence not did he submit any other evidence in Response to SOR or Response to FORM except as noted.

### **Policies**

Positions designated as ADP I and ADP II 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. 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 over-arching adjudicative goal is a fair, impartial and common sense 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.

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.” See *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or 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 [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise trustworthiness concerns. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Applicant accumulated six delinquent accounts, totaling approximately \$3,804, that consisted of five charged off as bad debts, and one student loan that went into default. His indebtedness began in 2000 and has been ongoing. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from financial difficulties. Applicant submitted evidence that his student loan has been returned to good standing. He submitted no evidence that he has made any progress in resolving the remaining five collection accounts.

Under AG ¶ 20(b), it may be mitigating where “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.” Applicant has failed to demonstrate that he acted responsibly under the circumstances, as required by AG ¶ 20(b). Applicant's only explanation regarding his indebtedness was found in his OPM Interview in which stated that all of his accounts became delinquent “because he was

not making any money due to being in between jobs a lot.” This blanket statement is insufficient to warrant application of AG ¶ 20(b).

AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Other than documenting payment of his student loan, Applicant has fallen short on showing that he has paid or otherwise resolved the remaining debts. Under this mitigating condition, I am able to give Applicant credit for rehabilitating his defaulted student loan default listed in SOR ¶ 1.a. I am unable to apply any mitigating conditions to the remaining five collection accounts listed under this concern given the fact that Applicant provided no favorable evidence.

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

The trustworthiness concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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 guideline notes several conditions that could raise trustworthiness concerns. Applicant incurred three traffic violations between 2002 and 2006. In January 2004, he was fired for workplace misconduct for responding to a sexually explicit e-mail. Finally, Applicant was arrested in January 2005 and charged with 1<sup>st</sup> degree wanton endangerment and 4<sup>th</sup> degree assault and received two years probation (one year supervised). Under AG ¶ 16(d),

[C]redible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations.

Under AG ¶ 17, potential conditions that could mitigate this security concern include:

(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; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

I specifically considered the mitigating conditions *supra* and conclude they do not apply. Applicant's identified conduct under this concern consists of five separate incidents spanning a four year period from 2002 to 2006. Taken together, these incidents preclude a finding that they are unlikely to recur. Doubt remains about his current reliability, trustworthiness, and good judgment.

### **Guideline J, Criminal Conduct**

The trustworthiness concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

The single allegation under Guideline J is a cross-allegation of the Guideline E concern over Applicant's 2005 domestic violence assault conviction. This offense is sufficient to apply two disqualifying conditions under AG ¶ 31:

(a) a single serious crime or multiple lesser offenses; and

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant's recent arrest brings to the forefront the criminal conduct concerns raised by his past behavior. I am required to consider Applicant's overall questionable behavior when evaluating the seriousness of the conduct alleged in the SOR to determine factors such as the extent to which his behavior is recent; the likelihood of recurrence; Applicant's explanations or lack thereof concerning the circumstances of the incidents alleged; and his rehabilitation.<sup>12</sup> I conclude, however, that the only substantiated criminal offense is in SOR ¶ 2.d. The Government did not prove the other offenses are crimes, as opposed to traffic offenses.

Under AG ¶ 32, potential conditions that could mitigate this security concern include:

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<sup>12</sup> ISCR Case No. 04-09959 at 3 (App. Bd. May 19, 2006).

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Under the totality of the circumstances, I find Applicant's criminal behavior is recent and not isolated. Considering his criminal behavior, the nature and seriousness of his misconduct, and lack of mitigating evidence, I am unable to apply any of the mitigating conditions *supra*. His behavior raises questions about his ability and willingness to follow the law, and ultimately, to protect classified information.

Additionally, for the same reasons outlined under the discussions of Guidelines F, E and J, incorporated herein, I conclude Applicant's behavior shows questionable judgment, lack of reliability, and untrustworthiness.

The objective of a trustworthiness determination is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to sensitive information. Indeed, the "whole person" concept recognizes we should view a person by the totality of his acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the facts listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has not mitigated the security concerns raised. He has not overcome the case against him and satisfied his ultimate burden of persuasion.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has not mitigated the trustworthiness concerns arising from his financial considerations.

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>13</sup> and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has mitigated or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

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<sup>13</sup> See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).



### **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
Subparagraph 1.a.:	For Applicant
Subparagraphs 1.b. – 1.f.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a. – 2.b.:	Against Applicant
Subparagraph 2.c.:	For Applicant
Subparagraphs 2.d. – 2.e.:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.a.:	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 grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

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ROBERT J. TUIDER  
Administrative Judge