



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



In the matter of:

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SSN: -----

Applicant for Public Trust Position

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ADP Case No. 07-07812

**Appearances**

For Government: Ray T. Blank, Esquire, Department Counsel

For Applicant: Pro Se

April 10, 2008

**Decision**

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Questionnaire for Public Trust Position (SF 85P), on November 28, 2005.<sup>1</sup> On November 1, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guidelines F, E, and J 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 Jan. 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.

Applicant acknowledged receipt of the SOR on November 5, 2007, and elected to have his case decided on the record in lieu of a hearing. Department Counsel

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<sup>1</sup>He resigned the questionnaire on March 24, 2006 and May 25, 2006.

submitted the Government's written case on February 29, 2008.<sup>2</sup> Applicant received a complete file of relevant material (FORM) on March 4, 2008, and was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's case. Applicant submitted additional material. I received the case assignment on April 7, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

## **Procedural and Evidentiary Rulings**

### **Motion to Amend SOR**

Department Counsel moved to amend the SOR by adding ¶ 1.r, alleging Applicant is indebted to a company on an automobile loan account that was initially referred to another company for collection in about July 2003 and subsequently charged off in the amount of \$10,952.88. As of August 21, 2007, this debt has not been paid. Applicant was provided notice of the amendment and filed no objection. Department Counsel's motion to amend the SOR is granted.

### **Findings of Fact**

In his Answer to the SOR, dated November 16, 2007, Applicant admitted the factual allegations in ¶¶ 1.a, 1.c, 1.e, 1.f, 1.g, 1.h, 1.i, 1.l, 1.m, 1.p, 1.q, 2.a, 2.b(2) and (4). He denied the factual allegations in ¶¶ 1.b, 1.d, 1.j, 1.k, 1.n, 1.o, 2.b(1) and (3) of the SOR (Item 2). He neither admitted nor denied the allegations of subparagraph 3.a. He also provided additional information to support his request for eligibility for a public trust position.

Applicant is a 41-year old employee of a defense contractor. He initially submitted a Questionnaire for Public Trust Positions, on November 25, 2005, which he resigned and certified on March 24, 2006, and May 25, 2006 (Item 4). He served in the National Guard from 1988 until 1998. He served in the U.S. Army from January 1998 until February 2000, and he held a security clearance (*Id*). He is divorced with one child.

In 1999 and 2000, while in the military, Applicant was charged with domestic assault offenses on three separate occasions. Specifically, on October 20, 1999, he and his wife were engaged in a verbal exchange which turned into a physical altercation when Applicant slapped his wife in the face, grabbed her and threw her on the floor (Item 8). He was charged with assault (domestic disturbance) (Item 9). On November 7, 1999, Applicant struck his wife in the head area with an open and closed fist (Item 10). He was charged with aggravated assault. On January 9, 2000, Applicant was again involved in a verbal altercation with his wife when he struck her. He was charged with assault (domestic disturbance with injuries) (Item 12). He explained that his wife committed adultery on many occasions and he is guilty of not handling the situation in a better way. He believed the anger was justified but he reported that he took anger management classes. Applicant believes these incidents were removed from his record.

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<sup>2</sup>The Government submitted 14 documents in support of its case.

Applicant has worked for his current employer since November 2005. He reported a period of unemployment from February 2000 until April 2000, and April 2004 until sometime in 2005 on his security application.

The SOR alleges 17 delinquent debts totaling approximately \$20,202.88. Applicant admits to approximately \$19,000 in delinquent debt.<sup>3</sup> Applicant asserts that the accounts in allegations ¶ 1.a, 1.b, 1.d, 1.e 1.g, 1.h, 1.i, 1.j, 1.k, 1.l, and 1.n, are either unknown to him or he has never been contacted by the creditor. Applicant alleges the debt in ¶ 1.f is paid (ARMY COM CTR) because “the military does not allow discharge before all bills/debts have been paid.” In response to some allegations, Applicant states he is willing to resolve the debt if contacted. Applicant provided no documentation of payment or payment plan for any of the debts (Item 5).

When Applicant signed his Standard Form SF 85P, Questionnaire for Public Trust Position on three separate dates, he answered “no” to questions 20 and 22 concerning his police record and financial delinquencies.

Applicant denied having been more than 180 days delinquent on any debts within the prior 7 years. Applicant explained in his answer to his interrogatories that he had no idea of the debts until he was confronted with this information. He maintains that he has never been contacted by any of the creditors so that he would have an opportunity to resolve the debts (Item 5). He also had inconsistent responses in the interrogatories compared to his admission and denials in the answer to the SOR. For example, he would admit the debt, but then state in the interrogatory that he has done nothing to resolve it because he was not aware of the debt.

Applicant did not list any arrests and/or charges on his SF 85P, because he believed it was removed from his record. He further explained the “military incident” was of a personal nature.

In January 2006, Applicant was charged and arrested with driving under a suspension. He admits to this violation in his response to the FORM. He was fined \$647.50. However, he did not list this in response to question 20. Applicant’s reasoning was that it thought the questions referred to felonies and not fines (Item 5).

In Applicant’s March 24, 2008 letter in response to the FORM, he asserted that he is a trustworthy and dependable person who is worthy of a trustworthiness determination. He regrets his poor judgment and admits some bad choices with respect to finances. He does not consider himself a risk. Applicant did not provide any additional information concerning the reasons for his financial difficulties or his inability to pay his delinquent debts.

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<sup>3</sup>This includes the amount in amended allegation 1.r.

## 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 delinquent debt on numerous accounts charged off or placed in collection beginning in 2000. He admits to \$19,000 of delinquent debt that is not resolved. 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. Under AG ¶ 20(a), the disqualifying condition may be mitigated where “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.” Applicant’s financial difficulties arose in 2000 and are ongoing at the present. He accumulated delinquent debt but provided no reasons for the accumulations. He did not present any evidence to persuade me that it is unlikely to recur, nor that it does not raise concerns about his current reliability, trustworthiness, or good judgment. The evidence does not raise this potentially mitigating condition.

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.” As noted above, Applicant listed two distinct periods of unemployment in his application. However, he

did not elaborate on them, nor did he explain what, if any, impact it had on his ability to pay his debts. He presented no evidence to show that he acted responsibly in identifying and resolving these debts. I find this potentially mitigating condition is not a factor for consideration in this case.

Evidence that “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” is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Applicant did not present any information concerning counseling. He has not resolved his delinquent debts, either by payment or settlement. I conclude these potentially mitigating conditions do not apply.

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

The security 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 security concerns. Under 16(a), “deliberate omission, concealment, or falsification of relevant facts from any personnel 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” is potentially disqualifying.

In this case, Applicant offered explanations for his not listing the overdue debts and the assault incidents on his public trust questionnaire. However, the explanations are inconsistent and not reasonable. It is not reasonable to conclude that he was not aware of the many delinquent debts over a period of almost seven years, nor that he was never notified of the delinquent debt. He admitted to several of the incidents that occurred with his wife when he was in the military. However, he did not list them because he thought that they were to be removed from his record. This leaves me with the conclusion that he deliberately omitted them in the hopes that they would not be discovered. I find that he intentionally omitted relevant information from his application in 2005 and again when he resigned the application on two occasions in 2006. None of the mitigating conditions apply.

## **Guideline J, Criminal Conduct**

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

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

The guideline notes several conditions that could raise security concerns. Under AG ¶ 31(a), an "single serious crime or multiple lesser offenses" may be potentially disqualifying. Similarly, under AG ¶ 31(c), "an allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted" may raise security concerns. As discussed above, Applicant intentionally falsified his public trust application. He re-certified the information in May 2006. This is sufficient to raise these potentially disqualifying conditions.

While the incidents of domestic violence are in the distant past and have not recurred, they are not considered for mitigation purposes because Applicant lied on his questionnaire. None of the mitigating conditions apply under this guideline.

## **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) 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 public trust position 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 the facts and circumstances surrounding this case. Applicant served in the military and the reserves. He has been employed with his current employer since 2005. He held a clearance while in the military. Applicant expresses regret for his actions and poor judgment. However, he has not provided any mitigating information concerning his financial problems nor his plan to resolve them. Moreover, he falsified his trustworthiness application as recently as may 2006. This is a violation of Federal law under Title 18, United States Code, Section 1001, which is a felony.

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.

### **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-1.r:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a-2.b:	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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Noreen A. LYNCH  
Administrative Judge