



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



In the matter of:)
)
) ADP Case No. 08-03216
)
)
Applicant for ADP – II Position)

Appearances

For Government: John Glendon, Department Counsel
For Applicant: *Pro Se*

November 10, 2008

Decision

HEINY, Claude R., Administrative Judge:

The Statement of Reasons (SOR) alleges Applicant had 16 past due accounts totaling more than \$62,000. Twelve of the debts have not been paid nor is there an arrangement paying these debts. Applicant mitigated the personal conduct security concerns, but failed to mitigate the financial considerations security concerns. Eligibility to access to sensitive information is denied.

Statement of the Case

On September 6, 2007, Applicant submitted his Questionnaires for Public Trust Position (SF 85P). On July 23, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F, financial considerations, based on a history of financial problems as evicenced by delinquent debts and Guideline E, personal conduct, for falsified material on his SF 85P. 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.

On August 21, 2008, Applicant's answer to the SOR was received in which Applicant requested a hearing and provided nine attachments listed as Exhibits A through I to his answer. On September 22, 2008, I was assigned the case. On October 7, 2008, DOHA issued a notice of hearing scheduling the hearing held on October 16, 2008. The government offered Exhibits (Ex.) 1 through 7, which were admitted into evidence. Applicant testified on his own behalf and submitted Exhibit A, which was admitted into evidence. The record was kept open to allow Applicant to submit additional matters. On October 27, 2008, additional documents were received. There being no objection, the material was admitted into evidence as Ex. B. On October 24, 2008, the transcript (Tr.) was received.

Findings of Fact

In his Answer to the SOR, Applicant denied the factual allegations in ¶¶ 1.g, 1.p, and 2.c of the SOR. He neither admitted nor denied SOR ¶ 2.b. He admitted the remaining factual allegations of the SOR. He admits owing more than \$15,000 on 12 debts. (Tr. 19) Applicant also provided additional information with his answer to the SOR to support his request for eligibility for access to sensitive information. There being no objection, the additional material was admitted into the record and referred to hereafter as "Answer Ex."

Applicant is a 37-year-old health program policy analyst who has worked for a defense contractor since September 2007, and is seeking to obtain accesses to sensitive information. (Ex. 1) Applicant maintains two jobs. He teaches medical assisting at night and is paid \$23 per hour, which generates \$15,000 to \$16,000 per year. (Tr. 41) In October 2008, Applicant was offered a new job paying \$85,000. (Ex. A)

Applicant was trained in the Air Force as a medical technician. (Tr. 42) Applicant was in the Air Force ten years and ten months, from January 1990 to January 2001. (Tr. 42, Ex. 1) Applicant received an honorable discharge and left as a staff sergeant, pay grade E-5. (Tr. 42, Ex. 6)

In August 2000, a paternity test determined Applicant was not the father of one of his wife's children. (Answer Ex. B) In March 2003, Applicant and his wife separated. (Answer Ex. A) In June 2003, a temporary protective order was issued against Applicant. (Answer Ex. G, I) From the time of separation and the divorce date, Applicant did not know his wife's location. (Tr. 52) Applicant has not seen his ex-wife since July 2006. (Tr. 53) In February 2004, at the time of the divorce decree, Applicant learned his

wife had obtained a \$922 monthly child support obligation and that he owed \$19,000 in past due child support. (Tr. 53, 56)

Applicant agreed to the support obligation in hopes he would be allowed to see his child. (Tr. 53) In hindsight, it was a bad decision because Applicant has yet to see his child. The balance of the arrearage occurred when Applicant was out of work due to illness. (Tr. 54) Applicant received partial disability from April 2005 to mid July 2005, which paid 60% of his income. (Tr. 57, 60) He was also unemployed from January 2006 to March 2006. (Tr. 57, 61) Prior to his unemployment he was making \$55,000 a year. (Tr. 62)

Applicant had difficulty serving his ex-wife in his attempt to have his child support lowered. (Tr. 64) In June 2007, the child support was \$560 per month with an additional \$100 per month to pay the arrearage. (Tr. 31) In April 2008, Applicant returned to court and discovered he was approximately \$26,000 in arrears on his child support (Tr. 54, SOR ¶ 1.q, \$26,267, which is the same debt as SOR ¶ 1.g, \$20,696). Applicant pays \$304 child support every two weeks for his one child of the marriage. (Tr. 31, 51, Ex. B) Applicant is current on his monthly child support payment, which includes payment on the arrearage. Payment is automatically deducted from his checking account. (Tr. 32, Ex. B)

In 2003, Applicant bought a Nissan, which was repossessed in 2004 (SOR ¶ 1.c, \$6,475, Tr. 73) Applicant owes: a \$1,400 telephone bill (SOR ¶ 1.b, Tr. 72); a \$1,717 credit card debt (SOR ¶ 1.e, Tr. 75); a \$1,670 doctor's bill (SOR ¶ 1. f, Tr. 75); three medical debts \$196 (SOR ¶ 1. h), \$435 (SOR ¶ 1.i), and \$457 (SOR ¶ 1.j); a \$59 utility gas bill (SOR ¶ 1.k); a \$1,162 hospital bill (SOR ¶ 1.l); and two telephone bills of \$267 (SOR ¶ 1. n) and \$77 (SOR ¶ 1. o).

In 2004, Applicant returned to school securing his bachelor's degree in health care management. Applicant is paying his student loans by automatic deduction from his bank account. Monthly, he pays \$112 on one loan and \$208 on the other. (Tr. 79) While in school, Applicant was overpaid \$896 by the Veteran Administration (VA). This debt (SOR ¶ 1. m) is paid each month by a \$100 automatic deduction from Applicant's bank account. (Tr. 45) Applicant owed a \$200 traffic ticket (SOR ¶ 1. p), which was paid following the hearing. (Ex. B)

In March 2005, Applicant was evaluated for memory loss, change in speech pattern, and fainting. (Answer Ex. E) Applicant learned he suffered from partial complex seizures. (Answer Ex. C) In 2005, Applicant suffered his last seizure. (Tr. 36) In May 2005, Applicant's doctor stated Applicant was suffering from a generalized anxiety disorder. He was suffering numbness, tingling in his hands and feet, generalized weakness, lightheadedness, and headaches. (Tr. 34) Applicant was treated long term for depression. (Answer Ex. E) Applicant has been on medication for the last four years and his depression is under control. (Tr. 33)

In Applicant's Questionnaires for Public Trust Position (SF 85P) dated September 6, 2007, Applicant failed to list a state tax lien (SOR ¶ 1.a, \$547, Ex. 3). Applicant was unaware of the tax lien four months after it was issued when he completed his SF 85P. (Tr. 36, 39) On his federal tax return, Applicant claimed as a dependant a woman with whom he lived. (Tr. 38, 66-67) The lien came about when the deduction was disallowed. In July 2005, Applicant and the woman married. (Tr. 68) Applicant received notice he owed some \$500, which his wife said she would pay. (Tr. 68) Applicant does not remember receiving any notice or paperwork concerning the tax lien before the lien was issued. (Tr. 39, 70) Applicant has made a \$50 payment on the tax debt. (Tr. 49)

In April 2008, Applicant entered into an agreement with a financial counseling firm or credit management agency. (Answer Ex. F) The financial service is to negotiate with creditors to pay Applicant's debts and have them removed from his credit report. Applicant went to the service intending to clean up his credit. (Tr. 45) The agreement will address eight debts totaling \$17,351. Once the service is paid a \$2,500 fee, the service will start negotiating with Applicant's creditors concerning the debts. (Tr. 48, 49)

The financial service fee is to be paid by monthly electronic payments. (Ex. B) For three months, from April 2008 to June 2008, Applicant was to pay the service \$330 each month for a total of \$990, which he has done. For the next 12 months, from July 2008 through June 2009, Applicant is to pay the service \$131.55 per month for a total of \$1,578. Starting in July 2008, Applicant was to save \$198.45 each month in order to have a fund of money from which offers will be made to negotiate payment to his creditors. (Ex. B, Tr. 48) The service has yet to negotiate with a creditor or make any type of payment. Once paid in June 2009, the financial service will start negotiations.

Applicant has not paid the small debts listed in the SOR because he is paying the service to negotiate on his behalf. (Tr. 78) Seven of Applicant's debts were under \$500 each, of which, three are under \$200 each.

In response to the March 2008 written interrogatories, (Ex 6) Applicant submitted a personal financial statement showing a gross salary of \$5,000 and a monthly net remainder (income less expenses and deductions) of \$1,354. (Ex. 6) Applicant provides financial support to his mother, grandmother, and his sister who has two children. (Tr. 83-84). He also helps his brother. (Tr. 87) Applicant plans to be debt free in a year and a half. (Tr. 84) Applicant contributes \$76 every two weeks to his 401(k) retirement plan, the balance of which is not part of the record. (Ex. B)

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

Revised Adjudicative (AG) ¶ 18 articulates the security concerns 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 classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed upon terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with eligibility for access to sensitive information. An applicant is not required to be debt free, but is required to manage his finances so as to meet his financial obligations.

The record evidence supports a conclusion Applicant has a history of financial problems. Applicant owed approximately \$42,000 on 15 past due obligations.¹ Applicant's history of delinquent debt is documented in his credit report, his SOR response, his response to interrogatories, and his testimony. Throughout this process, he admitted responsibility for all but three delinquent debts. His child support obligation was listed twice (SOR ¶¶ 1. g and 1. q) and he denied the \$200 traffic ticket (SOR ¶ 1. p). Applicant has provided insufficient documentation to show significant progress resolving his debts. Disqualifying Conditions AG ¶ 19(a), "inability or unwillingness to satisfy debts" and AG ¶19(c), "a history of not meeting financial obligations," apply.

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20(a) – (e) are potentially applicable:

¹ The SOR fails to list an allegation in SOR ¶ 1. d.

(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;

(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.

Approximately half of Applicant's debt (\$26,278 of \$41,828) relates to Applicant's child support arrearage. The arrearage was incurred between the time of his separation and divorce from his now ex-wife. Applicant agreed to the monthly child support obligation in a mistaken belief that if he agreed to the amount his ex-wife would allow him visitation with his child. His child support obligation is automatically deducted from his pay, but his ex-wife has continued in her refusal to allow him to see his child. He is paying \$100 monthly to the VA on an overpayment he received while he was a student. However, there are 12 additional debts totaling approximately \$14,000 that remain unpaid.

Applicant's medical problems caused him to receive partial disability payments from April 2005 to mid July 2005, which paid 60% of his income. He was unemployed the first three months of 2006. Additionally, Applicant provides support to his mother, sister, grandmother, and brother.

AG ¶ 20(a) does not apply to the 12 debts. They did not happen long ago, they are not infrequent, and were not incurred under such circumstances that it is unlikely to recur or cast doubt on the individual's current reliability, trustworthiness, or good judgment. The debts include medical bills, a utility bill, telephone bills, a credit card debt, and the 2004 vehicle repossession. No payments have been made on these debts.

Under AG ¶ 20(b), Applicant experienced both separation and divorce along with the financial burden associated with each and medical problems. AG ¶ 20(b) partially applies because these are problems beyond his control, but by making no payment on

the 12 delinquent debts since he returned to full-time employment he has failed to act responsibly as to these debts. Three of the debts are under two hundred dollars and four more are under \$500 each.

There is no indication Applicant received counseling for the problem nor is there a clear indication the problem is being resolved or is under control. Although no payments are being made on the 12 debts, Applicant hopes to be debt free in a year and a half. AG ¶ 20(c) does not apply.

Applicant has paid a traffic ticket and is making payments on his VA debt and on his child support obligation. ¶ 20(d) applies to these three debts because Applicant has initiated a good-faith effort to repay these overdue creditors or otherwise resolve the debts. The other debts are being handled by a finance service. Once the finance service has received its \$2,500 fee, scheduled to be June 2009, it will start negotiating settlement on Applicant's debts using money Applicant is to have saved. However, starting in July 2008, Applicant was to save \$198.45 monthly in order to have money when the service negotiated settlements on his debts. Applicant has not saved any of the required money. There is no good-faith effort to repay the 12 overdue creditors or otherwise resolve these debts.

Personal Conduct

The Directive sets out various factors relevant to an applicant's personal conduct that may be potentially disqualifying. Paragraph 15 of the Adjudicative Guidelines (AG) states a concern where there is 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 eligibility for access to sensitive information process or any other failure to cooperate with the eligibility for access to sensitive information process."

In June 2003, Applicant's now ex-wife requested and was granted a protective order. This accompanied a period of separation prior to their divorce. His ex-wife's conduct may have been influenced by Applicant's learning he was not the father of a child he believed was his. His ex-wife has acted in such a way to prevent Applicant from exercising his court ordered visitation. There is nothing in the record showing the issuance of this protective order or the factors leading to its issuance that would adversely reflect on Applicant's security worthiness.

Applicant incurred an arrearage for child support. Between the time of their separation and divorce, Applicant did not know his now ex-wife's location and she prevented him from seeing his child. He was unaware of the child support obligation until the time of the divorce. He agreed to the monthly child support payments in a mistaken belief that paying the amount would assure him visitation with his child. He was wrong. He is paying his child support obligation and making payment on the

arrearage. Neither the child support obligation nor the arrearage adversely reflects on Applicant's security worthiness.

Under AG ¶ 16 (a) "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine eligibility for access to sensitive information eligibility or trustworthiness, or award fiduciary responsibilities" and ¶ 16 (b) "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative" are security concerns.

Applicant failed to list a tax lien on his SF 85P. Applicant knew tax was owed, and thought his girlfriend, later to be his wife, paid the tax debt once they were notified of the delinquency. It was only after completing his SF 85 P that he learned a tax lien had been issued four months before he completed the form.

The Government has shown Applicant failed to list his tax lien, but this does not prove the Applicant deliberately failed to disclose information about the lien. Applicant has denied intentional falsification. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for eligibility for access to sensitive information is a security concern. But every inaccurate statement is not a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully. An omission concerning a tax lien is not deliberate if the person did not know it existed. When Applicant completed his SF 85P he was unaware of the lien.

Whole Person Concept

Under the whole person concept, the administrative judge must evaluate an Applicant's eligibility for eligibility for access to sensitive information 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for eligibility for access to sensitive information 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. The majority of the debts incurred were not the type that indicates poor self-control, lack of judgment, or unwillingness to abide by rules and regulations. Six of the debts set forth in the SOR were not incurred on luxuries, but were for medical treatment and taxes. This cannot be said of the credit card debt (SOR ¶ 1. e, \$1,717) or the delinquent telephone debts (SOR ¶ 1. e, \$1,403; SOR ¶ 1. n, \$267; or, SOR ¶ 1. o, \$77).

The issue is not simply whether all his debts are paid—it is whether his financial circumstances raise concerns about his fitness to have access to sensitive information. (See AG ¶ 2(a) (1).) Applicant has not addressed 12 of his delinquent debts and it appears no payment will be made on any of these debts until after June 2009. Overall, the record evidence leaves me with questions or doubts as to Applicant’s eligibility and suitability for access to sensitive information. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his financial considerations.

This decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to justify the award of access to sensitive information. The awarding of access to sensitive information is not a once in a life time occurrence, but is based on applying the factors, both disqualifying and mitigating, to the evidence presented. Under the Applicant’s current circumstances a clearance is not recommended, but should the Applicant be afforded an opportunity to reapply for access to sensitive information in the future, having paid the delinquent obligations, established compliance with a repayment plan, or otherwise addressed the obligations, he may well demonstrate persuasive evidence of his trust worthiness. However, a clearance at this time is not warranted.

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, Financial Considerations:	AGAINST APPLICANT
Subparagraph 1. a – 1. c:	Against Applicant
Subparagraph 1. d:	No allegation is stated.
Subparagraph 1. e and 1. f:	Against Applicant
Subparagraph 1. g:	For Applicant
Subparagraph 1. h – 1. l:	Against Applicant
Subparagraph 1.m:	For Applicant
Subparagraph 1. n and 1. o:	Against Applicant
Subparagraph 1. p and 1. q:	For Applicant
Paragraph 2, Personal Conduct:	FOR APPLICANT

Subparagraph 2. a – 2. c:

For 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.

CLAUDE R. HEINY II
Administrative Judge