



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



In the matter of: )  
)  
) ADP Case No. 08-03458  
)  
)  
Applicant for Public Trust Position )

**Appearances**

For Government: Nichole Noel, Esq., Department Counsel  
For Applicant: *Pro Se*

November 10, 2008

**Decision**

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the Financial Considerations security concerns. Eligibility for access to sensitive information is granted.

On April 28, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F, Financial Considerations. 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.

Applicant answered the SOR in writing in an undated response and requested a hearing before an Administrative Judge. The case was assigned to me on August 22, 2008. DOHA issued a Notice of Hearing on August 27, 2008, scheduling the hearing for September 16, 2008. On September 11, 2008, the hearing was cancelled because of the threat of severe weather. Another notice of hearing was issued on September 22,

2008. I convened the hearing as scheduled on October 8, 2008. The Government offered Exhibits (GE) 1 through 4, which were received without objections. Applicant testified on his own behalf and submitted Exhibits (AE) A through S, which were received without objections. I granted Applicant's request to keep the record open to submit additional information. Applicant submitted nine documents, marked AE T through BB, which were admitted without objections. Department Counsel's memo is marked Hearing Exhibit (HE) I. DOHA received the transcript of the hearing (Tr.) on October 16, 2008.

### **Findings of Fact**

Applicant is a 60-year-old employee of a defense contractor providing health care services. His performance appraisals have reflected exceptional job performance. He attended college but has not yet obtained a degree. Applicant retired from the United States Army as a Sergeant Major in 2000, after 33 years of service. Almost 24 years of his Army service was on active duty. He served two tours in Vietnam as a corpsman and was awarded numerous medals and commendations, including the Bronze Star Medal (2<sup>nd</sup> award) and the Combat Medical Badge. He is married with four children, ages 26, 24, 22, and 19. His youngest two children are still living at home. The youngest is working but does not pay rent. The 22-year-old is not currently working.<sup>1</sup>

Applicant was diagnosed with cancer in 2001. His treatment included surgery and radiation therapy. He was out of work for about a month and had to change jobs so that he works at a desk. His pay remained the same. He had a second job before his cancer diagnosis. Although his cancer did not have an impact on his primary job, he was no longer physically capable of working a second job. His wife has worked part-time since about 2002. Applicant admitted that he had some financial difficulties before he was diagnosed with cancer.<sup>2</sup>

The SOR lists 16 delinquent debts totaling about \$26,765. Applicant admitted to all the SOR allegations, but provided additional information contesting the validity of several of the debts and indicating that a number of the debts have been paid. Individual debts are address below.

SOR ¶ 1.a alleges a delinquent debt of \$1,109 to a department store for an account charged off in 2000. Applicant was sent Interrogatories and asked about this debt. He responded on May 11, 2007, "I acknowledge I owe this and intend to do my best to pay it with[in] the next two years." In his response to the SOR, Applicant stated that this debt was paid in the 1995 to 1997 time frame. He formally disputed the debt via e-mail to the department store on August 26, 2008. The department store responded that it was forwarding the e-mail to the customer service representative of the bank that issued the department store credit card. Applicant has not received a response from the bank. The debt was not discussed in Applicant's statement provided to an Office of Personnel Management (OPM) investigator in December 2004. The debt is not listed on

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<sup>1</sup> Tr. at 38-40; GE 1; AE A, B, Q.

<sup>2</sup> Tr. at 41-43; Applicant's response to SOR; GE E.

the credit report of April 10, 2007, or the credit report obtained by Applicant on October 18, 2008.<sup>3</sup>

Applicant settled the debt of \$2,194, as alleged in SOR ¶ 1.b, for \$304 on June 16, 2008. The debt is satisfied and resolved.<sup>4</sup>

SOR ¶¶ 1.c and 1.d allege delinquent debts of \$269 and \$279 to two department stores for accounts charged off in 2000. Applicant was asked about both debts in Interrogatories. He acknowledged responsibility for the debts and that he intended to pay them. In his response to the SOR, he stated that the creditor listed in SOR ¶ 1.c has been unable to locate his account. He stated that he paid the debt in ¶ 1.d on June 17, 2008. He submitted a copy of his bank statements. A debit of \$234 is reflected on June 18, 2008. Neither debt is listed on the credit reports in evidence.<sup>5</sup>

Applicant admitted owing the debt of \$2,688, as alleged in SOR ¶ 1.e. He stated that he is in negotiation with the collection company that now holds the debt and the company is willing to settle the debt for \$537. Applicant is attempting to work out a payment schedule with the company. The debt is listed on the credit report of April 10, 2007, but not the credit report of October 18, 2008.<sup>6</sup>

SOR ¶ 1.f alleges a debt of \$9,087 to a collection company on behalf of a financial institution. Applicant admitted owing the debt. The collection company is willing to settle the debt for \$2,989. Applicant is attempting to work out a payment schedule with the company. The debt is listed on the credit report of April 10, 2007, but not the credit report of October 18, 2008.<sup>7</sup>

Applicant stated that he has been paying the debt of \$731 to a financial institution, as alleged in SOR ¶ 1.g. The debt is listed on the credit report of April 10, 2007, as \$100 past due, with a balance of \$731. The debt is not listed on the credit report of October 18, 2008. Applicant has two open accounts with the same financial institution. He is current on both accounts.<sup>8</sup>

Applicant paid the debt of \$75 to a collection company on behalf of a telephone company, as alleged in SOR ¶ 1.h, on June 16, 2008. SOR ¶ 1.k alleges a debt of \$67 to the same telephone company. This is the same debt as alleged in SOR ¶ 1.h.<sup>9</sup>

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<sup>3</sup> Tr. at 29-31, 44; Applicant's response to SOR; GE 2-4; AE T, V, BB.

<sup>4</sup> Tr. at 44-45; Applicant's response to SOR; AE I, AA.

<sup>5</sup> Tr. at 45-46; Applicant's response to SOR; GE 2, 3; AE AA, BB.

<sup>6</sup> Applicant's response to SOR; GE 3; AE T, Y, BB.

<sup>7</sup> Applicant's response to SOR; GE 3; AE T, U, BB.

<sup>8</sup> Tr. at 47-48; Applicant's response to SOR; GE 3; AE T, BB.

<sup>9</sup> Tr. at 49-52; Applicant's response to SOR; GE 3; AE L, AA.

SOR ¶ 1.i alleges a debt of \$73 to a collection company on behalf of a cable provider. Applicant indicated that the cable provider waived the amount when he set up his new account with them. He provided documentation that he is not delinquent on his current account with the cable provider. The debt is listed on both credit reports in evidence.<sup>10</sup>

Applicant settled the debt of \$932 to a collection company on behalf of a telephone company, as alleged in SOR ¶ 1.j, for \$466 on June 16, 2008. The debt is satisfied and resolved.<sup>11</sup>

SOR ¶ 1.l alleges a delinquent debt of \$959 to a collection company on behalf of a department store for an account charged off in 2000. Applicant admitted owing this debt but stated that the balance was transferred to another financial institution and he was issued a credit card with the \$959 as a balance on the account. The debt is listed on the credit report of April 10, 2007. The credit report of October 18, 2008, lists an original debt of \$420 to the department store, but it indicates that the debt was “[t]ransferred to another lender or claim purchased,” and it does not show a balance. A debt to the collection company named in the SOR does not appear on the credit report. A debt to the financial institution that Applicant stated now has the debt is listed on the credit report. It shows the debt as “current” with a monthly payment of \$34 and a balance of \$1,114.<sup>12</sup>

Applicant settled the debt of \$985, as alleged in SOR ¶ 1.m, for \$256 on June 9, 2008. The debt is satisfied and resolved.<sup>13</sup>

SOR ¶ 1.n alleges a debt of \$272 to a collection company on behalf of a utility company. Applicant disputed owing this debt. He indicated the debt is for water provided at a house after he had already moved from the property. He provided documentation that he is not delinquent on his current account with the utility company. He wants the landlord to pay the water bill, but the landlord has refused. The debt is listed on both credit reports in evidence.<sup>14</sup>

Applicant acknowledged responsibility for the \$401 debt to a collection company on behalf of a telephone company, as alleged in SOR ¶ 1.o. He indicated that he would make arrangements to pay the debt within the next six months. He also stated that he thought the debt might be a duplicate of another debt. The debt is listed on the credit report of April 10, 2007, but not the credit report of October 18, 2008.<sup>15</sup>

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<sup>10</sup> Tr. at 49-50; Applicant's response to SOR; GE 3; AE T, W, BB.

<sup>11</sup> Tr. at 50; Applicant's response to SOR; AE M, S, AA, BB.

<sup>12</sup> Tr. at 31, 52; Applicant's response to SOR; GE 3; AE BB.

<sup>13</sup> Tr. at 52; Applicant's response to SOR; AE J, AA, BB.

<sup>14</sup> Tr. at 53; Applicant's response to SOR; GE 3; AE T, BB.

<sup>15</sup> Tr. at 53; Applicant's response to SOR; GE 3; AE BB.

SOR ¶ 1.p alleges a delinquent student loan of \$6,734. Applicant entered a rehabilitation program to bring the debt current. He testified that he made all the required payments for about 15 months. He provided documentation that he completed the rehabilitation program in September 2008. He still has the loan and is required to make payments, but it is now out of default status and is in good standing.<sup>16</sup>

Applicant received counseling when he was in the military. He is working diligently at not incurring new delinquent debts and has a plan to pay his delinquent debts and be debt-free by the time he is 65. He has paid other debts that are not reflected in the SOR because they were paid before it was issued.<sup>17</sup>

## **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.

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<sup>16</sup> Tr. at 53; Applicant’s response to SOR; AE F-H, R.

<sup>17</sup> Tr. at 55-59; GE 3; AE K.

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).

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

The security 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 notes several conditions that could raise security concerns under AG ¶ 19. Two are potentially applicable in this case:

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

Applicant accumulated a number of delinquent debts and was unable or unwilling to pay his obligations for a period of time. The evidence is sufficient to raise AG ¶¶ 19(a) and (c).

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20(a)-(e) 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; 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.

Applicant's financial problems go back more than seven years. He is still in the process of resolving his debts. AG ¶ 20(a) is not applicable at this time.

Applicant was diagnosed with cancer in 2001. His treatment included surgery and radiation therapy and he was out of work for about a month. He admitted that he had some financial difficulties before the cancer. Although his cancer did not affect his primary job, he was no longer physically capable of working a second job, which impacted his finances and his ability to address whatever debts were already delinquent. Applicant receives partial consideration under AG ¶ 20(b).

Applicant received financial counseling in the military. He has made great strides in handling his finances. He has paid or settled a number of debts and has a plan to address his remaining debts. He participated in a rehabilitation program for about a year to bring his student loan out of default. There are clear indications that the problem is being resolved. AG ¶ 20(c) is applicable. His actions are a start on a good-faith effort to repay overdue creditors or otherwise resolve debts.<sup>18</sup> AG ¶ 20(d) is partially applicable.

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<sup>18</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 Financial Considerations Mitigating Condition 6, 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

Applicant disputed owing several debts, but he only provided documentation that he disputed the debt in SOR ¶ 1.a. AG ¶ 20(e) is applicable to that debt.

### **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 common sense 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 this country for 33 years and retired as a Sergeant Major. He served two tours in Vietnam as a corpsman. His performance appraisals from his current employer are outstanding. He was stricken with cancer after he retired from the Army. Applicant honestly stated that his cancer was not the primary cause of his financial problems, but it prevented him from working a second job, which could have accelerated his debt repayment. He has been working at resolving his delinquent debts. He provided documentation that many of his debts have been paid. His finances are not perfect and he still has some delinquent debts, but he is clearly on the right path. The Appeal Board has noted that an applicant is not required to establish that he has paid 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."<sup>19</sup> Applicant has met those requirements. When I balance Applicant's remaining debts with his service to this country during war and peace, I find the latter far outweighs the former.

Overall, the record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I

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option (such as bankruptcy) in order to claim the benefit of Financial Considerations Mitigating Condition 6.

(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)).

<sup>19</sup> ADP Case No. 06-18900 at 4 (App. Bd. Jun. 6, 2008).



conclude Applicant has mitigated the trustworthiness concerns arising from his financial history.

### **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-1.p: For Applicant

### **Conclusion**

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

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Edward W. Loughran  
Administrative Judge