



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



In the matter of: )  
)  
) ADP Case No. 08-08768  
)  
)  
Applicant for Public Trust Position )

**Appearances**

For Government: Paul M. DeLaney, Esquire, Department Counsel  
For Applicant: *Pro se*

December 21, 2010

**Decision**

ANTHONY, Joan Caton, Administrative Judge:

I have carefully reviewed the administrative file, pleadings, and exhibits in this case and conclude that Applicant failed to mitigate security concerns under the Financial Considerations adjudicative guideline. Eligibility for access to sensitive information is denied.

Applicant submitted his Questionnaire for Public Trust Positions (SF 85P) on April 3, 2007. On July 27, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging trustworthiness concerns under Guideline F, Financial Considerations. DOHA acted 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On September 17, 2009, Applicant answered the SOR in writing. On June 1, 2010, he requested that his case be determined on the record in lieu of a hearing. The

Government compiled its File of Relevant Material (FORM) on July 8, 2010. The FORM contained documents identified as Items 1 through 12. By letter dated July 9, 2010, a copy of the FORM was forwarded to Applicant, with instructions to submit any additional information and/or objections within 30 days of receipt. Applicant received the file on August 2, 2010. His response to the FORM was due on September 1, 2010. He did not file any additional information or objections within the required time period. The case was assigned to me for a decision on December 15, 2010.

### **Procedural Matters**

In the FORM, the Government pointed out and provided corrections for four minor typographical errors in SOR allegations 1.c., 1.d., 1.j., and 1.p. Applicant did not object to the Government's corrections to the record. (See FORM, fn. 11.)

### **Findings of Fact**

The SOR comprises 17 allegations that raise trustworthiness concerns under AG F, Financial Considerations. The SOR alleges failure to file Federal and state income tax returns for tax years 2003 through 2006. The SOR also alleges financial delinquencies totaling approximately \$8,775. (Item 1.)

In his Answer to the SOR, Applicant admitted he failed to file Federal and state income tax returns for tax years 2003 through 2006. (SOR ¶¶ 1.a. and 1.b.) He also admitted 13 of the 15 SOR allegations of delinquent debt (SOR ¶¶ 1.c. through 1.g.; 1.i. through 1.k.; and 1.m. through 1.q.). He denied two allegations of delinquent debt (SOR ¶¶ 1.h. and 1.l.). Applicant's admissions are admitted as findings of fact. (Item 4.)

Applicant is 38 years old and divorced. It is unclear from the record whether he has dependent children.<sup>1</sup> On the SF 85P he filed in April 2007, Applicant listed employment since 2006 as a customer interactive agent for a government contractor. Applicant seeks eligibility for access to sensitive information for the first time. (Item 5.)

Applicant has a high school diploma and attended a community college for approximately one academic year. From 1999 to December 2005, he was employed as an assistant manager in a pharmacy. In December 2004, Applicant became ill with a life-threatening illness. (Item 5; Item 6.)

Applicant was interviewed by an Office of Personnel Management (OPM) investigator about his finances on March 13, 2008. He reported a history of financial difficulties. Applicant told the OPM investigator that in about 2003, he was served with a tax lien for failure to pay his Federal income taxes from 2000 and 2001.<sup>2</sup> In 2003, \$300 a month was garnished from Applicant's wages to satisfy the Federal tax lien. After two

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<sup>1</sup> In his personal subject interview, Applicant stated he and his former wife did not know they could claim tax deductions for their children. Applicant did not list any children on his SF 85P. (Item 6 at 5; Item 5.)

<sup>2</sup> Applicant told the OPM investigator he was not sure whether the Federal tax lien covered tax years 2000 and 2001 or 2001 and 2002. (Item 6 at 4.)

or three months of the garnishment, Applicant contacted the IRS and entered into an agreement to pay \$150 a month to satisfy the Federal tax lien.<sup>3</sup> Applicant made the monthly payments of \$150 to the IRS until December 2004, when he became seriously ill and was unable to continue payments because he could not work full time. He did not recall whether he contacted the IRS to inform the agency of his changed circumstances. He does not know the balance due on his 2003 tax lien. Applicant told the OPM investigator he intended to contact the IRS to make arrangements to resume payments. He stated that he had filed his income taxes since 2001 or 2002. (Item 6 at 5, 6.)

At his March 2008 interview with the OPM investigator, Applicant stated that his financial situation was improving: he had stable employment and medical insurance. He was attempting to pay off his old debts, and he told the investigator he was exploring debt consolidation with a credit counseling agency. (Item 6 at 7.)

In response to DOHA interrogatories in December 2008, Applicant, in a sworn statement, admitted that he had not filed his Federal or state income tax returns for 2003, 2004, 2005, and 2006. He further stated his intent to rectify his tax delinquencies as soon as possible. Nothing in the record suggests that Applicant has taken action to file his delinquent Federal and state tax returns for 2003, 2004, 2005, and 2006. (Item 7.)

The two debts that Applicant denied are listed on his credit reports of May 2, 2009, and September 12, 2007. He failed to provide documentation to establish that he had paid, settled, or had payment plans in place for the 13 delinquent debts he admitted. Four of Applicant's debts are for less than \$200 (SOR ¶¶ 1.d., 1.f., 1.k., and 1.q.). The debt alleged at SOR ¶ 1.d. is for \$21. Additionally, he provided no documentation to establish that he was not responsible for the two delinquent debts he denied. While Applicant told the OPM investigator that he was exploring debt consolidation and consumer credit counseling, nothing in the record suggests that he completed credit counseling. (Item 1; Item 4; Item 6; Item 9; Item 11.)

### **Burden of Proof**

The Government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the Government must establish by substantial evidence a *prima facie* case that it is not clearly consistent with the national interest for an applicant to have access to classified information. The responsibility then shifts to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a right to a security clearance, the applicant carries a heavy burden of persuasion. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to sensitive information in favor of protecting national security.

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<sup>3</sup> On April 3, 2009, in response to DOHA interrogatories, Applicant signed a statement affirming that he had read the summary of the interview and found it to be true and correct. He made no changes, corrections, or revisions to the investigator's summary. (Item 6 at 3-4.)

## 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. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge must apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record.

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 in seeking to obtain 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 *also* 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.

AG ¶19 provides three financial considerations disqualifying conditions that could raise security concerns and may be disqualifying in this case. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Under AG ¶ 19(c), “a history of not meeting financial obligations” may also raise trustworthiness concerns. Additionally, under AG ¶ 19(g) “failure to file annual Federal, state, or local income tax returns as required . . .” raises potentially disqualifying trustworthiness concerns.

In ISCR Case No. 08-12184 at 7 (App. Bd. Jan.7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government’s obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted.) Applicant’s history of delinquent debt is documented in his credit reports, his SF 85P, his interview with the OPM investigator, and his SOR response. In 2000 or 2001, Applicant failed to file his Federal income tax return. In 2003, 2004, 2005, and 2006, he also failed to file his Federal and state income tax returns. In his personal subject interview, Applicant told the investigator that he had filed his Federal income tax returns since 2001 or 2002. Moreover, Applicant accumulated delinquent debt and was unable to pay or satisfy his financial obligations. The evidence is sufficient to raise financial considerations disqualifying conditions identified at AG ¶¶ 19(a), 19(c), and 19(g).

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 trustworthiness, or good judgment.” Applicant’s financial delinquencies began in at least 2000, and they have continued to the present. He has not resolved his financial delinquencies, and they are likely to recur. Applicant’s failure to satisfy his delinquent debts over a period of at least ten years casts doubt on his current reliability, trustworthiness, and good judgment. Accordingly, I conclude that AG ¶20(a) does not apply to the facts of Applicant’s case.

Under AG ¶ 20(b), mitigation can occur 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 reported that in December 2004, he was stricken with a life-threatening illness and was unable to work full time. However, the record reflects that while his illness prevented him from paying his 2003 Federal tax lien, he did not resume payment when he regained his health and had stable employment. Applicant has been steadily employed for several years, and yet he appears to have made no effort to resolve his many financial delinquencies and file his delinquent tax returns. He offered no explanation for his failure to resolve or settle his financial delinquencies and file his delinquent Federal and state tax returns even after he regained his health and had steady employment. I conclude that while he experienced financial problems in part because of a medical situation beyond his control, he failed to act responsibly in identifying and resolving his financial delinquencies. I find that AG ¶ 20(b) applies only in part to the facts of Applicant’s 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.” Nothing in the record establishes that Applicant has received financial counseling or that he has otherwise taken positive action to resolve his financial problems. Moreover, nothing in the record establishes that he has made good-faith efforts to resolve his delinquent debts. Accordingly, I conclude that AG ¶¶ 20(c) and 20(d) do not apply to the facts of Applicant’s case. AG ¶¶ 20 (e) and 20 (f) are not raised by the facts of this case.

### **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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a 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 is a mature adult. His financial delinquencies occurred repeatedly over a period of at least ten years, suggesting lack of motivation or inability to learn to manage his financial commitments responsibly. While his illness impacted his ability to pay his debts for a period of time, he also experienced financial difficulties prior to his illness. During his interview with the OPM investigator, he stated that he intended to take action to pay his delinquent tax lien and other delinquent debts. However, he failed to do so. Moreover, there is no record evidence that Applicant attempted to resolve even the four modest debts of under \$200 on the SOR. In determining an individual's security worthiness, the Government cannot rely on the possibility that an applicant might resolve his or her outstanding debts at some future date. ISCR Case No. 98-0614 at 5 (App. Bd. Jul. 12, 1999). It is also well settled that failure to discharge debts over a period of time constitutes a continuing course of conduct that raises concerns about an applicant's reliability and trustworthiness. ISCR Case No 07-10575 at 4 (App. Bd. Jul 3, 2008).

The record reflects that Applicant has been steadily employed for over three years. He provided no documentation to show that he had paid or had payment plans in place to satisfy his delinquent debts. He failed to file his delinquent Federal and state income tax returns after asserting he would do so. He failed to demonstrate that his financial problems will not continue to be a trustworthiness concern in the future.

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 failed to mitigate the trustworthiness concerns arising from his financial delinquencies.

### **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.q.: Against Applicant

**Conclusion**

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

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Joan Caton Anthony  
Administrative Judge