



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



In the matter of:	)	
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SSN: -----	)	ADP Case No. 09-01206
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Gina Marine, Esquire, Department Counsel  
For Applicant: *Pro se*

October 6, 2010

**Decision**

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and transcript, Applicant's request for a position of trust is denied.

On May 27, 2008, Applicant submitted an Application for Public Trust Positions (SF 85P) to obtain eligibility for an ADP I/II/III position<sup>1</sup> required for his job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant interrogatories<sup>2</sup> intended to clarify or augment background information relevant to his suitability for a public trust position. After reviewing the results of the background investigation and Applicant's responses to the interrogatories, DOHA

<sup>1</sup> As defined in Chapter 3 and Appendix 10 of DoD Regulation 5220.2-R, as amended (Regulation).

<sup>2</sup> Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

adjudicators were unable to make a preliminary affirmative finding<sup>3</sup> that it is clearly consistent with the interests of national security to grant Applicant's request for a position of trust. On July 27, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise security concerns addressed in the adjudicative guidelines (AG)<sup>4</sup> for personal conduct (Guideline E) and financial considerations (Guideline F).

Applicant answered the SOR and requested a hearing. The case was first assigned to an administrative judge on March 15, 2010. After several attempts to schedule this matter for hearing,<sup>5</sup> the case was assigned to me on June 14, 2010. Pursuant to a Notice of Hearing issued on June 15, 2010, I convened a hearing on June 29, 2010. The Government presented seven exhibits that were admitted without objection as Government's Exhibits (Gx.) 1 - 7. Applicant testified and submitted one exhibit, which was admitted without objection as Applicant's Exhibit (Ax.) A. Additionally, I left the record open after the hearing to give Applicant time to submit additional relevant information. DOHA received a transcript of the hearing on July 7, 2010. The record closed on July 9, 2010, when I received Applicant's post-hearing submission, which was admitted without objection as Ax. B.

### **Findings of Fact**

Under Guideline F, the Government alleged that Applicant owed about \$33,883 for 22 delinquent debts (SOR 1.a - 1.v), and that he was arrested in June 2007 and charged with Fraud - Insufficient Funds Checks (SOR 1.w). Applicant admitted all of the allegations under this guideline.

Under Guideline E, the Government alleged that Applicant falsified his SF 85P by answering "yes" to question 20 (*Your Financial Record - 180-Day Delinquencies. Are you now over 180 days delinquent on any loan or financial obligation?*), listed only an unpaid student loan debt, and did not list the debts alleged in SOR 1.a - 1.v. (SOR 2.a). The Government also alleged that Applicant failed to cooperate with an authorized Government investigator by failing to provide a personal financial statement during a subject interview on October 23, 2008. (SOR 2.b) Applicant denied these allegations.

Applicant's admissions are incorporated in my findings of fact. Having reviewed Applicant's response to the SOR, the transcript, and exhibits, I make the following additional findings of relevant fact.

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<sup>3</sup> Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

<sup>4</sup> The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006). Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

<sup>5</sup> Applicant is assigned to an overseas job site and coordination of the dates for his availability in the United States was difficult.

Applicant is 35 years old, and is employed by a defense contractor in a logistics support position that requires access to sensitive automated information to perform his duties. He has held his current job, first as a “temp” agency employee, then as a company employee, since April 2008. (Gx. 1) Applicant served on active duty in the U.S. Army from November 1996 until March 2004. He served in a reserve status in the Army National Guard from 2005 until 2008. He was deployed to Iraq from November 2005 to November 2006. (Gx. 1; Gx. 2; Ax. A; Tr. 5)

Applicant has been steadily employed, albeit in a series of lower-paying jobs, since his discharge from active duty. Aside from his deployment to Iraq, he held four jobs between March 2004 and April 2008. His average stay at each job was about eight months. (Gx. 1; Tr. 55) While Applicant was in the Army, he earned about \$2,200 each month after taxes. (Tr. 54) His income at the time allowed him to keep up with a variety of credit obligations he incurred, such as two car payments, a loan for furniture, and credit cards. Some of his obligations were paid through direct payroll allotments. However, when he left the Army, those allotments stopped, and Applicant did not continue to pay his debts directly.

Applicant’s current job requires that he work overseas, which he has done since February 2010. His pay between April 2008 and January 2010 was about \$11.90 per hour for a 40-hour work week, for a gross monthly salary of about \$1,900. For his overseas work, he now earns about \$87,000 annually tax free. His monthly take-home pay is about \$6,400. (Tr. 49 - 54)

As a result of Applicant’s discharge and uneven work history since 2004, Applicant has accrued about \$33,600 for 21 of the 22 delinquent debts alleged in the SOR.<sup>6</sup> (Answer to SOR; Tr. 88 - 89; Gx. 3; Gx. 4; Gx. 5; Gx. 6) He asserted at the hearing that he has paid all or some of his debts. Under cross-examination, however, Applicant admitted that he has not acted on most of his debts. He averred, however, that he has paid off, or is making payments to, the debts alleged at SOR 1.b, 1.c, 1.h, 1.m, and 1.t. (Tr. 62 - 86) Delinquent student loans from 2004 (SOR 1.q, and 1.r) have been satisfied, albeit through attachment of Applicant’s income tax refunds over the past five years. (Tr. 61 - 62; Ax. B)

Applicant’s larger debts include a \$5,000 unpaid medical bill from October 2008 (SOR 1.a). Applicant attended a professional football game and was hospitalized after he collapsed from heat exhaustion. Despite being employed by his current company, he had no health insurance to cover the bill. He assumes his mother has been handling this debt. (Tr. 62 - 63) Another large debt is for a \$2,141 delinquent loan from a bank that caters to military personnel (SOR 1.g). Applicant also owes \$5,782 for an April 2004 car repossession (SOR 1.p), and \$6,299 for a February 2007 car repossession (SOR 1.s). As with most of his other debts, Applicant has not acted to pay or otherwise resolve these obligations.

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<sup>6</sup> The debt alleged at SOR 1.d is for the same account alleged in SOR 1.c. (Tr. 67 - 68)

Applicant was married from 1996 until 2002, when he and his ex-wife divorced. He has two child (ages 12 and 10) from that marriage. He has custody of the children, who live with their maternal grandmother when he is overseas. (Gx. 1; Tr. 103 - 105) Applicant sends about \$1,000 each month to the grandmother for the care of his children. He also sends about \$1,400 each month to his mother so she can pay his bills. When Applicant testified that he had paid some of the debts alleged in the SOR, he meant that his mother had made the payments using money he had sent her. (Tr. 63, 67, 93)

Applicant testified that he had proof of his claims of payment. Despite being allowed extra time to produce documentation of those claims (Tr. 112 - 113), Applicant only provided documentation of the student loans paid through tax refund diversions, and payment of a \$315 debt that was not alleged in the SOR. (Ax. B)

When Applicant submitted his SF 85P in August 2008, he disclosed that he was arrested in June 2007 on a warrant for issuing checks against insufficient funds. Applicant explained that he wrote three checks totaling about \$400 while he was deployed to Iraq. He did not know they had bounced until he went to the local sheriff's office on another matter and was arrested. Applicant spent one night in jail and made restitution the next day. (Tr. 87 - 88; Gx. 3; Gx. 7)

In response to SF 85P question 20, which asked if he was currently more than 180 days past due on any debt or obligation, he disclosed only that he was delinquent on his student loans. (Gx. 1) Applicant explained at an October 23, 2008, interview at Applicant's workplace with a Government investigator, and at his hearing, that he completed the questionnaire by hand and that someone else input the information into the automated form used by investigators. He also explained that when he completed the SF 85P, there was no room to list any of his other debts. Applicant reviewed the printed version of the SF 85P and signed it immediately below an advisement that 18 U.S.C. § 1001 makes it a crime to knowingly and willfully make a false statement to any agency of the U.S. Government concerning a matter within its jurisdiction. (Tr. 97 - 98; Gx. 1)

At the October 23, 2008, subject interview, Applicant and the Government investigator discussed in detail the available information about Applicant's finances. Another interview was conducted, again at Applicant's workplace, on December 1, 2008, to discuss the information about Applicant's arrest for worthless checks and the omissions from Applicant's SF 85P. (Gx. 3)

Applicant testified that, aside from the delinquent debts listed in the SOR, his current finances are sound. He averred that he makes his car loan, cell phone, and other monthly payments on time, and that he has money left over each month even after sending his mother and his children's maternal grandmother about \$2400 each month. (Tr. 92 - 93) He did not, however, provide any documentation of his current finances. Further, the Government has alleged (SOR 2.b) that Applicant failed to cooperate with the investigating agent by refusing to provide a financial statement during the October 23, 2008, interview. Applicant denied this allegation, but acknowledged that he questioned the need for that information, and that he did not like

the fact that the interview was held at his workplace as it was embarrassing to Applicant. Additionally, the summary of that interview corroborates the SOR 2.b allegation, and Applicant agreed that it is an accurate account of what happened. Accordingly, without the personal financial statement requested during his background investigation, and absent any corroborating documentation to support his testimony, I cannot conclude that Applicant's finances have improved or that he is able to repay any of his past-due debts. (Tr. 24, 47, 100 - 101; Gx. 3).

Applicant was a highly trained transportation specialist in the Army. He received numerous awards, commendations, and personal decorations on both active duty and in the Army National Guard. He received an honorable discharge each time he was released from active duty. His awards include multiple certificates of appreciation and achievement, two Army Achievement Medals, two Army Commendation Medals, and multiple Army Good Conduct Medals. (Ax. A)

### **Policies**

Positions designated as ADP I/II/III are classified as "sensitive positions." Regulation, ¶ C3.6.15. In deciding whether a person should be assigned to an ADP position, it must be determined that his or her loyalty, reliability, and trustworthiness are such that it is "clearly consistent with the interests of national security" to do so. Regulation, ¶ C6.1.1.1. The Regulation also requires that DoD contractor personnel are entitled to the procedural protections in the Directive before any adverse determination may be made. Regulation, ¶ C8.2.1.

The Directive requires that each decision be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,<sup>7</sup> and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole-person" concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of eligibility for a position of trust.

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<sup>7</sup> Directive. 6.3.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a position of trust for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government's case. Because no one is entitled to a position of trust, an applicant bears a heavy burden of persuasion. A person who has access to sensitive information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring applicants possess the requisite judgment, reliability, and trustworthiness of one who will protect sensitive information as his or her own. Any reasonable doubt about an applicant's suitability for access should be resolved in favor of the Government.

## Analysis

### Financial

The security concern about Applicant's finances, as stated in AG ¶ 18, is that:

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 Government presented sufficient information to support the allegations in SOR 1.a - 1.c, and 1.e - 1.u;<sup>8</sup> that is, that Applicant accrued at least \$33,600 for 21 delinquent debts (SOR 1.a - 1.y); and that he was arrested in June 2007 and charged with passing worthless checks (SOR 1.v). Available information also showed that the only debt that has been paid was done through involuntary attachment of his tax refunds to satisfy a federally-guaranteed student loan. Despite improved finances since February 2010, Applicant has not acted to pay or otherwise resolve his debts, some of which have been delinquent since 2004. Thus, the record requires application of the disqualifying conditions listed at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*), and AG ¶ 19(c) (*a history of not meeting financial obligations*).

By contrast, Applicant claimed that he had paid or resolved some of his debts. The record does not support his claims. Applicant also asserted that his present finances are sound and will allow him to resolve his debts if given the chance. However, Applicant did not explain why he took no action to resolve his debts when his income increased. Instead, he gave conflicting and misleading statements about his efforts to pay his debts. In light of his refusal to provide information about his finances when asked by a Government investigator, it is clear that Applicant does not appreciate the trustworthiness significance of managing his finances in a responsible manner.

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<sup>8</sup> As a duplicate debt, SOR 1.d is resolved for the Applicant.

Available information does not support application of any of the mitigating conditions listed at AG ¶ 20. Applicant did not present information that would support his claims of payment, or that would otherwise extenuate or mitigate the Government's concerns about his unpaid debts.

## **Personal Conduct**

As stated at AG ¶ 15, the security concern about Applicant's answers to his SF 85P is that:

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 Government's information showed, in relevant part, that when he submitted his SF 85P in May 2008, Applicant was more than 180 days delinquent on numerous debts. Yet, when he answered SF 85P question 20, he listed only his delinquent student loans, which, at the time, were being addressed through involuntary diversion of his tax refunds. Applicant denied any intent to mislead the Government about his finances, claiming instead that he was unable to include all of the requested information on the form provided. Yet neither did he inform anyone that he had other debts to list, nor ask for help in completing the form.

The Government's information also showed that Applicant refused to cooperate with a Government investigator during his background investigation. During a subject interview in October 2008, Applicant was asked to provide a personal financial statement to augment the information contained in credit reports the investigator had obtained. Applicant refused and took issue with the investigator's request to interview Applicant at his work site.

Applicants for positions of trust and for security clearances are investigated as specified in DoD Regulation 5200.2-R.<sup>9</sup> More specifically, the importance of investigating positions that access sensitive, as well as classified, information is addressed in this Regulation as follows:

C3.1.1. Designation of Sensitive Positions. Certain civilian positions within the Department of Defense entail duties of such a sensitive nature including access to classified information, that the misconduct, malfeasance, or nonfeasance of an incumbent in any such position could result in an unacceptably adverse impact upon the national security. These positions are referred to in this Regulation as sensitive positions. It is vital to the national security that great care be exercised in the selection of individuals to fill such positions.

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<sup>9</sup> Directive, 6.1.

DoD Regulation 5200.2-R, C3.1.1.

A review of DoD Regulation 5200.2-R shows that a subject interview is a basic requirement of any background investigation, and that the scope of the investigation may be expanded as necessary “to resolve unfavorable or questionable information.” (DoD Regulation 5200.2-R, C2.3.5, AP1.1.1.2.4, and AP1.1.1.4.2.3). More specifically, DoD Regulation 5200.2-R, C2.3.5 requires, inter alia, that a person’s finances are relevant to any background investigation. Available information shows that the October 2008 subject interview was conducted consistent with regulation standards

In short, the investigator was doing his job. Applicant was required to cooperate and to be candid and forthcoming in his responses to the investigator’s questions and requests for information. Applicant was not entitled to object to the location of the interview, and his refusal to provide a personal financial statement or other such relevant information raises a concern addressed in AG ¶ 15 as follows:

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation;

As to the allegation that Applicant deliberately falsified his answer to SF 85P question 20, Applicant’s explanation might seem plausible were this the only concern about his credibility. However, taken in context with his refusal to provide information requested by the Government investigator, as well as his inconsistent or uncorroborated testimony about his finances, it is clear that the Applicant is unwilling to be candid with the Government about relevant and material information in his background. Accordingly, his conduct also requires application of the disqualifying conditions at 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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities*).

By contrast, Applicant’s testimony, characterized above, precludes consideration of any of the AG ¶ 17 mitigating conditions that might apply to the facts of this case. Applicant did not make any attempt to timely correct his SF 85P omissions. Rather, he refused to cooperate with a Government investigator during a subject interview about his finances in October 2008. At his hearing, Applicant’s testimony was not credible, often conflicting, and without corroboration of his claims he is resolving his financial problems. Accordingly, Applicant has failed to mitigate the security concerns raised by his false answers to the SF 85P and by his refusal to cooperate with a Government investigator.



## **Whole-Person Concept**

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E and F. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is 35 years old and is presumed to be a mature, responsible adult. In addition to his work for a defense contractor, he served his country for 11 years in the Army and the Army National Guard. Available information shows that he was a well-trained soldier who earned numerous accolades for his service. However, this favorable information is insufficient to overcome the adverse inferences to be drawn from his poor financial history, his unwillingness to resolve his debts, and his unwillingness to be candid and forthcoming about information in his background, as required by applicable regulations. Applicant had the burden of resolving the doubts raised about his suitability for access to sensitive information, but he failed to meet that burden. As a result, doubts about his judgment, reliability, and trustworthiness remain. Because protection of the national interest is paramount in these determinations, those doubts must be resolved in favor of the Government.

## **Formal Findings**

Formal findings 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
Subparagraphs 1.a - 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraphs 1.e - 1.v:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a - 2.b:	Against Applicant

## **Conclusion**

In light of all of the foregoing, it is not clearly consistent with the interests of national security to allow Applicant to have access to sensitive information. Request for a position of trust is denied.

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MATTHEW E. MALONE  
Administrative Judge