



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



In the matter of: )  
 )  
XXXXXXXXXX, XXXXX ) ADP Case No. 09-05090  
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Applicant for Public Trust Position )

**Appearances**

For Government: Braden M. Murphy, Esq., Department Counsel  
For Applicant: *Pro se*

April 29, 2011

**Decision**

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TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate Guideline F (financial considerations) security concerns. Eligibility for access to sensitive information is denied.

**Statement of the Case**

Applicant submitted a Public Trust Position Application (SF-85P) on December 5, 2008.<sup>1</sup> On June 24, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing a security concern under Guidelines F (financial considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG), effective within the Department of Defense for SORs issued after September 1, 2006.

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<sup>1</sup> Applicant had previously submitted a Security Clearance Application (SF-86) on September 23, 2005. (GE 1.)

Applicant received the SOR on July 13, 2010. He answered the SOR in writing on August 2, 2010, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on August 31, 2010, and I was assigned the case on September 10, 2010.

DOHA issued a notice of hearing on September 20, 2010, scheduling the case for October 13, 2010. On September 23, 2010, DOHA issued an amended notice of hearing rescheduling the case for October 12, 2010. The hearing was held as scheduled. The Government offered Government Exhibits (GE) 1 through 9, which were received without objection. Applicant offered Applicant Exhibits (AE) A through C, which were received without objection, and he testified on his own behalf. DOHA received the hearing transcript (Tr.) on October 20, 2010.

### **Findings of Fact**

Applicant admitted all of the SOR allegations. His admissions are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

### **Background Information**

Applicant is a 44-year-old warehouse worker, who has been employed by a defense contractor since January 2009. He seeks access to sensitive information in conjunction with a public trust position, which is a condition of his continued employment. (GE 1, GE 2, Tr. 19-24.)

Applicant graduated from high school in June 1984. He was awarded an associate's degree in computer administration in December 1998. He received a electrician's certificate from his employer in February 2005. Applicant married in September 1998. He and his wife separated in February 2008 and have a divorce pending. Applicant has an adult daughter from a previous relationship. He also has three minor children born during his marriage. Applicant's estranged wife has custody of their children and he is paying her \$1,495 in monthly child support. His wife is employed in a management position at a U.S. Government facility. (GE 1, GE 2, Tr. 28-33, 38-39, 41.)

### **Financial Considerations**

Applicant's employment history preceding his current job has been plagued with lay-offs and underemployment. He was unemployed from November 2008 to January 2009. For the majority of 2008, he had a series of short-term low paying jobs. From March 2007 to January 2008, he was unemployed. Until his current job, his last stable job paying a living wage was from February 2005 to March 2007 as an electrician working at a U.S. Government facility. (GE 2, Tr. 35-37, 39-42, 44-45.)

Applicant's SOR alleges nine separate debts totaling \$418,012. The two largest debts are his mortgage with a past-due amount of \$32,121 on a balance of \$330,346 and a second mortgage with a past-due amount of \$9,967 on a balance of \$87,666. (SOR ¶¶ 1a – 1i, Tr. 11.) Applicant's financial problems began after his lay-off as an electrician in March 2007. As of his hearing date, none of the debts alleged have been paid. (Tr. 43.) Simply put, after Applicant was laid off in March 2007, he did not have the funds to pay his debts and fell into a financial tailspin from which he has not recovered to this day. At the time of his lay-off in March 2007, he was being paid \$28.95 an hour and was working full-time. (Tr. 43-44.)

Applicant claims that he attempted to contact "numerous creditors" to establish payment arrangements. He considered making mortgage payments his top priority and to that end contacted his mortgage lenders. In August 2010, he was able to obtain modifications on his first and second mortgages. Under the approved modifications, his monthly payments on his first and second mortgages will be \$1,926.10 and \$829.47, respectively, effective October 1, 2010. Applicant did not submit proof of payment on either of these accounts. He is uncertain how he will be able to make these combined mortgage payments on his income. Applicant's wife and three children currently live in the home. (AE A, AE B, Tr. 45-46.)

Applicant and his wife purchased their home in March 2003. At that time, they only had a primary mortgage with a fixed interest rate; however, they refinanced in June 2004 and acquired a second mortgage with adjustable interest rates. Over time their mortgage payments increased from a \$1,300 monthly payment to a \$2,600 monthly payment. Ultimately, Applicant and his wife refinanced three times before they received a loan modification in August 2010. (Tr. 46-53.) Applicant fell behind on his mortgage payments after he was laid off in March 2007 and refinanced to lower his mortgage payments. (Tr. 53-55.)

Applicant and his wife retained a bankruptcy attorney in July 2010. They are in the process of paying down his \$2,100 retainer fee. Until such time as that fee is paid, he will not file their Chapter 7 bankruptcy petition. (AE C, Tr. 66-68.) Applicant has not participated in any credit counseling. (Tr. 72.) Applicant's net monthly remainder after his child support is deducted is \$1,400. (Tr. 76.) He currently lives with his sister and pays her about \$900 per month for essentially room and board. After Applicant pays all of his other expenses, he has more money "going out than coming in" or "really nothing [at] all" left over. (Tr. 76-81, 96.) Applicant's sister is disabled and he receives \$680 from the state as her caregiver. His sister also receives state welfare to support her child. (Tr. 92-95.)

When queried about his state and federal income taxes, Applicant stated he owed \$1,100 to the Internal Revenue Service for tax year 2008. As of his hearing date, he not filed his 2009 state and federal income tax returns. He testified that he had an appointment with an income tax preparer in the near future to resolve his income tax problems. (Tr. 83-90.) Applicant is unable to pay any of his SOR creditors because he has nothing left over after he pays his monthly bills. (Tr. 97.) He anticipates the debts alleged in the SOR will be discharged when he receives a Chapter 7 bankruptcy

discharge. Applicant hopes that by filing bankruptcy his wife and children will be able to remain in their home. (Tr. 98-100.)

### **Character Evidence**

Applicant did not submit any character evidence.

### **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 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion as to obtaining a favorable trustworthiness decision.

A person who seeks access to sensitive information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This

relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to sensitive information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of sensitive information.

Section 7 of Executive Order (EO) 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

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

The trustworthiness concern relating to the guideline for financial considerations is set out in AG ¶ 18:

Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The Guideline notes several conditions that could raise trustworthiness concerns. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly, under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Applicant accumulated nine debts totaling \$418,121 that he is unable to pay. His indebtedness has been ongoing since at least 2007. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

Five financial considerations mitigating conditions under AG ¶¶ 20 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 conduct does not warrant application of AG ¶ 20(a) because there is more than one delinquent debt and his financial problems are not isolated. Therefore, his cumulative debt is "a continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)).

Under AG ¶ 20(b), Applicant receives partial credit because his periods of unemployment and underemployment from 2007 to 2009 were largely beyond his control. However, to receive full credit under this mitigating condition, Applicant has to demonstrate that he acted responsibly under the circumstances. There is no documentary evidence that Applicant remained in contact with his creditors or tried to make minimum payments during this time.<sup>2</sup> Under these facts, I am unable to apply full credit under this mitigating condition.

AG ¶ 20(c) is not applicable. Applicant has not participated in financial counseling and has yet to participate in the mandatory credit counseling required associated with Chapter 7 bankruptcy. It is clear that his financial situation is not resolved or under control. Likewise, there is no evidence in the record to establish full or partial mitigation under AG ¶ 20(d).<sup>3</sup> Given Applicant's current situation, he is unable to

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<sup>2</sup> "Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he maintained contact with his creditors and attempted to negotiate partial payments to keep his debts current.

<sup>3</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 [the "good-faith" mitigating condition], 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

pay any of his SOR creditors. He plans to file Chapter 7 bankruptcy as soon as he is able to pay his bankruptcy attorney's retainer fee. Until such time as that occurs, Applicant's financial situation remains status quo. AG ¶ 20(e) is not applicable because Applicant does not dispute the validity of the debts alleged.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance 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.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c).

The comments in the Analysis section of this decision are incorporated in the whole-person concept analysis. Applicant has had the misfortune of being laid off two times since 2007. From 2007 until he found his current job in January 2009, he worked low paying jobs. In short, he has not been able to recover financially since he was laid off in 2007. To make matters worse, he and his wife separated in February 2008 and have a divorce pending. In the interim, he is paying his estranged wife \$1,495 per month in child support for their three children and shares living expenses with his disabled sister. He also has unresolved income tax problems. He plans to file Chapter 7 bankruptcy; however, that course of action is being held in abeyance until he pays his bankruptcy attorney's retainer fee. To Applicant's credit, he is doing everything possible to keep his wife and three children in their family home.

Based on the record evidence, I have concerns about Applicant's current financial situation. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude he has not mitigated security concerns pertaining to financial considerations.

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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 option in order to claim the benefit of [the "good-faith" mitigating condition].

(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)).

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to a public trust position.

### **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
Subparagraphs 1a – 1i:	Against Applicant

### **Conclusion**

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

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ROBERT J. TUIDER  
Administrative Judge