



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



In the matter of: )  
)  
) ADP Case No. 10-00354  
)  
)  
Applicant for Public Trust Position )

**Appearances**

For Government: Richard A. Stevens, Esquire, Department Counsel  
For Applicant: *Pro se*

November 30, 2011

**Decision**

CREAN, THOMAS M., Administrative Judge:

Based on a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

**Statement of the Case**

On May 11, 2009, Applicant submitted a Questionnaire for Public Trust Position (SF 85P), as part of his employment with a defense contractor. The Defense Office of Hearings and Appeals (DOHA) could not make the preliminary affirmative findings required to determine eligibility for access to sensitive information. On December 9, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) detailing trustworthiness concerns for financial considerations (Guideline F), and personal conduct (Guideline E). 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 adjudicative guidelines (AG) effective in the

Department of Defense on September 1, 2006. Applicant acknowledged receipt of the SOR on January 4, 2011.

Applicant answered the SOR on January 18, 2011. He admitted all allegations under Guideline F with explanation and denied all allegations under Guideline E with explanation. He requested a hearing before an administrative judge. Department Counsel was prepared to proceed on March 22, 2011, and the case was assigned to me on April 4, 2011. The scheduling of a hearing was postponed because Applicant was not available because of illness. DOHA issued a Notice of Hearing on August 4, 2011, for a hearing on August 23, 2011. I convened the hearing as scheduled. The Government offered six exhibits which I marked and admitted into the record without objection as Government Exhibits (Gov. Ex.) 1 through 6. Applicant testified, and submitted ten exhibits consisting of letters of recommendation and commendation which I marked and admitted into the record without objection as Applicant Exhibits (App. Ex.) A through J. DOHA received the transcript (Tr.) of the hearing on September 12, 2011.

### **Procedural Issues**

Applicant is entitled to 15 days advanced notice of hearing. (Directive E3.1.8.) Applicant discussed with Department Counsel the hearing date of August 23, 2011, prior to the Notice of Hearing being mailed on August 4, 2011. Applicant was unsure of the date he received the actual Notice of Hearing. However, Applicant was ready to proceed and had sufficient time to prepare by August 23, 2011. He waived the 15 days notice requirement. (Tr. 4-5)

The Department Counsel withdrew SOR allegations 2.c and 2.d at the close of the Government's case. (Tr. 64-65)

### **Findings of Fact**

Applicant admitted all 23 SOR allegations under Guideline F. He denied the four SOR allegations under Guideline E. His admissions are included in my findings of fact. After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is a 40-year-old high school graduate who has been a heavy equipment packer for a defense contractor for over six years. He married in 1990 and has four teenage children. He and his wife are now separated. Two of his children are out of the household and on their own. A son lives with Applicant and a daughter with his wife. He provides support for his daughter. Applicant also has two grandchildren which he helps support. His monthly net pay is \$2,400 without overtime. His monthly recurring expenses are approximately \$1,800. Depending on the amount of overtime, his discretionary funds each month is between \$500 and \$1,400. (Tr. 11-14, 71-73; Gov. Ex. 1, SF 85P, dated May 11, 2009)

A credit report (Gov. Ex. 6, dated June 6, 2010), and Applicant's response to the SOR shows 20 unpaid medical debts, an unpaid phone debt (SOR 1.e), and two debts

remaining from car repossessions (SOR 1.a and SOR 1.b). Applicant admits these debts. The face amount of the 20 medical debts is approximately \$30,000. However, some of the debts are duplicates and the amount is less than the amount listed in the SOR. Applicant also does not use credit cards, and he is paying on taxes owed for tax year 2009. He is taking a financial management course through his church. (Tr. 37-38, 73-74)

Applicant acknowledged the delinquent car loans at SOR 1.a and 1.b. He purchased two cars for his family when he was working overtime and had sufficient funds to pay the car loans. The overtime was cut and he no longer had the funds to pay the loans. He tried to work with one of the lenders in 2005 or 2006 to have the payments or the interest rate reduced. He was not able to make an arrangement and the cars were repossessed. Since the repossessions, he has not inquired about the amount of the debt or made any payments or arrangements to pay the loans. He is unsure of the amount actually owed since the cars were sold after repossession. He is now driving an old car that is paid. (Tr. 35-36, 53-54, 61-62)

Applicant also acknowledges the telephone debt at SOR 1.e. He believes that the debt was paid. However, he has not made any inquires of the lender to determine if it is paid. (Tr. 55-56).

Applicant acknowledged all of the medical debts but believed some are duplicates. He intends to pay the debts, but he has not made any payments on the debts. He is now only able to keep up with his current medical debts because he has good health insurance with his employer that pays most of his medical bills. His daughter recently broke her back and paying the bills not covered by insurance has kept him from paying his past-due medical bills. He has never checked with the medical provider to determine the amount of debt he may owe. His wife did check on a few of the debts when the bills were received in the mail. Most were from the same medical center. She did not learn the amount of the debts since the debts had been sent by the medical provider to a collection agency. However, a review of the debts show that some of the delinquent debts were incurred in the last few years before the SOR was issued. (Tr. 61-64)

When Applicant was growing up, his parents entered the grocery business after they left active duty in the Marine Corps. Applicant had years of experience working in the grocery and retail industry. He was working in the retail industry at the time of the terrorist attack on September 11, 2001. After the incident, sales in the area where he lived declined and he was laid off. He returned to the area he was raised and secured work in the grocery business. He worked for a few years in that job until he was offered a lucrative position in April 2004 as a bread route salesman to grocery stores. The procedures Applicant followed for delivery of his products was to enter the store and check the stock on the shelves and in reserve for freshness. If the bread was outdated, he would bring it to the store manager to be checked by the manager so the store would receive credit. He would then bring fresh bread into the store, have the store manager enter the amount of the delivery into the store computer, print an inventory, and he and the manager would check the new delivery against the printed inventory from the store

computer. He and the manager both kept a copy of the documents showing the products taken from and delivered to the store. The grocery chain paid the bread company and Applicant was paid a commission for the bread that was delivered. (Tr. 19-24)

In August 2004, Applicant, his immediate supervisor, and a senior supervisor were called to a store for a large grocery chain because of an alleged discrepancy in the bread inventory of one of their stores served by Applicant. The loss prevention agent for the grocery chain told Applicant and his supervisors that there was over a \$7,000 discrepancy in the bread inventory. Applicant was alleged to have shorted the store on the inventory. Applicant denied the allegation. The loss prevention agent told Applicant and his supervisors that she had a surveillance video of Applicant taking inventory from the store, but she refused to show the video to them. Instead, she told Applicant he was barred from making any deliveries to any of the chain's stores. Since Applicant could not deliver to the grocery's chains stores, he was terminated by his employer in October 2004. Applicant denied that he shorted the store inventory. He followed the store check-in policy and all merchandise removed or taken into the store was always checked by the store manager. (Tr. 24-32; 40-47, 57-58; Gov. Ex. 4, Affidavit, dated March 24, 2010; Gov. Ex. 5, Termination Letter, dated November 1, 2004)

Applicant completed a Declaration for Federal Employment on October 28, 2004, and reaffirmed the Declaration on April 4, 2005. In response to a question concerning if he had been fired from any position in the last five years, he hand wrote on the form that he was terminated by the bread company for violation of the store check-in policy. (Gov. Ex. 3, Declaration for Federal Employment, dated April 4, 2005) He was required on a computer generated version of the form to update his Declaration for Federal Employment on May 12, 2009. In response to the same question concerning termination from a job, the "no" box was checked. (Gov. Ex. 2, Declaration for Federal Employment, dated May 12, 2009) When he completed a SF 85(P) Questionnaire for Public Trust Position on May 11, 2009, the "no" box for the question asking if he had ever been terminated from a job was checked. (Gov. Ex. 1, SF 85(P), dated May 11, 2009) Applicant explained he does not remember completing the applications in May 2009 and does not know why the "no": boxes were checked. He is baffled since the forms were completed on a computer and he does not remember completing the forms on line. (Tr. 33-34, 47-53, 59-61) Also on the SF 85(P), in response to a question concerning debts delinquent more than 180 days, Applicant listed only one car repossession. In fact, Applicant had two cars repossessed. He was not sure if the second car had been repossessed or if the loan payments were over 180 days delinquent at the time he completed the form. It was also alleged that Applicant failed to list seven allegations of delinquent debt more than 180 days past due (SOR 1.q to 1.w). Applicant stated he did not remember these debts. (Tr. 53-54)

Applicant's mother wrote that she and her husband served on active duty in the Marines and raised their son to have a good work ethic, integrity, and honor. He was required to work as a youth on paper routes and other activities. She believes her son to be honorable and truthful. (App. Ex. A, E-mail, dated August 18, 2011)

Applicant's pastor wrote that he has known Applicant for over 23 years. Applicant is involved in many church activities and recently spent time on a foreign mission for the Church. He feels Applicant is a valuable asset to any organization. (App. Ex. B, Letter, dated August 17, 2011)

A fellow worker wrote that he has known Applicant for over six years. Applicant has an excellent reputation at work. He is always positive no matter the circumstances. (App. Ex. C, Letter, dated August 18, 2011)

A government employee wrote that he has known Applicant for over ten years. He participated with Applicant on church and other activities. Applicant is responsible, reliable, and trustworthy. He is a trusted friend and confidante. (App. Ex. D, Letter, dated August 13, 2011) Another church member states he has known Applicant for over 20 years and finds him honest, hard-working, and very trustworthy. (App. Ex. E, Letter, undated) A friend wrote that she has known Applicant for over 22 years and finds him encouraging, supportive, and trustworthy. He has a positive attitude and is never manipulative or dishonest. (App. Ex. F, Letter, dated August 17, 2011) Applicant's security manager wrote that in the six years Applicant has been employed with the company, he has not had any security violations. (App. EX. G, e-mail, dated August 15, 2011)

Applicant received a letter of commendation for his work on a project in 2009. He was conscientious, paid attention to detail, and was instrumental in the mission accomplishments. (App. Ex. H, Letter, dated April 2, 2009) Applicant was also commended for his service to his company in November 2010. (App. Ex. I, Certificate dated November 1, 2010)

## **Policies**

Positions designated as ADP I and ADP II are classified as "sensitive positions." 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." Trustworthiness adjudications will apply to cases forwarded to DOHA by the Defense Security Service and Office of Personnel Management. (See, The Deputy Under Secretary of Defense (Counterintelligence and Security) Memorandum, dated November 19, 2004) 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 or a sensitive 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. 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. (AG ¶ 2(c))

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, an 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 for 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 safeguard sensitive information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of sensitive information.

## **Analysis**

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

There is a public trust concern for a failure or inability to live within one’s means, satisfy debts, and meet financial obligations because such actions 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 ¶ 18) Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in his or her obligation to protect sensitive 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 terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a situation of risk inconsistent with the holding of a public trust position. An applicant is not required to be debt free, but is required to manage his finances in such a way as to meet his financial obligations. Applicant’s delinquent debts, as established by a credit report and admitted

by Applicant are a security concern raising Financial Consideration Disqualifying Conditions (FC DC) ¶ 19(a) (inability or unwillingness to satisfy debts), and FC DC ¶ 19(c) (a history of not meeting financial obligations). The delinquent debts show a history of not meeting financial obligations because of an inability, and not unwillingness, to satisfy debt.

I considered Financial Considerations Mitigating Conditions (FC MC) ¶ 20(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), and FC MC ¶ 20(b) (the conditions that resulted in the financial problems 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). These mitigating conditions do not apply to Applicant's financial problems.

Applicant did not have health insurance to cover his family medical expenses when he incurred the majority of the delinquent medical debts. The medical debts are ongoing since they have not been paid. The medical debts were incurred by conditions beyond his control since he did not have medical insurance to cover his medical expenses. He now has adequate health insurance so medical debts are unlikely to recur. However, he has not mitigated the public trust concerns since he has not adequately inquired about or made any payments on the debts. He has not acted responsibly under the circumstances.

Applicant was making good pay because of overtime when he contracted for the purchase of two cars. When the overtime was curtailed he was unable to keep up with his car payments. He overextended himself because he was receiving overtime pay. Overtime is not a guaranteed salary and can provide a false impression of income. The conditions leading to the car loans were not beyond his control. Also, he has not acted reasonably or responsibly toward his remaining delinquent telephone debt. He has not made any payments towards the debts and has not inquired of the lenders or providers of services of the amount of the debts and means to pay them. He basically has walked away from the debts. His past-due debts still cast doubt on his reliability, trustworthiness, and good judgment.

I have considered FC MC ¶ 20(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). Applicant is taking a financial management course. While his past delinquent debts have not been resolved, his present financial situation is stable indicating his finances are under control.

I considered FC MC ¶ 20(d) (the individual initiated a good-faith effort to repay the overdue creditors or otherwise resolve debts). For FC MC ¶ 20(d) to apply, there must be an "ability" to repay the debts, the "desire" to repay, and "evidence" of a good-faith effort to repay. Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty and obligation. A systematic method of

handling debts is needed. Applicant must establish a "meaningful track record" of debt payment. A "meaningful track record" of debt payment can be established by reduction of debt through payment of debts. All that is required is that Applicant demonstrates he has established a plan to resolve his financial problems and has taken significant actions to implement that plan.

Applicant's failure to make inquiries concerning his debts and his failure to make any attempts to pay his past due obligations does not show good faith. He has not established that he acted reasonably, prudently, honestly, and with an adherence to duty and obligation in regard to paying the past-due debts. He has not shown a "meaningful track record" of debt payment since he is not paying his debts and there is no systematic method of debt payment. He has no established plan to resolve his financial problems and has not taken significant actions to pay his debts. While he is current with his present debts, this does not provide significant and credible information to establish a meaningful track record of debt payment. His management of his past financial obligations does not show reasonableness prudence, and a good-faith effort to repay his creditors and resolve debt. His financial management reflects adversely on his trustworthiness, honesty, and good judgment. He has not mitigated public trust concerns based on financial considerations.

## **Personal Conduct**

A security concern is raised for personal conduct based on Applicant's responses to financial and employment questions on his SF 85(P). Personal conduct is a security concern because conduct involving questionable judgment, untrustworthiness, unreliability, 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 (AG ¶ 15). Personal conduct is always a security concern because it asks whether the person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. The security clearance system depends on the individual providing correct and accurate information. If a person conceals or provides false information, the security clearance process cannot function properly to ensure that granting access to classified information is in the best interest of the United States Government.

Applicant was terminated from employment in August 2004. In October 2004, he completed a federal employment form in which he indicated he was terminated from a position in August 2004 for failure to follow company policy. Five years later in May 2009 he did not include the job termination on a SF 85(P). On this same form, he only listed one of two car repossession debts that were then more than 180 days past due, and failed to list seven other debts past due more than 180 days. Applicant's incorrect answers to these questions raises a public trust concern under Personal Conduct Disqualifying Condition (PC DC) AG ¶ 16(a) (the deliberate omission concealment, or falsification of relevant and material facts from any personnel security questionnaire,



personal history, or similar form used to conduct investigations, to determine security eligibility or trustworthiness).

Applicant denied an intentional falsification for the incorrect or missing material information on the application. While there is a security concern for an omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance, not every omission, concealment, or inaccurate statement is a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully with intent to deceive.

Applicant correctly completed the employment form in 2004. He does not remember completing the employment forms by computer in May 2009 and does not know why the “no” boxes concerning being fired from a job were checked. He is baffled since the form was completed on a computer and he does not remember completing the form on line. Also on the SF 85(P), in response to a question concerning debts delinquent more than 180 days, Applicant listed only one car repossession, and failed to list some other debts more than 180 days past due. In fact, Applicant had two cars repossessed. He was not sure if the second car had been repossessed or if the loan payments were over 180 days delinquent at the time he completed the form. He also did not remember the other debts or that they were over 180 days past due. It is obvious that Applicant had assistance in completing the computer generated forms. It is reasonable to believe that he was confused when the forms were completed in May 2009. It had been five years since he was terminated and he had already provided the information. Someone else was doing the work on the computer. He listed one of the car repossessions on the form thereby alerting security investigators that he had some financial issues. Applicant provided an adequate explanation for his responses and established that he did not deliberately provide the wrong answers with intent to deceive. Applicant mitigated security concerns for personal conduct by presenting sufficient information to mitigate public trust concerns for the personal conduct allegations.

### **Whole-Person Concept**

Under the whole-person concept, an 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) 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. I considered that Applicant is a trusted and highly regarded employee with a good work record and reputation on the job and is acclaimed in the community for honesty, reliability, and trustworthiness. His present finances are current and being paid as agreed. But Applicant has not acted responsibly to contact his past due creditors, inquire about the past-due debts, and arrange payment plans. He basically walked away from his past obligations that are now delinquent by ignoring them, not making inquiries concerning them, or establishing payment plans to resolve them. He presented sufficient information to mitigate trustworthiness concerns for his incorrect responses to questions on his declaration for federal employment and his application for a public trust position. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has failed to mitigate the trustworthiness concerns arising from his financial situation.

### **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 1.a - 1.w:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a – 2.b:	For Applicant
Subparagraphs 2.c – 2.d:	Withdrawn

### **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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THOMAS M. CREAN  
Administrative Judge