



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



In the matter of: )  
)  
) ADP Case No. 10-01176  
)  
Applicant for Public Trust Position )

**Appearances**

For Government: Julie R. Mendez, Esquire, Department Counsel  
For Applicant: *Pro se*

June 30, 2011

**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 trustworthiness concerns under the financial considerations adjudicative guideline. Eligibility for access to sensitive information is denied.

**Statement of Case**

Applicant submitted his Public Trust Position Application (SF 85P) on April 17, 2009. On March 1, 2011, 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 March 23, 2011, Applicant answered the SOR in writing. On April 12, 2011, he requested that his case be determined on the record in lieu of a hearing.<sup>1</sup> The Government compiled its File of Relevant Material (FORM) on May 5, 2011. The FORM contained documents identified as Items 1 through 9. By letter dated May 13, 2011, 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 May 27, 2011. His response to the FORM was due on June 26, 2011. Applicant submitted additional information within the required time period. The case was assigned to me for a decision on June 21, 2011. I marked the materials provided by Applicant in his response to the FORM as Item A, and they were entered in the record without objection. In addition, Applicant's employer filed a compelling need letter, dated June 16, 2011. I marked the compelling need letter as Item B and entered it in the record without objection.

### **Findings of Fact**

The SOR is comprised of ten allegations of financial delinquency, totaling approximately \$19,689, which raise trustworthiness concerns under Guideline F, Financial Considerations (¶¶ 1.a. through 1.j.). In his Answer, Applicant admitted the ten allegations in the SOR and provided additional information. Applicant's admissions are admitted as findings of fact. (Item 1; Item 5.)

The facts in this case are established by the record provided by the Government and by information provided by Applicant. The record evidence includes Applicant's April 17, 2009 SF 85P; official investigation and agency records; Applicant's responses to DOHA interrogatories; Applicant's credit reports of October 2, 2010, January 9, 2011, and June 3, 2011; and Applicant's response to the FORM. (Item 1; Items 5 through 9; Item A.)

Applicant is 33 years old. When he finished high school, Applicant enlisted in the military. He served on active duty from 1995 until 2004.<sup>2</sup> After his military discharge, Applicant was unemployed for about 15 months, from May 2004 until August 2005.<sup>3</sup> From August 2005 until January 2007, he was employed as an executive assistant by a federal contractor. In January 2007, Applicant established a transport business and was self-employed until May 2008. The business was not successful, and Applicant then took a job with a private firm, where he worked in administration from May 2008 until April 2009. Since April 2009, he has been employed as an executive assistant by a

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<sup>1</sup>Applicant filed two answers to the SOR. His answers to the SOR allegations were the same in the two documents. For clarity, when discussing Applicant's answers to the SOR, I will refer to Item 5, which is Applicant's answer dated April 12, 2011. (Item 3; Item 5.)

<sup>2</sup> Applicant stated that during his military service he had been granted a security clearance. (Item A.)

<sup>3</sup> While he was unemployed, Applicant attended vocational school and studied aviation maintenance for approximately four months. (Item 6 at 2.)

defense contractor.<sup>4</sup> He seeks eligibility for access to sensitive information. (Item 6 at 1, 3-4.)

On his SF 85P, Applicant identified his marital status as “married.” He is the father of three children, ages 14, 11, and 9. At his personal subject interview in November 2009, he explained that he was current in child support payments to his former wife for his oldest child, but he had been unable to pay approximately \$4,000 in arrearages. He stated that he had recently separated from his current wife, had to pay rent on his own apartment, and lacked sufficient funds to pay the child support arrearages.<sup>5</sup> (Item 6; Item 7 at 10.)

Applicant was interviewed by an Office of Personnel Management (OPM) investigator about his finances on November 24, 2009. He acknowledged the financial delinquencies identified at SOR ¶¶ 1.a. through 1.i.<sup>6</sup> He attributed his financial delinquencies to breaks in steady employment. He stated that he would pay the delinquent debts as soon as he had enough money to do so. In November 2010, in response to DOHA interrogatories, Applicant attributed his financial delinquencies to unemployment and unsteady employment. He stated that he intended to pay or settle most of his delinquent debts in January 2011, when he expected his financial situation to improve. (Item 7, 2-6, 9-12.)

In his Answer to the SOR, Applicant asserted he had paid two debts alleged on the SOR on March 16, 2011 (a \$100 debt alleged at SOR ¶ 1.b. and a \$396 debt alleged at SOR ¶ 1.h.). He also asserted that he had paid the \$207 debt alleged at SOR ¶ 1.g. on March 18, 2011. Applicant’s credit bureau report, attached to his response to the FORM, corroborated payment of the debt alleged at SOR ¶ 1.g. However, he did not provide documentation to corroborate payment of the debts alleged at SOR ¶¶ 1.b. and 1.h. (Item 5.)

In his Answer to the SOR, Applicant stated that, on March 18, 2011, he had negotiated a payment plan for the \$1,124 delinquent debt identified at SOR ¶ 1.a. In his response to the FORM, he provided a copy of his credit report of June 3, 2011, showing that the debt had been paid in full. (Item 5; Item A at 16-17.)

When he answered the SOR, Applicant admitted that the debt alleged at SOR ¶ 1.c. had not been paid. In his response to the FORM, Applicant provided a copy of a letter from the creditor, dated May 25, 2011, confirming the current balance due of

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<sup>4</sup> In his March 23, 2011 Answer to the SOR, Applicant attached a one-page document which he identified as his Social Security Earnings Record covering the period from 1994 to 2009. Nothing on the face of the Earnings Record identifies it as belonging to or pertaining to Applicant. (Item 3 at 4.)

<sup>5</sup> In his response to the FORM, Applicant explained that he and his wife were living in separate households from July 2008 until June 2010. During that time, he voluntarily paid her \$1,308 each month for her support. (Item A.)

<sup>6</sup> Applicant told the investigator that he disputed the delinquent accounts alleged at SOR ¶¶ 1.i. and 1.j. However, in his Answer to the SOR, he admitted that the debts were his. (Item 7 at 9-10, 12; Item 2; Item 5.)

\$1,224.86 and stating it would deposit a postdated check from Applicant for \$200 in partial satisfaction of the debt. (Item 5; Item A.)

In his Answer to the SOR, Applicant admitted SOR ¶ 1.f., which alleged that he owed \$3,083 in child support arrearages. He stated that the arrearages occurred in the past when he was unemployed or underemployed. He stated that since he had been regularly employed, he had been making his monthly child support payments on time and had included additional payments to satisfy the arrearages. In his response to the FORM, he provided a document from the state child support agency showing that, as of May 2011, he had reduced the child support arrearages he owed from \$3,083 to \$1,373.78. (Item 5; Item A.)

The SOR alleged at ¶ 1.i. that Applicant owed \$7,177 to a federal agency for overpayments received during his military service. Applicant admitted the debt, which he has known about since 2006. Applicant told the OPM investigator that he had refused to pay the debt, pending confirmation by the military of the overpayment. In his answer to the SOR, Applicant asserted that he had negotiated a payment agreement with the agency and had agreed to monthly payments of \$202, beginning on April 17, 2011. Applicant's credit bureau report showed that one payment of \$202 had been reported by two of the three national credit reporting agencies in May 2011. (Item 1; Item 5; Item 7 at 9-10; Item A.)

Three debts alleged on the SOR remain unpaid. Those debts are alleged at SOR ¶ 1.d. (\$2,912), ¶ 1.e. (\$1,967), and ¶ 1.j (\$1,499). (Item 5.)

During his interview with the OPM investigator in November 2009, Applicant reported a net monthly income of \$3,849. He reported total monthly living expenses of \$2,919 and total monthly payments on existing debt of \$170. His net monthly remainder was \$760. Applicant has not had consumer credit counseling. (Item 7 at 9, 12.)

### **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 sensitive 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 public trust position, 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.

### **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 two financial considerations disqualifying conditions that could raise trustworthiness 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.

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. 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) and 19(c).

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 2006, and they have continued to the present. It is 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).

While Applicant is credited with paying down his child support arrearages and satisfying the delinquent debts alleged at SOR ¶¶ 1.a. and 1.g., most of his actions to resolve his delinquent debts occurred after receiving the SOR in March 2011. Three large delinquent debts remain unresolved; he has made one payment of \$202 on his debt of over \$7,000 to a federal agency; and he failed to provide documentation to corroborate payment of the debts alleged at SOR ¶¶ 1.b., 1.c., and 1.h. In determining an individual's trustworthiness, 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). 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 he was unemployed for about 15 months after his military service ended in 2004. Additionally, the business he established in January 2007 failed in May of 2008. However, the record reflects that Applicant has been steadily employed since June 2008, and he did not address the majority of his delinquent debts until after he received the SOR. He offered no explanation for his failure to resolve or settle his financial delinquencies even after he had steady employment. I conclude that while he experienced financial problems in part because of his unemployment in 2004 and 2005 and as a consequence of his business failing in 2008, he failed to act responsibly in identifying and timely resolving most of 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 developed a plan of action to resolve his financial problems. Applicant is credited with a good-faith effort to resolve his child support arrearage. However, since the record establishes that his efforts to resolve his other delinquent debts are recent, he has failed to establish a track record of good faith and timely payment. He has not demonstrated that he can be relied upon to consistently satisfy his financial obligations over time. Accordingly, I conclude that AG ¶ 20(c) does not apply to Applicant's case, and AG ¶ 20(d) applies only in part to the facts of his case. AG ¶¶ 20(e) and 20(f) are not raised by the facts of this case.<sup>7</sup>

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<sup>7</sup> AG ¶ 20(e) reads: "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 provide evidence of actions to resolve the issue." AG ¶ 20(f) reads: "the affluence resulted from a legal source of income."

## 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 several years, suggesting lack of interest or inability to learn to manage his financial commitments responsibly. While his unemployment and business failure impacted his ability to pay his debts for a period of time, he has also been steadily employed for three years and only addressed the majority of his alleged debts after receiving the SOR in March 2011. During his November 2009 interview with the OPM investigator, he stated that he intended to take action to pay those delinquent debts. One year later, in November 2010, he responded to DOHA interrogatories and asserted that he would begin to address his financial delinquencies in January 2011. However, he failed to address even his smaller debts until he received the SOR in March 2011. His failure to discharge debts over a period of time when he had a monthly net remainder of approximately \$760 raises concerns about his judgment, reliability and trustworthiness. 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.:           For Applicant

Subparagraphs 1.b. - 1.e.: Against Applicant

Subparagraphs 1.f. - 1.g.: For Applicant

Subparagraphs 1.h. – 1.j.: 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