



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



In the matter of:	)	
	)	
	)	ADP Case No. 10-05816
	)	
	)	
Applicant for Public Trust Position	)	

**Appearances**

For Government: Candace Garcia, Esquire, Department Counsel  
For Applicant: *Pro se*

May 10, 2011

**Decision**

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant’s eligibility for access to sensitive information is denied.

Applicant submitted his Questionnaire for Public Trust Position (SF 85P) on August 18, 2009. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR), detailing the trustworthiness concerns under Guideline F, Financial Considerations, and Guideline E, Personal Conduct, on November 23, 2010. The action was taken under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the *Adjudicative Guidelines For Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR on November 29, 2010. He answered the SOR in writing on December 10, 2010 and requested a hearing before an administrative judge. DOHA received the request on December 13, 2010. Department

Counsel was prepared to proceed on January 24, 2011, and I received the case assignment on February 1, 2011. DOHA issued a notice of hearing on February 23, 2011, and I convened the hearing as scheduled on March 9, 2011. The Government offered Exhibits (Ex.) 1 through 6, which were received without objection. Applicant testified. He did not submit any exhibits. DOHA received the transcript of the hearing (Tr.) on March 19, 2011. I held the record open until March 24, 2011, for Applicant to submit additional matters. He did not submit any additional documentation. The record closed on March 24, 2011.

## **Procedural Rulings**

### **Notice**

The hearing notice was mailed less than 15 days before the hearing. (Tr. at 8-9.) I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived his right to 15 days notice. (*Id.*)

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.b-1.g of the SOR. He denied the factual allegations in ¶¶ 1.a and 1.h-1.j of the SOR. He also provided additional information to support his request for eligibility for a public trust position.

Applicant, who is 32 years old, works as a pharmacy technician for a Department of Defense contractor. He began his employment in August 2009. Applicant married in 2004. He and his wife do not have any children. He graduated from high school and attended college for one year. He has never been arrested nor does he gamble.<sup>1</sup>

In 2005, Applicant accepted a \$50,000 position as a regional marketing manager with a company many miles from his home. He and his wife sold their home and moved across the country in June 2005. Eighteen months later, his employer eliminated his position. However, he accepted another position with the same employer at the same salary. Applicant worked in his new position from January 2007 until June 2007, when he left for a contract position in marketing, which paid him \$48,000 a year and appeared to be a long-term position. This job ended in January 2008 when the company lost the contract on which he was working. In February 2008, he began working as a customer service representative at a salary of \$30,000. He left that job in June 2009.<sup>2</sup>

After moving across country, Applicant's wife started attending cosmetology school, where she learned skills to be a hair stylist. She initially worked part time, then began working full time in 2008, earning between \$20,000 and \$35,000 a year. She

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<sup>1</sup>GE 1; Tr. 18-19, 71-72.

<sup>2</sup>GE 1; Tr. 20, 23-24, 37-38, 42-44.

started her current position in September 2009. She works on commission and must build a clientele base.<sup>3</sup>

Applicant and his wife received a \$70,000 profit from the sale of their house in 2005. They purchased a second house for \$215,000 in February 2006, using \$50,000 of their profit for this house. They used the remaining \$20,000 to pay debts, such as her school loans. They financed their new house with an adjustable rate mortgage (ARM). Their monthly mortgage payment was \$1,250 for the first three years. In January 2009, their monthly mortgage payment increased to \$1,950. Applicant paid this amount once. He contacted the mortgage company and negotiated a 30-year fixed rate mortgage, which returned his monthly mortgage payment to approximately \$1,250 a month, plus taxes and homeowners' association fees.<sup>4</sup>

In 2008, after his income declined by \$20,000, Applicant and his wife discussed moving back west to be closer to family and friends. They decided to remain in the east while his wife completed her hair stylist training. One year later, they again considered moving west. They discussed what to do about their house, as their house had a market value of \$80,000, and they owed \$181,000 on their mortgage. They met with a local attorney, who advised against a short sale and recommended that they allow the house to go to foreclosure. They considered renting the house, but the rental income would be about \$400 a month less than their expenses on the house each month. This deficiency would impact their ability to pay their usual living expenses. After much thought and discussion, they decided to stop making their mortgage payments beginning in April 2009, and they moved west in early July 2009. The mortgage company foreclosed on their house in August 2010.<sup>5</sup>

Applicant and his wife paid on their other debts until they moved. Applicant started working in August 2009, earning \$26,000 a year, and his wife started working in September 2009, earning approximately \$18,000 a year. During their six weeks of unemployment, they lived with family. They continue to live in his mother's house, as she lives in another state. They pay his mother \$1,200 a month in rent, which covers all her expenses on the house. Applicant now earns \$31,000 a year. His monthly expenses total approximately \$3,000. His monthly income covers his monthly expenses. He files his income tax returns each year. He owed additional taxes of \$5,000 for the tax year 2007. He has a payment plan, and his tax refund was applied to this debt, which has a current balance of approximately \$3,400.<sup>6</sup>

Applicant has not paid any of the debts listed in the SOR. The bank purchased his house for \$1 at the foreclosure sale. He has not received any notice of deficiency from the bank and has no idea if he owes a balance on his mortgage loan. He believes

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<sup>3</sup>Tr. 25, 49-50, 51-52.

<sup>4</sup>*Id.* 20, 22, 25-26, 34, 38-39.

<sup>5</sup>GE 2; GE 5; Tr. 21, 26, 44-45.

<sup>6</sup>GE 2; Tr. 41-48, 50-54, 57-59.

the debts in SOR allegations 1.h and 1.i are the same. The September 18, 2009 and February 23, 2010 credit reports indicate that the debt in SOR allegation 1.i is disputed, and the account is closed. He also believes that the debts in SOR allegations 1.a and 1.j are the same and paid. He did not provide evidence which supports his belief.<sup>7</sup>

Applicant hired a bankruptcy attorney in October 2010, as he and his wife plan to file bankruptcy to resolve their debts. He has not started the bankruptcy process because he must pay the attorney \$2,500. He has saved \$600 towards the filing costs. Upon the advice of his attorney, he is not contacting his old creditors or paying his past-due debts. He and his wife have one car, and they have not attended any financial counseling classes. As of the date of his interview with the security investigator, he intended to pay his debts. He does not have the money to pay the debts.<sup>8</sup>

When Applicant completed his SF 85P in August 2009, he answered “no” to question 22b, which asked if he was 180 days delinquent on any loans or financial obligations. At the time he answered this question, he was not over 180 days delinquent on any of his debts to the best of his knowledge. He had stopped paying his debts when he moved in July 2009 and his mortgage was less than 180 days past due. His employer gave him a few hours to complete the SF 85P, which did not allow him time to review a credit report. He did not believe he had any old debts as he had disputed the debts. At various times, these debts had been removed from his credit reports.<sup>9</sup>

### **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. 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 over-arching adjudicative goal is a

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<sup>7</sup>GE 4; GE 5; Tr. 29-32.

<sup>8</sup>Tr. 28, 55-57, 61.

<sup>9</sup>*Id.* 66-67.

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 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 *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 trustworthiness concerns. Applicant accumulated delinquent debt and was unable to pay his obligations for a period of time. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

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 reliability, trustworthiness, or good judgment.” Applicant’s financial problems are recent. Thus, this mitigating condition does not apply.

Under AG ¶ 20(b), it may be mitigating 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’s financial problems arose when he lost his contract position and accepted a new job paying \$20,000 a year less. His wife’s income began to increase, but they found it difficult to meet all their financial obligations. But it is difficult to conclude that Applicant has acted responsibly, given his belated efforts to resolve the debts through a bankruptcy. This mitigating condition is only partially applicable.

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). Applicant has not received financial counseling, nor are his past-due debts resolved. This mitigation condition is not applicable.

AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Applicant has not contacted any of his creditors to resolve his debts. This mitigating condition is not applicable.

AG ¶ 20(e) applies where “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.” The credit reports reflect that Applicant disputed the debt in SOR allegation 1.h, which he denies owning. This mitigating condition applies to this allegation only.

## **Guideline E, Personal Conduct**

AG ¶ 15 expresses the trustworthiness concern pertaining to personal conduct:

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 sensitive 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 ¶ 16(a) describes conditions that could raise a trustworthiness concern and may be disqualifying:

(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.

For this guideline to apply, Applicant's omission must be deliberate. The Government established that Applicant omitted material facts from his August 18, 2009 SF 85P when he failed to list the debts in SOR allegations 1.a, 1.h, 1.i, and 1.j. This information is material to the evaluation of Applicant's trustworthiness and honesty. In his response, he denied that he had an intent to hide this information from the Government. When a falsification allegation is controverted, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.<sup>10</sup>

Applicant did not review his credit report before he completed his SF 85P. He was not aware that any debts more than 180 days old existed on his credit report because his oldest debts disappeared and reappeared on his credit report. He believed that his problems with these debts had been resolved. The debts in SOR allegations 1.b through 1.g were not 180 days past-due. The evidence falls short of establishing that the Applicant intentionally omitted information from his SF 85P. Guideline E is found in favor of Applicant.

## **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

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<sup>10</sup>See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

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) 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. The decision to grant or deny trustworthiness eligibility requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a trustworthiness concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a public trust position should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate trustworthiness concern.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant has no criminal record, nor is he involved in questionable activities, such as gambling or alcohol abuse. Until 2009, he regularly paid his bills, and he pays his current bills. His income declined in 2008, making it difficult for him to pay his bills. After a year of coping with this problem, he and his wife decided to move west to be near family and friends after living in the east for four years. They consulted an attorney about their house. After weighing their options and upon legal advice, they decided to allow their house to go to foreclosure. After moving, they did not work for at least six weeks, making it difficult for them to pay their bills. They continue to earn less income than in the past. As a result, they have not paid their past-due debts. They are saving money to pay an attorney to file bankruptcy for them, but have yet to file their petition. At the present time, their financial problems are not resolved.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a public trust position. I conclude Applicant has not mitigated the trustworthiness concerns arising from his financial considerations. However, he has mitigated the trustworthiness concerns arising from his personal conduct. He did not intentionally falsify his answers about his debts on his SF 85P as the known debts were not 180 days over due.



## 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.g:	Against Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For 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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MARY E. HENRY  
Administrative Judge