



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



In the matter of: )  
)  
) ADP Case No. 11-11064  
)  
)  
Applicant for Public Trust Position )

**Appearances**

For Government: Gregg Cervi, Esq., Department Counsel  
For Applicant: *Pro se*

07/24/2013

**Decision**

COACHER, Robert E., Administrative Judge:

Applicant has not mitigated the personal conduct or the financial considerations trustworthiness concerns. Eligibility for access to sensitive information is denied.

**Statement of the Case**

On December 4, 2012, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guidelines E and F. The DOD acted under Executive Order (EO) 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) promulgated by the President on December 29, 2005, and effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR in writing on April 4, 2013. The case was assigned to me on May 14, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 22, 2013, and the hearing was convened as scheduled on June 12, 2013. The Government offered Exhibits (GE) 1 through 7, which were admitted

into the record without objection. An index for the government exhibits was marked Hearing Exhibits (HE) I. Applicant testified, but did not submit any documentary evidence. I kept the record open to allow Applicant to submit additional information; however, he chose not to submit anything further before the record closed on June 26, 2013. DOHA received the transcript of the hearing (Tr.) on June 19, 2013.

### **Findings of Fact**

Applicant is a 28-year-old employee of a government contractor. He has worked as a help-desk technician for his current employer since March 2011. He was married in 2010 and divorced in 2012. He has three children from two relationships, ages 10, 4, and 3. He has custody of the 10 year old, and is current on his child support for the two younger children living with their mother. He has some college education. He does not have military experience.<sup>1</sup>

In January 2010, Applicant was working for a commercial company. He wanted to attend a sporting event and needed to take time off from work to do so. He went to his supervisor's office to ask permission. His supervisor told him he could take the time off, but he needed to send the supervisor an email formally requesting it. Applicant failed to send the email and went to the event, taking time off from work to do so. A timecard was submitted for Applicant showing that he had worked the hours he was absent. Apparently, a coworker saw Applicant at the event and informed his supervisor. Applicant was called before his supervisor and another employee and asked if he attended the game. He denied attending. He later admitted that he lied because he didn't want to admit attending the event in front of the other employee. He was terminated for fraud, since he received pay for hours he did not work, which is the allegation stated in SOR ¶ 1.a.<sup>2</sup>

The SOR also lists 14 delinquent debts totaling about \$41,882. Applicant admitted that he owed the delinquent debts listed in SOR, except for ¶ 2.c., which he denied, claiming that it was his father's debt.<sup>3</sup>

Applicant's financial troubles began back in 2011. He was behind on several debts at that time and he was planning to use his income tax refund to pay them when he and his wife separated and ultimately divorced. He then got behind on his mortgage payments. He asked his wife to sign a quit claim deed so he could refinance, but she refused. He is currently one month behind on his mortgage. He was given an opportunity to submit documents showing his current mortgage status post-hearing, but he failed to do so. He pays \$200 monthly for child support and is current on that obligation. He admitted having very little, if any, disposable income available at the end of the month once he pays his bills. He has not sought out financial counseling in the

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<sup>1</sup> Tr. at 6, 27, 59-60; GE 1.

<sup>2</sup> Tr. at 28-31; GE 3.

<sup>3</sup> Tr. at 35; Applicant's response to SOR.

past, but a friend who is involved in financial planning has offered to help him clean up his credit for a fee of \$600.<sup>4</sup>

The status of the debts is described in the table below and all the debts are listed in credit reports dated March 2011, August 2012, November 2012, and April 2013.<sup>5</sup>

DEBT SOR ¶	AMOUNT	STATUS	EVIDENCE
2.a	\$177	Remains unpaid, no contact with creditor. Unresolved.	Tr. at 48.
2.b	\$432	Remains unpaid, no contact with creditor. Unresolved.	Tr. at 48.
2.c.	\$9,744	Applicant claimed this was his father's debt, but provided no evidence to document his dispute, even though he was given the opportunity to submit supporting documents after the hearing. Debt is listed as a student loan in the credit reports. Unresolved.	Tr. at 48, 62.
2.d	\$1,000	Currently behind one month, but provided no documentation. Unresolved.	Tr. at 49.
2.e – 2.i	\$1,845	Applicant claims he pays periodic \$50 payments on these student loan debts with the last such payment occurring in April 2013. No documentation provided. Unresolved.	Tr. at 50.
2.j	\$4,747	This was a line of credit from his former employer that was being paid out of his paycheck. When he was terminated for fraud, he stopped making the payments. His last payment was in December 2009. Unresolved.	Tr. at 51-52.
2.k	\$13,134	This debt resulted from a balance owed after a car repossession. He is jointly liable with his ex-wife. No contact made with the creditor. Unresolved.	Tr. at 52-53.
2.l	\$8,658	Remains unpaid, no contact with creditor. Unresolved.	Tr. at 53.

<sup>4</sup> Tr. at 32-34, 45, 47, 55-57, 63.

<sup>5</sup> GE 4-7.

2.m	\$1,903	Remains unpaid, no contact with creditor. Unresolved.	Tr. at 54.
2.n	\$242	Remains unpaid, no contact with creditor. Unresolved.	Tr. at 54.

### **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 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).

### **Guideline E, Personal Conduct**

The trustworthiness concern relating to the guideline for personal conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a trustworthiness concern and may be disqualifying. One is applicable in this case:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and,

(4) evidence of significant misuse of Government or other employer's time or resources.

Applicant was terminated from his employment when he failed to properly request time off in writing as directed by his supervisor. He took time off without submitting a written request and was therefore paid for several hours that he did not

work. The company considered his actions tantamount to fraud. To compound his error, Applicant lied to his supervisor when he was asked directly whether he took the time off. AG ¶ 16(d)(2) is applicable.

AG ¶ 17 provides conditions that could mitigate trustworthiness concerns. Two potentially apply:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

Applicant was confronted by his former employer about his actions in taking time off before he could reveal it on his own. During that confrontation he chose to lie. Lying to an employer is not a minor offense. Neither AG ¶¶ 17(a) nor 17(b) apply.

### **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. Two are applicable in this case:

(a) inability or unwillingness to satisfy debts; and

(c) a history of not meeting financial obligations.

Applicant accumulated numerous delinquent debts and was unable or unwilling to pay his obligations for a period of time. The evidence is sufficient to raise AG ¶¶ 19(a) and 19(c).

Several financial considerations mitigating conditions under AG ¶ 20(a) 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.

Although some of Applicant's debts occurred several years ago, they are still owed and they are numerous. AG ¶ 20(a) is not applicable at this time.

Applicant's separation and divorce contributed to his financial distress. Those are conditions that were largely beyond his control. To be fully applicable, AG ¶ 20(b) also requires that the individual act responsibly under the circumstances. Applicant failed to act timely dealing with his debts. Even though he recently contacted a friend about cleaning up his credit, no substantive debt reduction has happened. AG ¶ 20 (b) does not apply.

Even though Applicant contacted his friend for credit help, there is no indication his debts are being resolved or under control. Applicant receives partial consideration under AG ¶ 20(c). His actions do not qualify as a good-faith effort to repay overdue creditors or otherwise resolve debts.<sup>6</sup> AG ¶ 20(d) is not applicable. His disputed debt

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<sup>6</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 Financial Considerations Mitigating Condition 6, 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 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 (such as bankruptcy) in order to claim the benefit of Financial Considerations Mitigating Condition 6.

(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. Jun. 4, 2001)).

that he claims is his father's is not supported by any documented proof absolving him of liability. AG ¶ 20(e) is not applicable.

### **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 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 have incorporated my comments under Guidelines E and F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment. Applicant intentionally deceived his employer to gain a benefit. When confronted, he lied about what he had done. Financially, he has struggled during and after his divorce to pay his debts. Despite those circumstances, Applicant has had sufficient time to develop a plan of action to deal with his debts, yet he failed to do so. Applicant's financial track record does not persuade me that he will satisfy the delinquent debts.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the trustworthiness concerns.

### **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:	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraphs 2.a-2.n:	Against Applicant



## **Conclusion**

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

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Robert E. Coacher  
Administrative Judge