



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



In the matter of: )  
 )  
XXXXXXXXXX, XXXXX ) ADP Case No. 12-03619  
 )  
Applicant for Public Trust Position )

**Appearances**

For Government: Chris Morin, Esq., Department Counsel  
For Applicant: *Pro se*

08/19/2014

**Decision**

Tuider, Robert J., Administrative Judge:

Applicant’s statement of reasons (SOR) alleges four delinquent debts, totaling \$81,479. The debts are student loans that Applicant cosigned for his son, and his son failed to repay the loans when they were due. These debts were brought to Applicant’s attention by a Government investigator as early as January 2012; however, it was not until recently that Applicant’s son began repayment. Applicant has not demonstrated circumstances beyond his control, good-faith, or a sufficient repayment track record. Financial considerations concerns are not mitigated. His eligibility to occupy a public trust position is denied.

**Statement of the Case**

On November 10, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of an application for a public trust position (SF 86). On February 28, 2014, the Department of Defense (DOD) issued an SOR to Applicant, pursuant to Department of Defense Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program (Directive), dated January 2, 1992, as amended, and modified; Department of Defense (DOD) Regulation 5200.2-R, Personnel Security Program, dated Jan. 1987, as amended (Regulation); and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleges trustworthiness concerns under Guideline F (financial considerations). The SOR detailed reasons why DOD was unable to find that it is clearly consistent with the national interest to grant or continue Applicant's eligibility to occupy a public trust position, which entails access to sensitive information.

On April 16, 2014, Applicant responded to the SOR, and he requested a hearing. On May 19, 2014, Department Counsel indicated he was ready to proceed on Applicant's case. On May 20, 2014, the Defense Office of Hearings and Appeals (DOHA) assigned Applicant's case to me. On May 23, 2014, DOHA issued a hearing notice, setting the hearing for June 26, 2014. Applicant's hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 4, and Hearing Exhibit (HE) I, which were received into evidence. Applicant testified and offered Applicant Exhibits (AE) A through C, which were received into evidence. I held the record open until July 11, 2014, to afford Applicant the opportunity to submit additional documents. Applicant timely submitted AE D through AE I, which were received into evidence.

### **Findings of Fact<sup>1</sup>**

Applicant's SOR response admitted responsibility for the SOR debts in ¶¶ 1.a-1.d. He also provided mitigating information. Applicant's admissions are accepted as findings of fact.

### **Background Information**

Applicant is a 60-year-old senior applications developer systems analyst employed by a defense contractor since October 2006. From July 1996 to October 2006, he was a contract employee for the same defense contractor until he was hired as a fulltime employee in October 2006. Applicant seeks a public trust position as a condition of his continued employment. (Tr. 18-21, GE 1, AE E.)

Applicant graduated from high school in June 1970. He was awarded a bachelor of science degree in business administration in May 2004. Applicant pursued graduate education and was awarded a master's degree in management information systems in January 2008. (Tr. 21-24, GE 1.) He married in December 1979, and has three adult children – two sons and a daughter. (Tr. 24-25.) Applicant did not serve in the U.S. armed forces. (GE 1.) Applicant's wife manages a cook shop, a small family business, to earn extra income. (Tr. 31-32.)

---

<sup>1</sup>Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

## Financial Considerations

Applicant's history of delinquent debt is documented in his credit reports, his January 27, 2012 Office of Personnel Management (OPM) personal subject interview (PSI), his September 11, 2013 responses to DOHA interrogatories, his SOR response, and his hearing record. (GE 2-4.) His OPM PSI, DOHA interrogatories, and SOR provided specific notice to him of the debts causing trustworthiness concerns.

The SOR debts consist of four student loans that have either been charged off or are in a collection status in amounts of \$68,383; \$3,413; \$5,488; and \$4,195. (SOR ¶¶ 1.a – 1.d.) The student loans were taken out by Applicant's youngest son (YS), and loans for which Applicant cosigned in 2001, 2002, 2004, and 2007. When YS finished school, he had difficulty finding a job until recently, and defaulted on his student loans at which point the lenders looked to Applicant for repayment. (Tr. 26-31, GE 3.) The student loan in SOR ¶ 1.a was charged off in 2010, and the student loans in SOR ¶¶ 1.b. through 1.d have been in a collection status since 2011, apparently after being deferred. (GE 3, GE 4.)

YS is 31 years old and attended college from 2002 to 2007. Applicant claims that he became aware these debts were in arrears as a result of these proceedings. At a minimum, Applicant was informed that these loans were a concern to the Government during his January 2012 OPM PSI, in his September 2013 DOHA interrogatories, and in his February 2014 SOR. Applicant claimed that he "honestly thought" that YS had consolidated his student loans and was "managing" the situation. As it turned out, the private cosigned student loans were in default and the creditors were looking to Applicant for repayment. (Tr. 33-40, 57, GE 2.)

This situation is problematic inasmuch as YS is primarily responsible to repay these loans; however, it is Applicant who has found himself in a situation where he is legally obligated to repay YS's loans. Since these four delinquent loans have been brought to Applicant's attention, he has been coordinating with YS to bring these loans to good standing. The following summarizes the current status of the four student loans.

SOR ¶ 1.a – Sallie Mae charged-off student loan for \$68,383. As of the hearing date, the balance was actually \$84,462. Applicant testified that Sallie Mae offered to reduce that amount to \$27,000 if Applicant was able to make \$2,000 monthly payments for one year. Applicant was unable to pay that amount. Applicant's son began making payments on the full amount beginning in May 2014 per an agreement with the creditor. The dates and amounts paid to date are: April 23, 2014 - \$250; April 30, 2014 - \$250; May 30, 2014 - \$500; June 27, 2014 - \$430; and July 2, 2014 - \$430. Applicant stated that he is "starting to monitor it a little bit more" by remaining in telephone contact with YS. YS recognizes that his failure to keep his payments current may affect his father's credit and livelihood. (Tr. 41-49, SOR answer, AE A, AE C, AE I.)

SOR ¶¶ 1.b through 1.d. – Three private student loans (PSL), all with the same lender, in the respective amounts of \$3,413, \$5,488, and \$4,195. In March 2014, YS made payment arrangements with the PSL lender authorizing a \$140 monthly debit

from his checking account beginning on April 21, 2014. Applicant provided copies of YS's checking account statements showing that \$140 payments were debited on April 21, 2014, May 21, 2014, May 30, 2014, and July 2, 2014 (June payment). (Tr. 61-63, SOR answer, AE B, AE D.)

Department Counsel queried Applicant whether he considered making payments directly to the two lenders to have absolute certainty that the payments were made in a timely manner in order to protect his job. Applicant responded that he has "thought about it," but for now planned to continue monitoring his son's accounts. Applicant did not know if he would be able to make his son's student loan payments were his son to default. YS recently started working at a radio station, and Applicant does not know what's YS's annual salary is. (Tr. 45-51, 66-67.)

Applicant's personal financial statement (PFS) showed the following monthly amounts: gross salary \$8,500; net income \$6,550; expenses \$2,640; debts \$3,639; and net remainder \$270. (AE H.) Applicant did not describe any financial counseling.

### **Character Evidence**

Applicant submitted two work performance reviews for 2012 and 2013. Both reviews document average to above average performance. (AE G, AE H.)

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Government's authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. See *Id.* at 527.

Positions designated as ADP I and ADP II are classified as "sensitive positions." 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." Regulation ¶ C6.1.1.1. 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, an 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 an evaluation of the

whole person. An administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to sensitive information. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security and trustworthiness suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance [or access to sensitive information]." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance [or trustworthiness] determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

The protection of the national security and sensitive records is of 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." 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."

## **Analysis**

### **Financial Considerations**

AG ¶ 18 articulates the trustworthiness concern relating to financial problems:

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 disqualifying conditions that could raise a trustworthiness concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" and "(c) a history of not meeting financial obligations." 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. *Id.* (internal citation omitted).

Applicant's history of delinquent debt is documented in his credit reports, his OPM PSI, his responses to DOHA interrogatories, his SOR response, and his hearing record. Applicant's SOR alleges four delinquent debts, totaling \$81,479. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;<sup>2</sup> and

---

<sup>2</sup>The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

(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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in [trustworthiness] decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

Applicant's conduct in resolving his debts warrants only partial application of AG ¶¶ 20(a) to 20(d). AG ¶ 20(e) is not applicable. Applicant did not provide documentation showing that he disputed any of his delinquent SOR debts. YS's unwillingness or inability to pay his student loans has placed his father, the Applicant, in an unfortunate situation. To Applicant's credit, there has been some recent activity to repay the student loans for which he cosigned. However, Applicant has been aware that the debts identified in his SOR were a trustworthiness concern to the Government as early as January 2012 when they were brought to his attention during his OPM PSI. The recent activity of short duration by YS to repay his student loans does not establish a track record as contemplated by the Appeal Board. It is unfortunate that Applicant was unable or unwilling to address these concerns in a meaningful manner when they were first brought to his attention in 2012. While YS is primarily legally and morally obligated to repay these student loans, Applicant became responsible when YS failed the make

---

In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that 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 [the "good faith" mitigating condition].

ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)) (internal citation and footnote omitted.)

timely payments. Applicant's has a rather tenuous plan in place, that being to "monitor" his recently employed son's progress.<sup>3</sup>

The Appeal Board explained that circumstances beyond one's control can cause unresolved debt, and are not necessarily a bar to having access to sensitive information stating:

However, the Board has previously noted that an applicant is not required to be debt-free [or] to develop a plan for paying off all debts immediately or simultaneously. All that is required is that an applicant act responsibly given his [or her] circumstances and develop a reasonable plan for repayment, accompanied by "concomitant conduct," that is, actions which evidence a serious intent to effectuate the plan. See ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008).

ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009). Applicant admitted responsibility for his SOR debts, establishing some good faith. However, it was only within the last several months that these long-standing debts have been addressed by YS.<sup>4</sup> While the recent partial repayment of these student loans is commendable, the present solution is problematic at best and there has been insufficient time to establish a meaningful track record of debt repayment. Further time is needed to fully establish Applicant's financial responsibility.

### **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

---

<sup>3</sup>The Appeal Board has indicated that promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner. ISCR Case No. 07-13041 at 4 (App. Bd. Sept. 19, 2008) (citing ISCR Case No. 99-0012 at 3 (App. Bd. Dec. 1, 1999)).

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



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 have incorporated my comments under Guideline 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 is a mature and responsible individual. Since 1996, he has worked for his employer as a contract employee or as a company employee. There is nothing in the record to suggest that he has been anything other than a model employee during those years. Applicant has successfully raised three adult children. There is every indication that he is loyal to the United States and his employer. I give Applicant credit for accepting responsibility as cosigner of his son's student loans for the SOR debts.

However, I cannot overlook the fact that Applicant has known about his son's inability or unwillingness to repay his student loans since at least January 2012 and did little to remedy the situation until recently. If Applicant had become fully engaged in this process at the time it was brought to his attention, a different result most likely would have resulted. Unfortunately, monitoring his son's payment progress for the past few months is too little too late. He failed to establish that he was unable to make payments to the creditors.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole-person. I conclude financial considerations are not mitigated. Eligibility for access to classified information is granted.

### **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:	FOR APPLICANT
Subparagraphs 1.a to 1.d:	For 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.

---

Robert J. Tuidor  
Administrative Judge