



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



In the matter of:

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Applicant for Public Trust Position

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ADP Case No. 15-03800

**Appearances**

For Government: Andrew H. Henderson, Esq., Department Counsel

For Applicant: *Pro se*

04/21/2017

**Decision**

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke him eligibility for a public trust position. Applicant did not present sufficient evidence to explain, extenuate, or mitigate the trustworthiness concern stemming from his problematic financial condition. Accordingly, this case is decided against Applicant.

**Statement of the Case**

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on May 26, 2013. On December 3, 2015, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility sent Applicant a statement of reasons (SOR), detailing trustworthiness concerns under Guideline F for financial considerations.<sup>1</sup>

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<sup>1</sup> This action was taken under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, as well as 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* (Jan. 1987), as amended (Regulation). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified*

The SOR is similar to a complaint. Applicant answered the SOR on March 15, 2016, and requested a decision based on the written record without a hearing.

On June 10, 2016, Department Counsel submitted a file of relevant and material information (FORM).<sup>2</sup> Included in the FORM were six items of evidence, items one and two and items four through six of which are admitted into evidence as Government Exhibits 1, 2 and 4 through 6. Item three is marked as Government Exhibit 3 and is discussed below. The FORM was mailed to Applicant, who received it on May 31, 2016. Applicant's response to the FORM was due on June 17, 2016. On June 17, 20 and July 6, 2017, Applicant responded to the FORM. His responses with accompanying documents are marked as Applicant's Exhibits A through C and are admitted into evidence. The case was assigned to me on March 10, 2017.

### **Procedural Matters**

The FORM includes Exhibit 3, which is a report of investigation (ROI) summarizing Applicant's interview that took place during the June 2013 background investigation. The ROI is not authenticated as required under ¶ E3.1.20 of the Directive.<sup>3</sup> Department Counsel's written brief includes a footnote advising Applicant that the summary was not authenticated and that failure to object may constitute a waiver of the authentication requirement. The footnote is prominently prefaced with a bolded, upper-case notice to Applicant and flagging for Applicant the importance of the footnote, which then explains the concepts of authentication and waiver. In a case such as this, where Applicant has responded to the FORM, it is fair to conclude that Applicant read the footnote, understood it, and chose not to object to the ROI. The ROI is, therefore, admissible.

### **Findings of Fact**

Applicant is 32 years old, never married, and is a high school graduate with some college credits. At the time of his SF 86, he had been employed since September 2012 as a manager of a fitness club.<sup>4</sup> Applicant is seeking to obtain eligibility to occupy a position of public trust, because his sponsor provides security and technology services to the Department of Defense. Eligibility is necessary, because a job with his sponsor would involve access to sensitive but unclassified information.

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*Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006).

<sup>2</sup> The file of relevant material consists of Department Counsel's written brief and supporting documentation, some of which are identified as evidentiary exhibits in this decision.

<sup>3</sup> See generally ISCR Case No. 12-10933 (App. Bd. Jun. 29, 2016) (In a concurring opinion, Judge Ra'anani notes the historical concern about reports of investigation in that they were considered by some to present a heightened problem in providing due process. Judge Ra'anani raises a number of pertinent questions about using an unauthenticated ROI in a non-hearing case with a pro se applicant.).

<sup>4</sup> Exhibit 2.

Under Guideline F, the SOR alleged seven delinquent collection accounts and four delinquent medical accounts totaling approximately \$18,100.<sup>5</sup> Applicant's handwritten answers to eight SOR allegations are, "I deny this debt is still valid," or "I deny that this debt is still valid as it does not appear on my credit report."<sup>6</sup> Attached to his answer is a credit report dated February 29, 2016, which does not show any of the SOR debts. In his typewritten answer, Applicant admits each debt alleged but states that one or more of the Chase debts (paragraphs 1.c., e., and i.) might be duplicates, because he was not aware of having more than one Chase credit card.<sup>7</sup>

Applicant's financial problems stemmed from being terminated by his employer for disciplinary reasons in January 2008.<sup>8</sup> Applicant remained unemployed until August 2009. During that period, Applicant relied on unemployment compensation, which was not enough to meet his routine household expenses. Applicant had another period of unemployment from August 2011 until September 2012, during which time he again relied on unemployment benefits. Applicant became unemployed at that time, because his employer lost the contract that he was servicing.<sup>9</sup> Applicant admits in his answer that he has not made payments on the collection accounts since 2008, due to his then-inability to pay. He thought he had no option but to wait for the debts to "fall off" his credit reports.

Applicant's answer explained that the four medical accounts (paragraphs 1.f. through h. and k.) were incurred in September 2011 when he was bitten by a dog in his parents' home. He received emergency room treatment for his injury, and his parents told him they would pay for that treatment. He did not know that his parents failed to pay the emergency room medical bills.<sup>10</sup> In his response to the FORM, Applicant detailed the efforts he made after the SOR was issued and after the FORM was filed to track down the creditors or collection agencies holding the SOR debts. He has not been successful.<sup>11</sup>

## **Policies**

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." (See Regulation ¶ C6.1.1.1.) The Deputy Under Secretary of Defense (Counterintelligence and Security)

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<sup>5</sup> Exhibit 1.

<sup>6</sup> Exhibit 1, paragraphs 1.a. through f. and paragraphs 1.i. and j.

<sup>7</sup> Exhibit 1.

<sup>8</sup> Exhibits 1, 2 and 3.

<sup>9</sup> Exhibit 2.

<sup>10</sup> Exhibit 1.

<sup>11</sup> Exhibits A through C.

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."

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

## **Discussion**

### **Guideline F – Financial Considerations**

Under Guideline F for financial considerations,<sup>12</sup> the suitability of an applicant may be questioned or put into doubt when that applicant has a history of excessive indebtedness or financial problems or difficulties. The overall concern is:

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<sup>12</sup> AG ¶¶ 18, 19, and 20 (setting forth the concern and the disqualifying and mitigating conditions).

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 a [person's] reliability, trustworthiness, and ability to protect [sensitive] information.<sup>13</sup>

The concern is broader than the possibility that a person might knowingly compromise sensitive information to obtain money or something else of value. It encompasses concerns about a person's self-control, judgment, and other important qualities. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding sensitive information.

In analyzing the facts of this case, I considered the following disqualifying and mitigating conditions or factors:

AG ¶ 19(a) inability or unwillingness to satisfy debts;

AG ¶ 19(c) a history of not meeting financial obligations;

AG ¶ 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 [person] acted responsibly under the circumstances;

AG ¶ 20(c) [t]here are clear indications that the problem is being resolved or is under control; and

AG ¶ 20(d) the [person] initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

The evidence supports a conclusion that Applicant has had a problematic financial condition sufficient to raise a trustworthiness concern under Guideline F. He has been unable to pay his debts and has made no payments on his collection accounts since 2008, thus triggering AG ¶¶ 19(a) and (c).<sup>14</sup> A trustworthiness adjudication is not a proceeding aimed at collecting an applicant's debts. Rather, it is a proceeding aimed at evaluating an applicant's judgment, reliability, and trustworthiness.<sup>15</sup> Applicant's inability to pay his debts was caused by him being terminated by his employer in January 2008

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<sup>13</sup> AG ¶ 18.

<sup>14</sup> I find persuasive Applicant's explanation of his overdue medical accounts, and the Government has not offered evidence to rebut that explanation. The circumstances causing those debts to be overdue (a dog-bite and his parents' failure to pay those debts, as promised) were largely beyond Applicant's control, thus triggering AG ¶ 20(b).

<sup>15</sup> ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008).

for disciplinary reasons. Therefore, the cause of his loss of employment was not due to circumstances largely beyond his control. AG ¶ 20(b) does not apply.<sup>16</sup>

Applicant's answer indicates that he labors under the misapprehension that a debt is satisfactorily resolved once it "falls off" his credit reports. The Appeal Board "has long recognized that debts remain relevant for [trustworthiness evaluations] even if they cannot be legally listed on a credit report due to the passage of time."<sup>17</sup> There are no clear indications that the problem is being resolved or is under control, or that Applicant initiated a good-faith effort to repay overdue creditors or otherwise resolve the debts. AG ¶¶19(c) and (d) do not apply.<sup>18</sup>

The record creates doubt about Applicant's trustworthiness, good judgment, and ability to protect sensitive information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.<sup>19</sup> Accordingly, I conclude that Applicant did not meet his ultimate burden of persuasion to show that it is clearly consistent with the interests of national security to grant him eligibility for access to sensitive information.

### **Formal Findings**

The formal findings on the SOR allegations are:

Paragraph 1, Guideline F:	Against Applicant
Subparagraphs 1.a.- e. and i. and j:	Against Applicant
Subparagraph 1.f – h. and k.:	For Applicant

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<sup>16</sup> Applicant had another period of unemployment, from August 2011 until September 2012, but that was not caused by disciplinary reasons. Although that period of unemployment likely impacted Applicant's financial situation adversely, it was his disciplinary termination in January 2008 that caused his inability to pay at issue here.

<sup>17</sup> ISCR Case No. 15-0128 at 3 (App. Bd. Aug. 26, 2016). See also ISCR Case No. 15-00254 at 3 (App. Bd. Aug. 26, 2016).

<sup>18</sup> The Chase accounts do not appear to be duplicative. They have different account numbers, dates of opening, and dates of last activity. Exhibits 4, 5 and 6.

<sup>19</sup> AG ¶ 2(a)(1)-(9).

## **Conclusion**

In light of the record as a whole, it is not clearly consistent with the interests of national security to grant Applicant eligibility for access to sensitive information.

Philip J. Katauskas  
Administrative Judge