



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 15-03912

Appearances

For Government: Chris Morin, Esquire, Department Counsel

For Applicant: *Pro se*

08/19/2016

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant has mitigated the trustworthiness concerns regarding financial considerations. Eligibility to occupy a public trust position is granted.

Statement of the Case

On July 1, 2013, Applicant applied for a public trust position and submitted an Electronic Questionnaire for Investigations Processing (e-QIP).¹ On December 21, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, pursuant to DOD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended and modified (Regulation); DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (effective within the DOD on September 1, 2006) (AG) for all adjudications and other determinations made under the Directive. The SOR alleged trustworthiness concerns under Guideline F (Financial Considerations), and detailed reasons why the DOD

¹ GE 1 (e-QIP, dated July 1, 2013).

adjudicators were unable to make an affirmative finding under the Directive that it is clearly consistent with the interests of national security to grant or continue Applicant's eligibility for occupying a public trust position to support a contract with the DOD. The SOR recommended referral to an administrative judge to determine whether such eligibility should be granted, continued, denied, or revoked.

It is unclear when Applicant received the SOR as there is no receipt in the case file. In a sworn statement, dated January 12, 2016, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. On February 24, 2016, Department Counsel indicated the Government was prepared to proceed. The case was assigned to me on March 23, 2016. A Notice of Hearing was issued on April 29, 2016. I convened the hearing, as scheduled, on May 19, 2016.

During the hearing, three Government exhibits (GE 1 through GE 3), six Applicant exhibits (AE A through AE F), and one administrative exhibit, were admitted into evidence without objection. Applicant testified. The transcript (Tr.) was received on June 1, 2016. I kept the record open to enable Applicant to supplement it. Applicant took advantage of that opportunity. He timely submitted a number of additional documents, which were marked as AE G through AE J, and admitted into evidence without objection. The record closed on June 16, 2016.

Findings of Fact

In his Answer to the SOR, Applicant denied, with explanations, all of the factual allegations pertaining to financial considerations (§§ 1.a. through 1.h.) of the SOR. Applicant's comments are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 27-year-old employee of a defense contractor. He has been a full-time system programmer for a defense contractor since May 2013.² He is seeking to retain his eligibility for occupying a public trust position to support a contract with the DOD. He has never served in the U.S. military.³ He is a 2006 high school graduate and the recipient of a 2011 bachelor's degree.⁴ Applicant has never been married.⁵ He has no children.⁶

² Tr. at 35-36, 40-41.

³ GE 1, *supra* note 1, at 18.

⁴ GE 1, *supra* note 1, at 10-11; Tr. at 34-35.

⁵ GE 1, *supra* note 1, at 20.

⁶ Tr. at 35.

Financial Considerations⁷

Applicant has a twin brother whose given name is so similar to Applicant's given name that the first six letters of each name are identical, and their middle names, though different, start with the same letter, causing considerable confusion, especially for creditors and credit reporting agencies.⁸ This confusion has resulted in substantial misreporting of account responsibility. For example, when Applicant disputed certain accounts in his credit reports and attempted to have those credit reports corrected, Equifax identified Applicant as the name on the file, and initially rather than making proper corrections as to account responsibility, they simply noted that Applicant was "formerly known as" his twin brother.⁹ Some disputed listings were eventually deleted because they were, in fact, not Applicant's responsibility. With that as background, there was nothing unusual about Applicant's finances until sometime in mid-2011 when he claimed that "there are family financial issues that are vital to my family situation,"¹⁰ without ever explaining what those issues might be.

The SOR identified eight purportedly continuing delinquent accounts, totaling approximately \$28,380, as reflected by the July 2013 credit report, which is a combined credit report in the names of both Applicant and his twin brother,¹¹ and the April 2015 credit report.¹² Those debts and their respective current status, according to the credit reports, other evidence submitted by the Government and Applicant, and Applicant's comments regarding same, are described below:

SOR ¶ 1.a.: This is a student loan with a high credit of \$11,202 and a past-due amount of \$15 that was placed for collection and charged off in the amount of \$11,829 (not \$11,202 as alleged in the SOR).¹³ Applicant denied the allegation claiming that his student loan was being paid, and that the student loan referenced in the SOR was actually that of his twin brother.¹⁴ He disputed the account with Equifax as a mistaken identity, and following an investigation by Equifax, the account was deleted from

⁷ General source information pertaining to the financial accounts discussed below can be found in the following exhibits: GE 1, *supra* note 1; GE 2 (Combined Experian, TransUnion, and Equifax Credit Report, dated July 11, 2013); GE 3 (Equifax Credit Report, dated April 8, 2015); Answer to the SOR, dated January 12, 2016). More recent information can be found in the exhibits furnished and individually identified.

⁸ AE G (Letter, dated May 24, 2016; GE 1, *supra* note 1, at 22. It should also be noted that Applicant's father shares the same given name with Applicant's brother and the same middle name with Applicant.

⁹ AE F (Equifax Credit Report, dated February 9, 2016), at 2. See AE B (Equifax Credit Report, dated December 21, 2015); AE B (Equifax Dispute Confirmation, dated January 1, 2016).

¹⁰ GE 1, *supra* note 1, at 31.

¹¹ GE 2, *supra* note 7, at 1-3.

¹² GE 3, *supra* note 7.

¹³ GE 2, *supra* note 7, at 7.

¹⁴ Answer to the SOR, *supra* note 7, at 1; AE C (Student Loan Correspondence, various dates), pertaining to Applicant's current student loan; AE A (Credit Union Statements, various dates), pertaining to Applicant's current student loan. See also AE D (Student Loan Application, dated December 23, 2006).

Applicant's credit report.¹⁵ Department Counsel conceded that the error had been identified and corrected.¹⁶ The account has been resolved.

SOR ¶ 1.b.: This is a student loan with a high credit of \$8,000, unpaid balance of \$8,818, and past-due balance of \$15 that was placed for collection and charged off.¹⁷ Applicant denied the allegation claiming that the student loan referenced in the SOR was actually that of his twin brother.¹⁸ He disputed the account with Equifax as a mistaken identity, and following an investigation by Equifax, the account was deleted from Applicant's credit report.¹⁹ Department Counsel conceded that the error had been identified and corrected.²⁰ The account has been resolved.

SOR ¶ 1.c.: This is an unspecified type of bank account with a high credit and unpaid balance of \$7,940 that was placed for collection.²¹ Applicant denied the allegation claiming that the account referenced in the SOR was actually that of his twin brother.²² He disputed the account with Equifax as a mistaken identity, and following an investigation by Equifax, the account was deleted from Applicant's credit report.²³ Department Counsel conceded that the error had been identified and corrected.²⁴ The account has been resolved.

SOR ¶ 1.d.: This is a medical account with a high credit and unpaid balance of \$91 that was placed for collection for services rendered in August 2008.²⁵ Applicant denied the allegation claiming that the account referenced in the SOR was actually that of his twin brother. He also noted that any medical charges made before 2012 should have been billed to his parents as he was then covered by their insurance.²⁶ He did not dispute the account because it was no longer listed in his 2016 credit reports.²⁷ Without

¹⁵ Tr. at 26; AE E, *supra* note 7, at 1. Adding to the confusion is that Equifax used Applicant's Social Security Number and his home address, but directed the response to Applicant's brother.

¹⁶ Tr. at 26-29.

¹⁷ GE 3, *supra* note 7, at 2.

¹⁸ Answer to the SOR, *supra* note 7, at 1.

¹⁹ Tr. at 29-30; AE E, *supra* note 7, at 1. Adding to the confusion is that Equifax used Applicant's Social Security Number and his home address, but directed the response to Applicant's brother.

²⁰ Tr. at 29-30.

²¹ GE 3, *supra* note 7, at 2; Answer to the SOR, *supra* note 7, at 1.

²² Answer to the SOR, *supra* note 7, at 1.

²³ Tr. at 31; AE E, *supra* note 7, at 1. Adding to the confusion is that Equifax used Applicant's Social Security Number and his home address, but directed the response to Applicant's brother.

²⁴ Tr. at 30-31.

²⁵ GE 3, *supra* note 7, at 2.

²⁶ Answer to the SOR, *supra* note 7, at 1.

²⁷ Tr. at 31.

documentary confirmation that the account was either not Applicant's responsibility, or that if it was his responsibility, it had been paid off, the account remains unresolved.

SOR ¶¶ 1.e. and 1.f.: These are two medical accounts with unpaid balances of \$52 and \$49 that were placed for collection for services rendered in in 2011.²⁸ Applicant stated that the charges stemmed from an automobile accident in which he was involved, and that the other insurance was supposed to be responsible for the charges.²⁹ Upon learning of the delinquencies, Applicant paid \$101 to the collection agency holding both accounts.³⁰ The accounts have been resolved.

SOR ¶¶ 1.g. and 1.h.: These are two medical accounts with unpaid balances of \$148 and \$80 that were placed for collection.³¹ Applicant denied the allegations claiming that the accounts referenced in the SOR were actually those of his twin brother.³² He subsequently spoke with a representative of the collection agency and was advised that both accounts were, in fact, his twin brother's. The collection agency refused to submit written confirmation of what Applicant was told.³³ Nevertheless, neither account was listed in Applicant's February 2016 Equifax credit report.

Applicant's personal budget indicates a monthly net income of \$3,164; and normal monthly expenses, including student loan payments, of \$2,864; leaving him a monthly remainder of \$300 for saving or spending. He allocates \$100 each month for his investment account.³⁴ There is no evidence of any delinquent accounts which are Applicant's responsibility. His finances are under control. Applicant's purported financial problems are, as Department Counsel conceded, *de minimis* in nature, and they do not raise a current trustworthiness concern.³⁵

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security

²⁸ GE 2, *supra* note 7, at 12-13.

²⁹ Tr. at 32-33.

³⁰ Tr. at 32-33; Answer to the SOR, *supra* note 7, at 1; AE J (Credit Union Statement, dated January 26, 2016); AE I (Statement, undated).

³¹ GE 2, *supra* note 7, at 12. At the commencement of the hearing, Department Counsel moved to amend the SOR by substituting the date "July 11, 2013" for the date "April 8, 2015" in both SOR ¶¶ 1.g. and 1.h. to conform to the expected evidence. There being no objection, the motion was granted and the amendments made. Tr. at 12-13.

³² Answer to the SOR, *supra* note 7, at 1-2.

³³ AE I, *supra* note 30.

³⁴ AE H (Personal Budget, undated).

³⁵ Tr. at 49.

emphasizing, “no one has a ‘right’ to a [position of public trust].”³⁶ As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. Positions designated as ADP-I and ADP-II are classified as “sensitive positions.”³⁷ “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.”³⁸ DOD contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made.³⁹

When evaluating an applicant’s suitability for a public trust position, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for a public trust position.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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 common sense decision. 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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”⁴⁰ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.⁴¹

³⁶ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

³⁷ Regulation ¶¶ C3.1.2.1.1.7, C3.1.2.1.2.3, and C3.1.2.2. See also Regulation app. 10, ¶ 10.2.

³⁸ Regulation ¶ C6.1.1.1.

³⁹ Regulation ¶ C8.2.1.

⁴⁰ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

⁴¹ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of sensitive information. Furthermore, security clearance determinations, and by inference, public trust determinations, should err, if they must, on the side of denials.⁴² 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.

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. Also, under AG ¶ 19(c), "a history of not meeting financial obligations" may raise trustworthiness concerns. Applicant's purported financial problems arose because of mistaken identity when the credit reporting agencies confused Applicant's accounts with those of his twin brother. Of the eight accounts alleged in the SOR, five were determined to belong to Applicant's twin brother. Applicant was not aware of the three remaining accounts. Once he learned the true status and responsibility of the accounts, he promptly resolved two of them, and he is currently researching the sole remaining account.

While "[i]t is well-settled that adverse information from a credit report can normally meet the substantial evidence standard. . . ,"⁴³ in this unusual instance, the credit reports were an amalgamation of accounts related to both Applicant and his twin

⁴² *Egan*, 484 U.S. at 531.

⁴³ ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010).

brother. Applicant and his twin brother have given names so similar that the first six letters of each name are identical, and their middle names, though different, start with the same letter. One credit reporting agency combined Applicant's Social Security Number and his home address, but directed communications to his brother. On another occasion, rather than making corrections, the reporting agency simply noted that Applicant was formerly known as his twin brother. One credit report, upon which part of the SOR was based, clearly reflected the names of both Applicant and his twin brother, a fact that should have justified if not required further scrutiny of its accuracy. There is no evidence of Applicant's inability or unwillingness to pay his debts. AG ¶ 19(a) has not been established. While there were at least two, and possibly three, delinquent accounts with a combined unpaid balance of \$192, two of which were promptly resolved, the remaining debt of \$91 does not constitute a history of not meeting financial obligations. Those debts are *de minimis* in nature, and they do not raise a current trustworthiness concern. AG ¶ 19(c) has not been established.

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. Moreover, I have evaluated this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.⁴⁴

There is minimal evidence against mitigating Applicant's conduct. He had two, and possibly three, medical accounts, totaling \$192 placed for collection.

The mitigating evidence is more substantial and compelling. There is no evidence of misuse of information technology systems, mishandling protected information, or substance abuse. Applicant is the victim of identity confusion because his twin brother and he have such similar names and the creditors and credit reporting

⁴⁴ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

agencies did not bother to scrutinize the information they reported as accurate, and they initially gave superficial treatment to Applicant's efforts to sanitize and correct the financial information appearing in his credit reports. There is no evidence of fiscal irresponsibility. Applicant maintains a budget and routinely saves \$300 each month for savings and investments. In the absence of evidence of delinquent accounts which are Applicant's responsibility, there are clear indications that Applicant's finances are in good order and under control.

Overall, the evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a position of public trust. For all of these reasons, I conclude Applicant has mitigated the trustworthiness concerns arising from his financial considerations. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

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. through 1.h.:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility to occupy a public trust position to support a contract with DOD. Eligibility is granted.

ROBERT ROBINSON GALES
Administrative Judge