



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



In the matter of:

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ADP Case No. 16-03316

Applicant for Public Trust Position

**Appearances**

For Government: Andre M. Gregorian, Esq., Department Counsel

For Applicant: *Pro se*

03/07/2018

**Decision**

TUIDER, Robert, Administrative Judge:

Applicant mitigated concerns pertaining to Guideline E (personal conduct); however, he was unable to mitigate concerns pertaining to Guideline F (financial considerations). Eligibility for a public trust position is denied.

**Statement of the Case**

On January 7, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing trustworthiness concerns under Guidelines F and E. On February 6, 2017, Applicant responded to the SOR, and elected to have the case decided on the written record in lieu of a hearing.

On March 13, 2017, the Government submitted its written case. On March 20, 2017, Applicant received a complete copy of the file of relevant material (FORM). He was afforded 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit additional information. On October 16, 2017, the case was assigned to me. The Government exhibits, marked as Items 1 through 12, are admitted in evidence.

## **Procedural Matters**

Department Counsel moved to amend SOR ¶ 1.a and add SOR ¶ 1.f as follows:

1.a – In or around October 1992, you filed Chapter 7 Bankruptcy. In or around February 1993, this Bankruptcy was discharged.

1.f – You are indebted to the Federal Government for a tax lien entered against you in June 2016 in the approximate amount of \$51,184.00. As of the date of this Statement of Reasons, the lien remains unpaid.

Department Counsel further moved that Applicant provide answers to the foregoing allegations in his Response to the FORM, adding that if Applicant does not answer the foregoing allegations, that his silence be construed as denials.

There being no response or objection from Applicant, Department Counsel's motion to amend the SOR is granted. Furthermore, Applicant's non-response to the FORM is construed as a denial to each of the two foregoing allegations.

## **Findings of Fact**

Applicant denied SOR ¶ 1.a, and consistent with the foregoing, the amended version of SOR ¶ 1.a will be construed as a denial. He admitted SOR ¶¶ 1.b, 1.c, 1.d, and denied SOR ¶¶ 1.e and 2.a. As noted, the added SOR ¶ 1.f will be construed as a denial.

Applicant is a 52-year-old marketing manager employed by a defense contractor since June 2014. He seeks a public trust position with his current employment. Applicant graduated from high school in June 1984. He attended college on-line, but was not awarded a degree. Applicant served in the U.S. Army from June 1984 to June 1991, and was honorably discharged. He served in the U.S. Army Reserve from February 1993 to January 2010, at which time completed enough cumulative service to retire from the Army Reserve and was honorably discharged. Applicant was married from February 1989 to May 1990, and that marriage ended by divorce. He remarried in July 1993. Applicant did not list any children on his SF-86. (Items 2, 3)

## **Financial Considerations**

Under Guideline F, the Amended SOR alleges a 2016 Federal tax lien for \$51,184, a 2015 \$13,962 state tax lien, a 2014 \$26,473 judgment, a \$2,075 charged-off account, a Chapter 7 bankruptcy filed in 1992 and discharged in 1993, and a Chapter 13 bankruptcy filed in 2014 and converted to Chapter 7 and discharged in 2015. Total debt is \$93,694. (SOR ¶¶ 1.a – 1.f) These allegations are established through Applicant's admission, in part, and through evidence presented. (GE 1 – 12)

Applicant attributes his financial problems to a failed restaurant business. He states that he is on payment plans for the state tax lien and charged-off account, and that

the judgment was discharged in his most recent bankruptcy. Applicant failed to provide documentary evidence that he made payments toward any of the debts alleged.

In conclusion, the file lacks sufficient evidence that Applicant paid, arranged to pay, settled, compromised, disputed, or otherwise resolved his SOR allegations. He did not describe financial counseling or present a budget. The record lacks corroborating or substantiating documentation and detailed explanations of the causes for his financial problems and other mitigating information. The FORM noted that Applicant had 30 days from the receipt of the FORM "in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate. If you do not file any objections or submit any additional information . . . your case will be assigned to an Administrative Judge for a determination based solely on this FORM." As noted, Applicant did not submit evidence responsive to the FORM.

### **Personal Conduct**

Under Guideline E, the SOR alleges that Applicant deliberately failed to disclose in his June 2015 SF-86 that he had a state tax lien entered against him in 2015 and that he had a judgment filed against him in 2014. He claimed to be unaware of either. Applicant did list adverse information such as his Chapter 7 bankruptcy putting the Government on notice of his unfavorable financial history. (Items 1, 2) There is no record evidence to suggest that Applicant received notice of the lien or judgment. During his November 2015 Office of Personnel Management (OPM) Personal Subject Interview (PSI), the investigator discussed numerous mistakes Applicant made when completing his SF-86 to include discrepancies regarding his telephone number, address, education, employment, military history, references, family, and associates, etc. (Items 2, 3) Per Applicant, the OPM investigator advised him to "check with the courthouse due to potential of judgment." (Items 2, 3)

### **Policies**

This case is adjudicated under DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

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(a), 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.

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.

## **Analysis**

### **Financial Considerations**

AG ¶ 18 articulates the trustworthiness concern for financial problems:

Failure 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 classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

AG ¶ 19 provides three disqualifying conditions that could raise a trustworthiness concern and may be disqualifying in this case: “(a) inability to satisfy debts”; “(c) a history of not meeting financial obligations;” and (f) failure to file or fraudulently filing annual Federal, state, or local income tax returns or failure to pay annual Federal, state, or local income tax as required.” The record established the disqualifying conditions in AG ¶¶ 19(a), 19(c), and 19(f), requiring additional inquiry about the possible applicability of mitigating conditions.

AG ¶ 20 lists six potential mitigating conditions:

(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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated and is adhering to 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; and

(g) the individual has made arrangements with the appropriate tax authority to file or pay the amount owed and is in compliance with those arrangements.

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 [trustworthiness] eligibility, there is a strong presumption against the grant or maintenance of a [trust position]. 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 [trustworthiness] concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in [public trust positions] 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).

In summary, no mitigating conditions fully apply. Applicant has been gainfully employed for the majority of his adult life, and he is presumed to be a mature, responsible citizen. Nonetheless, without other information suggesting his long-standing financial problems are being addressed, doubts remain about his suitability for access to sensitive

information. Protection of the national interest is the principal focus of these adjudications. According, those doubts must be resolved against the Applicant.

## **Personal Conduct**

AG ¶ 15 articulates the trustworthiness concern for 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 classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes one condition that could raise a trustworthiness concern and may be disqualifying in this case:

(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 national security eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant denied deliberately falsifying his June 2015 SF-86 adding that he was unaware of the lien or judgment. He was open and forthcoming during his OPM PSI about his finances and readily acknowledged his omission. I also note that he made numerous other mistakes when completing his SF-86 that were apparently viewed as inadvertent.

Based on the available information, it appears Applicant was confused or careless when completing his June 2015 SF-86. His lack of attention to detail cannot be imputed as a willful and deliberate attempt to undermine the investigative process. Although the information he provided about his past financial situation proved to be incorrect, as was other information he provided, I attribute these lapses to carelessness and am satisfied that he did not deliberately and intentionally fail to disclose his delinquent debts with intent to deceive.<sup>1</sup>

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<sup>1</sup> The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

## 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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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 F and E in my whole-person analysis. Unmitigated financial considerations trustworthiness concerns lead me to conclude that grant of a public trust position to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a public trust position in the future. With more effort towards documented financial responsibility and compliance with applicable regulations, he may well be able to demonstrate persuasive evidence of his eligibility for a public trust position.

In closing, Applicant chose to rely on the written record versus a hearing. In so doing, however, and with regard to financial considerations, he failed to submit sufficient evidence to supplement the record with relevant and material facts regarding his circumstances or articulate his position limiting my assessment that discussed in the FORM. I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, and the AGs, to the facts and circumstances in the context of the whole person. Personal conduct trustworthiness concerns are mitigated; however, financial considerations trustworthiness concerns are not mitigated.

### **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.f:                  Against Applicant

Paragraph 2, Guideline E:                      FOR APPLICANT

    Subparagraph 2.a:                          For Applicant

### **Conclusion**

I conclude that it is not clearly consistent with national interest to grant Applicant eligibility for a public trust position. Eligibility for a public trust position is denied.

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ROBERT TUIDER  
Administrative Judge