



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



In the matter of:

[NAME REDACTED]

Applicant for Public Trust Position

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ADP Case No. 17-03932

**Appearances**

For Government: Bryan Olmos, Esq., Department Counsel  
For Applicant: *Pro se*

11/08/2018

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**Decision**

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MALONE, Matthew E., Administrative Judge:

Applicant's information is not sufficient to mitigate the trustworthiness concerns raised by his unpaid debts, his failure to file his income tax returns as required, and by his deliberate false statements about adverse information in his background. Applicant's request for eligibility to occupy a position of trust is denied.

**Statement of the Case**

On March 24, 2016, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain eligibility for an ADP I/II/III position for his job with a defense contractor. After reviewing the results of the ensuing background investigation, Department of Defense (DOD) adjudicators were unable to determine that

it is clearly consistent with the interests of national security to grant Applicant's request for a position of trust.<sup>1</sup>

On March 23, 2018, DOD issued Applicant a Statement of Reasons (SOR) alleging facts raising trustworthiness concerns addressed through the adjudicative guidelines (AG)<sup>2</sup> for financial considerations (Guideline F) and personal conduct (Guideline E). Applicant timely responded to the SOR (Answer) and requested a hearing.

I received the case on August 9, 2018, and scheduled the hearing for October 19, 2018. The parties appeared as scheduled, and I admitted Government's Exhibits (GX) 1 – 6 without objection by the Applicant. Applicant testified and submitted Applicant's Exhibit (AX) A, which I admitted without objection from the Government. I received a transcript of the hearing (Tr.) on October 25, 2017. I left the record open after the hearing to allow Applicant time to submit additional relevant information. (Tr. 44 – 46, 122) The record closed on October 26, 2018, when I received Department Counsel's waiver of objection to the admissibility of Applicant's timely post-hearing submissions. Those documents are admitted as AX B – E.<sup>3</sup>

Also included in the record are a letter from Department Counsel, dated May 30, 2018, and a List of Government's Exhibits. They are identified as Hearing Exhibits (HX) 1 and 2, respectively. In accordance with Directive E3.1.13, HX 1 provided Applicant advance copies of GX 1 – 6. Additionally, it presented Applicant with an Amendment of the SOR.<sup>4</sup>

### **Findings of Fact**

Under Guideline F, the Government alleged that Applicant had not yet filed his federal (SOR 1.a) and state (SOR 1.b) income tax returns for the 2014 – 2016 tax years, and that he owed \$1,448 to the federal government for unpaid taxes in 2013, that debt being enforced through a tax lien. (SOR 1.c). The SOR further alleged that Applicant owed another \$3,184 for four delinquent or past-due debts (SOR 2.d – 2.g). In response to the SOR, Applicant admitted, with explanations, all of the allegations under Guideline F. He also claimed that the tax lien alleged in SOR 1.c was actually a state tax lien for the same amount.

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<sup>1</sup> Required by DOD Directive 5220.6, as amended (Directive).

<sup>2</sup> Adjudicators applied the adjudicative guidelines issued by the Director of National Intelligence on December 10, 2016, and effective for all adjudications on or after June 8, 2017.

<sup>3</sup> AX B (four pages) is an email from one of Applicant's creditors confirming that, on the same day as his hearing, Applicant finalized a repayment plan to resolve one of his debts through 26 payments of \$150 between October 26, 2018 and February 28, 2020. AX C (30 pages) consists of copies of federal and state income tax returns for the tax years 2014 – 2017. AX D (one page) is a brief note from Applicant's supervisor expressing support for Applicant. AX E (three pages) is an excerpt from Applicant's credit report, dated October 16, 2018.

<sup>4</sup> See Directive E3.1.17.

In consideration of Applicant's response, Department Counsel amended SOR 1.c to reflect that the lien is for a state tax debt. Additionally, Department Counsel amended the SOR to add allegations (SOR 1.h – 1.j) that Applicant owed three debts totaling \$11,129, bringing the total non-tax delinquent debt at issue to \$14,313. Before the hearing, Applicant did not respond as requested to the amendments. At hearing, he did not object to any of the amendments, and he admitted the SOR 1.h – 1.j allegations. (Answer; HX 1; Tr. 13 – 24)

Under Guideline E, the Government alleged that Applicant deliberately made false statements by omitting from his e-QIP the fact that he had been charged with or arrested for alcohol or drug-related crimes between 1983 and 2000 (SOR 2.a); by failing to disclose in his e-QIP that he failed to file his tax returns, as alleged in SOR 1.a and 1.b (SOR 2.b(1)); and by failing to disclose the tax lien addressed in SOR 1.c (SOR 2.b(2)). Finally, it was alleged that Applicant intentionally provided false information to a government investigator during a personal subject interview by failing to disclose that he had not filed his income tax returns, as alleged in SOR 1.a and 1.b, and by misrepresenting facts about one of his income tax returns (SOR 2.c). In response to the SOR, Applicant denied SOR 2.a, but admitted 2.b and 2.c. (Answer)

In addition to the facts established by Applicant's admissions, I make the following findings of fact. Applicant is 54 years old and is employed by a federal contractor, for whom he has worked since early 2016. He previously worked for a different contractor at the same military installation between 2011 and 2016. Applicant has never been married, and he has one adult child. (GX 1; Tr. 101)

As of the date of the SOR, Applicant had not filed his federal or state income tax returns for the 2014, 2015, and 2016 tax years. Applicant claimed that he only filed his returns every three years, but he did not explain why. At the hearing, he testified that in 2017, he had given his information for 2014 – 2016 to someone else to prepare his returns; however, that person had become involved in some sort of fraud (again, unexplained) and did not file Applicant's returns. As of the hearing, Applicant had not yet filed his returns for 2014 – 2016. Additionally, he has not yet filed his 2017 returns because he first must file the 2014 – 2016 returns. Applicant's post-hearing submissions included copies of prepared, unsigned, undated federal and state income tax returns for those tax years. If those returns have, in fact, been filed, it appears from the information he provided that they were filed after this hearing. (Answer; GX 2; AX B; Tr. 49 – 50, 56 – 65)

In his e-QIP, Applicant listed the debt at SOR 1.d, as well as three other unalleged past-due debts in Section 26 (Financial Record). He stated therein that they were caused by "family problems" and that he was "in the process" of resolving them. During his ensuing background investigation, investigators obtained credit reports that document all of the delinquent debts in the SOR (as amended), including a state tax lien from the 2013 tax year. Applicant claimed that debt was not for income tax; rather, it was likely for an unpaid property tax bill. Applicant further attributed his financial problems to his mother's

medical issues. She had a stroke in 2005, then contracted cancer, and had only Medicaid and Medicare for her medical expenses. Applicant supported his mother by buying food, medically-necessary furniture, and medications not otherwise covered by her medical insurance. To that end, he relied on credit cards that he was eventually unable to pay. Applicant's mother died in May 2018 and he also had to pay another \$500 for his share of the funeral expenses. All of the debts listed in the SOR remain unresolved. To pay off his debts, Applicant intends to rely on income tax refunds he expects to receive after he files his returns. The state tax lien will likely be resolved first through diversion of his state tax refunds. He feels he could resolve all of his debts over the next year or so. (Answer; GX 1 – 5; Tr. 47, 50, 54 – 55, 67 – 68, 73 – 78, 95 – 98, 110 – 112)

Applicant has a long record of criminal activity that ended in 2009, when he was charged with theft. Between 1983 and 2000, Applicant's criminal conduct was drug-related. Available information shows he was charged 13 times with drug-related offenses, such as possession of a controlled dangerous substance (CDS) and possession of a CDS with intent to distribute. When Applicant submitted his e-QIP, he answered "no" to the question in e-QIP Section 22 (Police Record (EVER)) that asked, "Have you **EVER** been charged with an offense involving alcohol or drugs?" (Bold and upper case in the original). (GX 1; GX 6)

Applicant also answered "no" to the question in e-QIP Section 26 (Financial Record – Taxes) question that asked, "In the last seven (7) years have you failed to file or pay your Federal, state, or other taxes when required by law or ordinance?" He knew at that time he had not filed his tax returns for 2014, and that he owed the state tax lien alleged at SOR 1.c. When Applicant was asked about this answer in a subject interview with a government investigator on September 8, 2017, Applicant confirmed his e-QIP answers and indicated that he only had a minor problem with interest reporting on his 2015 returns. His statements during the interview were false in that they implied he had filed his returns, when he knew he had not done so. (Answer; GX 1; Tr. 49 – 50, 68 – 69)

Applicant denied any intent to falsify or mislead by his answer, claiming he likely misread the question because he was tired, stressed from the need to care for his ailing mother, and trying to complete the questionnaire in a hurry. Applicant testified that he disclosed some of his debts because he read that information from a credit report. Applicant did not explain why he could not simply have answered "yes" to these Section 22 and 26 questions based on his own memory of having been charged with so many drug offenses, and on his own knowledge that he had not filed his income tax returns and owed a state tax lien. (Answer; GX 1; GX 2; Tr. 49 – 50, 68 – 73, 83 – 92, 105 – 109)

Applicant did not provide much information about his current finances. In addition to his work as a federal contractor, he has a second, part-time job that pays him about \$600 each month. The prepared tax returns he submitted post-hearing reflect an adjusted gross income of \$44,841 for 2017. In a subject interview with an investigator in October 2017, he presented information showing he earned about \$1,000 after deductions, but there is no information about his regular monthly expenses or other financial obligations. Applicant submitted information showing that he has established a monthly repayment

plan with a collection agency effective a week after his hearing. He is required to make 36 monthly payments, but there is no information in this record about which debt the agency is collecting for and that would show he can actually make the required payments. Applicant has not sought or received any financial counseling or other professional assistance. (Answer; AX B; AX C; AX E; Tr. 78 – 82, 99 – 101)

Applicant has a good reputation at work. His supervisors regard him as reliable, hardworking, and trustworthy. He also has been recognized for his good performance by the military commander of the installation where Applicant works. (AX A; AX D)

### **Policies**

Eligibility for a position of public trust must be based on a determination that it is “clearly consistent with the interests of national security” to do so.<sup>5</sup> All such adjudications must adhere to the procedural protections in the Directive before any adverse determination may be made. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,<sup>6</sup> and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors, commonly referred to as the “whole-person” concept, listed in the guidelines at AG ¶ 2(d).<sup>7</sup> The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of eligibility for a position of trust.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a position of trust for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government’s case. Because no one is entitled to a position of trust, an applicant bears a heavy burden of persuasion. A person who has access to sensitive information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring applicants possess the requisite judgment, reliability, and trustworthiness of one who will protect sensitive information as his or her own. Any reasonable doubt about an applicant’s suitability for access should be resolved in favor of the Government.

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<sup>5</sup> Security Executive Agent Directive (SEAD) 4, Appendix A, Paragraph 1(d).

<sup>6</sup> Directive, 6.3.

<sup>7</sup> (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.

## Analysis

### Financial Considerations

The Government presented sufficient information to support the allegations that Applicant has not filed his federal and state income tax returns as required for several years. He also owes unpaid state taxes, a debt that has been enforced by a lien against Applicant for more than five years. Finally, Applicant owes more than \$14,000 for seven other delinquent debts. This information raises a trustworthiness concern about Applicant's finances that is addressed, in relevant part, at AG ¶ 18, as follows:

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.

More specifically, this record requires application of the disqualifying conditions at AG ¶¶ 19(a) (*inability to satisfy debts*); 19(c) (*a history of not meeting financial obligations*); and 19(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*).

I have also considered the following pertinent AG ¶ 20 mitigating:

(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.

AG ¶ 20(a) does not apply because Applicant's debts have been delinquent for several years and they remain unresolved. Only AG ¶ 20(b) applies, in part, based on Applicant's representations that his financial problems resulted from expenditures related to the care and support of his late mother. For proper application of AG ¶ 20(b), it was incumbent on Applicant to show that he acted responsibly in the face of circumstances beyond his control. He did not do that. Applicant's debts remain unresolved. He did not establish any good-faith effort to repay or otherwise resolve his debts. The repayment plan documented by AX B was scheduled to begin well after his hearing, and Applicant did not establish he is able to make the payments required. Nor has he shown that any of the debts alleged are invalid and subject to dispute. AG ¶¶ 20(d) and AG 20(e) do not apply.

Applicant did not present any information that would suggest his current finances are sound and no longer pose a trustworthiness concern. He has not engaged in any financial counseling or other professional assistance to improve his finances. AG ¶¶ 20(c) does not apply.

As to Applicant's taxes, available information shows that, as of the hearing, he had not filed his annual income tax returns since 2014. The information he provided post-hearing shows his returns may have been filed after the hearing. Additionally, Applicant still has not resolved a state tax lien that has been in place for five years. AG ¶¶ 20(g) does not apply. On balance, Applicant did not mitigate any of the trustworthiness concerns raised by the adverse information about his finances.

## **Personal Conduct**

The trustworthiness concern under this guideline is articulated at 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

Available information shows that Applicant omitted from his e-QIP any mention of his drug-related criminal charges between 1983 and 2000. He also did not disclose his failure to file his federal and state income tax returns for the 2014 tax year, and the fact that he had a delinquent state tax debt enforced by a 2013 lien against him. Questions in e-QIP Sections 22 and 26 plainly required him to make those disclosures. Available information also shows that Applicant provided inaccurate information regarding his taxes when he was interviewed by a government investigator during his background investigation.

Applicant denied that he intentionally omitted information from his e-QIP, or that he gave false official statements about his taxes during his interview. Nonetheless, having weighed all of the information probative of the allegations at SOR 2.a – 2.c, I conclude Applicant intended to deceive the government by withholding relevant information from his e-QIP and by making false statements to a government investigator.

The following AG ¶ 16 disqualifying conditions apply:

(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; and

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.



In response to the Government's information, Applicant claimed that he misread the questions in the e-QIP because he was tired and trying to complete the e-QIP in a hurry. I did not find his testimony in this regard credible. Against Applicant's response is the absence of an explanation why he could list debts from a credit report he was reading, but could not properly answer "yes" or "no" to questions about information of which he plainly was aware without any external reference. It is unreasonable to conclude that Applicant needed to look at his credit report to be candid about his debts, but simply overlooked the fact he had been arrested or charged 13 times from the time he was 19 until he was 38; or that he had not filed his taxes because, as he himself stated, he only files every three years. Finally, a summary of interview, the accuracy of which Applicant acknowledged, shows he made statements to an investigator that clearly implied that Applicant had filed his taxes when he knew he had not.

I also have considered the following pertinent AG ¶ 17 mitigating conditions:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully; and
- (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.

None of these apply. Rather than try to correct his e-QIP omissions about his taxes, Applicant made additional false statements about his taxes when he was interviewed by a government investigator. It does not appear that he ever addressed his arrest record until after the SOR was issued. Applicant's false statements were not the result of counsel or advice from any qualified person, and the circumstances under which he completed his e-QIP were not unusual. On balance, Applicant did not mitigate the trustworthiness concerns under this guideline.

I have evaluated the facts and have applied the appropriate adjudicative factors under Guidelines E and F. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). Applicant provided positive information about his performance and reputation in the workplace. He also seemed contrite at his hearing about the mistakes he has made. Nonetheless, the record evidence as a whole leaves me with significant doubts about Appellant's suitability for a position of public trust. Because protection of the national interest is the central focus of these adjudications, any remaining doubts must be resolved against the Applicant.

### **Formal Findings**

Formal findings 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.j:                   Against Applicant

Paragraph 2, Guideline E:                   AGAINST APPLICANT

Subparagraphs 2.a – 2.c:                   Against Applicant

### **Conclusion**

In light of all of the foregoing, it is not clearly consistent with the interests of national security for Applicant to occupy a position of trust. Applicant's request for public trust eligibility is denied.

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MATTHEW E. MALONE  
Administrative Judge