



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



In the matter of:	)	
	)	
XXXXXXXXXX, XXXXX	)	ADP Case No. 07-07799
SSN: XXX-XX-XXXX	)	
	)	
Applicant for Public Trust Position	)	

**Appearances**

For Government: Francisco Mendez, Esq., Department Counsel  
For Applicant: *Pro se*

September 19, 2008

**Decision**

TUIDER, Robert J., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to sensitive information is denied.

**Statement of the Case**

Applicant submitted his Questionnaire for Public Trust Position (SF 85P), on May 17, 2006.<sup>1</sup> On January 28, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the trustworthiness concerns under Guideline F (Financial Considerations) for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

<sup>1</sup> Applicant had previously submitted an SF 85P dated April 4, 2006 and a Declaration for Federal Employment on April 4, 2006. GE 1, GE 2.

Applicant acknowledged receipt of the SOR on February 4, 2008. He answered the SOR in writing on March 20, 2008, and requested a hearing before an Administrative Judge. DOHA received the request on March 24, 2008. Department Counsel was prepared to proceed on May 14, 2008, and I received the case assignment on May 21, 2008.

DOHA issued a notice of hearing on May 29, 2008, and I convened the hearing as scheduled on June 23, 2008. The Government offered Government Exhibits (GE) 1 through 9, which were received without objection, with the exception of GE 9. Applicant objected to GE 9 being admitted on the grounds that it was not provided to him in a timely manner. After argument by both parties, I overruled Applicant's objection. Tr. 12-14. Applicant testified on his own behalf and submitted Applicant Exhibit (AE) A, without objection. DOHA received the hearing transcript (Tr.) on June 30, 2008.

Although Applicant did not request to keep the record open, he submitted a letter he prepared dated July 18, 2008, and marked AE B. In AE B, Applicant states he has contacted every debtor on his credit report, and negotiated payment arrangements with three of his creditors. He also requested that I delay my decision for six months to provide him additional time to address his credit problems. Department Counsel forwarded AE B by Government's Reply to Post-Hearing Submission Offered by Applicant (Ex. II) dated July 21, 2008. Department Counsel objected to the admission of AE B on the grounds that it was not timely submitted and he was deprived of the opportunity to cross-examine the Applicant or rebut the information presented. After considering the matter, I admitted AE B. However, I will not delay issuing my decision further especially in light of the fact that Applicant has been aware of the Government's concerns since at least October 2007 when he completed and submitted his Response to DOHA Interrogatory, discussed *infra*.

### **Findings of Fact**

In his Answer to the SOR, dated March 20, 2008, Applicant admitted the factual allegations in ¶¶ 1.c. – 1.e., 1.g., 1.i. – 1.k., and 1.m. – 1.n. of the SOR. He denied the factual allegations in ¶¶ 1.a. – 1.b., 1.f., 1.h., and 1.l. of the SOR. After a complete and thorough review of the evidence, I make the following additional findings of fact:

Applicant is a 34-year-old senior information assurance engineer, who has worked for his defense contractor employer since April 2006. GE 3, Tr. 24, 56. He seeks access to sensitive information in conjunction with a public trust position, which is a condition of his employment. Tr. 25.

He was awarded an associates degree in general studies from a community college in August 2003. GE 1, Tr. 23. Applicant was married in March 1996. He and his wife have three daughters, ages 11, 9, and 5. Applicant and his wife have been separated since April 2006, and have a divorce pending. GE 1, p. 5, AE A, Tr. 23, 25, 56.

Applicant's background investigation addressed his financial situation and included the review of his April 2006 and May 2006 SF 85Ps, April 2006 Declaration for Federal Employment, October 2007 Response to DOHA Interrogatory, and April 2006, July 2006, June 2007, December 2007, and June 2008 credit reports. GE 1 – 9.

The Government alleged in the SOR and established by Applicant's admissions and/or evidence presented that Applicant has/had 14 delinquent debts totaling \$24,954. The debts consist of ten collection accounts, three charged off accounts, and one judgment. Applicant's indebtedness began in 2002/2003 and has been ongoing. Response to SOR, GE 4 – 9, Tr. 54.

Applicant has paid/resolved the debts listed in SOR ¶¶ 1.a., and 1.b. He disputes the debt itemized in SOR ¶ 1.f., which is a \$248 collection account owed to a cable company. He claimed that he returned the cable box after he moved and was not given credit by the cable company. He did not provide any documentation. Tr. 33-35. He disputes the debt listed in SOR ¶ 1.h., which is a \$1,095 charged off account owed to a telephone company. He claimed he settled this account and paid a lesser amount. He did not provide any documentation. Tr. 39-41. With regard to \$1,831 collection account listed in SOR ¶ 1.j., he stated he "believe[s] [he] made two payments to fulfill that debt at a charge-off amount" in November 2007. He did not provide any documentation. Tr. 42-44. With regard to the \$1,931 charged off account listed in SOR ¶ 1.l., he stated this debt was contained in the \$8,679 collection account listed in SOR ¶ 1.m. He did not provide any documentation to support this contention. Tr. 45-46, 31-46.

In October 2007, Applicant responded to DOHA Interrogatories which queried him about the debts alleged in the SOR. His responses varied, but made the point that he was in the process of resolving each and every debt and that documentation would be forthcoming. Apart from the debts listed in SOR ¶¶ 1.a. and 1.b., there is no documentation in the record substantiating any of the other debts alleged have been paid/resolved. The documentation that indicates these two debts have been paid is contained in Applicant's June 2008 credit report, GE 9.

Post-hearing, Applicant submitted a letter, which stated he had negotiated payment arrangements with three of his creditors. He did not provide any documentation from these creditors. AE B.

Applicant stated before his separation, his wife was responsible for paying the bills and failed to do so. He acknowledged that he should have been more diligent in ensuring the family finances were handled in a responsible manner. He also stated his divorce is not final and that the responsibility of the marital debt has yet to be determined. Tr. 15-16. Applicant was unemployed from November 2002 to December 2002. Tr. 37. He added:

You know, to be perfectly honest with you, I have not handled my debt pretty well, as it clearly indicates here through my credit history. However it is my intention to give this more credence than I have in the past. Tr. 51.

Applicant stated he has \$1,500 remaining per month after paying all his bills. In response to Department Counsel's query why he had not used that money to pay his debt, Applicant answered, "I just haven't done it." Tr. 54. Applicant did not provide any good character evidence.

## **Policies**

Positions designated as ADP I and ADP II are classified as "sensitive positions." (See 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) 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 over-arching adjudicative goal is a fair, impartial and common sense 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." 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.

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 as to obtaining 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 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.

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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **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. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Applicant accumulated numerous delinquent accounts, totaling \$24,954, that were charged off as bad debts, submitted for collections, and/or resulted in a judgment being entered against him. His indebtedness began in 2003/2003 and has been ongoing. The evidence is sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from financial difficulties. Applicant claims his indebtedness stems from his wife not paying the family bills, a separation and pending divorce, and a brief period of unemployment. Two potential mitigating conditions apply under this concern.

Under AG ¶ 20(b), it may be mitigating where “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.” As noted above, Applicant has been separated since April 2006, and his indebtedness began in

2003/2003. His divorce is pending. Applicant's unemployment spanned only a two-month period from November 2002 to December 2002. While going through a divorce is oftentimes costly and traumatic, I note Applicant's financial problems are not recent. Even if Applicant's wife had not fulfilled her obligation to pay the family bills, Applicant failed in his responsibility to exercise greater care in overseeing the family budget. Particularly troubling is the fact that Applicant claims he currently has a net monthly remainder of \$1,500 after his bills are paid, yet there is no documented effort that he has paid/resolved his outstanding debts. Applicant has failed to show that his separation and pending divorce has hindered him in addressing his outstanding debts. Similarly, the length of time that has elapsed since his two-month unemployment in 2002 does not provide a persuasive explanation for his indebtedness.

AG ¶ 20(d) applies where the evidence shows "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." Other than documenting payment of two debts through GE 9, Applicant has fallen short on showing that he has paid or otherwise resolved the remaining debts. Applicant was quite clear in his October 2007 Response to DOHA Interrogatory that he was going to resolve his debts and provide documentation. Hence his post-hearing July 18, 2008 letter unaccompanied by documentation that he is "working and will continue to work diligently with [his] credit counseling to payoff [his] debt" rings hollow. I conclude none of these potentially mitigating conditions apply.

The objective of a trustworthiness determination is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to sensitive information. Indeed, the "whole person" concept recognizes we should view a person by the totality of his acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the facts listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has not mitigated the financial considerations security concern. He has not overcome the case against him and satisfied his ultimate burden of persuasion.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a public trust position. For all these reasons, I conclude Applicant has not mitigated the trustworthiness concerns arising from his financial considerations.

## **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
Subparagraph 1.a. – 1.b.:	For Applicant
Subparagraph 1.c. – 1.n.:	Against Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a public trust position. Eligibility for access to sensitive information is denied.

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ROBERT J. TUIDER  
Administrative Judge