Date: May 23, 2023

In the matter of: ----- Applicant for Public Trust Position	ADP Case No. 22-01352

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
James B. Norman, Esq., Chief Department Counsel

FOR APPLICANT
Ryan C. Nerney, Esq.

The Department of Defense (DoD) declined to grant Applicant a trustworthiness designation. On July 20, 2022, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision – trustworthiness concerns raised under Guideline F (Financial Considerations) of DoD Directive 5220.6 (Jan. 2, 1992, as amended) (Directive) and Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (Dec. 10, 2016) (AG). Applicant requested a hearing. On March 22, 2023, after the record closed, Defense Office of Hearings and Appeals Administrative Judge Benjamin R. Dorsey denied Applicant's request for a trustworthiness designation. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

The SOR alleged two delinquent credit card debts totaling about $36,000. The Judge found against Applicant on both allegations. On appeal, Applicant asserts that the Judge failed to properly consider all available evidence, rendering his adverse decision arbitrary, capricious, or contrary to law, and failed to properly apply the mitigating conditions. Consistent with the following, we affirm.

Judge's Findings of Fact and Analysis

Applicant is in his early 40s. He is twice divorced, has been married to his current wife since 2017, and has three minor children. He earned his bachelor's degree in 2004 and his master's degree in 2010. Applicant has worked for a defense contractor since 2020 and has also worked as a self-employed consultant since 2017.

Applicant explained that the credit card alleged at SOR ¶ 1.a was used to pay for living expenses, but that he became delinquent on the account in early 2020 after he began incurring additional expenses following his child's autism diagnosis. He contacted the creditor in early 2022 and established a payment arrangement to settle the account for less than the full balance and complied with the agreement by paying approximately $19,000 towards the original delinquent balance of approximately $21,000. The final settlement payment was made in January 2023. Decision at 2; Applicant Exhibit (AE) A.

Turning to the debt alleged at SOR ¶ 1.b, Applicant explained that the credit card was used for travel-related expenses with an employer for whom he worked until mid-2017. He claimed to have become delinquent on the account in about June 2018 following a dispute with the employer about which expenses were reimbursable, and that he was further delinquent both because he lost access to the account and due to his child's diagnosis. Applicant received multiple communications from the creditor notifying him that the account was delinquent and providing contact information to resolve the debt. In August 2022, he resolved the account, which was delinquent for approximately $15,000, with a single settlement payment of approximately $2,000. Decision at 2-3; AE C.

The Judge found that the SOR debts "were delinquent for years" and that, while his "expenses initially left him unable to pay these debts," Applicant had the ability to satisfy the SOR debt as of at least December 2020 when his salary increased "but chose not to until after the Government issued the SOR." Decision at 5. The Judge concluded that Applicant failed to show that he resolved the debts in good faith or to establish "a track record of financial responsibility sufficient to show that his financial delinquencies are unlikely to recur." Decision at 6.

Discussion

Applicant has not challenged any of the Judge's specific findings of fact. Rather, he contends that the Judge erred in failing to comply with the provisions of Executive Order 10865 and the Directive by not considering all the evidence, and by not properly applying the mitigating conditions. Applicant's arguments, as discussed more below, advocate for an alternative weighing of the evidence, which is not enough to show that the Judge weighed the evidence or reached conclusions in a manner that is arbitrary, capricious, or contrary to law. *See, e.g.*, ISCR Case No. 06-17409 at 3 (App. Bd. Oct. 12, 2007).

Applicant argues, for example, that mitigating condition 20(d) – "the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts" – is "fully applicable to the facts and circumstances of this case" and that the Judge failed "to articulate any reason as to why this mitigating condition is not fully applicable given the full resolution of

the debts at issue." Appeal Brief at 13. It is well settled that the "timing of the resolution of financial problems is an important factor in evaluating an applicant's case for mitigation because an applicant who begins to resolve financial problems only after being placed on notice that his clearance was in jeopardy may lack the judgment and self-discipline to follow rules and regulations over time or when there is no immediate threat to his own interests." ISCR Case No. 15-06440 at 4 (App. Bd. Dec. 26, 2017). Contrary to Applicant's argument, the Judge acknowledged that Applicant had "resolved his delinquencies by settling them for less than the full amount," but found that the mitigating condition only partially applied because the resolution did not occur until after Applicant received his SOR. Decision at 6. The Judge's determination with respect to mitigating condition 20(d) is supported by both the record and Appeal Board precedent.

Moreover, a Judge is not obligated to make favorable findings and conclusions regarding a debt simply because it is resolved before the close of the record. ISCR Case No. 03-04704 at 4 (App. Bd. Sep. 21, 2005). "Evaluating the totality of the evidence in Guideline F cases, even those in which the applicant has actually paid his or her debts, requires consideration of the circumstances underlying the debts for what they may reveal about the applicant's judgment and reliability." ISCR Case No. 15-03019 at 3 (App. Bd. Jul. 5, 2017). In the instant case, the Judge noted the following such circumstances: since about early 2018, Applicant's salary was at least $165,000 and, beginning in late 2020, his annual income has been about $390,000; his wife's annual income is about $200,000; as of the hearing, Applicant had approximately $50,000 to $100,000 in savings and several hundred thousand dollars in investment and retirement assets; during the time in which the two alleged debts were delinquent, Applicant took numerous international trips for vacation and to visit family. Decision at 3. The Judge also noted that Applicant explained that he "did not settle his debts until after the SOR was issued because he had to pay for other expenses for his family," but "also claimed that he has always had enough money to pay his debts, but he did not prioritize the SOR debts until the time he satisfied them." Decision at 3. The Judge clearly considered Applicant's debt resolution but concluded that, when weighed against the foregoing circumstances, the resolution alone was insufficient to mitigate the concern. We find no reason to disturb the Judge's treatment of any of the mitigating conditions.

Finally, Applicant's brief relies on hearing-level decisions in unrelated Guideline F cases to argue that the Judge erred in his analysis of this case. His reliance on those decisions is misplaced. As the Board has previously stated, how particular fact scenarios were decided at the hearing level in other cases is generally not a relevant consideration in our review of a case. *See, e.g.*, ISCR Case No. 19-02593 at 3 (App. Bd. Oct. 18, 2021). On appeal, Hearing Office decisions may be useful to highlight a novel legal principle; but only in rare situations – such as separate cases involving spouses, cohabitants, or partners in which the debts and the financial circumstances surrounding them are the same – would the adjudication outcome in another case have any meaningful relevance in our review of a case. The decisions that Applicant cites have no direct relationship or unique link to Applicant's case that would make them relevant here. *See also* ISCR Case No. 19-03174 at 2 (App. Bd. Feb. 10, 2021).

Applicant failed to establish the Judge committed any harmful error. Based on our review of the record, we conclude the Judge examined the relevant evidence and articulated a satisfactory explanation for the decision. We need not agree with a Judge's decision to find it sustainable. *See* ISCR Case No. 11-13965 at 3 (App. Bd. Aug. 6, 2013). The decision is sustainable on the record.

A trustworthiness determination will be granted only when "clearly consistent with the national security interests of the United States." AG, App. A ¶ 1(d). *See also Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013) (citing *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)); ADP Case No. 17-03252 at 3 (App. Bd. Aug. 13, 2018). "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." AG, App. A ¶ 2(b).

Order

The decision is **AFFIRMED**.

Signed: Moira Modzelewski
Moira Modzelewski
Administrative Judge
Member, Appeal Board

Signed: Allison Marie
Allison Marie
Administrative Judge
Member, Appeal Board

Signed: Jennifer I. Goldstein
Jennifer I. Goldstein
Administrative Judge
Member, Appeal Board