KEYWORD: Guideline F

DIGEST: An applicant does not have to have paid off all of his debts in order to mitigate Guideline F concerns. However, an applicant must demonstrate a plan for debt payment, accompanied by concomitant conduct, that is, conduct that evidences a serious intent to resolve the debts. In this case, Applicant has expressed his hope and expectation that he can, in the future, either pay his student loans or at least have them deferred. However, he has not demonstrated an actual track record of payment on his student loans. To the contrary, he has, at best, promised to resolve these debts some time in the future, which is not sufficient. Favorable decision reversed.

CASENO: 17-00263.a1

DATE: 12/19/2018

DATE: December 19 2018

In Re:	
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Applicant for Public Trust Position	

APPEAL BOARD DECISION

APPEARANCES

FOR GOVERNMENT
Erin P. Thompson, Esq., Department Counsel

FOR APPLICANT
Pro se

The Department of Defense (DoD) declined to grant Applicant a trustworthiness designation. On September 15, 2017, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision–trustworthiness concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Department Counsel requested a hearing. On September 7, 2018, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge Mark Harvey granted Applicant's request for a trustworthiness designation. Department Counsel appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issue on appeal: whether the Judge's favorable decision was arbitrary, capricious, or contrary to law. Consistent with the following, we reverse.

The Judge's Findings of Fact

Applicant works for a Defense contractor. He has amassed over 120 college credits, although he has not received a degree. He served in the military from 2004 to 2009, during which time he deployed to the Middle East. Divorced, Applicant pays $200 a month in child support.

Applicant experienced several periods of unemployment. The first, from late 2009 to late 2011, followed his discharge from the military during which time he was not looking for work and lived on his savings. His debts became delinquent during later periods of unemployment. Applicant's SOR listed numerous delinquent debts for various charged-off accounts, collection accounts, a utility bill, a repossessed vehicle, etc. It also alleged nearly $35,000 in student loans.

Applicant paid two small debts, and most of the remaining ones were discharged through Chapter 7 bankruptcy. However, Applicant's student loans were not discharged. Applicant received financial counseling as part of the bankruptcy process. From late 2015 to late 2017, Applicant was employed, and a little over $500 was garnished from his monthly pay to cover his student loan debt. After this time, he made eight payments of varying amounts,[1] and his student loan debt is now about $2,000 lower than the amount alleged in the SOR. Applicant is awaiting a payment plan regarding these loans. Applicant wants to return to college, and he has some Veterans Affairs education benefits available. Once he is enrolled he can seek a deferral of his student loan debt. He made payments on the loans almost every month that he was employed and his bankruptcy was not pending.

Applicant's supervisor finds him to be professional and diligent. He believes that Applicant is sincere in his desire to resolve his financial problems.

The Judge's Analysis

[1]"After October 2017, [Applicant] made five $194 payments, one $195 payment, one $89 payment, and one $237 payment to address his student loans." Decision at 3.

The Judge stated that Applicant's finances were harmed by his divorce and by his periods of unemployment. He noted that Applicant had paid two debts and had made several payments toward his student loans. He stated that Applicant has a plan for bringing his student loans into current status. He also concluded that Applicant's bankruptcy discharge resolved those debts that were covered thereunder. In the whole-person analysis, the Judge found that Applicant has established a plan to resolve his student loans and has demonstrated a meaningful track record of debt repayment.

Discussion

The standard applicable to trustworthiness cases is that set forth in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) regarding security clearances: such a determination "may be granted only when 'clearly consistent with the interests of the national security.'" *See, e.g.*, ADP Case No. 17-03252 at 3 (App. Bd. Aug. 13, 2018). *See also Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013), *cert. denied*. As with security clearance cases, the applicant in a trustworthiness proceeding is responsible for presenting evidence to rebut, explain, extenuate, or mitigate admitted or proven facts. The applicant in such cases also has the ultimate burden of persuasion. Directive ¶ E3.1.15.

In deciding whether the Judge's rulings or conclusions are erroneous, we will review the decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. *See* ADP Case No. 16-03595 at 3(App. Bd. Aug. 27, 2018).

Department Counsel argues that the Judge failed to address significant aspects of the case, which undermines his favorable decision. We find this argument persuasive. The concern under Guideline F is not simply that an applicant might be tempted to compromise protected information in order to pay his debts. A Judge should also consider the extent to which an applicant's circumstances cast doubt upon his judgment, self control, and other characteristics essential to protecting national security information. *See, e.g.,* ISCR Case No. 17-01556 at 3 (App. Bd. Aug. 2, 2018). This obligation is rooted in the language of the Directive, which states that failure to meet financial obligations may indicate unwillingness to abide by rules and regulations, thereby raising questions about an applicant's ability to protect information that our national interests require be guarded from improper disclosure. Directive, Encl. 2, App. A ¶ 18. *See also* ADP Case No. 14-03077 at 3 (App. Bd. Oct. 22, 2015).

We first note Department Counsel's argument that Applicant did not begin seriously to address his financial problems until he had received the SOR. We have long stated that the timing of an applicant's efforts at debt resolution is relevant in evaluating the sufficiency of his or her case for mitigation. *See, e.g.*, ADP Case No. 16-03595 at 4. Applicants who begin to resolve their debts

only after having been placed on notice that their clearances or trustworthiness designations are in jeopardy may be disinclined to follow rules and regulations when their personal interests are not at stake. *See, e.g.*, ISCR Case No. 16-03122 at 3-4 (App. Bd. Aug. 17, 2018). In the case before us, the Judge failed to discuss the timing of Applicant's bankruptcy, which was the principal means through which Applicant attempted to resolve his debts. In fact, as Department Counsel notes, Applicant did not file his bankruptcy petition until over six months after the date of the SOR, and the court granted his discharge a little over two weeks prior to the date of the hearing. *See* Government Exhibit (GE) 6, Bankruptcy Court Document. In failing to discuss this aspect of the case, the Judge left unaddressed a matter that, on its face, impugns Applicant's effort to show that he has the requisite judgment and reliability for a trustworthiness designation.

We also note the Judge's favorable treatment of Applicant's student debt payments. By far, the largest such payments were through garnishment, which is not the same thing as resolving debts through voluntary efforts and, therefore, is generally entitled to less weight. *See, e.g.*, ISCR Case No. 14-05803 at 3 (App. Bd. Jul. 7, 2016). Otherwise, Applicant's payments were sporadic at best and do not show a consistent effort to reduce his obligation to the Department of Education. Moreover, Applicant's hope for resolution of his student loan debts consists in awaiting a payment plan[2] or, in the alternative, re-enrolling in college, which he asserts would place these debts in deferment status. As the Judge observed in his analysis, an applicant does not have to have paid off all of his debts in order to mitigate Guideline F concerns. However, an applicant must demonstrate a plan for debt payment, accompanied by concomitant conduct, that is, conduct that evidences a serious intent to resolve the debts. *See, e.g.*, ISCR Case No. 16-03889 at 5 (App. Bd. Aug. 9, 2018). In this case, Applicant has expressed his hope and expectation that he can, in the future, either pay his student loans or at least have them deferred. However, he has not demonstrated an actual track record of payment on his student loans. To the contrary, he has, at best, promised to resolve these debts some time in the future, which is not sufficient. *See, e.g.*, ISCR Case No. 16-03122 at 4.

We note other aspects of Department Counsel's argument highlighting things that vitiate the force of Applicant's case for mitigation. For example, she argues that a bankruptcy discharge does not insulate an applicant's financial condition from scrutiny. We find Department Counsel's argument to be persuasive. *See, e.g.*, ADP Case No. 17-00684 at 3 (App. Bd. Aug. 7, 2018). We have previously stated that the extent to which an applicant has made his creditors whole is a factor entitled to the Judge's consideration. In particular, it is relevant that a bankruptcy discharge can result in an applicant's avoidance of debt payment, as is the case here. *See, e.g.*, ISCR Case No. 15-00682 at 3 (App. Bd. Jul. 13, 2016). Moreover, Applicant's first period of unemployment was voluntary and, accordingly, cannot fairly be considered a matter that was beyond his control. *See* Directive, Encl. 2, App. 2 ¶ 20(b).

[2]During his clearance interview, which was conducted between July and September of 2016, Applicant stated that he had been speaking with a named official about a possible payment plan. He characterized this plan as a one-time offer from the creditor, which he had not accepted because he was concerned that his financial problems might imperil his job. GE 2, Interview Summary, at 6. There is nothing in the record to corroborate Applicant's claim to be working on a payment plan or to substantiate the nature of any negotiations that he may have had with the agency in charge of collecting the student loan debt in the two years separating the clearance interview and the hearing.

Given the totality of the evidence, the record does not support a conclusion that Applicant acted responsibly in regard to his debts nor, at least regarding the student loans, does the record show that Applicant's financial problems are under control. We conclude that the Judge's favorable decision fails to consider important aspects of the case and runs contrary to the weight of the record evidence. Given the totality of the evidence, we conclude that the Judge's favorable decision is not sustainable.

Order

The Decision is **REVERSED**.

Signed: Michael Ra'anan
Michael Ra'anan
Administrative Judge
Chairperson, Appeal Board

Signed: James E. Moody
James E. Moody
Administrative Judge
Member, Appeal Board

Signed: James F. Duffy
James F. Duffy
Administrative Judge
Member, Appeal Board