



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



In the matter of:)
)
 ---) ADP Case No. 17-03903
)
 Applicant for Public Trust Position)

Appearances

For Government: Ross Hyams, Esquire, Department Counsel
For Applicant: *Pro se*

05/29/2019

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the trustworthiness concerns regarding financial considerations and personal conduct. Eligibility to occupy a public trust position is granted.

Statement of the Case

On May 14, 2010, and again on June 9, 2016, Applicant applied for a national security position, essentially a public trust position, and submitted Electronic Questionnaires for Investigations Processing (e-QIP). On December 18, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and Directive 4 of the Security Executive Agent (SEAD 4), *National Security Adjudicative Guidelines* (December 10, 2016) (AG), for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position, effective June 8, 2017.

The SOR alleged trustworthiness concerns under Guidelines F (Financial Considerations) and E (Personal Conduct) and detailed reasons why the DOD CAF was unable to make an affirmative finding under the Directive that it is clearly consistent with the national interest to grant Applicant's eligibility for occupying a public trust position to support a contract with the DOD. The SOR recommended referral to an administrative judge to determine whether such eligibility should be granted, continued, denied, or revoked.

In a sworn statement, dated January 22, 2018, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on March 23, 2018. The case was assigned to me on January 10, 2019. A Notice of Hearing was issued on March 13, 2019, scheduling the hearing for April 3, 2019. I convened the hearing as scheduled.

During the hearing, Government exhibits (GE) 1 through GE 5 and Applicant exhibits (AE) A through AE F were admitted into evidence without objection. Applicant testified. The transcript (Tr.) was received on April 15, 2019. I kept the record open to enable Applicant to supplement it. He took advantage of that opportunity and timely submitted several documents, which were marked and admitted as AE G through AE W, without objection. The record closed on May 3, 2019.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the factual allegations pertaining to financial considerations in the SOR (SOR ¶¶ 1.a. through 1.o.), as well as the sole allegation pertaining to personal conduct (SOR ¶ 2.a). Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 54-year-old employee of a defense contractor. He has been serving as a financial technician (travel auditor) with his current employer since April 2019, after serving in a different position as a clerk with the same employer since July 2016. A 1983 high school graduate, Applicant received a bachelor's degree in 1990, and earned a number of additional credits towards a higher degree. He served on active duty as an infantry officer with the U.S. Marine Corps (USMC) from August 1992 until June 1998, when he accepted a regular commission, and continued serving with the USMC until he resigned his commission and received an honorable discharge as a major in June 2000. He was granted a secret clearance in 1994, and has been occupying a position of public trust since 2016. Applicant was married in 2000, and he has been separated since 2010, with an intention of divorcing, once he has the money to do so. He has one child, born in 2004.

Military Record

During his military career, Applicant was deployed overseas to Kuwait, Korea, Japan, and Somalia, and while in the United States, was involved in counterdrug

operations. He was awarded the National Defense Service Medal, a Certificate of Appreciation, the Sea Service Deployment Ribbon, the Armed Forces Expeditionary Medal, the Joint Meritorious Unit Award, the Combat Action Ribbon, the Meritorious Unit Commendation, and the Marine Corps Recruiting Ribbon.¹

Financial Considerations²

As noted above, after the hearing was conducted, Applicant accepted another position from his employer, with an immediate increase of his annual salary, as well as overtime.³ However, before his recent string of favorable employment experiences, he went through a series of unemployment periods commencing in August 2008, during the national housing crisis and plummeting national economy. He had previously been hired as a pharmaceutical sales specialist in April 2004, and when his mentor left the company for a competitor, Applicant joined his mentor in May 2007. Because he was unable to sell his residence in one city, he could not afford to maintain two mortgages. His new employer had a policy that mandated that he reside fulltime within his designated geographical territory within six months of being hired. Recognizing the difficulties, Applicant's district manager extended him an extra 12 months to move. However, senior management refused to permit an additional extension, and Applicant was terminated in August 2008.⁴

Although he sought employment in his field in entry-level positions in multiple locations, he was unsuccessful because he was deemed overqualified and because he had previously made too much salary. Applicant was eventually able to gain a variety of full-time and part-time seasonal positions starting in February 2010, but he went through additional layoffs and unemployment from August 2010 until October 2013; July 2014 until January 2015; and July 2015 until March 2016.⁵

Applicant's savings were eventually depleted, and some accounts became delinquent. At least one account was charged off. The SOR identified 15 purportedly delinquent accounts that had been placed for collection or charged off, as generally reflected by Applicant's June 2016 or October 2017 credit reports. Those debts total approximately \$45,544. The current status of those accounts is as follows:

¹ AE H (Certificate of Release or Discharge from Active Duty (DD Form 214), dated June 3, 1998); AE I (DD Form 214, dated June 15, 2000); AE J (List of Deployments, undated); AE L (Award List, undated).

² General source information pertaining to the financial issues discussed below can be found in the following exhibits: GE 4 (Combined Experian, TransUnion, and Equifax Credit Report, dated June 23, 2016); GE 5 (Equifax Credit Report, dated October 19, 2017); GE 3 (Enhanced Subject Interview, dated July 19, 2017); and Applicant's Answer to the SOR, dated January 22, 2018.

³ AE G (Comments, undated); AE Q (Official Job Offer E-mail, dated April 24, 2019).

⁴ GE 2 (E-QIP, dated June 9, 2016, at 10-18); GE 3, *supra* note 2, at 4.

⁵ GE 2, *supra* note 4, at 10-18; GE 3, *supra* note 2, at 4.

(SOR ¶ 1.a.): This is a home mortgage with a high credit of \$180,000 and a past-due balance of \$5,164, which was placed for collection after Applicant's June 2016 credit report was issued.⁶ The account was actually current until mid-2016, when Applicant's wife was involved in an automobile accident. It occurred during a transition period when Applicant was between employers and health coverages, leaving him fully responsible for the unanticipated approximately \$6,000 in medical payments and vehicle repair costs. He eventually managed to substantially reduce the delinquency, but a natural disaster – called Hurricane Michael – occurred in October 2018, leaving him further behind. That hurricane was the first category 5 hurricane to strike the contiguous United States since 1992. Applicant had previously been granted annual leave, and, as an hourly employee rather than a salaried employee, he was required to take the leave although the facility had shut down. Because of his reduced income caused by the shutdown, Applicant did not have sufficient funds to make his monthly mortgage payment. He managed to make multiple monthly payments in early 2019 in an effort to catch up, and as of April 3, 2019, he was only two months behind. His parents became aware of his situation, and they were scheduled to make his April payment, an action that would bring his mortgage to only one month delinquent, and Applicant planned to make his May payment on the due date to bring it back into a current status.⁷ The account has either been resolved or is the process of being resolved.

(SOR ¶ 1.b.): This is a bank-issued credit-card account with a \$16,659 credit limit that was placed for collection and a disputed amount was reported to have been charged off in June 2012. Applicant's June 2016 credit report stated that \$16,659 was charged off, but his October 2017 credit report seems to indicate that there was a past due balance of \$10,320 and an unpaid balance of \$14,609.⁸ In 2014, approximately three years before the SOR was issued, Applicant entered into a repayment arrangement with the creditor's collection agent under which he agreed to make monthly \$50 payments commencing on January 31, 2014. He continued to make his payments in compliance with those arrangements through October 2018, when the creditor withdrew the account from the collection agent, eventually reducing the unpaid balance from \$16,659.91 to \$13,909.91.⁹ Applicant contends that the creditor informed him in May 2019, that it anticipates issuing him a Form 1099-C, *Cancellation of Debt*, in the amount of \$13,901.91,¹⁰ but he failed to submit any documents to support his contention. Notwithstanding the absence of such supporting documentation, it appears that the account is in the process of being resolved.

(SOR ¶¶ 1.c. through 1.e.): These are three bank-issued credit-card accounts from the same bank with reported unpaid and past-due balances of \$12,165, \$6,986, and

⁶ GE 4, *supra* note 2, at 8; GE 5, *supra* note 2, at 1.

⁷ Tr. at 25-32; AE S (Memo, dated May 2, 2019); AE R (Statement, undated); AE U (Account Detail, undated); AE T (Mortgage Statements, various dates).

⁸ GE 4, *supra* note 2, at 6; GE 5, *supra* note 2, at 2.

⁹ AE V (Account Payment History Report, dated May 1, 2019); Tr. at 32-33.

¹⁰ AE R, *supra* note 7.

\$3,127 that were placed for collection.¹¹ Applicant was not aware that his wife had stopped making the monthly payments on the accounts because she was handling the bills and never told him about the delinquencies. When he found out about the delinquencies and questioned her, she denied knowing that they were in collection.¹² The creditor issued Applicant three Form 1099-Cs, cancelling the three debts: on May 3, 2014, cancelling the debt for \$5,404.40 (SOR ¶ 1.d.); on November 15, 2014, cancelling the debt for \$10,900.63 (SOR ¶ 1.c.); and on December 31, 2015, cancelling the debt for \$3,054.02 (SOR ¶ 1.e.).¹³ While the two older Form 1099-Cs were to be applied to Applicant's 2014 income, and the most recent one was to be applied to his 2015 income, Applicant seemingly amended his earlier filings and added all three to his federal income tax return for the tax year 2014, which he filed in March 2018.¹⁴ Because his withheld income tax, earned income credit, and child tax credit were more than his total tax, including the income from the cancelled debts, Applicant anticipated a tax refund.¹⁵ Those accounts have been resolved.

(SOR ¶¶ 1.f., 1.g., 1.h., 1.j., 1.k., 1.l., 1.n., and 1.o.): These are eight medical debts, totaling \$3,063, purportedly generated in 2013 by unidentified medical providers with unpaid balances of \$1,211, \$588, \$420, \$389, \$274, \$130, \$31, and \$31 that were placed for collection, as reported solely by Equifax (with one exception regarding an account reported also by TransUnion) in Applicant's June 2016 credit report.¹⁶ None of these debts are reported in Applicant's October 2017 Equifax credit report. Although he "verified" the information pertaining to the accounts during his interview with an investigator from the U.S. Office of Personnel Management (OPM) in July 2017, in fact, he was under the impression those debts were related to his May 2016 accident and resulting injuries while at work. Moreover, when asked about each particular account, Applicant had no specific information to discuss because the charges should have been handled by his workers compensation claim.¹⁷ Applicant contacted both the hospital and the billing department of the medical group that he thought had generated the bills, but they had no record of any outstanding accounts in his name. He contacted Equifax, but it too had no such information.¹⁸

During the hearing, because he was unable to obtain any information regarding the accounts, he stated that they might be related to his wife's June 2016 accident.¹⁹

¹¹ GE 4, *supra* note 2, at 6-7.

¹² Tr. at 38-40.

¹³ AE A (Forms 1099-C, various dates).

¹⁴ AE W (U.S. Individual Income Tax Return – 2014 (Form 1040), dated March 31, 2018).

¹⁵ AE W, *supra* note 14, at 2.

¹⁶ GE 4, *supra* note 2, at 12-13.

¹⁷ GE 3, *supra* note 2, at 4-9.

¹⁸ AE R, *supra* note 7.

Applicant's wife managed to locate two explanations of benefits (one for herself and one for their son) which indicated that the charges related to a June 9, 2016 incident were, for some unexplained reason, sent directly to Medicaid rather than to the primary insurance company. Neither bill was in an amount listed in the credit report or in the SOR.²⁰ The Appeal Board previously explained:²¹

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

In attempting to meet his burden, Applicant contacted the credit reporting agency, the hospital, the billing department of his medical group, and the only identified collection agent. His wife contacted the insurance companies and potential medical providers. No relevant information pertaining to 2013 medical charges was furnished to them. Since the identities of the unidentified creditors have not been reported to Applicant, despite his being motivated and able to resolve these purported debts, it is impossible for him to take further action. While it is not dispositive of the allegations, it is significant that neither Experian nor TransUnion (with the one exception) reported the accounts in Applicant's June 2016 credit report, and Equifax, after reporting them in that credit report, did not report the accounts in the October 2017 credit report.

(SOR ¶¶ 1.i. and 1.m.): These are two medical debts, totaling \$519, purportedly generated in 2014 by unidentified medical providers with unpaid balances of \$389 and \$130 that were placed for collection, with one reported by Equifax and TransUnion, and one reported solely by Equifax in Applicant's June 2016 credit report.²² Applicant and his wife took the actions described above regarding the 2013 medical accounts, with the same results.

Other than the accounts alleged in the SOR, there is no evidence of any other delinquent accounts. During the hearing, Applicant indicated that in the past, he had earned six-figure salaries and bonuses, and that became a major issue in his inability to obtain employment over the ensuing years.²³ During the tax year 2018, Applicant's income was \$32,236.49.²⁴ As noted above, on April 24, 2019, Applicant received an official job offer for a civil-service positions with a salary, including locality pay, of \$37,843,

¹⁹ Tr. at 41.

²⁰ AE B (E-mail, dated March 26, 2019, with attached explanations of benefits).

²¹ ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010).

²² GE 4, *supra* note 2, at 12-13.

²³ Tr. at 54-55.

²⁴ AE P (2018 W-2 Earnings Summary, undated).

a position he accepted.²⁵ While there is no evidence of financial counseling, in the absence of any additional delinquent accounts, it appears that Applicant's financial situation is now under control.

Personal Conduct

On June 9, 2016, when Applicant completed his e-QIP, he responded to certain questions pertaining to his financial record found in Section 26. Some of those questions asked if, in the past seven years, he had bills or debts turned over to a collection agency; and had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed. Applicant answered "no" to those questions, and certified that his responses were "true, complete, and correct" to the best of his knowledge and belief.²⁶ In fact, his answers were incorrect, for Applicant actually had several delinquent accounts that clearly came within the scope of the questions asked.

In his Answer to the SOR, Applicant admitted that he had deliberately falsified the material facts in his responses to the e-QIP inquiries, although during the hearing he modified that admission by claiming that he did not purposely try to deceive, and did not know why he had answered as he had.²⁷ He claimed that he had used his 2010 e-QIP for most of his entries, and noted that in that 2010 e-QIP, he answered the same questions with a "yes." He reiterated that it was not his intention to deceive.²⁸

Work Performance and Character References

Several individuals have known Applicant for over 30 years. One former senior non-commissioned officer – a member of a special forces group, and now with the U.S. Department of Homeland Security – has had years of interaction with Applicant when he was an infantry officer and a recruiter. He is aware that Applicant holds on to the traditions and codes of conduct. He does not believe that Applicant is capable of trying to deceive the U.S. Government about his financial status. He knows Applicant is very serious about security issues, and based on 30 years of interaction, he is confident that Applicant's error was unintentional and would not be repeated. He is also aware that Applicant is dealing with an estranged wife, and based on his experience in dealing with such situations, it is quite common for the estranged spouse not to share certain financial issues.²⁹

A retired U.S. Navy lieutenant commander has also known Applicant for 30 years. Without reservation, he does not believe that Applicant would ever purposely attempt to

²⁵ AE Q, *supra* note 3. There is one significant requirement for the position, as it is not a position of public trust, but rather a position that requires a secret clearance.

²⁶ GE 2, *supra* note 4, at 35.

²⁷ Tr. at 51, 83.

²⁸ Tr. at 51; See also AE C (e-QIP, dated May 14, 2010), at 43.

²⁹ AE F (Character Reference, undated).

deceive investigators. His comments echoed those of the first character reference.³⁰ A retired USMC master sergeant has known Applicant for four decades. Knowing Applicant's character and excellent personal ethics, any question regarding misleading or actively deceiving the Government "simply is not within his core."³¹ Another individual who has known Applicant for over 30 years is equally supportive. She stated that Applicant "has more integrity than any person I have known. His strength of character is evident as he will not compromise his morals for any reason. I have never known this man to tell a lie or deceive in word or action." She added, that he possesses all of the following attributes: honesty, integrity, strong core values, and the strength to stand by them.³²

The director of the Navy's largest personnel support detachment has had Applicant on his staff for three years. Applicant is considered very proficient and knowledgeable, with a proactive approach in all tasks assigned. He is considered loyal, trustworthy, and dedicated to mission success. He is also versatile, self-motivated, and very reliable.³³

Applicant has received several performance awards, including one for initiative.³⁴ Applicant's military performance reports reflect an individual with outstanding future potential who is detailed, mature, motivated, and efficient, who always maintains a crisp military appearance, has outstanding organizational skills, has an imaginative and proactive approach to problem-solving skills, and who is an honest broker.³⁵

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a [position of public trust]."³⁶ As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. DOD contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made.³⁷

³⁰ AE F (Character Reference, dated March 25, 2018).

³¹ AE F (Character Reference, undated).

³² AE F (Character Reference, dated March 25, 2019).

³³ AE F (Character Reference, dated March 27, 2019).

³⁴ AE M (Award, undated); AE N (Certificate of Excellence, dated May 2007); AE O (Certificate, undated); AE L, *supra* note 1.

³⁵ AE K (Military Performance Reports, various dates).

³⁶ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

³⁷ It should be noted that a memorandum from the Deputy Under Secretary of Defense for Counterintelligence and Security, Adjudication of Trustworthiness Cases, dated November 19, 2004, covers the handling of trustworthiness cases under the Directive. The memorandum directed the Defense

When evaluating an applicant's suitability for a public trust position, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for a public trust position.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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 common sense decision. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."³⁸ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.³⁹

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of sensitive information. Furthermore, security clearance determinations, and by inference, public trust determinations, should err, if they must, on the side of denials.⁴⁰ In reaching this decision, I have drawn only those conclusions that

Office of Hearings and Appeals (DOHA) to continue to utilize the Directive in ADP contractor cases for trustworthiness determinations.

³⁸ "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

³⁹ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

⁴⁰ *Egan*, 484 U.S. at 531.

are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

At the outset, I note I had ample opportunity to evaluate the demeanor of Applicant, observe his manner and deportment, appraise the way in which he responded to questions, assess his candor or evasiveness, read his statements, and listen to his testimony. It is my impression that his explanations regarding his financial considerations and personal conduct issues are consistent and have the solid resonance of truth.

Upon consideration of all the facts in evidence, including Applicant's testimony, as well as an assessment of Applicant's demeanor and credibility, and after application of all appropriate legal precepts and factors, I conclude the following with respect to the allegations set forth in the SOR:

Guideline F, Financial Considerations

The trustworthiness concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

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.

The guideline notes several conditions that could raise trustworthiness concerns under AG ¶ 19:

- (a) inability to satisfy debts;
- (b) unwillingness to satisfy debts regardless of the ability to do so; and
- (c) a history of not meeting financial obligations.

Applicant failed to maintain several accounts in a current status and a number of them became delinquent. Accounts totaling \$45,544 were placed for collection or charged off. AG ¶¶ 19(a) and 19(c) have been established. AG ¶ 19(b) has not been established

because there is no evidence that Applicant had the ability to pay his debts but was unwilling to do so.

The guideline also includes examples of conditions that could mitigate trustworthiness concerns arising from financial difficulties under AG ¶ 20:

(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;⁴¹

(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;⁴² and

(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.

⁴¹ A debt that became delinquent several years ago is still considered recent because "an applicant's ongoing, unpaid debts evidence a continuing course of conduct and, therefore, can be viewed as recent for purposes of the Guideline F mitigating conditions." ISCR Case No. 15-06532 at 3 (App. Bd. Feb. 16, 2017) (citing ISCR Case No. 15-01690 at 2 (App. Bd. Sept. 13, 2016)).

⁴² The Appeal Board has previously explained what constitutes a good-faith effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good-faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the concept of good-faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy [or statute of limitations]) in order to claim the benefit of [the "good-faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

AG ¶¶ 20(a), 20(b), 20(c), 20(d), and 20(e) all fully or partially apply. Applicant's financial difficulties arose after he joined his mentor at a new employer after Applicant had been very successful at his old employer. Because of the national housing crisis and plummeting national economy, he was unable to sell his residence and comply with his new employer's policy-mandate that he reside fulltime within his designated geographical territory within a certain time period. The result was unemployment. He endured lengthy periods of unemployment, interrupted by relatively brief or seasonal periods of underemployment, largely because he had previously been too successful and was now deemed overqualified – situations that were largely beyond his control. Applicant's savings were eventually depleted, and accounts became delinquent. Other factors exacerbating Applicant's financial situation were (a) his wife's failure to properly process the family bills and she withheld significant financial information from him; (b) her injuries from an automobile accident in 2016; (c) his work-related injuries in 2016; and (d) Hurricane Michael in 2018.

Applicant acted responsibly by seeking and obtaining even entry-level positions wherever he could find them, and by working with his creditors or collection agents.⁴³ He entered into repayment arrangements with his mortgage holder, and eventually either eliminated the delinquency or is within a month of doing so. He received Form 1099-Cs for three accounts from one creditor, and the amounts cancelled were added to his income on his tax return. And, although he has little evidence that he has resolved purportedly delinquent medical bills, it was not for lack of trying to resolve the unidentified accounts. Those entities that should have been aware of the accounts – the credit reporting agency, the hospital, the billing department of his medical group, insurance companies, and potential medical providers – all had no relevant information for him or his wife. Applicant offered substantial evidence to indicate that his financial situation is now under better control. Applicant's actions under the circumstances no longer cast doubt on his current reliability, trustworthiness, and good judgment.⁴⁴

Trustworthiness decisions are aimed at evaluating an applicant's judgment, reliability, and trustworthiness. They are not a debt-collection procedure. The guidelines do not require an applicant to establish resolution of every debt or issue alleged in the SOR. An applicant needs only to establish a plan to resolve financial problems and take significant actions to implement the plan. There is no requirement that an applicant immediately resolve issues or make payments on all delinquent debts simultaneously, nor is there a requirement that the debts or issues alleged in an SOR be resolved first. Rather, a reasonable plan and concomitant conduct may provide for the payment of such debts, or resolution of such issues, one at a time. Mere promises to pay debts in the future, without further confirmed action, are insufficient. In this instance, however,

⁴³ "Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

⁴⁴ See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

Applicant transitioned into positive action well before the SOR was issued, and he now has a history of fulfilling his promises.

Guideline E, Personal Conduct

The trustworthiness concern relating to the guideline for Personal Conduct is set out in 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.

The guideline notes a condition that could raise trustworthiness concerns under AG ¶ 16:

(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.

As noted above, in June 2016, when Applicant completed his e-QIP, he responded to certain questions pertaining to his financial record in Section 26. Some of those questions asked if, in the past seven years, he had bills or debts turned over to a collection agency; and had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed. Applicant answered "no" to those questions, and certified that his responses were "true, complete, and correct" to the best of his knowledge and belief. In fact, his answers were incorrect, for Applicant actually had several delinquent accounts that clearly came within the scope of the questions asked.

Although Applicant admitted in his Answer to the SOR that he had deliberately failed to disclose the material facts in his responses to the e-QIP inquiries, during the hearing he modified that admission by claiming that he did not purposely try to deceive, and did not know why he had answered as he had. He claimed that he had used his 2010 e-QIP for most of his entries, and noted that in that 2010 e-QIP, he answered the same questions with a “yes.” He reiterated that it was not his intention to deceive.

Applicant’s comments provide sufficient evidence to examine if his submission was a deliberate failure to disclose negative financial information, as alleged in the SOR, or merely an inaccurate answer that was the result of oversight or misunderstanding of the true facts on his part. Proof of incorrect answers, standing alone, does not establish or prove an applicant’s intent or state of mind when the falsification or omission occurred. As an administrative judge, I must consider the record evidence as a whole to determine whether there is a direct or circumstantial evidence concerning Applicant’s intent or state of mind at the time the alleged falsification or omission occurred. I have considered the entire record, including Applicant’s initial and subsequent comments.⁴⁵

When Applicant completed his e-QIP, there were several issues taking place. First, Applicant was using his 2010 e-QIP responses as a guide in entering his 2016 responses. Everything was essentially the same, but, for some unknown reason, he did not use his 2010 response for the 2016 response with respect to the financial inquiries. Instead of reporting the same correct answer and citing financial issues, he simply marked “no.” Regarding the home mortgage, Applicant’s account was actually current until mid-2016, after the e-QIP was submitted. As for the three credit-card accounts for which Form 1099-Cs were issued in 2014 and 2015, his wife never acknowledged to him that the accounts were delinquent and the balances cancelled, and he did not find out the true status of the accounts until substantially after the e-QIP was submitted. With respect to the alleged delinquent medical bills from 2013 and 2014, Applicant assumed they were bills from 2016 accidents, but he was wrong. Unable to track down the unidentified creditors, information regarding the accounts from providers, collection agents, insurance companies, or credit bureaus, Applicant’s efforts have been blocked. If he was unaware that the accounts existed or were delinquent until his OPM interview, Applicant could not have lied about them in 2016. Recognizing Applicant’s reputation for honesty and

⁴⁵ 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)). See also ISCR Case No. 08-05637 at 3 (App. Bd. Sept. 9, 2010) (noting an applicant’s level of education and other experiences are part of entirety-of-the-record evaluation as to whether a failure to disclose past-due debts on a security clearance application was deliberate).

trustworthiness, as described by people who have known him well for over 30 years, it appears that if Applicant's answers to the e-QIP inquiries were incorrect, it would have been aberrant behavior on his part to have done so deliberately. AG ¶ 16(a) has not been established. Applicant's actions under the circumstances do not cast doubt on his current reliability, trustworthiness, and good judgment.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a position of public trust by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at SEAD 4, App. A, ¶ 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 SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant eligibility for a position of public trust must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.⁴⁶

There is some evidence against mitigating Applicant's conduct. Applicant failed to maintain several accounts in a current status and a number of them became delinquent. Accounts totaling \$45,544 were placed for collection or charged off.

The mitigating evidence under the whole-person concept is more substantial. Applicant is a 54-year-old employee of a defense contractor. He has been serving as a financial technician (travel auditor) with his current employer since April 2019, after serving in a different position as a clerk with the same employer since July 2016. A 1983 high school graduate, Applicant received a bachelor's degree in 1990, and earned a number of additional credits towards a higher degree. He served on active duty as an infantry officer with the U.S. Marine Corps (USMC) from August 1992 until June 1998, when he accepted a regular commission, and continued serving with the USMC until he resigned his commission and received an honorable discharge as a major in June 2000. Applicant was deployed overseas to Kuwait, Korea, Japan, and Somalia, and while in the United States, was involved in counterdrug operations. He was granted a secret clearance in 1994, and has been occupying a position of public trust since 2016.

⁴⁶ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); see also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Applicant's finances appear to be much better, and it is anticipated that they will improve now that he has been installed into his new position with the civil service.

The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:⁴⁷

In evaluating Guideline F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts. However, an applicant is not required, as a matter of law, to establish that he [or she] has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he [or she] has ". . . established a plan to resolve his [or her] financial problems and taken significant actions to implement that plan." The Judge can reasonably consider the entirety of an applicant's financial situation and his [or her] actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) ("Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.") There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

Applicant has demonstrated a good track record of debt reduction and elimination efforts, resolving, or in the process of resolving, nearly all of his debts. As far as the \$3,582 in unidentified medical debts, Applicant must be credited with good-faith efforts to resolve them, but the absence of information regarding those debts has blocked his efforts to do so. Overall, the evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a position of public trust.⁴⁸ For all of these reasons, I conclude Applicant has successfully mitigated the trustworthiness concerns arising from his financial considerations. See SEAD 4, App. A, ¶¶ 2(d)(1) through AG 2(d)(9).

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:

FOR APPLICANT

⁴⁷ ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted).

⁴⁸ As noted above, while Applicant initially applied for a position of public trust, his current position with the civil-service is not a position of public trust, but rather a position that requires a secret clearance. The adjudicative standards for both are identical. My decision would be the same whether his position is a public trust position or requires access to classified information.

Subparagraphs 1.a. through 1.o.: For Applicant
Paragraph 2, Guideline E: FOR APPLICANT
Subparagraph 2.a.: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a position of public trust to support a contract with the DOD, or a security clearance. Eligibility is granted.

ROBERT ROBINSON GALES
Administrative Judge