



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ADP Case No. 20-00588
)
Applicant for Public Trust Position)

Appearances

For Government: Nicole Smith, Esq., Department Counsel
For Applicant: *Pro se*

04/09/2021

Decision

Harvey, Mark, Administrative Judge:

Applicant made sufficient effort to address his student and mortgage loans in light of his available financial resources. He misunderstood the scope of the questions about delinquent debts on his Questionnaire for National Security Positions or security clearance application (SCA), and he was not attempting to be deceptive about his finances when he failed to disclose his delinquent student loan debts. (Government Exhibit (GE) 1) Guideline F (financial considerations) trustworthiness concerns are mitigated, and Guideline E (personal conduct) trustworthiness concerns are refuted. Eligibility for access to sensitive information is granted.

Statement of the Case

On November 19, 2018, Applicant completed and signed an SCA. (Government Exhibit (GE) 1) On May 10, 2020, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue eligibility for a public trust position for Applicant. (HE 2) Specifically, the SOR set forth trustworthiness concerns arising under Guidelines F and E.

Applicant provided an undated response to the SOR and requested a hearing. (HE 3) On September 29, 2020, Department Counsel was ready to proceed. On October 30, 2020, the case was assigned to me. On February 25, 2021, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for March 9, 2021 using the U.S. Cyber Command video teleconference system. (HE 1) Applicant waived his right under the Directive to 15 days of notice of the date, time, and location of the hearing. (Tr. 10) His hearing was held as scheduled.

During the hearing, Department Counsel offered four exhibits; Applicant offered five exhibits; and all proffered exhibits were admitted into evidence without objection. (Tr. 14-21; GE 1-5; Applicant Exhibit (AE) A-AE E) On March 19, 2021, DOHA received a copy of the transcript of the hearing. Applicant provided three additional documents and several emails, which were admitted without objection (AE F-AE I) Department Counsel provided post-hearing comments about the materiality of Appellant's post-hearing documents by email on April 6, 2021. (AE I) The last exhibit was provided on April 7, 2021; there was no objection; and I admitted it into evidence. (AE I) The record closed on April 7, 2021. (Tr. 39, 46; AE I)

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript. ISCR and ADP decisions and the Directive are available at <https://ogc.osd.mil/doha/isp.html>.

Findings of Fact

In Applicant's SOR response, he admitted all of the SOR allegations. (HE 3) He also provided extenuating and mitigating information. (*Id.*) Applicant's admissions are accepted as findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant is a 39-year-old health service information technology specialist employed by the same defense contractor since December 2018. (Tr. 5, 22) He was employed from April 2018 to December 2018 at another company. He was employed in a food store from 2010 to October 2017. (Tr. 22) He has never served in the military. (Tr. 7) In 2000, Applicant graduated from high school. (Tr. 6) In 2013, he received an associate's degree in business administration. (Tr. 6, 25) In 2006, he married, and in April 2019, he was divorced. (Tr. 23) Custody of his six-year-old son is shared with his former spouse. (Tr. 7, 23) He does not pay or receive any child support or pay or receive any alimony. (Tr. 24)

Financial Considerations

Applicant had financial problems because of his son's medical problems. (Tr. 26) His son was born in 2014 and had a stroke. (Tr. 26) He was unemployed from October 2017 to April 2018. (Tr. 22, 26)

Applicant's SOR alleges nine Department of Education (DOE) student loan debts totaling \$59,802 that were placed for collection in the following amounts: ¶ 1.a (\$10,588); ¶ 1.b (\$10,289); ¶ 1.c (\$9,906); ¶ 1.d (\$5,990); ¶ 1.e (\$5,739); ¶ 1.f (\$5,060); ¶ 1.g (\$4,842); ¶ 1.h (\$3,109); and ¶ 1.i (\$4,279). The SOR also alleges his \$115,334 mortgage was at least 120 days delinquent in the amount of \$2,299.

Applicant provided three screen shots from his TransUnion Credit Report showing 16 DOE/Nelnet student loans with status "on time" and totaling \$83,673 as follows: \$10,674; \$10,372; \$9,986; \$6,038; \$5,785; \$5,274; \$5,101; \$4,881; \$4,506; \$4,311; \$3,336; \$3,296; \$3,187; \$3,187; \$3,132; and \$607. (Tr. 34; AE F) In March 2019, his \$676 federal income tax refund and his \$321 state income tax refund were diverted to address his student loan debt. (AE G) He provided eight monthly checking account statements from May 2019 to December 2019 showing \$5 payments to address his DOE student loan debts. (AE H) The payments were automatically deducted from his bank account. (Tr. 28; AE H) In December 2019, a new company purchased his student loans, and his automatic payments from his bank stopped. (Tr. 27-29) In 2020, he learned Nelnet had his student loan account, and in February or March 2020, he contacted Nelnet. (Tr. 29) Nelnet wanted \$400 monthly, and Applicant said he is paying \$20 to \$25 a month. (Tr. 30) He made some payments to show his good faith. (Tr. 34-35) He tried to maintain contact with his student loan creditors. (Tr. 26) The creditor informed Applicant that they are not collecting mandatory payments until August 2021 because of the CARES act; however, he has arranged for \$50 payments to begin on April 16, 2021. (AE I) He made his first \$50 payment on April 7, 2021. (*Id.*)

In 2018, Applicant's mortgage became delinquent. (Tr. 31) His December 30, 2019 credit report shows his last activity on his mortgage account was in October 2018. (Tr. 31) He said it became delinquent because of his separation from his spouse. (Tr. 31) His May 2020 mortgage statement shows his mortgage was current, and he had paid \$7,303 in 2020 to the mortgage company. (Tr. 30; AE B) His December 2020 mortgage statement shows he made payments totaling \$15,691 to address the mortgage, and escrow payments totaling \$7,356 for taxes and insurance in 2020. (*Id.*) His monthly mortgage and escrow payment is \$1,071. (*Id.*) His March 2021 mortgage statement shows a balance owed on his mortgage of \$110,095. (*Id.*) His mortgage is current. (*Id.*)

Applicant's net monthly income after deductions is \$1,750. (Tr. 31) His monthly mortgage payment is \$1,071. (AE B) He does not have a car payment as he purchases used vehicles. (Tr. 37-38) He has about \$300 available after paying his expenses. (Tr. 32) His son is remote learning. Applicant is high risk because of the Corona Virus and works at home. (Tr. 32) Applicant would like to obtain part-time employment after the economy returns to normal to increase his income. (Tr. 32) He has about \$2,000 in a savings account and \$50,000 in a retirement account. (Tr. 32-33)

Applicant was unemployed for a time while he cared for his son. He may have been able to obtain a deferment for up to three years in his student loan payments due to unemployment. See Ryan Lane, Student Loans, *How to Get an Unemployment Deferment for Your Student Loans*, Nerd Wallet, <https://www.nerdwallet.com/article/loans/student-loans/unemployment-deferment-student-loans>. (HE 4) However, in order to obtain an unemployment deferment, a debtor must be receiving unemployment benefits or seeking a full-time job to get this deferment. (*Id.*) Applicant did not present evidence that he sought an unemployment deferment in student loan payments.

Under the Federal Government's COVID-19 relief rules, Applicant's student loan payments have been deferred since March 13, 2020:

To provide relief during the COVID-19 emergency, the U.S. Department of Education (ED) has stopped collection activity on defaulted federally owned student loans and/or grant overpayments. In addition, interest is temporarily set at 0% on defaulted federally owned student aid debt. This 0% interest and stopped collections period will last from March 13, 2020, through at least Sept. 30, 2021. You can still make payments if you choose. (U.S. Dept. of Education website, *Don't get discouraged if you're in default on your federal student loan*, <https://studentaid.gov/manage-loans/default/get-out>. (HE 5)

The DOE has provisions for a loan rehabilitation agreement with nominal monthly payments:

Under a loan rehabilitation agreement, your loan holder will determine a reasonable monthly payment amount that is equal to 15 percent of your annual discretionary income, divided by 12. Discretionary income is the amount of your adjusted gross income (from your most recent federal income tax return) that exceeds 150 percent of the poverty guideline amount for your state and family size. You must provide documentation of your income to your loan holder. (*Id.*) See also U.S. Dept. of Education website, *Coronavirus and Forbearance Info for Students, Borrowers, and Parents*, <https://studentaid.gov/announcements-events/coronavirus>. (HE 6)

The annual poverty guideline in Applicant's state for a two-person family is \$17,420. Wisconsin Dept. of Health Services website, *Federal Poverty Level Guidelines*, <https://www.dhs.wisconsin.gov/medicaid/fpl.htm>. (HE 6) Applicant's income is below 150 percent of the poverty guideline of \$26,130.

After completion of the loan rehabilitation agreement, a debtor can enroll in an "income-driven repayment plan." U.S. Dept. of Education, *If your federal student loan payments are high compared to your income, you may want to repay your loans under an income-driven repayment plan*, <https://studentaid.gov/manage-loans/repayment/plans/income-driven>. (HE 7) Under the "income-driven repayment plan" a debtor starts with payments of 15 percent of their discretionary income, which is calculated by subtracting the state poverty guideline amount from income. As income increases,

payments increase until the debt is either paid or 20 years of payments elapse. (*Id.*) Any debt left after 20 years of payments is forgiven. If his income is below the 150 percent threshold, he would not need to make any payments to address his student loan debt.

Applicant paid several non-SOR debts, and he showed he had a zero balance on a credit card. He made sporadic minimal payments over the last several years to address his student loan debts; however, he did not make sufficient payments to keep the student loan debts current. The magnitude of his student loan debts are expected to continue to increase as he currently lacks the income to pay down his student loan debts.

Personal Conduct

SOR ¶ 2.a alleged that Section 26, “**Financial Record – Delinquency Involving Routine Accounts**,” of Applicant’s November 19, 2018 SCA asked whether in the previous seven years Applicant had any bills or debts turned over to a collection agency, or whether he had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed. Applicant answered “yes” and disclosed a medical collection debt he subsequently paid. In his SCA, he did not disclose his student loans that were in collections status. SOR ¶ 2.a did not allege that he failed to answer truthfully whether he had any debts that were more than 120 days past due.

Applicant’s November 27, 2018 credit report indicates he has 16 DOE student loans with balances ranging from \$10,057 to \$586; the last activity on all 16 accounts is April 2018; and date of report to the credit reporting company is November 2018. (GE 3 at 3-7) The status is “student loan permanently assigned to government; collection, educational.” (*Id.*) The November 27, 2018 credit report does not indicate whether the DOE is a “collection agency.” (GE 3) DOE contracts with multiple companies for collection services. See U.S. Dept. of Education website, *If you default on your federal student loan, the loan may be placed with a collection agency, which will then contact you to obtain payment*, available at <https://studentaid.gov/manage-loans/default/collections>.

Applicant’s November 27, 2018 credit report also shows 16 DOE accounts, 120 days or greater past due, the last activity on accounts in January 2018, with zero balances and accounts transferred and closed. (GE 3 at 7-11) This credit report shows two Navient student loans with statuses of “pays as agreed,” and accounts transferred and closed. (*Id.* at 15) It shows six DOE accounts with the balance dates of May 2012, zero balances, and statuses of transferred, and pays as agreed. (*Id.* at 16-17) The only account in the collection section is a medical debt that is a “paid collection” with a zero balance. (*Id.* at 18)

Applicant said he was unaware that his student loans were delinquent more than 120 days at the time he completed his SCA. (Tr. 35) He checked a Credit Karma credit report before completing his SCA, and it did not list his delinquent mortgage or student loans as having gone to collections. (Tr. 35, 41) He did not retain a copy of the Credit Karma credit report that he used to prepare his SCA. (Tr. 40) His creditors wrote and said they were going to send the student loans to collections or charge them off; however, they

did not actually take those actions. (Tr. 36) He regretted his reliance on the Credit Karma report and his decision not to list his student loans on his SCA. (Tr. 42-43)

As to his mortgage, Applicant said he stopped making his payment in December 2018, and it was not delinquent when he filled out his SCA. (Tr. 36) Applicant said he answered truthfully on his SCA based on his Credit Karma credit report. He believed his debts changed to collection or delinquent status after he completed his SCA. (Tr. 18-19, 35-36) He did not intend to conceal the fact that his student loans had gone to collections. He admitted his delinquent debts during his OPM interview. (Tr. 18)

Character Evidence

Applicant's supervisor described him as a "very kind, friendly, hard-working, and personable individual." (AE A) "His work ethic is professional and appropriate, and he is eager to be a contributing member . . . and looks forward to taking on new challenges, as well as getting involved wherever he can." (*Id.*) She indicated he is calm, courteous, efficient, dedicated, and helpful. (*Id.*) He makes important contributions to mission accomplishment. (*Id.*) His 2020 performance evaluation describes his exceptional productivity and contributions to his employer. (AE C)

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 [public trust position]." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Government's authority to restrict access to classified information applies similarly in the protection of sensitive, unclassified information. As Commander in Chief, the President has the authority to control access to information bearing on national security or other sensitive information and to determine whether an individual is sufficiently trustworthy to have access to such information. See *Id.* at 527.

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. DOD contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made.

When evaluating an applicant's suitability for a public trust position, an 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 an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to sensitive information. See *Egan*, 484 U.S. at 531. “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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s suitability for a public trust position. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her [access to sensitive information].” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance [or trustworthiness] determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

The protection of the national security and sensitive records is of 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.” 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.”

Analysis

Financial Considerations

AG ¶ 18 articulates the trustworthiness concern for financial problems:

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. . . . An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. . . .

The Appeal Board explained the scope and rationale for the financial considerations trustworthiness concern in ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012) (citation omitted) as follows:

This concern is broader than the possibility that an applicant might knowingly compromise [sensitive] information in order to raise money in satisfaction of his or her debts. Rather, it requires a Judge to examine the totality of an applicant's financial history and circumstances. The Judge must consider pertinent evidence regarding the applicant's self-control, judgment, and other qualities essential to protecting the national secrets as well as the vulnerabilities inherent in the circumstances. The Directive presumes a nexus between proven conduct under any of the Guidelines and an applicant's [eligibility for a public trust position].

AG ¶ 19 includes disqualifying conditions that could raise a trustworthiness concern and may be disqualifying in this case: "(a) inability to satisfy debts"; and "(c) a history of not meeting financial obligations." Applicant's history of not timely paying his mortgage and student loan debts when due establishes AG ¶¶ 19(a) and 19(c).

AG ¶ 20 lists financial considerations mitigating conditions which may be applicable in this case:

(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; 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.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's [eligibility for a public trust position], there is a strong presumption against the grant or maintenance of [eligibility for a public trust position]. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising [trustworthiness] concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in [public trust position] decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to [sensitive] information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

Applicant presented some important mitigating information. He was unemployed for six months. He was unable to work outside his home because he was taking care of his handicapped son. He was divorced. He is underemployed, and he lacks the income to pay all of his debts unless he obtains an income-driven repayment plan for his student loans. There is no evidence that he was aware of the existence of the income-driven repayment plan for his student loans. These are circumstances beyond his control that adversely affected his finances. "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. Applicant took reasonable actions to maintain contact with his creditors, including making \$5 monthly payments to his student-loan creditor.

Two Appeal Board decisions illustrate the analysis for applying AG ¶¶ 20(a) and 20(b) when an Applicant lacks the income to address debts. In ISCR Case No. 09-08533 (App. Bd. Oct. 6, 2010), the applicant had \$41,871 in delinquent credit card debt and defaulted on a home loan generating a \$162,000 delinquent debt. *Id.* at 2. That applicant filed for bankruptcy the same month the Administrative Judge issued her decision. *Id.* at 1-2. The applicant in ISCR Case No. 09-08533 was recently divorced, had been unemployed for 10 months, and had childcare responsibilities. Her former husband was inconsistent in his child support payments to her. The Appeal Board determined that AG ¶ 20(a) was "clearly applicable (debt occurred under such circumstances that it is unlikely to recur and [the debt] does not cast doubt on the individual's current reliability, trustworthiness, or good judgment)" even though that applicant's debts were unresolved at the time the Administrative Judge's decision was issued. *Id.* at 3. The Appeal Board also decided that the record evidence raised the applicability of AG ¶ 20(b) because of the absence of evidence of irresponsible behavior, poor judgment, unreliability, or lack of trustworthiness. *Id.* at 4. It is noteworthy that Applicant has the burden of proving the

applicability of any mitigating conditions, and the burden to disprove a mitigating condition never shifts to the Government.

Similarly, in ISCR Case No. 08-06567 (App. Bd. Oct. 29, 2009) the Appeal Board addressed a situation where an applicant was sporadically unemployed and lacked the ability to pay his creditors. The Appeal Board noted “it will be a long time at best before he has paid” all of his creditors. *Id.* at 3. The applicant was living on unemployment compensation at the time of his hearing. The Appeal Board explained that such a circumstance was not necessarily a bar to having access to classified information stating:

However, the Board has previously noted that an applicant is not required to be debt-free nor to develop a plan for paying off all debts immediately or simultaneously. All that is required is that an applicant act responsibly given his [or her] circumstances and develop a reasonable plan for repayment, accompanied by “concomitant conduct,” that is, actions which evidence a serious intent to effectuate the plan.

ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009) (citing ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008)). The applicant in ISCR Case No. 08-06567 used his limited resources to (1) resolve some of his debts; (2) had a repayment plan for the remaining debts; and (3) took “reasonable actions to effectuate that plan.” *Id.* The Appeal Board remanded the Administrative Judge’s decision because it did not “articulate a satisfactory explanation for his conclusions,” emphasizing the Administrative Judge did “not explain[] what he believes that applicant could or should have done under the circumstances that he has not already done to rectify his poor financial condition, or why the approach taken by applicant was not ‘responsible’ in light of his limited circumstances.” *Id.*

The timing of the resolution of Applicant’s debts is a pertinent consideration. The Appeal Board has observed, “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.” ADP Case No. 17-00263 at 3 (App. Bd. Dec. 19, 2018) (citing ISCR Case No. 16-03122 at 3-4 (App. Bd. Aug. 17, 2018)). Applicant brought his mortgage to current status before the SOR was issued.

The Appeal Board has explained what constitutes a “good faith” effort to repay overdue creditors or otherwise resolve debts under AG ¶ 20(d):

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) in order to claim the benefit of [the “good faith” mitigating condition].

ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (citations, footnote, and last quotation marks omitted).

At the time of his hearing, it was evident that Applicant did not understand how to bring his student loans to current status. Taking into consideration the level of his knowledge about finances, particularly student loans, Applicant took reasonable and responsible actions to resolve his debts, establishing his good faith. Based on Applicant’s credible and sincere promise to pay his debts and his track record of paying his debts, future new delinquent debt “is unlikely to recur and does not cast doubt on [Applicant’s] current reliability, trustworthiness, or good judgment.” AG ¶ 20(a).

Application of AG ¶¶ 20(a), 20(b), and 20(d) is warranted. Applicant’s financial situation was damaged by circumstances partially or fully beyond his control. He acted responsibly by paying as many debts as possible. Although there is limited evidence of record that he established and maintained contact with his creditors, his financial problem is being resolved and is under control. Applicant will conscientiously endeavor to maintain his financial responsibility, and he will establish a student loan payment plan and bring his student loans to current status. His efforts are sufficient to mitigate financial considerations trustworthiness concerns.

Personal Conduct

AG ¶ 15 explains why personal conduct is a trustworthiness concern stating:

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.

AG ¶ 16 lists one condition that could raise a trustworthiness concern and may be disqualifying in this case:

(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.

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.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)). The Appeal Board indicated:

When evaluating the deliberate nature of an alleged falsification, a Judge should consider the applicant's *mens rea* in light of the entirety of the record evidence. See, e.g., ADP Case No. 15-07979 at 5 (App. Bd. May 30, 2017). As a practical matter, a finding regarding an applicant's intent or state of mind may not always be based on an applicant's statements, but rather may rely on circumstantial evidence. *Id.* Additionally, the Appeal Board gives deference to a Judge's credibility determinations. Directive ¶ E3.1.32.1.

ADP Case No. 17-03932 at 3 (App. Bd. Feb. 14, 2019).

The SOR alleges Applicant "falsified material facts" in his November 19, 2018 SCA when he failed to disclose his delinquent mortgage and student loans in collections. This means the Government alleged Applicant "falsely created or altered in order to deceive." Merriam Webster Dictionary, available at <https://www.merriam-webster.com/dictionary/falsified>. Applicant admitted that he erred when he failed to disclose his delinquent student loan debts on his SCA. His rationale for not disclosing these delinquent debts was his reliance on a summary credit report, Credit Karma. Before completing his SCA, he checked Credit Karma for reportable financial information. There was no mention of his mortgage or student loans. Applicant is unsophisticated in financial matters.

Applicant's November 19, 2018 SCA asked whether in the previous seven years Applicant had any bills or debts turned over to a collection agency, or whether he had any account or credit card suspended, charged off, or cancelled for failing to pay as agreed. It is noteworthy, that Applicant's 2018 credit report does not indicate that DOE turned his student loans over to a collection agency. Evidently, DOE retained his student loans and classified them as being in collections. It is unclear whether DOE engages in collection activity. His credit report only put one medical account in the collections part of the report, and Applicant disclosed that debt on his SCA.

There were no instances of inconsistent statements that damaged his credibility, except for his failure to disclose his student loans on his SCA. See, e.g., ISCR Case No. 18-02181 at 3 (App. Bd. Aug. 19, 2019); ISCR Case No. 14-02567 at 5 (App. Bd. Oct. 5, 2015); ISCR Case No. 10-09035 at 6-7 (App. Bd. June 10, 2014). He explained why he did not disclose this negative financial information. I find Applicant's denial of intent to deceive the Government about his debts to be credible. Personal conduct trustworthiness concerns are refuted.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for access to sensitive information 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 AG ¶ 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 AG ¶ 2(c), "[t]he ultimate determination" of whether to grant access to a public trust position and access to sensitive information "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guidelines E and F are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 39-year-old health service information technology specialist employed by the same defense contractor since December 2018. In 2013, he received an associate's degree in business administration. In April 2019, he was divorced. His finances were harmed by his divorce, underemployment, unemployment, and his son's medical issues. Nevertheless, he acted responsibly by bringing his mortgage to current status. He owes about \$83,000 in student loans which are current due to the CARES Act. He has a history of delinquent student loans due to lack of income; however, there is a mechanism for maintaining his student loans in current status, that is, the "income-driven repayment plan." It would take 20 years, but he would be able to resolve his student loans.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Applicant refuted the trustworthiness concerns under Guideline E, and he mitigated the trustworthiness concerns under Guideline F.

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
Subparagraphs 1.a through 1.j:	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 national security to grant or continue Applicant's eligibility for a public trust position. Eligibility for a public trust position is granted.

Mark Harvey
Administrative Judge