

advising Applicant of the basis for that decision—trustworthiness concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On April 11, 2007, after the hearing, Administrative Judge Mary E. Henry granted Applicant’s request for a trustworthiness determination. Department Counsel filed a timely appeal pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Department Counsel raised the following issues on appeal: whether the Judge erred in her application of the Guideline F mitigating factors; whether the Judge’s whole person analysis is unsupported by the record evidence; and whether the Judge’s finding that Applicant did not falsify her application is unsupported by record evidence. Finding error, we reverse.

Whether the Record Supports the Administrative Judge’s Factual Findings

The Judge made the following pertinent findings of fact: at the time of the hearing, Applicant was a 34 year-old employee of a government contractor. Over the course of several years, Applicant amassed a number of debts. She had two automobiles which were repossessed in 2003, one in the amount of \$7,149 and the other in the amount of \$13, 567. Applicant has been paying \$100 a month on the smaller of the two. She testified that she was not aware that repossession did not necessarily extinguish a debt.

She also owes \$102 for an internet bill; \$987 for a mail order account; \$92 for a “dish network” bill; \$348 for a collection account; \$2,893 for a loan; \$159 for cable services; and \$135 for medical services. None of these bills had been paid at the close of the record. Applicant also owes \$386 for a collection account; \$1,092 for a credit card; and \$1,666 for a store account. Applicant either does not recognize these debts or disagrees with the amounts owed.

Applicant married in 1999. During the course of the marriage, Applicant’s husband’s working hours were decreased to 30 hours a week, which had a financial impact on the family. In 2001, the couple separated. In 2006 Applicant hired a credit counseling agency. This agency assisted her in getting some debts removed from her credit report.

Whether the Record Supports the Administrative Judge’s Ultimate Conclusions

The Appeal Board may reverse the Judge’s decision to grant, deny, or revoke a trustworthiness determination if it is arbitrary, capricious, or contrary to law. *See* Directive ¶¶ E3.1.32.3 and E3.1.33.3. Once the government presents evidence raising trustworthiness concerns, the burden shifts to the applicant to establish any appropriate mitigating conditions. *See* Directive ¶ E3.1.15. “The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole.” *See* ADP Case No. 05-12037 at 3 (App. Bd. May 10, 2007). A trustworthiness determination must be guided by common sense in light of the record as a whole. *See* Directive ¶ E2.2.3.

Regarding Guideline F, the Judge concluded that Applicant has met her burden of persuasion concerning Financial Consideration Mitigating Condition (FCMC) 4,¹ which contemplates that an applicant has engaged the services of some variety of debt management agency in an effort to gain control over his or her financial situation. *See, e. g.*, ISCR Case No. 03-23765 at 3 (App. Bd. Jan. 31, 2006) (“The Administrative Judge noted Applicant’s efforts to deal with his overdue debts, including his receiving debt management credit counseling . . .”) However, examination of Applicant Exhibit (AE) U reveals that, in this case, the agency which Applicant hired merely attempts to remove “errors, misrepresentations, or unverifiable information” from a client’s credit report. Applicant’s contract with this agency states explicitly, however, that “[t]his is not a debt consolidation or bill payment program.” AE U at 2. All this agency appears to do is to have matters removed from a client’s credit report which, by law, may be so removed. It does not go further and attempt resolution of debts that are legitimately the client’s own. Therefore, the Judge erred to the extent that she concluded that Applicant established FCMC 4.

The Judge also gave Applicant some credit for the fact that her financial difficulties were exacerbated by her husband’s loss of income² and that she has not amassed “significant, new delinquent debt” over the three years preceding the decision.³ Additionally, the Judge noted that most of her unpaid debts are now beyond the statute of limitations, removing an incentive for Applicant to violate her position of trust in exchange for debt forgiveness or repayment.

However, we also note contrary record evidence, principally that Applicant’s relatively extensive debts are ongoing and that she has made minimal efforts at repayment. Indeed, other than a plan to pay off the remaining debt on one of her repossessed cars, Applicant has made no appreciable effort in this regard. Applicant stated her intent to pay her debts; however, “promises to pay . . . [are] not a substitute for a consistent record of timely remedial action.” ISCR Case No. 02-31872 at 4 (App. Bd. May 24, 2005); *see also* ISCR Case No. 01-08410 at 3 (App. Bd. May 8, 2002) (A “promise to pay off unresolved debts in the future does not constitute evidence of reform or rehabilitation . . .”) Applicant’s past failure seriously to approach creditors⁴ and her failure to engage the services of a debt management agency vitiate the mitigating force of her husband’s job problems. That is, while his loss of income may constitute a situation that was outside Applicant’s control, they did not relieve Applicant of the responsibility to take timely and reasonable steps to address her financial problems. In any event, Applicant’s history of bad debt is extensive and predates in part and post dates in part her marital difficulties. *See* Tr. at 59. Additionally, reliance upon legal defenses such as the statute of limitations does not necessarily demonstrate prudence, honesty, and reliability; therefore, such reliance is of diminished probative value in resolving

¹Directive ¶ E2.A6.1.3.4.

²Directive ¶ E2.A6.1.3.3. “The conditions that resulted in the behavior were largely beyond the person’s control . . .”

³*See* Directive ¶ E2.A6.1.3.1. “The behavior was not recent.”

⁴Applicant claimed that she did not realize that she had the large number of delinquent debts alleged in the SOR. The Judge found this claim credible, holding in favor of Applicant on Guideline E allegations of falsification of her public trust questionnaire as to the existence of debts over 90 and 180 days respectively. Assuming without deciding that the Judge’s finding is sustainable, such lack of awareness impugns Applicant’s judgment and reliability. *See* ISCR Case No. 01-13815 at 3 (App. Bd. Jan. 8, 2003) (Reasons underlying a failure to pay debt relevant to evaluating an applicant’s reliability).

trustworthiness concerns arising out of financial problems. *See, e.g.*, ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

Read in light of Applicant's history of bad debts and the scarce evidence of timely remedial action, the record as a whole does not support the Judge's holding that Applicant has met her burden of persuasion "to grant Applicant eligibility for assignment to sensitive duties." Decision at 11. We conclude that the Judge's favorable trustworthiness determination is arbitrary, capricious, and contrary to law. In light of this conclusion, we need not address the issue concerning Guideline E.

Order

The Judge's favorable trustworthiness determination is REVERSED.

Signed: Michael Y. Ra'anan

Michael Y. Ra'anan
Administrative Judge
Chairman, Appeal Board

Signed: Jean E. Smallin

Jean E. Smallin
Administrative Judge
Member, Appeal Board

Signed: James E. Moody

James E. Moody
Administrative Judge
Member, Appeal Board