



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



In the matter of:

Applicant for Public Trust Position

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ADP Case No. 14-02204

Appearances

For Government: Caroline E. Heintzelman, Esq., Department Counsel
For Applicant: *Pro se*

02/22/2016

Decision

Harvey, Mark, Administrative Judge:

Applicant’s statement of reasons (SOR) alleges four delinquent student loan debts totaling \$76,724. On January 29, 2016, the creditor wrote that the four student loan debts were combined; the monthly payment is \$250; and they are current. Applicant and his spouse’s other student loan debts are either in rehabilitation or in current status. He promised to pay his student loan debts, and he has a track record of paying his current debts and expenses. Financial considerations concerns are mitigated. Eligibility for a public trust position is granted.

Statement of the Case

On September 27, 2012, Applicant signed an Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86). (Government Exhibit (GE) 1) On May 19, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, and modified; DOD Regulation 5200.2-R, *Personnel Security Program*, dated January 1987, as amended (Regulation); and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleges trustworthiness concerns under Guideline F (financial considerations). (HE 2) The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with national security to grant or continue Applicant's eligibility to occupy a public trust position, which entails access to sensitive information. (HE 2) The DOD CAF recommended referral to an administrative judge to determine whether such access to sensitive information should be granted, continued, denied, or revoked. (GE 1)

On June 17, 2015, Applicant responded to the SOR allegations and requested a hearing. (HE 3) On October 16, 2015, Department Counsel indicated she was ready to proceed. On October 27, 2015, the case was assigned to me. On December 9, 2015, the Defense Office of Hearings and Appeals issued a hearing notice setting the hearing for January 13, 2016. The hearing was held as scheduled. At the hearing, the Government provided 4 exhibits, and Applicant offered 10 exhibits, which were admitted into evidence without objection. (Tr. 16-23; GE 1-4; Applicant's Exhibit (AE) A-J) On January 22, 2016, I received a transcript of the hearing (Tr.). On February 5, 2016, Applicant provided one exhibit consisting of 66 pages, which was admitted into evidence without objection. (AE K) The record closed on February 11, 2016. (Tr. 45-46)

Findings of Fact¹

In his Answer to the SOR, Applicant admitted that he was responsible for the four student loans in the SOR, and he denied that they were delinquent. (HE 3) His admissions are accepted as findings of fact.

Applicant is a 33-year-old medical-enrollment specialist, who has been working for his employer since October 2013. (Tr. 9, 25) In 2000, he graduated from high school. (Tr. 6) In 2006, Applicant received a bachelor of arts degree. (Tr. 7) In 2010, he married, and he and his spouse have a two-year-old child. (Tr. 8) He has never served in the military. (Tr. 8) There is no evidence of reportable criminal offenses, alcohol or drug abuse, or violations of his employment rules.

Financial Considerations

Applicant's financial problems were caused by three circumstances: (1) Applicant and his spouse moved to a different state to enable them to care for her father, who had two strokes; (2) Applicant's spouse had cancer, which generated some medical bills; and (3) Applicant and his spouse had low incomes, were somewhat underemployed, and had excessive student loan debt. (AE J; AE K)

Applicant's only delinquent debts were in the realm of student loans. He disclosed delinquent student loans on his 2012 SF 86, and they are documented in his credit report. (GE 1-4) At his hearing, Applicant was unable to explain the convoluted

¹ Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

history of his and his spouse's student loans from 2007 to present. I requested that Applicant provide two years of payment history for his and his spouse's student loans. (Tr. 44-45) After his hearing, Applicant provided additional documentation which shows the four creditors for their student loans have indicated that their student loans are all current or in rehabilitation programs at this time. Applicant and his spouse's total student loan debt is about \$220,000.

Applicant graduated from college in 2006, and his student loans were deferred for the first two years. (Tr. 28) The four student loans alleged in the SOR totaled \$76,724, and were listed in SOR ¶ 1.a for \$23,600; ¶ 1.b for \$13,713; ¶ 1.c for \$7,826; and ¶ 1.d for \$31,585. At various times over the last eight years, Applicant's SOR student loans were in deferred status three times, in repayment status five times, in forbearance status once, in grace status once, and in default status in 2015, which resulted in them being placed on the SOR. (AE K at 26-37) Each of the four loans has a different payment history. Applicant consistently made \$200 monthly payments to address his student loans for several years. (Tr. 29) A creditor's transaction audit report from March 2012 to January 2016 showed numerous payments. (AE K at 41-45) The four student loans were combined into one account in 2015. The balance owed in April 30, 2015, was \$77,241, and his required monthly payment was \$250. (SOR response) The balance owed on January 29, 2016, was \$77,186 and the monthly payment was \$250. (AE K at 38) Applicant's bank makes automatic \$250 monthly payments from Applicant's bank account, and he has been making those payments for two years. (Tr. 39) At the current rate of payment, it will be many years before the SOR-listed student loans debts will be paid.

Federal tax forms issued by creditors show that in 2009, Applicant paid \$5,820 in student loan interest. (AE E at 4) In 2011, Applicant paid \$5,376 in student loan interest. (AE A at 2) The amount of student loan interest paid in other years is not part of the record.

Applicant's parents paid part of his student loans, as they are cosigned on some of his loans. (Tr. 43) His parents paid one of Applicant's student loans for \$56,000 on an unspecified date by taking out a second mortgage on their home. (AE J)

Applicant has a non-SOR student loan with a balance of \$44,103 (original balance for two loans were \$23,279 and \$7,200 with a 7.25 percent interest rate on both). (Tr. 40; AE K at 1, 46-48) As of January 2016, Applicant made seven monthly payments of \$5 as part of the creditor's loan rehabilitation program. (AE K at 46-48)

Applicant's spouse has five student loans that were combined, and are owed to one creditor. (AE K at 51) The total for the five student loans is about \$34,000. Applicant and his spouse consistently made \$350 monthly payments from June 2014 to January 2016 to address this debt. (Tr. 34; AE A; AE K at 52-57, 60) From July 2013 to June 2014, her monthly payments were about \$175. (AE K at 59-61) On January 21, 2016, the creditor wrote the account was current and in good standing. (AE K at 51)

Applicant's spouse has another student loan from a bank for about \$65,127. In January 2016, the bank wrote that this account was current. (Tr. 38; AE K at 66-67) In 2008, the loan balance was \$46,592. (AE K at 66) Payments were not made from October 2012 to June 2015, when payments resumed. (AE K at 66)

Applicant and his spouse's joint federal income tax returns show the following income and tax information:

Tax Year	Adjusted Gross Income (AGI)	Taxes Withheld	Taxes Refunded	Student Loan Interest Deduction	
2010	\$36,495	\$2,368	\$1,339		AE K at 4-5
2011	\$31,926	\$1,496	\$203		AE K at 6-7
2012	\$34,205	\$1,911	\$443	\$2,500	AE K at 8-9, 11
2013	\$47,540	\$4,993	\$3,902	\$2,500	AE K at 16-19
2014	\$67,139	\$8,223	\$4,697	\$2,500	AE K at 20-25

Applicant received informal credit or financial counseling from his pastor, and he provided a budget. (Tr. 27, 47; AE K at 1-3) His taxes are current. (Tr. 27) Applicant's roommate from 2006 to 2008 described him as frugal and conscientious about paying his debts. (AE I) Applicant's father described him as very honest and focused on doing what is right. (AE J)

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.

Positions designated as ADP I and ADP II are classified as "sensitive positions." Regulation ¶¶ C3.1.2.1.1.7 and C3.1.2.1.2.3. "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." Regulation ¶ C6.1.1.1. Department of Defense contractor personnel are afforded the right to the procedures contained in the Directive before any final unfavorable access determination may be made. See Regulation ¶ C8.2.1.

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. Directive ¶ E3.1.15. 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).

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."

Analysis

Financial Considerations

AG ¶ 18 articulates the trustworthiness concern relating to financial problems:

Failure or inability 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 [sensitive] information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 provides two disqualifying conditions that could raise a trustworthiness concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" and "(c) a history of not meeting financial obligations." In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

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.

(internal citation omitted). Applicant's history of delinquent debt is documented in his SF 86, credit reports, and SOR response. Applicant's SOR alleges four delinquent student loans totaling \$76,724, and the record establishes that on several occasions these student loan debts were delinquent. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

(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, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;² and

²The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

(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.

The Appeal Board concisely 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 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).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶¶ 20(a) to 20(d) are applicable. Resolution of Applicant's SOR debts and maintenance of his financial responsibility were delayed by underemployment, moving to a different state, and his spouse's medical problems, which are circumstances largely beyond his control. Applicant and his spouse have about \$220,000 in student loan debt. Some of those student loans have occasionally been in delinquent status. All of that student loan debt is in current status or in a rehabilitation status. Applicant and his spouse are both employed outside their home, and their budget has the additional pressure of a two-year-old child to care for, which includes day care expenses. It will be many years before their student loan debt is paid.

In ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009) the Appeal Board addressed a situation where an applicant, who had been sporadically unemployed and lacked the ability to pay his creditors, noting that "it will be a long time at best before he has paid" all of his creditors. The applicant was living on unemployment compensation

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].

(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)).

at the time of his hearing. The Appeal Board explained that such a circumstance was not necessarily a bar to having access to classified or sensitive 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. See ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008).

ISCR Case No. 08-06567 at 3 (App. Bd. Oct. 29, 2009). 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.*

Applicant has made some progress on his student loans in the last year. He understands what he must do to establish and maintain his financial responsibility.³ Applicant admitted responsibility for and took reasonable and responsible actions to resolve as much of his debts as was possible based on his circumstances. There are clear indications the problem is being resolved and is under control. His efforts are sufficient to mitigate financial considerations trustworthiness concerns.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant’s eligibility for a public trust position 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(a):

(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

³The Appeal Board has indicated that promises to pay off delinquent debts in the future are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner. ISCR Case No. 07-13041 at 4 (App. Bd. Sept. 19, 2008) (citing ISCR Case No. 99-0012 at 3 (App. Bd. Dec. 1, 1999)).

for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

The ultimate determination of whether to grant eligibility for a public trust position must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a 33-year-old medical-enrollment specialist, and he has worked for his employer since October 2013. In 2006, Applicant received a bachelor of arts degree. There is no evidence of reportable criminal offenses, alcohol or drug abuse, or violations of his employment rules. He is sufficiently mature to understand and comply with his public trust responsibilities.

Applicant is credited with admitting responsibility for his student loan debts on his SF 86. All of Applicant's and his spouse's student loans are current or in rehabilitation status. His parents paid one of Applicant's student loans for \$56,000. His spouse's illness, underemployment, and the need to move to a different state contributed to his financial problems. These are all circumstances largely beyond his control. The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

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 has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has . . . established a plan to resolve his 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 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.

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

Applicant understands what he needs to do to establish and maintain his financial responsibility. He and his spouse have all of their debts in paid, current, or rehabilitation status. He took reasonable actions under his particular financial

circumstances to address his delinquent debts. His overall history shows a “meaningful track record” of debt repayment. I am confident he will continue his establishment and maintenance of his financial responsibility.⁴

I have carefully applied the law, as set forth in *Egan*, the Directive, the Regulation, and the AGs, to the facts and circumstances in the context of the whole person. I conclude financial considerations concerns are mitigated. Eligibility for a public trust position is granted.

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 to 1.d:	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 Applicant eligibility for a public trust position. Eligibility for access to sensitive information is granted.

Mark Harvey
Administrative Judge

⁴Of course, the Government may re-validate Applicant's financial status at any time through credit reports, investigation, and additional interrogatories. Approval of access to sensitive information now does not bar the Government from subsequently revoking it, if warranted. “The Government has the right to reconsider [trustworthiness] significance of past conduct or circumstances in light of more recent conduct having negative [trustworthiness] significance.” ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012). Violation of a promise made in a [trustworthiness] context to pay legitimate debts also raises judgment concerns under Guideline E, and may support future revocation of a public trust position. An administrative judge does not have “authority to grant an interim, conditional, or probationary clearance.” ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012) (citing ISCR Case No. 10-03646 at 2 (App. Bd. Dec. 28, 2011)). See *also* ISCR Case No. 04-03907 at 2 (App. Bd. Sep. 18, 2006) (stating, “The Board has no authority to grant [a]pplicant a conditional or probationary [public trust position] to allow her the opportunity to have a [public trust position] while she works on her financial problems.”). This footnote does not imply that this Applicant’s public trust position is conditional.