DATE: December 13, 2007

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| In re: | ) | |
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| ---------- | ) | ISCR Case No. 06-25768 |
| SSN: ---------- | ) | |
| | ) | |
| Applicant for Security Clearance | ) | |

**DECISION OF ADMINISTRATIVE JUDGE**
**LEROY F. FOREMAN**

## APPEARANCES

**FOR GOVERNMENT**
Emilio Jaksetic, Esq., Department Counsel

**FOR APPLICANT**
V. Elizabeth Powell, Esq.

## SYNOPSIS

Applicant used credit cards to pay $55,000 in margin calls after a stock market downturn in 1997. He paid off all the credit card accounts except two in which he disputed the balance due. He successfully compromised one of the disputed credit card debts and the creditor withdrew its claim in the other. He disputed a cell phone bill and a medical bill, and both disputes were resolved. Security concerns based on financial considerations are mitigated. Clearance is granted.

## STATEMENT OF THE CASE

On May 15, 2003, Applicant applied for a security clearance. On May 10, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive); and the revised adjudicative guidelines (AG) approved by the President on December 29, 2005, and implemented effective September 1, 2006. The SOR alleges security concerns under Guideline F (Security Considerations).

Applicant answered the SOR in writing on July 6, 2007, admitted all but one of the allegations, offered explanations, and requested a hearing. The case was assigned to me on September 24, 2007. Scheduling was delayed because Applicant had not received a response to his request for documents from the Office of Personnel Management and the Department of the Air Force. After two conference calls with Department Counsel and Applicant's counsel on October 1 and October 11, 2007, I set the hearing for October 31, 2007. The case was heard as scheduled. I held the record open until November 16 to enable Applicant to submit additional documentary evidence. I received his evidence on November 7, 2007, and it is admitted as Applicant's Exhibit (AX) 9.[1] Department Counsel's response to Applicant's additional evidence is attached to the record as Hearing Exhibit I. DOHA received the transcript (Tr.) on November 9, 2007.

## FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 50-year-old electrical engineer employed by a defense contractor. He has worked for his current employer since August 2001. While employed full-time, he attended off-duty graduate-level classes from the fall of 2001 to the fall of 2004, worked on his thesis from 2004 to 2006, and received a master's degree in electrical engineering in September 2006 (Tr. 46; AX 1). He has held a security clearance since April 1991, but it was suspended pending adjudication of his application to continue it (Tr. 16).

When the stock market dropped drastically in the fall of 1997, Applicant used several credit cards to pay about $55,000 in margin calls (Tr. 48-50). He used credit cards because he did not have any equity in his home or any other available assets (Tr. 61). He usually made the minimum required payments on the credit cards (Tr. 95). He obtained extensions of time to file his income tax returns, even though he was due refunds. In 2003, he filed his tax returns and used the refunds to pay off a car loan and all the credit card accounts, except two that he disputed (Tr. 85-87).

[1]Ordinarily, an applicant's exhibits are lettered. However, since Applicant submitted numerous exhibits that were already numbered, I continued with his numbering system rather than delay the hearing to change all the numbers to letters.

The debts alleged in SOR ¶¶ 1.b, 1.c, and 1.d are the same credit card debt of about $17,000 (Tr. 56-59, 64-65). Applicant disputed this debt because he believed he was the victim of a bait-and-switch. In May 2002, he contacted the creditor, seeking a lower interest rate. He was orally promised an interest rate of 3.7% on his balance and the same lower rate on $5,000 transferred from another account. When Applicant received his statement, it reflected an 8.9% rate on the transferred balance and 22.98% on the original balance. Applicant did not make the stated minimum payment of $255 because he regarded it as "fraudulent," having been derived by applying the 22.98% rate. Instead, he continued to make payments of the amount he calculated as the minimum required amount. When he did not make the full $255 payment, the 22.98% rate was applied to his entire balance. He continued to make payments until he was interviewed by a security investigator in January 2004 and informed the account had been charged off (Tr. 62-63). In March 2007, he received a letter from the creditor stating the account was charged off and sold in January 2003 (AX 4 at 10). He was able to recoup about $500 in money orders made payable to the creditor that had not been cashed. In October 2007, after retaining a lawyer, he offered to settle the account (AX 4). His offer was accepted, and he paid the agreed amount as full settlement on November 1, 2007, the day after the hearing (AX 9).

The $11,000 credit card debt alleged in SOR ¶ 1.e also was incurred to pay the margin calls. Applicant was current on his payments until he moved to another geographical location to take a new job and did not receive his monthly bill. He was advised by the creditor that the account would not be referred for collection if he made a double payment. He made two double payments, but his account was still charged off. He received a settlement offer of 80 % of the balance in October 2001, and he responded by accepting the offer, provided that the creditor would not report the amount compromised to the Internal Revenue Service as income. He did not receive a response to his counteroffer. He filed a complaint with the Office of the Comptroller of the Currency in March 2007 about the handling of this account. In September 2007, his lawyer again offered to settle the account. On October 2, 2007, the creditor responded to the offer of settlement by stating it was "unable to retrieve all of the necessary documentation because of the age of the account," and informed Applicant that "the balance of the account was removed and requests were sent to the credit bureaus asking that the account be deleted from his credit report." (AX 3). He and his lawyer construed this response as a withdrawal of the claim.

The $564 debt alleged in SOR ¶ 1.a arose when Applicant moved and changed cell phone companies. The account was placed for collection in March 2005. Applicant thought he was being double-billed and complained to the state Attorney General. In September 2007, after being advised by the Attorney General's office that debts from two separate carriers were involved, he offered to settle the account. The collection agency responded to the offer by stating it had closed the account. He sent another letter to the collection agency asking whether anything else was required of him, but received no response. (AX 5.)

The $163 debt alleged in SOR ¶ 1.f is reflected on Applicant's credit reports as "medical" with no identification of the medical provider (GX 4, 5, 6). He learned about the alleged debt when he received interrogatories from DOHA. He contacted two medical providers to determine who was claiming the debt. He contacted a medical doctor whom he had paid in advance for his treatment, but the doctor's office could not determine why he had been billed. He also contacted a community hospital where he had received treatment, and he found that some of his payments had not been posted. In December 2003, he offered to settle the debt but received no response (Tr. 82-83). In July

2007, he made another offer to settle the debt (Tr. 83; AX 7 at 4 and 7) but received no response. He filed a complaint with the state Attorney General in October 2007 (AX 7 at 1), and he wrote a letter to the collection agency asking that the debt be removed from his credit records (AX 6). He called the collection agency and was informed that he need not pay the debt because it had "expired" and was no longer collectible under local law (Tr. 77-78).

The evidence concerning the debts alleged in the SOR is summarized in the table below.

| SOR | Debt | Amount | Status | Evidence |
|---|---|---|---|---|
| 1.a | Cell phone | $564 | Disputed; claim abandoned | Tr. 70-73; AX 5 |
| 1.b | Credit card | $17,177 | Settled | AX 4 at 1; AX 9 |
| 1.c | Credit card | $389 | Same debt as 1.b | Tr. 56-59, 64-65; AX 4 at 5, 6, 8, 13 |
| 1.d | Credit card | $17,559 | Same debt as 1.b | Tr. 56-59, 64-65 AX 4 at 5, 6, 8, 13 |
| 1.e | Credit card | $11,000 | Claim withdrawn by creditor | Tr. 65-69; AX 3 |
| 1.f | Medical bill | $163 | Disputed; no response to Applicant's offers to settle; claim barred by statute of limitations and abandoned by collection agency | Tr. 77-78, 82-83; AX 6; AX 7 |

In March 2007, Applicant submitted a personal financial statement in response to DOHA interrogatories. He reported net monthly income of $5,410.96, expenses of $1,625.29, debt payments of $3,047.20, and a net remainder of $2,363.76 (GX 3 at 7). At the hearing, he testified his monthly expenses had decreased by about $400, leaving a net remainder of about $2,900 (Tr. 84-85). Applicant lives in a rented house. He owns a home in another state, where he intends to retire. He rented the property until it was damaged by hurricanes. At present, he is unable to rent it due to unrepaired hurricane damage (Tr. 116, 120). The mortgage payments on the property are current.

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the Guidelines. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material

facts and circumstances, the whole person concept, the disqualifying conditions and mitigating conditions under each specific guideline, and the factors listed in AG ¶¶ 2(a)(1)-(9).

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified 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 security suitability. *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. *See* 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 security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

## CONCLUSIONS

The concern under Guideline F is as follows: "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 classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." AG ¶18.

Several disqualifying conditions under this guideline could raise a security concern and may be disqualifying in this case. AG ¶ 19(a) is raised where there is an "inability or unwillingness to satisfy debts." AG ¶ 19(b) is raised where there is "indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt." AG ¶ 19(c) is raised when there is "a history of not meeting financial obligations." AG ¶ 19(e) is raised when there is "consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis."

Applicant's financial history raises AG ¶ 19(a) and (c). AG 19(b) is not raised because his indebtedness was not caused by frivolous or irresponsible spending, but rather by an unexpected financial reversal. AG ¶ 19(e) is not raised because he did not spend beyond his means, but rather

was the victim of an unexpected financial setback that forced him to borrow money at high interest rates.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 19(a) and (e), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns based on financial problems can be mitigated by showing that "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." AG ¶ 20(a). It may be established by showing the conduct was "so long ago," or "so infrequent," or "occurred under such circumstances that it is unlikely to recur." If any of these three disjunctive prongs are established, the mitigating condition is not fully established unless the conduct "does not cast doubt on the individual's current reliability, trustworthiness, or good judgment."

The first prong ("so long ago") is not established. Although the underlying delinquent debts began several years ago, the debts were unresolved until recently. The second prong ("so infrequent") also is not established, because Applicant's financial history reflects numerous delinquent debts.

The third prong (under circumstances unlikely to occur) is established. Applicant was financially solvent until the market crash triggered $55,000 in margin calls. He had no choice but to use high-interest credit cards to pay the margin calls. He settled all but two of the credit card accounts without incident. He perceived himself as a victim of bait-and-switch on one account, and as the victim of a broken telephonic promise not to charge off the other account if he made a double payment. Even while disputing the accounts, he continued to make payments. After he retained an attorney, he was able to resolve both accounts. He is no longer financially overextended, and he has become much more knowledgeable about the pitfalls of credit card use.

The fourth prong also is established. Applicant has held a clearance for many years, apparently without incident. He was financially solvent before the market crash. He paid off all but two credit card accounts. The first involved in the interest-rate dispute, but he continued to make what he considered to be correct payments while pursuing the dispute. He continued to make payments on the second account until he learned it was closed and his money orders were not being cashed. He obtained legal advice and successful resolved all his delinquent debts. The combination of the third and fourth prongs is sufficient to establish the mitigating condition in AG ¶ 29(a).

Security concerns under this guideline also can be mitigated by showing that "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." AG ¶ 20(b). Both prongs, i.e., conditions beyond the person's control and responsible conduct, must be established.

Applicant's financial problems were caused by the unexpected market crash in 1997 that resulted in $55,000 in margin calls. He had no equity in his home and no other assets to pay the margin calls, and so he used his credit cards, the only source of funds available. His rental income from his home was interrupted by hurricane damage. The market crash and the damage to his home were events beyond his control. Nevertheless, he kept up with his payments until 2001, and he resolved all the credit card accounts in 2003, except for the two disputed accounts.

In evaluating whether Applicant's conduct was reasonable, I have considered that he is an electrical engineer, not a lawyer or accountant. He fell behind at a time when he was under heavy time demands, working full-time and completing the requirements for a master's degree. He reasonably concluded he was the victim of a bait-and-switch marketing tactic that increased rather than decreased his monthly payments. He was understandably upset when a telephonic promise that the account would not be charged off was not honored. He continued to make payments even while the two credit card accounts were being disputed. He retained an attorney, and, with her assistance, resolved the two disputed accounts. He disputed the cell phone debt and the medical bill, and both claims were abandoned. Under all the circumstances, I conclude he reacted responsibly to circumstances beyond his control. The mitigating condition is AG ¶ 20(b) is established.

Security concerns under this guideline also can be mitigated by showing that "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." AG ¶ 20(c). Applicant's problems did not stem from financial indiscipline, but from a financial catastrophe and his lack of understanding about his rights and obligations under his credit card contracts. He hired a lawyer, and all his delinquent debts have been resolved. I conclude AG ¶ 29(c) is established.

Security concerns under this guideline also can be mitigated by showing that "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." AG ¶ 20(d). 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." ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999).

The evidence shows Applicant continued to pay his debts even though he was financially stretched. He was attempting to resolve his credit card debts long before he applied for continuation of his security clearance. He disputed what he considered to be unfair practices or unwarranted charges. He did not learn of the debts alleged in SOR ¶¶ 1.a and 1.f until he was asked about them during the adjudication process. He promptly investigated the debts and took action to resolve them. In the case of the cell phone debt, he offered settlement when he learned his perception of double billing was wrong. In the case of the two disputed credit card accounts, he continued to make payments while the disputes were ongoing. He made multiple offers to settle the medical bill that were ignored. Allowing the statute of limitations to run on a debt is not necessarily "good faith," but in this case the statute ran because Applicant could not find anyone who would accept his offers of settlement. Eventually, the collection agency abandoned the debt. All the debts have been resolved. I conclude AG ¶ 20(d) is established.

Security concerns under this guideline also can be mitigating by showing "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." AG ¶ 20(e). Applicant disputed several debts. The evidence indicates his dispute of the cell phone debt was unfounded. I cannot determine from the evidence whether Applicant misunderstood the terms of the low "teaser" rate offered on one of his credit card accounts or was the victim of a bait-and-switch. Similarly, I cannot determine whether Applicant misunderstood the terms and time limit for submitting a double payment or was the victim of a broken telephonic promise. The medical debt was difficult to identify because of the cryptic credit report entry, but it was successfully disputed. I conclude AG ¶ 20(e) is established only for the medical debt.

In addition to considering the specific disqualifying and mitigating conditions under Guideline F, I have also considered: (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 applicant'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. AG ¶¶ 2(a)(1)-(9).

Applicant is a mature, well-educated adult, but he was unfamiliar with intricacies of credit card accounts and the pitfalls of "teaser" rates on transferred credit card accounts. He has held a security clearance for many years without incident. He was sincere and credible at the hearing, and his explanations for his financial problems were plausible. He has resolved all his delinquent debts and is not vulnerable to pressure, coercion, exploitation, or duress. He is financially solvent, earns a good income, lives modestly, and is unlikely to experience further financial problems.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on financial considerations. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him a security clearance.

## FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

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|---|---|
| Paragraph 1. Guideline F (Financial): | FOR APPLICANT |
| Subparagraphs 1.a-1.f | For Applicant |

## DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to continue Applicant's security clearance. Clearance is granted.

LeRoy F. Foreman
Administrative Judge