DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 21-01411
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Dan O'Reilley, Esq., Department Counsel
For Applicant: *Pro se*
04/11/2022

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Decision

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MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 13, 2020. On July 5, 2021, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on October 19, 2021, and requested a decision based on the written record in lieu of a hearing. On December 2, 2021, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM), including evidentiary documents identified as Items 1 through 5. He was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government's evidence. He received the

FORM on December 23, 2021, and timely submitted his response, to which the Government did not object. Items 1 and 2 contain the pleadings in the case. Items 3 and 5 are admitted into evidence. Item 4 is discussed below. The case was assigned to me on March 3, 2022.

Evidentiary Matter

Applicant was interviewed by an investigator on March 3, 2021, in connection with the background investigation initiated by his SCA. Item 4 is summary of the interview prepared by the investigator. Item 4 purports to be an accurate summary of the information that Applicant provided to the investigator during the interview. However, Item 4 was not authenticated as required by Directive ¶ E3.1.20,

The Government included in the FORM a notice advising Applicant of his right to: comment on whether the summary accurately reflected the information he provided to the investigator; make any corrections, additions, deletions, or updates necessary to make the summary clear and accurate; or object to the admissibility of Item 4 on the ground that it was not authenticated. Applicant was also notified that if he did not raise any objection to the admissibility of Item 4 in his response to the FORM; or, if he did not respond to the FORM, he could be considered to have waived any such objection, and Item 4 could be considered as evidence in his case.

Applicant raised an objection to Item 4 in his FORM response on the basis that it was not authenticated by a government witness, and that it "is also grossly biased in the selection and presentation of information, with many of its claims also being factually incorrect." He did not specify the facts that were inconsistent with the information discussed with the investigator during the interview, but stated that "My own Statement of Reasons Response more accurately summarizes what actually occurred." The Government did not object to Applicant's FORM response or otherwise oppose Applicant's objection to the admission of Item 4. Accordingly, Applicant's objection to Item 4 is sustained and it will not be considered as evidence in his case.

Findings of Fact

Applicant, age 40, was divorced from his wife of nearly 14 years in 2018. They have two children, ages 15 and 17. He received his high school diploma in June 1999. He took a few college courses in about 2009 or 2010. He has been employed as a software developer by a defense contractor since 2010. In 2014, that contractor was acquired by another entity, for whom he remains employed as a senior specialist. This is his first application for a DOD security clearance. His background was investigated by another agency in 2018, from whom he received access or clearance eligibility of a type of which he was not aware. (Item 3)

Because Applicant denied the one $267,064 debt alleged in the SOR, the Government had the initial burden of proving the alleged facts. It met that burden by proffering a 2021 credit bureau report (CBR) that corroborated the allegation. The burden

then shifted to the Applicant to refute, extenuate, or mitigate the alleged facts. (Items 2, 5)

The CBR reflected that a debt belonging to Applicant, as an individual account, was assigned to a collection company on behalf of a health insurance company in about January 2019. The balance owed as of April 2021 was $267,064. Included in the debt's CBR entry was the following notation: "account information disputed by consumer." There was no indication in the record that any of the information reported on this CBR was ever invalidated by either the credit bureau agency, the collection company, or the original creditor. (Item 5)

On his SCA, Applicant answered "yes" to whether, in the last seven years, he had any bills or debts turned over to a collection agency and disclosed a debt, in the amount approximate amount of $274,000 from approximately June 2013, that a health insurance company claimed he owed. He disputed the debt on the basis that it was an "accounting mistake on the part of the insurance company." With respect to actions he took to resolve the dispute, he explained:

> I spent six months trying to clear up the issue (I still have the original voided check), and after two years the account was audited and the check was reissued. I paid the health providers, and sat on the rest for over a year in case they wanted it back. Three years later (five years after the initial mistake), they decided to come after me for it; and
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> I proved to [the health insurance company] that they had no legal claim, so they sold the debt. I believe it was then sold again. I've continued to dispute this, and asked to go to court if they believe they have a case, but they just continue to trash my credit without even contacting me. So, at this point (it's been nearly seven years), I'm simply waiting for it to fall off my credit report. (Item 3)

In his SOR answer, Applicant reiterated his dispute of the debt and further elaborated on underlying the facts and circumstances. The record did not expressly confirm the reason the insurance company issued the check to Applicant. However, given the information provided by Applicant in his SOR answer and in his FORM response, it is reasonable to conclude that the check was issued for Applicant to reimburse one single medical provider for services rendered. (Item 2; FORM response)

While Applicant acknowledged that the insurance company obviously made a mistake in sending him such a "large check," he believed that he should be absolved of the responsibility for repaying the debt because he made a "[more than] reasonable effort to correct their mistake" over the course of a number of years. He tried to resolve the issue immediately upon receipt of the erroneous check by making regular calls to the insurance company. At some point, the insurance company told him that they would send him a new check and he agreed not to cash or deposit the original check (Conversation 1). However, the new check never arrived and "after six months of trying," he "simply gave up." (Item 2)

Two years later, Applicant was contacted by an auditor for the insurance company, to whom he explained the situation (Conversation 2). The auditor told him that they would send a new check in the correct amount. When Applicant received the new check, to his "surprise," it was in the same amount as the first check. At that point, he decided to deposit the new check into a new account that was "separate from [his] personal funds," and pay off "the medical bills." He did not provide details about "the medical bills" he paid from the new check in his SOR answer. However, in his FORM response, he clarified that he paid $30,000 from the new check to a single medical provider for expenses associated with the services reimbursed by the new check as well as some other services for which he had not received a reimbursement check. He then contacted the insurance company to figure out how and where to send the remainder to them. Although he never heard back from them, he left the remaining funds in the new account, assuming that they would want it back eventually. He asserted: "After paying my medical debts, I would have gladly sent the remainder of the money back (as I attempted to), had I known who and where to send it to;" and "Having witnessed years of gross incompetence at [the insurance company], it would have been foolish to simply drop a check in the mail and hope it finds its way to the appropriate account." (Item 2; FORM response)

Another year passed before Applicant decided, "with much hesitation and consideration," to use some of the remaining funds for the down-payment on a new home. He concluded that the insurance company had "likely simply written off their mistake," because it had been over three years since he received the initial check and over a year since he received the new check. He reasoned that, if the insurance company were to later ask him for the funds, he could always take a home equity line of credit against the home to repay it. (Item 2).

As more time passed, Applicant and his wife spent "much of the remaining money" and then "the last bit of it was finally wiped out as a result of [their] divorce." Applicant did not detail how the remaining funds were spent by him and his wife except insofar as he referenced the purchase of a 1936 Ford in September 2016. However, he indicated that, at some point during their divorce, the funds were split between them. While his half was consumed during the course of their divorce proceedings, which spanned from June 2017 through July 2018, he asserted: "How or when my ex-wife spent her half is unknown." In his FORM response, Applicant acknowledged that, while the purchase of a 1936 Ford in September 2016 may have been "extravagant," it was not indicative of his spending habits. It was gifted to his father-in-law (FIL) for whom it had sentimental value because it had previously belonged to his FIL's brother. He purchased the vehicle from his FIL's sister-in-law upon his FIL's brother's passing. The record did not indicate the purchase price of the vehicle. (Item 2)

The insurance company did not contact Applicant again until four years after the second check was issued, which was six years after the first check was issued (Conversation 3). At that point, Applicant averred that he was not in a position to return the remaining funds back to the insurance company. He attributed that position to the following: 1) he no longer had the house from which he could pull equity; 2) he had "a great deal of credit[-]card debt from divorce lawyers and furnishing [his] children's bedrooms" (because his ex-wife "kept everything"); and 3) any remaining funds were "split

up in the divorce." He maintained: "as much as I would have liked to have repaid [the insurance company] at that time, I simply couldn't;" and "it's unreasonable to expect me to have held onto that money forever." (Item 2)

During Conversation 3, Applicant explained "all of this" to the insurance company. He also apologized that he was no longer in a position to repay the money, and "invited them to discuss the case further in court if they felt [he] was still obligated to repay." He asserted: "they instead handed it off to collections." He might "have shared the same with somebody from the collections company at that time," but could not recall. He then averred: "In any case, I haven't heard from them since." He did not indicate to whom "them" referred or to the what time "since" referred. (Item 2)

Applicant also relied on the statute of limitations to support his position that he should no longer be held responsible for repaying the insurance company or the collection company. In his SOR answer, he argued that the reason he had not heard from "them since" was "because this 'debt' is long past the statute of limitations for collection (it's now been nearly seven years since the second check, and nine years since the first.). In fact, the collection is even scheduled to fall off my credit reports in just a few months." And, in his FORM response, he argued:

> Having not heard back from them after receiving the new check, the only logical conclusion is that somebody at [the insurance company] was trying to hide their mistake. Whatever the case though, expecting me to still be sitting on that money four years later is unreasonable (which is why statutes of limitation exist). Nonetheless, if I were still in a position to pay back that money, I would have. Unfortunately, though, my divorce made that impossible. It's unreasonable to expect me to spend the foreseeable future in financial distress to repay a mistake that [the insurance company] wrote off years ago, and the collection company has made no effort to collect. (Item 2; FORM response)

Applicant has over 20 years of experience and expertise in software development. He loves the United States, and prides himself on living by the high standards of his strongly-held Christian beliefs. He maintained that he has "no *actual* debt," nor does he gamble, have mental health issues, use drugs, or drink. With respect to debt alleged in the SOR, he asserted: "I can, with good conscience, say that I did everything I could do [to do] what was right in that situation." (Item 2)

In neither his SOR answer nor in his FORM response did Applicant proffer any documents corroborating his efforts to resolve the debt or his position that he is no longer liable for repaying the debt.

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 have access to such information." (*Egan* 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." (EO 10865 § 2)

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." (EO 10865 § 7). Thus, a decision to deny a security clearance 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 that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. (*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. ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016). 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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005))

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; AG ¶ 2(b))

Analysis

Guideline F: Financial Considerations

The concern under this guideline is set out in AG ¶ 18:

> Failure to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds . . . .

This concern is broader than the possibility that a person might knowingly compromise classified information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. (ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012))

The record evidence establishes the following disqualifying conditions under this guideline: AG ¶ 19 (a) (inability to satisfy debts); AG ¶ 19 (b) (unwillingness to satisfy debts regardless of the ability to do so); and AG ¶ 19(c) (a history of not meeting financial obligations). Having considered all of the factors set forth in AG ¶ 20 that could mitigate the concern under this guideline, I find the following relevant:

> AG ¶ 20(a): the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
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> AG ¶ 20(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;
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> AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts; and
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> AG ¶ 20(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 Government presented a *prima facie* case for disqualification under Guideline F. Accordingly, it was incumbent on Applicant to present sufficient reliable information on which application of available mitigating conditions could be based. He did not do so. Although Applicant raised the potential applicability of the mitigating conditions cited above, he produced no documentation or other corroborating information to support any of the cited mitigating conditions. I considered the understandable frustration Appellant experienced while making numerous attempts to return the remaining funds, which weighs in his favor. However, he not only failed to meet his burden of persuasion to overcome the Government's case for disqualification, but he used funds to which he knew he had no legal right. Accordingly, I find that Applicant has not mitigated the Guideline F concerns. AG ¶¶ 20(a), (b), (d), and (e) are not established.

I also want to address Applicant's statute of limitations assertion. While relying on the statute of limitations could be a legally permissible option for him to avoid repaying his debt, it raises a concern with respect to his security worthiness. As an individual seeking to obtain the benefit of a privilege and not a right, he is held to a higher standard for actions that might otherwise be considered innocuous in other contexts. Applicant made a choice to protect his self-interest above his legal obligations. I am, therefore, left with doubt as to whether he may also act similarly with respect to his security obligations.

Whole-Person Analysis

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall commonsense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole person. An 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.

I have incorporated my comments under Guideline F in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated the security concerns raised by his unresolved debt. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the interests of national security to grant him eligibility for access to classified information.

Formal Findings

Formal findings 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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security to grant or continue Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge