DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 06-13610
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Nichole L. Noel, Esquire, Department Counsel
For Applicant: *Pro Se*

December 10, 2008

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Decision

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HARVEY, Mark W., Administrative Judge:

Applicant failed to mitigate security concerns regarding personal conduct and financial considerations. He knowingly and deliberately failed to disclose two felony convictions on his security clearance application. He also failed to resolve one debt for $8,708 to a credit card company. Eligibility for access to classified information is denied.

Statement of the Case

On May 6, 2004, Applicant submitted a Security Clearance Application (e-QIP version) (hereinafter SF 86) (Government Exhibit (GE) 1-4). On June 29, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him,[1] pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR

[1]Government Exhibit (GE) 1-1 (Statement of Reasons (SOR), dated June 29, 2007). GE 1-1 is the source for the facts in the remainder of this paragraph unless stated otherwise.

alleges security concerns under Guidelines F (Financial Considerations), and E (Personal Conduct).[2] The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing.[3] A complete copy of the file of relevant material (FORM), dated November 1, 2007, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.[4] On December 10, 2007, Applicant requested a 90-day delay to submit his response to the FORM (GE 5 at 3). Department Counsel concurred with a 30-day delay, but objected to a 90-day delay (GE 5). On January 15, 2008, the case was assigned to me. For at least a year prior to his March 20, 2008, proceeding, Applicant was assigned to a combat zone overseas, and collection of evidence was difficult for him (Tr. 22-23). After a series of e-mail communications, Applicant requested to provide a statement in the format of a teleconference. In an e-mail dated March 19, 2007 (GE 7), Applicant stated:

> I appreciate everyone's efforts [to attempt to arrange a video teleconference (VTC)). It looks like the VTC isn't going to work out as well as we had planned. I will put this in writing so everyone will know that I am requesting this. I [Applicant's name], am requesting a tele-conference for my interview with the personnel listed in this email. My VTC personnel here will email you with the phone number to the room I will be using for this tele-conference. I look forward to speaking with you.[5]

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[2]On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are applicable to Applicant's case because his SOR was issued after Sep. 1, 2006.

[3]GE 1-2 (Applicant's undated response to SOR).

[4]The Defense Office of Hearings and Appeals (DOHA) transmittal letter informed Applicant that he had 30 days after Applicant's receipt to submit information.

[5]At the hearing the following exchange occurred:

> Administrative Judge: . . . I want to make it clear that [Applicant] has requested that we do a speaker, non-video type hearing today. Is that correct, [Applicant]?
>
> Applicant: That is correct, sir.
>
> Administrative Judge: You understand that under the Directive, you have a right to an in-person hearing or at least a video teleconference type hearing. Is that correct?
>
> Applicant: Yes.

The teleconference proceeding itself was conducted in a manner consistent with a typical DOHA security clearance hearing; however, it was not a hearing as I could not observe Applicant's demeanor during the interview. This interview was conducted on March 20, 2008. There were no objections to my consideration of GEs 1-6 (Transcript (Tr1.) 11). The interview transcript was received on March 28, 2008. Applicant's final submissions were received on April 5 and 16, 2008 (GE 8 and 9). There were no objections to my consideration of GE 8 and 9, and they are admitted.

Procedural Rulings

Department Counsel objected to my communications with Applicant using e-mail (with a copy electronically provided to Department Counsel), arguing such a procedure is not permitted under the Directive and is unfair to the Government. Department Counsel recommended selection of one of three options: (1) use of video teleconference (VTC), (2) delay until in-person presentation or (3) close of the record without further presentation of evidence.

Department Counsel contended use of e-mail to collect evidence[6] is too helpful to the Applicant because the process will reveal how disqualifying conditions might be mitigated,[7] and unfairly facilitates gathering and presenting documentary evidence. Moreover, it does not permit Applicant's cross-examination, or observation of an Applicant's demeanor.

Department Counsel's observations about the limitations of written evidence and e-mail in regard to cross-examination and assessment of demeanor are well taken. At

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> Administrative Judge: And knowing you have those rights, you've decided to waive those rights and present your case in the format of a speaker hearing. Is that correct?
>
> Applicant: That's correct.

Tr1. 13-14.

[6] An Administrative Judge has some discretion to research issues, especially to protect the rights of a *pro se* Applicant, so long as the product of the research if used to decide an issue is provided to the parties, and the parties have an opportunity to comment on the information. *See Hines v. Department of Health and Human Services*, 21 Cl.Ct. 634 (1990); *Illinois v. Swart*, 860 N.E.2d 1142 (Ill. App. 2006), *but see Kershner v. Massanari*, 16 Fed. Appx 606 (9th Cir. 2001) (unpublished opinion) (stating the administrative law judge (ALJ) "should not have gone outside the record to perform his own medical research," and noting the ALJ incorrectly applied a medical summary of an article to determine a *pro se* claimant was not credible without providing the article to the parties). *See, e.g., Hamdan v. Rumsfeld*, 548 U.S. 547 (2006) (providing an example of an appellate decision with numerous citations to internet documents).

[7] "[A]n ALJ has a heightened obligation to assist a *pro se* claimant, in particular to "assist [him or her] affirmatively in developing the record." *Carroll v. Secretary of Health and Human Services*, 872 F.Supp. 1200, 1204 (E.D.N.Y. 1995) (citing *Smith v. Bowen*, 687 F.Supp. 902, 906 (S.D.N.Y. 1998)). "Especially where an unrepresented claimant's record is inconsistent and incomplete, an ALJ must 'scrupulously and conscientiously probe into, inquire of and explore all the relevant facts.'" *Id*. (Citing *Hankerson v. Harris*, 636 F.2d 893, 895 (2d Cir. 1980)). *See also Garrett v. Richardson*, 363 F. Supp. 83 (E.D.S.C. 1973) (discussing ALJ's responsibility to obtain reports for full and fair hearing).

most, e-mail and speaker phone evidence presentations are not equivalent to in-person testimony and do not constitute a "hearing." The cross-examination and full evaluation of demeanor and credibility through a hearing are critical due process components. However, Applicant can waive his hearing as under the FORM process and in this case affirmatively chose to do so.[8]

I overruled Department Counsel's motion to preclude consideration of e-mailed information. The Directive does not address methods of collecting evidence such as VTC, e-mail and speaker phones. Moreover, VTC is routinely used and encouraged to conduct hearings because travel expenses are saved. E-mail and speaker phones should also be encouraged as a substitute for written correspondence as they allow an almost real time response and more timely clarification, speeding the processing of cases without compromising the quality of the evidence received.

On April 28, 2008, I denied Applicant's request for access to classified information. Applicant appealed my decision to the DOHA Appeal Board.

Appeal Board's Remand and Subsequent Processing

The Appeal Board remanded Applicant's case stating:

> Given Applicant's pro se status, the likely exigencies of communicating to DOHA from a war zone, and the circumstances highlighted above, a reasonable person could conclude that Applicant's waiver of his right to a hearing was not sufficiently knowing so as to satisfy the due process requirements of Directive. Accordingly, the Board concludes that the best course of action is to remand the case to the Judge for a new proceeding, either a determination on the written record or a hearing that complies with the requirements of the Directive (making appropriate allowances given Applicant's presence in a conflict zone).

ISCR Case No. 06-13610 at 3 (App. Bd. Oct. 31, 2008).

[8]The Appeal Board remanded Applicant's case because the Appeal Board wanted to protect Applicant's due process rights, determining that his waiver of a hearing was not sufficiently knowing and citing his presence in Afghanistan (a combat zone) when he rendered his waiver. Unfortunately, the Appeal Board did not articulate why a waiver of a hearing in the context of a DOHA FORM proceeding is more knowing than the process used in Applicant's first proceeding. Moreover, Applicant received more due process in his first proceeding than an Applicant receives under the FORM process. In any event, it is clear that Applicant understood his March 20, 2008, proceeding did not involve observation of his demeanor because he was well aware when the video portion of the teleconference became unavailable at his Afghanistan location. Applicant has four years of college and works in information technology. He knew what was occurring and waived the video portion both orally and in writing. He chose to proceed with the teleconference proceeding without video. Nevertheless, I welcome the Appeal Board's remand because it provides an opportunity to determine whether Applicant has made progress resolving financial or personal conduct concerns, or has developed new evidence supporting or corroborating his positions on security concerns. A hearing adds the most important element to Applicant's clearance determination, which is a credibility evaluation.

After Applicant received the Appeal Board's remand, he requested a hearing. Applicant waived his right to the 15-days notice and his hearing was held on November 18, 2008 (Tr2. 21-22, Remand AE D, E). The parties did not object to consideration of the same documents that were admitted in the previous proceeding, and I admitted those same documents with the same exhibit numbers (Tr2. 16-19). The parties did not object to admission of the transcript from the prior proceeding, and I admitted it (Tr2. 20). References to the pages in the prior proceeding are marked "Tr1." and references to the hearing on November 18, 2008, are designated "Tr2." Applicant did not object to anything in the first decision rendered aside from wanting a hearing so that his credibility could be evaluated (Tr2. 52).

I approved a post-hearing delay until December 2, 2008, for Applicant to provide additional documentation concerning his case (Tr2. 44-45, 59). Applicant said that would be "plenty of time." (Tr2. 45). I emailed the transcript of the hearing to Applicant as he requested (Tr2. 6, 45). On December 1, 2008, Applicant provided a copy of his opening statement as an attachment to an email (Remand AE A). From December 2 to December 2-6, 2008, the parties sent several emails (AE B-C). All documentation Applicant submitted was admitted into evidence AE A-C, and I closed the record on December 8, 2008.

Findings of Fact[9]

In his SOR response, Applicant admitted responsibility for the federal and state tax debts listed in the SOR, and that he did not disclose his debts and two felonies on his 2004 SF 86. He said he did not intend to deceive the government. Applicant explained why he believed the security concerns were mitigated. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 52 years old (Tr1. 4, Tr2. 6).[10] He married in 1996 and divorced in 2000. He remarried in 2003. He served on active duty from 1978 to 1982 in the Navy. He has two years of college and some subsequent college credits equivalent to four years of college (Tr1. 4, Tr2. 6). He has been employed by government contractors since 1998 (Tr1. 17-18, Tr2. 7), and began working for the current government contractor on November 30, 2006 (Tr1. 17). Applicant does not have a clearance (Tr1. 5-6, Tr2. 7). He has been married four times, and his most recent marriage occurred in 2003 (Tr1. 37-38, Tr2. 7-8). Applicant's two children were born in 1997 and 2005 (Tr1. 38, Tr2. 8).

[9] The facts in this decision do not specifically describe employment or locations in order to protect Applicant and his family's privacy. The cited sources contain more specific information.

[10] Applicant's SF 86 (GE 1-4) is the source for the facts in this paragraph, unless stated otherwise.

Financial Considerations (Guideline F)

Applicant's SOR lists seven debts. On January 31, 2008, Applicant sent an e-mail which includes the statement, "I have been making payments to clear my debts, and as they are completed, I have asked them to send me documentation for the payment in full and that my matters with these debts are cleared." (GE 10). Specific information about each debt follows:

For SOR ¶ 1.a, a Federal tax lien was filed against Applicant on April 27, 1998, in the amount of $5,512. He filed his federal tax returns, and was unclear about why there was a federal tax lien (Tr1. 19-23). His federal tax lien was paid by payroll deduction in August or September 2008 (Tr2. 29, 34-35). On November 18, 2008, he said he wrote the IRS about three months ago requesting a letter releasing the debt (Tr2. 35). On December 4, 2008, Applicant said in an email that he had "paystubs" showing "payments for Federal taxes paid." He then offered to email his proof to me (Remand AE B). I asked him to immediately do so (Remand AE B). However, I did not subsequently receive any Federal tax-related evidence from Applicant.

SOR ¶¶ 1.b to 1.d list state tax liens filed on November 15, 1999, in the amounts of $911; $1,591; and $1,814. Applicant remembered when he filed his Oregon state tax return in 1998 he owed less than $1,000 (Tr1. 20). He suspected that his former spouse (who also charged $20,000 in bills when she visited his overseas location in the late 1990s) took the money that was supposed to be paid to Oregon (Tr1. 21). Around mid-January 2008, Applicant's cousin contacted the state of Oregon to obtain information about his state tax debt (Tr1. 21-22). At his hearing on November 18, 2008, Applicant said he sent his cousin the funds and his Oregon state taxes are paid (Tr2. 29, 35-36). He asked his cousin to provide proof that the debt was paid (Tr2. 36). On December 4, 2008, Applicant said in an email that he had "paystubs" reflecting "partial payments to the state of Oregon, which shows about half of the payments, as the rest was paid in cash directly to the state office." He then emailed his proof to me, which consisted of pay stubs showing in October 2008 he paid $3,000 to the state of Oregon as a tax deduction (Remand AE B). On December 6, 2008, he also sent an email indicating he separately and directly sent $1,326 and $648.90 to Oregon for taxes (Remand AE B).

For SOR debts ¶¶ 1.a to 1.d, Applicant said he was not notified of these debts and was unaware of them (GE 1-2). In his response to interrogatories, dated April 3, 2007, he said for SOR debts ¶ 1.a, he was overseas for the past nine years and was tax exempt (GE 1-5). On April 15, 2008, in an email he said the federal and state taxes owed are being resolved using direct withdrawal from his bi-weekly pay (GE 6). He provided his pay statement showing a payment of $1,394 towards his federal tax debt (GE 6). His next five pay statements will result in full payment of his federal tax debt (GE 6). His state tax payments should appear on his April 2008 pay statement (GE 7).

SOR ¶ 1.e describes Applicant's credit card account, which became delinquent in 2002 in the amount of about $8,708. Applicant said he charged travel expenses incurred on behalf of his employer, and he believed his employer was responsible for paying the creditor (Tr1. 24-26). In his response to the SOR and to interrogatories, he

said his employer told Applicant that this debt was resolved in 2003 (GE 2, 5). In his response to interrogatories, dated April 3, 2007, he said he was "taking action to rectify this situation and have it removed from [his] files" (GE 5). In his SOR response he promised to investigate removal of this delinquent debt from his records (GE 1-2). On February 19, 2008, I specifically asked Applicant by email to provide copies of documentation he used to investigate and dispute this debt (GE 6-V). On March 20, 2008, he said he contacted the creditor and the creditor was attempting to obtain resolution from his former employer (Tr1. 24). He told the creditor he would pay the debt, and the creditor offered to cut the debt by one third (Tr1. 25). Applicant had no correspondence with the creditor—all of his communications with the creditor were verbal, over the telephone (Tr1. 25). On April 15, 2008, in an email he said the creditor "are/have sent me a settlement that would be reimbursed in the event [his former employer] were to pay off this debt." (GE 6). At his hearing on November 18, 2008, Applicant said the credit card company told him not to pay the debt because it would be "very difficult" to obtain a refund if his former employer paid the debt (Tr2. 30). Applicant claimed the creditor offered to provide correspondence documenting their advice not to pay their bill (Tr2. 36). Applicant did not provide any such documentation concerning this creditor's proposal.

SOR ¶¶ 1.f and 1.g are two credit card accounts, which became delinquent in 2003 in the amounts of $772 and $516. In Applicant's SOR response, he said his former spouse incurred these debts without his knowledge and he paid them in March 2007 (GE 1-2). At his hearing, he said his wife was responsible for one account, he was responsible for the other, and both were taken care of (Tr1. 28). On January 31, 2008, Applicant provided a letter from the creditor indicating that an account from the creditor for $222 was settled and paid on March 26, 2007 (Tr1. 28, GE 6-C). The account number in GE 6-C matches the account number in the credit report for the $516 debt, and I find "For Applicant" on SOR ¶ 1.g (Tr1. 28-29, GE 1-10 at 2). On February 19, 2008, I asked Applicant by e-mail to provide documentation showing proof of payment for the other debt (GE 6-V). On April 15, 2008, he said in an email, "A settlement is being sent me which when paid will be considered paid in full." (GE 6). On November 18, 2008, he said the debt in SOR ¶ 1.f was "cleared," and he promised to provide corroborating documentation to support resolution of this debt (Tr2. 31, 37); however, he did not provide any such documentation after his hearing.

Applicant's pay statement for April 3, 2008, shows bi-weekly pay of $5,104 (GE 6). He said he worked very diligently from December 2007 to March 20, 2008 (the date teleconference statement) to investigate and resolve his delinquent debts (Tr1. 23-24). He promised "100 percent to take care of" his debts (Tr1. 24).

Personal Conduct (Guideline E)

Applicant answered, "No" on his SF 86, executed on May 6, 2004, to three questions that are relevant to the issue of whether Applicant falsified his SF 86:

> **Question 21. Your Police Record – Felony Offenses** Have you ever been charged with or convicted of any felony offense? For this item, report

> information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.
>
> **Question 38. Your Financial Delinquencies-180 Days** In the last 7 years, have you been over 180 days delinquent on any debt(s)?
>
> **Question 39. Your Financial Delinquencies-90 Days** Are you currently over 90 days delinquent on any debt(s)?

Applicant was arrested on February 27, 1997, and charged with: (1) forgery 1st degree, (2) theft 1st degree, (3) failure to appear 2nd degree and (4) negotiating a bad check. On February 12, 1998, he was convicted of negotiating a bad check, a felony, fined $1739.00, and sentenced to two years probation.

Applicant was arrested on May 14, 1997, and charged with: (1) failure to appear 1st degree, (2) forgery 1, and (3) failure to appear 1st degree theft I. On February 12, 1998, he was convicted of (1) failure to appear 1st degree, a felony, fined $669.00, and sentenced to two years probation, and (2) forgery 1, a felony, fined $919.00, and sentenced to two years probation.

The two felony convictions resulted from thefts using a forged check from Applicant's father, and forgery of a credit card purchase (Tr1. 39-41). Applicant provided extenuating information concerning the felony convictions, essentially blaming his former wife for the offenses. *Id*. In his SOR response he denied that he was aware of the delinquent debt, and admitted the felony charges and convictions (Tr1. 30-32, GE 1-2). He explained why he did not disclose the requested information about the felonies:

> I admit that the findings are in my past record. I was instructed in writing, of which I unfortunately do not have copies of, when filling out the forms, while working [for a contractor overseas], to follow the instructions as presented. I was to fill out these forms under the timeframe Year 2000 – 2004. I followed the instructions as directed. I did not list these cases as it did not fall into the instructed timeframe.

GE 1-2. At his proceeding on March 20, 2008, he described the circumstances of completing his SF 86 as follows:

> . . . I asked them when I was there, I said I - - I do have some things on my record, I was not - - you know, I didn't tell them exactly what I had. The time frame that they told me [about was] from 2000 and 2004[.] [W]hen we were filling this out [, they said] to go back four years. I said I have some other things. Is that going to be a problem? And they said no. As we went through this, and again, this is what's really bad about this, is I'm - - I'm following the direction that they were giving me and as they were telling

> everybody. They wanted the - - and their explanation for that, by the way, was we need to get these through as fast as we can. Therefore, they said, four years go back, do this. And that's what we turned in.

Tr1. 32-33. On February 19, 2008, I specifically asked Applicant by email to provide the name of any witness who could corroborate his statement about these instructions (GE 6-V). At his March 20, 2008, proceeding, he said his employer's security officers provided the instructions about completing his SF 86 (Tr1. 35-36). Applicant said he did not have any documentation to provide concerning the instructions he was given about completing the SF 86 (Tr1. 31).

In regard to Applicant's failure to disclose his delinquent debts on his SF 86, he said he thought his employer paid the debt in SOR ¶ 1.e (Tr1. 33). He was not aware of the other debts (Tr1. 33-34).

At his hearing on November 18, 2008, Applicant said he downloaded and set up the electronic 2004 SF 86 for his employer (Tr2. 31, 38). Security personnel orally asked the questions, and then the security personnel filled out the 2004 SF 86s for the employees based on their responses (Tr. 37). He insisted the security personnel limited the questions about criminal conduct to any arrests and felonies in the last four years (Tr2. 32). He volunteered to the security personnel that he had felonies prior to 2000 and they "kind of yelled at [him], at that point," and they directed him to answer the questions as they asked them (Tr2. 33). Applicant claimed, "I disclosed [the felonies] to them. But they said that is not our concern. Our concern is 2000. Listen and follow the instructions. They kind of yelled at me." (Tr2. 43).

Applicant said he never saw the hard copy of the SF 86 in 2004 (Tr2. 38); however, later he said he had an unsigned copy of his 2004 SF 86, which he provided to his new employer (Tr2. 41). He claimed the 2004 SF 86 he provided to his new employer was unsigned (Tr2. 41). He denied that he signed the 2004 SF 86 in 2004 (Tr2. 38-41). Applicant said the signature that appears on his 2004 SF 86 was actually made on the 2004 SF 86 in 2006 when he signed the 2004 SF 86 before providing the version in the record to his new federal-contractor employer (Tr2. 40-41). His new employer told him to backdate the 2004 SF 86 (Tr2. 40-42). He promised to provide an email he sent to his new employer asking whether he should sign the 2004 SF 86 and about what date he should put next to his signature (Tr2. 41-42). However, he did not provide the email after his hearing. He read the 2004 SF 86 before he submitted it in 2006, and his new employer told him not to change his answers (Tr2. 46). He told his current employer about the felonies, and Applicant promised to seek a statement from his current employer corroborating his account (Tr. 47). He never mentioned the backdated signature on his 2004 SF 86 before his November 18, 2008, hearing because he never realized it before and it never crossed his mind before (Tr2. 42). He never filled out a job application when he was hired by his current employer, and was hired based on a recommendation (Tr2. 47-48). Accordingly, he did not have an opportunity to disclose his felonies on a job application to be hired by his current employer.

Applicant was unable to obtain evidence corroborating his description of the advice security officers provided in 2004 and 2006 about completion of SF 86s (Tr2. 43).

Employee Performance

Applicant said the generals on down to the lieutenants in the combat zone are depending on Applicant to continue his work in the combat zone (Tr2. 48). His skill is unique (Tr2. 48). The government spent millions of dollars on two products that are ineffective at stopping a very significant virus that attacks through USB devices, and Applicant created a product that does work (Tr2. 49).

Applicant worked for his current employer in a combat zone and deserves substantial credit for his patriotism and dedication to the national defense (Tr1. 42). He has sacrificed for his country through his multiple overseas tours for nine years (Tr1. 42-43). He enjoys contributing to the national defense. He receives satisfaction from supporting his family and the troops in the combat zone (Tr1. 42-44). His supervisors are pleased with his performance and are in the process of promoting him (Tr1. 42-44). His assistance is very important to the information technology mission in the combat zone (GE 10).

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 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." *Id*. at 527. The President has authorized the Secretary of Defense or his designee to grant Applicant's 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 revised adjudicative guidelines (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 over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, 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 the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible

extrapolation as to potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned." *See* Exec. Or. 10865 § 7. *See also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. 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 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. *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. 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). 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 determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

Financial Considerations

AG ¶ 18 articulates the security 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 classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 provides three Financial Considerations Disqualifying Conditions that could potentially raise a security concern and may be disqualifying in this case, "(a) inability or unwillingness to satisfy debts," and "(c) a history of not meeting financial obligations."

Applicant's history of delinquent debt is well documented; however, he deserves credit for the progress he has made in the resolution of his debts. He established that he paid the debt in SOR ¶ 1.g on March 27, 2007. I am satisfied he paid his federal and Oregon state tax debts described in SOR ¶¶ 1.a, 1.b, 1.c, and 1.d. He has not made sufficient progress on his debt in SOR ¶ 1.e, and it is currently delinquent. He has provided insufficient documentation to show progress resolving the debt in SOR ¶ 1.e. The government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20(a)-(e) 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; 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.

Applicant receives partial credit under AG ¶ 19(b) because a condition that caused some financial problems was largely beyond his control, that is, his difficult marriages, and eventual divorces (his most recent divorce was in 2003). Overall he showed some financial responsibility when he paid most of his delinquent debts, except for his credit card debt when he was employed by his former employer (SOR ¶ 1.e).

However, financial considerations cannot be mitigated because he was employed and had the means to address the delinquent debt in SOR ¶ 1.e, especially after he became aware that this debt was a security concern around June 29, 2007 (the SOR's

date). He did not provide proof that he disputed the debt in SOR ¶ 1.e as required by AG ¶ 19(e). He did not do enough to resolve the $8,708 debt in SOR ¶ 1.e.

In sum, Applicant did not establish that he made a good faith effort to repay the debt in SOR ¶ 1.e, or otherwise resolve it to a sufficient degree to mitigate it. His financial problems are continuing and likely to recur. He should have been more diligent, providing documentation showing greater and more timely efforts to resolve this delinquent debt. He has not carried his burden of proving his financial responsibility. There are not clear indications his debt in SOR ¶ 1.e is being resolved. His overall conduct with the creditor in SOR ¶ 1.e casts doubt on his current reliability, trustworthiness, and good judgment and I conclude no mitigating conditions fully apply.

Personal Conduct (Guideline E)

AG ¶ 15 expresses the security concern pertaining to personal conduct:

> 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes two conditions that could raise a security 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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and
>
> (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant's May 6, 2004, SF 86 asked about his delinquent debt. He answered, "No," and did not disclose the debts discussed in the previous section. However, his answers were not deliberately false because he was unaware of his delinquent debts. He has successfully refuted this allegation.

Applicant's May 6, 2004, SF 86 asked, "**Question 21. Your Police Record – Felony Offenses** Have you ever been charged with or convicted of any felony offense?" He answered, "No," and did not disclose his two felony convictions. He provided deliberately false information. His statement that he was told not to provide information about offenses prior to 2000 is not credible. AG ¶¶ 16(a) and 16(b) apply.

AG ¶ 17 provides seven conditions that could mitigate personal conduct security concerns in this case:

> (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
>
> (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
>
> (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
>
> (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
>
> (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;
>
> (f) the information was unsubstantiated or from a source of questionable reliability; and
>
> (g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

As indicated previously, Applicant's answers about his delinquent debts were not deliberately false because he was unaware of his delinquent debts. The allegations about providing false answers to Questions 38 and 39 are unsubstantiated and therefore mitigated under AG ¶ 17(f).

None of the mitigating conditions in AG ¶ 17 apply to his false answer to Question 21. Although Applicant's falsification of his SF 86 on May 6, 2004, is not recent, he falsely stated at his 2008 hearing that security officials told him not to include information about offenses prior to 2000. I do not believe his claim that security personnel told him not to include his pre-2000 felonies on his SF 86. His failure to present corroboration about his allegation that security personnel told him not to list pre-2000 offenses or information is a minimal factor in this decision because I recognize

that security personnel are unlikely to admit such malfeasance.[11] I primarily base my opinion that he was not truthful at his hearing on November 18, 2008, on his demeanor, and his new, implausible story that security personnel at his new employer told him in 2006 not to disclose his felonies. It is simply not credible that two different security officers at two different companies would tell Applicant not to disclose expressly requested information on a security clearance application.

Applicant did not promptly inform the government of the falsification. He did not receive counseling designed to improve his conduct. He admitted the information he provided on his security clearance application about his two felonies was not correct, and the falsification of his SF 86 is substantiated. The falsification of his 2004 SF 86, as compounded by his statements blaming the falsification on security personnel at two different companies casts doubt on his current reliability, trustworthiness, and good judgment.

Whole Person Concept

In all adjudications, the protection of our national security is the paramount concern. The adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of his or her acts, omissions, and motivations as well as various other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances and applying sound judgment, mature thinking, and careful analysis. Under the whole person concept, the Administrative Judge should consider the nine adjudicative process factors listed at Directive ¶ E2.2.1:

> (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 voluntariness of participation; (6) the presence or absence of rehabilitation

[11]Administrative judges "must look at the record for corroboration of Applicant's testimony." ISCR Case 02-03186 at 3 (App. Bd. Feb. 16, 2006). Moreover, a judge may consider "Applicant's failure to present documentary evidence in corroboration of his denials and explanations." ISCR Case 01-20579 at 5 (App. Bd. Apr. 14, 2004) (holding Applicant's failure to provide reasonably available corroborative evidence may be used in common sense evaluation to determine whether Applicant's claims are established). In ISCR Case 01-02677 at 7 (App. Bd. Oct. 17, 2002), the Appeal Board explained:

> While lack of corroboration can be a factor in evaluating the reliability or weight of evidence, lack of corroboration does not automatically render a piece of evidence suspect, unreliable, or incredible. . . . Evidence that lacks corroboration must be evaluated in terms of its intrinsic believability and in light of all the other evidence of record, including evidence that tends to support it as well as evidence that tends to detract from it.

I recognize Applicant is assigned overseas in a combat zone and obtaining corroboration from other employees about the advice of security personnel would be difficult. Accordingly, the absence of corroboration in this case is a much lesser factor than it would otherwise be.

and other pertinent 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 Directive ¶ E2.2.3, "The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security must be an overall common sense determination based upon careful consideration" of the guidelines and the whole person concept.

Applicant went through several difficult marriages and divorces. Delinquent debt resulted in the 1999 to 2003 timeframe, and his most recent divorce was in 2003. He paid $222 in March 2007, resolving the debt in SOR ¶ 1.g. He paid the debt in SOR ¶ 1.a ($5,512 federal tax debt). He said he gave the money to his cousin to pay his Oregon state tax debt (SOR ¶¶ 1.b to 1.d). On December 4, 2008, he said he had "paystubs" showing "partial payments to the state of Oregon, which shows about half of the payments, as the rest was paid in cash directly to the state office." On December 6, 2008, he emailed some pay information showing he paid the state of Oregon $3,000 in October 2008 as an "Oregon State Deduction" (Remand AE B). He has earned substantial credit for his service to his country overseas for many years, especially his current service in a combat zone.

Applicant provided sufficient evidence that he resolved all SOR debts except for the debt of $8,708 in SOR ¶ 1.e. In regard to the debt in SOR ¶ 1.e, he failed to establish that he acted responsibly after he became fully employed and received the SOR.

However, his failure to show financial responsibility is a much lesser security concern than his falsification of his SF 86, compounded by his false explanation at his hearing about receiving bad advice from security personnel. If his single delinquent debt in SOR ¶ 1.e was the only security concern, I would mitigate all security concerns under the "Whole Person Concept."

Applicant deliberately failed to disclose his two felonies on his 2004 security clearance application. This falsification has a serious negative impact on my security clearance determination because it damages his integrity and trustworthiness. He claimed that he disclosed his felonies to security personnel in 2004 and again to security personnel at a different company in 2006. He asserted that security personnel in both offices told him not to list conduct prior to 2000 (his two felony convictions occurred in 1998). His false statements about receiving this bad advice on March 20, 2008, and again on November 18, 2008, are recent. An Applicant should not receive a clearance when they provide recent, false explanations for failing to disclose information on an SF 86. His statement that he disclosed the felonies to his current employer in 2006, who told him not to disclose the information on his 2004 SF 86 and to back date the 2004 SF 86 is not credible. It is simply not plausible that two security offices for two different defense contractors would tell an Applicant not to reveal information that was clearly and expressly required on a security clearance application.

I take this position based on the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), my "careful consideration of the whole person factors"[12] and supporting evidence, my application of the pertinent factors under the Adjudicative Process, all the evidence in this decision (especially his contributions to his employer and his country, while serving in a combat zone) and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude he is not eligible for access to classified information.

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:	AGAINST APPLICANT
Subparagraphs 1.a to 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraphs 1.f and 1.g:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraphs 2.b and 2.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
Mark W. Harvey
Administrative Judge

[12] *See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).