

DATE: December 29, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-08505

DECISION OF ADMINISTRATIVE JUDGE

MARK W. HARVEY

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Brett J. Riegel, Esq., Applicant's Counsel

SYNOPSIS

Forty-four-year-old Applicant had one alleged delinquent debt listed on his statement of reasons (SOR). The debt was satisfied through foreclosure and repossession of Applicant's residence in 2001 because no supplemental proceeding establishing the amount of the debt was filed within six months of delivery of the sheriff's deed as required under Pennsylvania law. He falsely answered two questions on his security clearance application concerning the repossession and civil court action involving his residence because he was embarrassed about his financial difficulties. He mitigated security concerns about financial considerations, but not about personal conduct. Clearance is denied.

PROCEDURAL RULING

On or about August 10, 2006, Department Counsel made a motion to amend the Statement of Reasons (SOR), adding two falsification allegations concerning Questions 35 and 40 of Applicant's Security Clearance Application, Standard Form (SF) 86. ⁽¹⁾ Applicant made a timely objection to the amendment, asserting that the government was aware of these allegations at the time the original statement of reasons (SOR) was prepared on August 10, 2004. Moreover, the change to the SOR at this late date was unduly prejudicial, and violated Constitutional principles of due process. ⁽²⁾ Applicant conceded that lack of notice did not cause any prejudice, or change the evidence that would be presented. However, Applicant's memory about why he answered Questions 35 and 40 on his 2004 SF 86 would be more clear in 2005 when he responded to the SOR than it is now (R. 10). On November 13, 2006, Department Counsel filed an answer to Applicant's reply. *See Exhibit 10.*

The government was aware that Applicant answered, "No" in response to Questions 35 and 40 of his SF 86 when the SOR was signed on October 20, 2005. Applicant subsequently provided additional information about the judgment that raised doubt about whether Applicant correctly answered Question 37 of his SF 86, which was an alleged falsification in SOR ¶ 2.a. The government recognized that other financial questions on his SF 86 were related and amended the SOR to allege Applicant falsified Questions 35 and 40 of his SF 86. These amendments were made to provide notice, and to take into account potential financial issues and exigencies of proof. Applicant received notice on August 10, 2006,

which provided an adequate opportunity to prepare to address security concerns pertaining to Questions 35 and 40 at his hearing on November 15, 2006. These amendments are not unfairly prejudicial.

A SOR may be amended "so as to render it in conformity with the evidence admitted or for other good cause." Directive ¶ E3.1.17. The Appeal Board in ISCR Case No. 99-0447 at 4 (App. Bd. July 25, 2000) (citations omitted) emphasized that a SOR is liberally construed, and liberally amended, stating:

The purpose of an SOR is to give an applicant adequate notice of the allegations against him or her so that the applicant has a reasonable opportunity to respond to them. In assessing the sufficiency of an SOR, it is necessary to balance the need for fair notice to an applicant against the need to avoid transforming SOR pleadings into a game of wits in which a minor or technical misstep is decisive. As long as there is fair notice to the affected party and the affected party has a reasonable opportunity to respond, a case should be adjudicated on the merits of relevant issues and not concerned with pleading niceties. ⁽³⁾

See also ISCR Case No. 02-22163 at 3 (App. Bd. Mar. 12, 2004); ISCR Case No. 00-0633 at 4 (App. Bd. Oct. 24, 2003). Under the Appeal Board's jurisprudence the SOR amendment was timely, and Constitutional due process was not violated. Accordingly, I granted Department Counsel's motion to amend the SOR (R. 10).

STATEMENT OF THE CASE

On August 10, 2004, Applicant applied for a security clearance and submitted a SF 86.⁽⁴⁾ On October 20, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a SOR to him, 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.⁽⁵⁾ The SOR alleges security concerns under Guidelines F (Financial Considerations) and E (Personal Conduct). I granted the defense motion to amend the SOR as stated above. 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.

In an answer, notarized on November 25, 2005, Applicant responded to the SOR allegations, and elected to have his case decided at a hearing.⁽⁶⁾ On October 4, 2006, the case was assigned to me. The hearing was held on November 15, 2006. DOHA received the hearing record (R.) on November 29, 2006, and I received it on December 4, 2006.

FINDINGS OF FACT

As to the factual allegations under Guidelines F and E, Applicant admitted that a foreclosure judgment was entered on July 19, 1999, in the amount of \$120,448.60 on his residence. The judgment was *in rem*,⁽⁷⁾ and the debt resulting from the difference between the property's sale price and the foreclosure sale price was not legally perfected. As such any resulting debt is not legally enforceable. He denied falsification of Question 37 of his SF 86 without elaboration.⁽⁸⁾ His admissions concerning the debt and foreclosure are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 44 years old (R. 58).⁽⁹⁾ From 1996 to March 2003, he has worked as an electronic technician. Since March 2003, he has either been self-employed as a consultant or employed as test technician for a defense contractor.⁽¹⁰⁾ His supervisor at the defense contractor provided a letter indicating he has known Applicant since 1994.⁽¹¹⁾ He has also worked with Applicant since 2001. He believes Applicant is reliable and trustworthy. He describes Applicant as a valuable asset to his company.

He served in the Pennsylvania National Guard from 1980 to 1998, reaching the grade of E-6.⁽¹²⁾ He received awards for being the best overall noncommissioned officer (NCO) at annual training and the best NCO in the battalion in 1995 (R. 78, 80). He attended school for 12 years and received a GED (R. 52). In 1996, he received a diploma from a vocational,

technical or trade school.⁽¹³⁾ He was married in 1980 to his current spouse.⁽¹⁴⁾ His two children were born in 1981 and 1984.⁽¹⁵⁾

Financial Considerations

SOR ¶ 1.a alleges Applicant is financially overextended because he has a judgment in the amount of \$120,448.60 that is an unpaid debt. Applicant's evidence established that the judgment was *in rem*, and had not been perfected against Applicant. When the creditor took possession of the property, and failed to perfect the debt within six months, it was satisfied. Accordingly, there is no valid, unpaid debt based on this judgment. Nevertheless, the factual history of this foreclosure, and the delinquent debt preceding the foreclosure are relevant to the allegations of falsification of Applicant's 2004 SF 86.

In 1988, Applicant purchased a house in Pennsylvania for \$45,000, of which \$36,000 was financed.⁽¹⁶⁾ A year or so later, he borrowed \$11,000 on his equity. In 1996, he decided to refinance with CF because he needed the funds for windows, and to repair problems with his home's septic system. The mortgage with CF was an adjustable rate mortgage, and the payments were increasing (R. 29). His employer moved to a different state (R. 30), and his ability to repay CF was compromised when he lost his job. He was briefly underemployed and decided to attend school to improve his technical skills. By July 1999, Applicant was about three months behind on his mortgage payments to CF, which payments were about \$1,225 per month (R. 39-40).

On July 14, 1999, Applicant made an agreement with a corporation (HR) whereby he sold⁽¹⁷⁾ or deeded his home to HR.⁽¹⁸⁾ Applicant promised to pay HR an initial payment of \$1,600, and then \$800 per month for rent.⁽¹⁹⁾ HR was supposed to retain Applicant's rent payments. No mortgage payments were to be made to CF. HR was supposed to negotiate refinancing or debt reduction with CF, and if that was unsuccessful the house would go into foreclosure. HR would attend the foreclosure sale and bid up to 85% of the fair market value of the residence, which was substantially less than the mortgage amount. Applicant also expected to continue to occupy the residence, and planned ultimately to purchase his residence from HR (R. 55).

Applicant ceased making mortgage payments to CF in July 1999,⁽²⁰⁾ and CF filed the foreclosure on July 20, 1999. *Id.* Judgment for \$120,449.60 was entered on that same day.⁽²¹⁾ By August 31, 2000, Applicant had paid HR \$11,000.⁽²²⁾ Applicant received notice of the Sheriff's Sale (R. 41) and contacted HR.⁽²³⁾ Instead of attending the Sheriff's Sale,⁽²⁴⁾ and bidding for the residence as agreed, HR told Applicant to file for bankruptcy to stop the sale. Applicant declined to file for bankruptcy. Applicant stopped making payments to HR because HR did not bid at the Sheriff's Sale (R. 35), which was on October 26, 2000. CF received title to the property on November 29, 2000.⁽²⁵⁾ On March 1, 2001, Applicant received a ten-day notice of intention to enter default judgment.⁽²⁶⁾ On April 1, 2001, Applicant and his family moved out at the request of CF.⁽²⁷⁾

At his security interview in 2005, Applicant said he thought he owed CF about \$30,000, and planned to file for bankruptcy to eliminate this debt.⁽²⁸⁾ HR kept Applicant's \$11,000, and filed for bankruptcy.⁽²⁹⁾ Applicant has been unable to recover the money paid to HR despite writing letters and seeking assistance from his attorney (*Id.*; R. 35-37). Applicant never received notice of the execution of any *in personam* judgment based on the foreclosure (R. 37-38).

Under Pennsylvania law, CF was required to file a deficiency judgment within six months after recovery of the title to the property, if CF determined anything in excess of recovery of the mortgaged property was owed.⁽³⁰⁾ By May 29, 2001, Applicant had not heard from CF or received

a notice involving the deficiency judgment or any supplementary proceeding establishing the amount of the debt.⁽³¹⁾

Applicant provided a personal financial statement (PFS), dated April 19, 2005, to a security investigator.⁽³²⁾ His PFS indicates his and his wife's combined net salary is \$3,700 per month, and their expenses totaled \$2,150 per month. He listed monthly household expenses as follows: mortgage of \$99,000 (\$630), groceries (\$500), clothing (\$20), utilities

(\$300), car expenses (\$300), life and other insurance (\$200), and miscellaneous (\$200). His total monthly debt payment was \$761, which included a car loan of \$14,000 (monthly payment of \$461), and taxes of \$2,900 (monthly payment of \$300), but excluded his mortgage. The PFS lists the following assets: real estate of \$170,000, savings of \$4,000; stocks and bonds of \$4,000, cars or boats with a value of \$20,000; and miscellaneous with a value of \$10,000. After deducting all expenses and his debt payments, he had a positive cash flow of \$789 per month.

Personal Conduct

Question 37 asks, "**Your Financial Record - Unpaid Judgements** In the last 7 years, have you had any judgements against you that have not been paid?" Applicant answered, "No." SOR ¶ 2.a alleges that this answer is false. As indicated previously, the judgment was *in rem*, rather than *in personam*. Moreover there was no supplementary proceeding setting the amount of the debt. Accordingly, Applicant could accurately provide a negative answer to this question, and SOR ¶ 2.a is not substantiated.

Question 35 asks, "**Your Financial Record - Repossessions** In the last 7 years, have you had any property repossessed for any reason?" Applicant answered, "No." SOR ¶ 2.b alleges that this answer is false. Question 40 asks, "**Public Record Civil Court Actions** In the last 7 years, have you been a party to any public record civil court actions not listed elsewhere on this form?" Applicant answered, "No." SOR ¶ 2.c alleges that this answer is false. As discussed, the answers to Questions 35 and 40 should have been, "Yes" because his residence was repossessed four years earlier, and the repossession resulted from a civil court action.

Applicant's explanation for why he answered, "No," to Questions 35 and 40 was inconsistent. Moreover, he had ample opportunity to consider whether to submit an SF 86 which omitted information about his problems with his mortgage on his foreclosed home.

He had his SF 86 for about a month (R. 62). He brought his SF 86 home and asked his wife some questions as he filled it out, but he did not show it to her or ask her to review it (R. 45, 51). It was returned to Applicant several times to get additional information from him concerning addresses of relatives (R. 68). He completed it in a somewhat hurried fashion (R. 37). In his April 19, 2005, statement to a security investigator he said, "As far as not reporting it ⁽³³⁾ on the Security Questionnaire 'I must have overlooked it!'"

He did not owe money from the judgment because it was paid when the creditor received possession (R. 54). His house was not repossessed because he voluntarily gave it back (R. 55). He signed it over to HR with the intent to buying it back from HR (R. 55, 77). The failure to list the civil court action was through his "own stupidity and laziness" (R. 55, 63, 76, 81). He figured if they found out about it, his SF 86 would be returned to him and he could make a correction to the form (R. 55-56; 63, 81). He also said he did not understand Question 40 stating, "I didn't understand the question. I just blew thr[ough] it in a hurry to get it done." (R. 63, 76). He did not consult with anyone about answering the financial questions of his SF 86 (R. 56).

He explained that he went too fast through his SF 86 and thought if there was an error it would be returned to him for correction (R. 67). He was aware that he was named as a defendant in a civil court case (R. 70). He considered the issue of the foreclosure to be a private matter (R. 70). The problems with HR were very stressful and embarrassing (R. 75, 82). He described it as "one of the hardest things I'll ever go through, very embarrassing." *Id.*

In sum, I find that the reason that he did not answer, "Yes" on Questions 35 and 40 was because he did not want to disclose embarrassing financial information. His various statements about being hurried, overlooking it, believing he voluntarily gave up possession, stupidity and/or laziness are not credible. ⁽³⁴⁾

POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider Enclosure 2 of the Directive, which sets forth adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These adjudicative guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the adjudicative process provision in Section E2.2, Enclosure 2, of the Directive. An administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

Specifically, an 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 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.

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, facts must be established by "substantial evidence."⁽³⁵⁾ The government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence and prove a mitigating condition. Directive ¶ E3.1.15 provides, "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." 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).⁽³⁶⁾

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an 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.

The scope of an administrative judge's decision is limited. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. 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.

CONCLUSIONS

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:

Guideline F (Financial Considerations)

The government has met its initial burden under Guideline F. Applicant's initial failure to pay his debt to CF is of concern, especially in light of his desire to have access to the nation's secrets. Under Guideline F (Financial Considerations), "[a]n individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." Directive ¶ E2.A6.1.1. A person who fails or refuses to pay long-standing debts or is financially irresponsible may also be irresponsible or careless in his or her duty to protect classified information.

Two Financial Considerations Disqualifying Conditions (FC DC) could raise a security concern and may be disqualifying in this case. FC DC 1 applies where an applicant has a history of not meeting his or her financial obligations. Directive ¶ E2.A6.1.2.1. FC DC 3 applies where an applicant has exhibited inability or unwillingness to satisfy debts. Directive ¶ E2.A6.1.2.3. Applicant's actions in initially failing to satisfy an outstanding financial obligation gives rise to FC DC 1 and 3. Applicant admitted he was responsible for the debt listed in the SOR. His mortgage became delinquent because he had insufficient income to make his mortgage payments. The government produced substantial evidence of these two disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove a mitigating condition. The burden of disproving a mitigating condition never shifts to the government.⁽³⁷⁾

A security concern based on financial problems can be mitigated by substantial evidence under FC MCs 1 or 2 that "the behavior was not recent" or "it was an isolated incident." Directive ¶¶ E2.A6.1.3.1 and E2.A6.1.3.2. The Directive does not define "recent," and there is no "bright-line" definition of what constitutes "recent" conduct. Based on my evaluation of the record evidence as a whole,⁽³⁸⁾ I conclude FC MCs 1 and 2 do apply because Applicant had one delinquent SOR debt which was satisfied in 2001, more than five years before his hearing.

Applicant disclosed sufficient information to support consideration of FC MC 3, "the conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)." Directive ¶ E2.A6.1.3.3. He indicated he was underemployed after his employer moved to a different state. Underemployment caused his financial problems, and he has provided enough information about changes in his financial situation, with linkage to the generation of his delinquent debt to warrant full application of FC MC 3.

FC MCs 4 and 6 can mitigate a security concern arising from financial problems when, "the person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control," or "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." Directive ¶¶ E2.A6.1.3.4 and E2.A6.1.3.6.

There was no testimony about financial counseling. He does not receive credit under FC MC 4 because there is no evidence that he has or will begin to receive financial counseling. There are however, indicia of improved financial self-discipline, and I have confidence that he is on the right track now, and will not have future financial problems. Clearly, the financial problem was resolved in 2001 and no delinquent debts have been generated in five years.⁽³⁹⁾

FC MC 6 does not apply because there is insufficient information to establish that Applicant showed good faith in the resolution of his debts. The Appeal Board has defined the concept of good faith, as requiring "a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004). Applicant's process of using HR to resolve his mortgage problem with CF does not meet the Appeal Board's stringent definition of good faith. Nevertheless, based on application of FC Cs 1, 2, and 3 and satisfaction of the delinquent debt in 2001, I conclude that security concerns pertaining to financial considerations are mitigated.

Personal Conduct

Under Guideline E, "conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that [applicant] may not properly safeguard classified information." Directive ¶ E2.A5.1.1.

Three personal conduct disqualifying conditions (PC DC) could potentially raise a security concern and may be

disqualifying in this case. PC DC 2 applies where there has been "deliberate omission, concealment, or falsification of relevant and material 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." Directive ¶ E2.A5.1.2.2. A security concern may result under PC DC 3 when an applicant deliberately provides "false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination." Directive ¶ E2.A5.1.2.3. PC DC 5 applies when an applicant has "a pattern of dishonesty or rule violations." Directive ¶ E2.A5.1.2.5.

For PC DCs 2 and 3, Applicant deliberately gave a false answer to Questions 35 and 40 of his 2004 SF 86, in an attempt to conceal his financial problems. The evidence of record establishes SOR ¶¶ 2.b and 2.c by substantial evidence because he admitted preparing his security questionnaire, he understood the questions, and he deliberately provided answers that omitted material, ⁽⁴⁰⁾ derogatory information. PC DC 5 does not apply to SOR ¶¶ 2.b and 2.c because the falsification occurred on the same 2004 SF 86.

A security concern based on Guideline E may be mitigated by substantial evidence of personal conduct mitigating conditions (PC MC). Under PC MC 1, security concerns may be mitigated when the derogatory "information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability." Directive ¶ E2.A5.1.3.1. The allegations in SOR ¶¶ 2.b and 2.c are established by substantial evidence, and constitute deliberate falsifications. As such the allegations in SOR ¶¶ 2.b and 2.c are substantiated and relevant to making a security determination about his judgment, trustworthiness, and reliability.

PC MC 2 applies when the "falsification was an isolated ⁽⁴¹⁾ incident, was not recent, ⁽⁴²⁾ and the individual has subsequently provided correct information voluntarily." Directive ¶ E2.A5.1.3.2. PC C 3 ⁽⁴³⁾ applies when the "individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts." Directive ¶ E2.A5.1.3.3. Applicant receives some credit under PC MC 2 and under the "whole person" analysis because only one false SF 86 was submitted to the government on August 10, 2004, approximately 30 months ago. ⁽⁴⁴⁾ Additionally, he receives some credit under PC MC 3 because he made a belated, good-faith effort to correct the record when he admitted his SF 86 contained incorrect information in his statement to an investigator on April 15, 2005 (albeit after being confronted by the facts), in his response to the SOR on November 25, 2005, and at his hearing. ⁽⁴⁵⁾ Although his eventual admission that the clearance entries were false was not "prompt," he deserves some credit under the "whole person" concept for providing accurate information in 2005 and 2006.

PC MC 4 applies when "[o]mission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided." Directive ¶ E2.A5.1.3.4. There is no evidence that anyone gave Applicant improper or inadequate advice or suggested that he omit information from his SF 86. Security concerns can be mitigated under PC MC 5 when an applicant "has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress." Directive ¶ E2.A5.1.3.5. Under PC MC 5, Applicant receives some credit for eventually disclosing his financial problems. Any steps made toward rehabilitation are insufficient in magnitude and too recent to support full application of PC MC 5.

"Whole Person" Analysis

In addition to the enumerated disqualifying and mitigating conditions as discussed above, I have considered the general adjudicative guidelines related to the whole person concept under Directive provision E2.2.1. As noted above, Applicant's false statement on his 2004 SF 86 is a very significant security concern because it is an indication he may not safeguard classified information. E2.2.1.1. His actions were knowledgeable and voluntary. E2.2.1.2 and E2.2.1.5. His falsification occurred relatively recently, and his initial statement to the security investigator included an inconsistent statement that he "must have overlooked it." E2.2.1.3. He is 44 years old, sufficiently mature to be fully responsible for his conduct. E2.2.1.4. The motivation for the falsification was to conceal information about his financial problems. E2.2.1.7. There is little or no potential for pressure and/or exploitation. E2.A6.1.1 and E2.2.1.7. The likelihood of recurrence is low. I am confident that Applicant realizes the importance of being accurate and truthful, especially when involved with security matters. However, corroborating evidence of change is sparse. E2.2.1.6 and

E2.2.1.9. The absence of evidence of any prior security violation, his forthright and candid statement at the end of his hearing, his evident sincerity about ensuring his SF 86 is accurate, and his remorse about his SF 86 all weigh in his favor. However, there is a paucity of supporting evidence establishing his rehabilitation. After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to personal conditions, but as indicated previously security concerns pertaining to financial considerations are mitigated.

The evidence leaves me with grave questions and doubts as to Applicant's security eligibility and suitability. 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"⁽⁴⁶⁾ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under Enclosure 2 of the Directive. Applicant has failed to mitigate or overcome the government's case. 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: FOR APPLICANT

Subparagraph 1.a: For Applicant

Paragraph 2., Guideline E: AGAINST APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: Against Applicant Subparagraph 2.c: Against Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Mark W. Harvey

Administrative Judge

1. Department Counsel's motion, Exhibit 8, was sent to Applicant's Counsel on or about August 10, 2006 (R. 8).
2. Exhibit 9 (Applicant's reply brief).
3. The Appeal Board listed the reasons non-SOR conduct may be considered: "(a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3." ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). Additionally, the Appeal Board has determined that even though crucial security concerns are not alleged in the SOR, the Judge may consider those security concerns when they are relevant and factually related to a disqualifying condition that was alleged in the SOR. ISCR 05-01820 at 3 n.4 (App. Bd. Dec. 14, 2006) (citing ISCR Case No. 01-18860 at 8 (App. Bd. Mar. 17, 2003) and ISCR Case No. 02-00305 at 4 (App. Bd. Feb. 12, 2003)).
4. Exhibit 1, Electronic Standard Form (SF) 86, Security Clearance Application is dated May 25, 2004, on the first page. Applicant's signature appears on pages 7 (dated Aug. 10, 2004), 10 (dated Aug. 9, 2004), and 11 (dated Aug. 9, 2004). There is an allegation of falsification of this SF 86 in SOR ¶¶ 2.a, 2.b, and 2c.

5. Exhibit 11 (Statement of Reasons (SOR), dated October 20, 2005), is the source for the remainder of this paragraph.
6. Exhibit 12 (Applicant's response to SOR, dated November 25, 2005).
7. The judgment at issue was an "*in rem* judgment." In *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977), the Supreme Court defined some judgments pertaining to real property and jurisdiction:

If a court's jurisdiction is based on its authority over the defendant's person, the action and judgment are denominated "*in personam*" and can impose a personal obligation on the defendant in favor of the plaintiff. If jurisdiction is based on the court's power over property within its territory, the action is called "*in rem*" or "*quasi in rem*." The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court. "A judgment *in rem* affects the interests of all persons in designated property. A judgment *quasi in rem* affects the interests of particular persons in designated property. The latter is of two types. In one the plaintiff is seeking to secure a pre-existing claim in the subject property and to extinguish or establish the nonexistence of similar interests of particular persons. In the other the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him. Restatement, Judgments, 5-9." *Hanson v. Denckla*, 357 U.S. 235, 246 n. 12 (1958).
8. Exhibit 12, *supra* note 6, is the source for the facts in this paragraph.
9. Exhibit 1, *supra* note 4, at 1.
10. Exhibit 1, *supra* note 4, at 2-3 is the source for this sentence and the next sentence, concerning Applicant's employment.
11. Exhibit A (letter from Applicant's supervisor, dated November 14, 2006) is the source for this sentence and the remainder of this paragraph.
12. Exhibit 1, *supra* note 4, question 11, at 3. He testified that he had 13 years of military service, and planned to return to the National Guard to complete 20 years service (R. 52).
13. Exhibit 1, *supra* note 4, question 5 at 1.
14. Exhibit 1, *supra* note 4, question 8 at 2; R. 25.
15. Exhibit 1, *supra* note 4, question 9, at 2-3; R 25.
16. Exhibit 2 (statement to Special Investigator, Office of Personnel Management Investigations Service, dated April 19, 2005), at 1 is the source for the facts in this paragraph, unless otherwise stated.
17. Exhibit F (Offer to Purchase, signed by Applicant, but not signed by HR), at 36.
18. Exhibit F (letter from Applicant and his spouse, dated April 30, 2001, describing HR arrangement) and R. 31-35. Although Applicant signed the deed, HR never recorded it.
19. Exhibit F (Rental Agreement, signed by Applicant, but not signed by HR; and cancelled checks showing payments to HR), at 19-30 and 32-33.
20. Exhibit E (letter to Department Counsel, dated February 7, 2006 and docket).
21. Exhibit E (docket), at 3.
22. Exhibit 2, *supra* note 16 (stating payments to HR totaled about \$14,000), at 2; Exhibit F (cancelled checks), at 19-30; Exhibit F (letter from Mr. Riegel to HR, dated February 2, 2001) (stating payments to HR exceeded \$11,000), at 16.

23. Exhibit F (letter of Applicant, dated April 30, 2001), at 1-2, is the source for the remainder of this paragraph, unless stated otherwise.
24. Four sheriff's returns of writs of execution were filed on July 19, 2000; August 21, 2000; October 19, 2000; and November 28, 2000. *See* Exhibit E (docket), at 3.
25. Exhibit F (letter of Applicant, dated April 30, 2001), at 1-2; Exhibit E (docket), at 3; R. 38, 44.
26. Exhibit F (letter from Mr. Riegel to Applicant, dated March 8, 2001), at 18.
27. *Id.*, at 18; R. 37, 46.
28. Exhibit 2, *supra* note 16, at 2.
29. Exhibit F (letters from Mr. Riegel to HR and Applicant), at 15-16 and 18.
30. 42 Pa. C.S.A. § 5522(b)(2) provides, "A petition for the establishment of a deficiency judgment following execution and delivery of the sheriff's deed for the property sold in connection with the execution proceedings referenced in the provisions of section 8103(a) (relating to deficiency judgments)." Exhibit B (copy of statute with historical and statutory notes). 42 Pa. C.S.A. § 8103(a) states, "Whenever any real property is sold, directly or indirectly, to the judgment creditor in execution proceedings and the price for which such property has been sold is not sufficient to satisfy the amount of the judgment, interest and costs, the judgment creditor shall petition the court to fix the fair market value of the real property sold. The petition shall be filed as a supplementary proceeding in the matter in which the judgment was entered. . ." 42 Pa. C.S.A. § 8103(b) mandates that any debtor and owner of property, who is not named and served is discharged from personal liability to the judgment creditor on the debt. 42 Pa. C.S.A. § 8103(d) indicates the creditor can file to have a judgment "satisfied" by asserting that the creditor has not filed a petition to set the fair market value within the six months' limitation in § 5522. Exhibit C (copy of statute with historical and statutory notes).
31. Exhibit E (docket).
32. Exhibit 2, *supra* note 16, at 5. His personal financial statement is the source for the information in this paragraph, unless otherwise indicated. His PFS erroneously deducted his mortgage payment from his income twice. Applicant and his wife had some pay raises by the time of his hearing, two years later. He was receiving \$45,000 per year and his wife was receiving \$22,000 per year. The debt situation was unchanged (R. 57).
33. "It" refers to the discussion about the mortgage difficulties with CF and the attempt to retain his residence with the help of HR.
34. Even though he was aware of his mortgage being over 180 days delinquent within 7 years of completing his SF 86, he answered, "No" to Question 38 which asks, "**Your Financial Delinquencies - 180 days** In the last 7 years, have you been over 180 days delinquent on any debt(s)? There is no SOR allegation that Applicant provided a false answer to Question 38, and Applicant's counsel objected to Applicant being required to explain his answer to this question. I considered Applicant's answer to Question 38 for purposes of impeaching Applicant's credibility. *See* note 3, *supra* (indicating a non-SOR alleged falsification may be considered for credibility purposes).
35. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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).
36. "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July

- 6, 2006).
37. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).
38. *See* ISCR Case No. 03- 02374 at 4 (App. Bd. Jan. 26, 2006) (citing ISCR Case No. 02-22173 at 4 (App. Bd. May 26, 2004)). When making a recency analysis for FC MC 1, all debts are considered as a whole.
39. *See* ISCR 04-07360 at 2 (App. Bd. Sept. 26, 2006) (stating partial credit was available under FCMC 6 for debts being resolved through garnishment).
40. The Appeal Board has defined "materiality" to include "conduct an applicant sought to conceal [that] is determined to be extenuated or mitigated for purposes of Guidelines other than E. For purposes of falsification, materiality also covers information that is relevant to a security clearance investigation." ISCR Case No. 02-24062 at 5 (App. Bd. Jan. 31, 2005) (citing ISCR Case No. 95-0818 at 3-4 (App. Bd. Jan. 31, 1997)).
41. *See* ISCR Case No. 02-12329 at 5 (App. Bd. Dec. 18, 2003) (indicating that inconsistent statements are considered when determining whether a falsification is "isolated").
42. *See* ISCR Case No. 03-16819 at 5 (App. Bd. Oct. 12, 2006) (holding falsification over four years before hearing could be considered "recent").
43. For cases involving an applicant's disclosure to correct an earlier falsification PC MC 3, rather than PC MC 2 is the proper guideline. *See* ISCR Case No. 02-15003 at 3 (App. Bd. Mar. 17, 2005) (citing ISCR Case No. 01-06166 (App. Bd. Oct. 25, 2001)), *see also* ISCR Case No. 97-0289 at 2 (App. Bd. Jan. 22, 1998).
44. *See* ISCR Case No. 04-07360 at 2, 3 (App. Bd. Sep. 26, 2006) (indicating when a mitigating condition cannot be fully applied, "some credit" is still available under that same mitigating condition).
45. In ISCR Case No. 04-08934 at 2 (App. Bd. Aug. 17, 2006) the Board stated that Applicant's statements about his intent and state of mind when he executed his SF 86 were relevant but not binding information. Moreover, his statements are considered in light of the record evidence as a whole. *Id.* "The security concerns raised by Applicant's falsification were not necessarily overcome by Applicant's subsequent disclosures to the government." *Id.* (citing ISCR Case No. 01-19513 at 5 (App. Bd. Jan. 22, 2004)).
46. *See* ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).