DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 07-02905
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Alison O'Connell, Esquire, Department Counsel
For Applicant: *Pro se*

February 21, 2008

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Decision

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FOREMAN, LeRoy F., Administrative Judge:

Applicant submitted her Security Clearance Application (SF 86) on March 9, 2006. On August 15, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny her application, citing security concerns under Guideline F (Financial Considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on September 24, 2007 and requested a hearing before an administrative judge. DOHA received the request on September 27, 2007. Department Counsel was prepared to proceed on November 8, 2007, and the case was assigned to me on November 13, 2007. DOHA issued a notice of hearing on November 20, 2007; and I convened the hearing as scheduled on December 18, 2007. Government Exhibits (GX) 1 through 13 were admitted in evidence without objection.

Applicant testified on her own behalf and presented the testimony of two witnesses. I granted Applicant's request to keep the record open until January 4, 2008, to enable her to submit additional evidence. On January 3, 2008, I granted her request to extend the time for submitting additional evidence until January 18, 2008. Applicant timely submitted Applicant's Exhibits (AX) A through W, some of which were admitted over Department Counsel's objections.[1] My ruling on the objections is discussed below. Department Counsel's objections are attached to the record as Hearing Exhibit (HX) I. DOHA received the transcript of the hearing (Tr.) on January 4, 2008. The record closed on January 18, 2008. Eligibility for access to classified information is granted.

Procedural and Evidentiary Rulings

Amendment of SOR

The SOR ¶ 1.b alleged Applicant filed a Chapter 13 bankruptcy petition in December 2002 and it was granted in July 2003. Department Counsel moved to amend the SOR ¶ 1.b to allege, "On July 31, 2003, the bankruptcy petition you filed in December 2002 for bankruptcy protection under Chapter 13 of the U.S. Bankruptcy Code was dismissed." Applicant did not object to the amendment, and I granted the motion to amend (Tr. 20).

Objections to Applicant's Post-hearing Submission

Applicant presented no documentary evidence at the hearing. I held the record open to permit her to produce bank statements, correspondence from creditors, and "[a]nything that would kind of fill in the blanks with paper to show what you've done to dispose of the debts." (Tr. 139-40). She timely submitted AX A through W. Department Counsel objected to AX A, B, C, K, and L on the ground that they exceeded the scope of documents allowed to be submitted post-hearing. To the extent that some of the documents address the family expenses that contributed to Applicant's financial problems, they exceed the category of evidence showing disposition of the debts. However, they address matters about which Applicant testified and was cross-examined. I have the discretion to expand the scope of a post-hearing submission, and I have chosen to exercise that discretion in the interest of basing my decision on as much relevant information as possible.

Department Counsel also objected on the ground that AX A, B, and C, statements from Applicant, her military supervisor, and her husband, are testimonial and not subject to cross-examination. Hearsay evidence is admissible, even though not tested by cross-examination. ISCR Case No. 03-06770 at 4 (App. Bd. Sep. 9, 2004). Much of the statement from her military supervisor is advocacy rather than recitation of facts, and I have treated it as such. The statements of Applicant and her husband cover the same material as was covered at the hearing, although with greater specificity in

[1] Applicant's exhibits were numbered as enclosures to her "rebuttal" letter, admitted as AX B. The enclosures were lettered alphabetically, and a cross-reference between the numbered enclosures and letter exhibits was annotated in pencil on AX B and HX I.

some cases. The Appeal Board has noted, "By design, the DOHA process encourages judges to err on the side of initially admitting evidence into the record and then to consider a party's objections when deciding what, if any, weight to give that evidence." ISCR Case No. 04-12449 at 4 (App. Bd. May 14, 2007). With this guidance in mind, I have admitted AX A, B, and C, taking into account that they were not tested by cross-examination and weighing the extent to which they are corroborated by other record evidence.

Findings of Fact

In her answer to the SOR, Applicant admitted the Chapter 13 bankruptcy alleged in SOR ¶¶ 1.a and 1.b. She admitted the debts alleged in SOR ¶¶ 1.c, 1.d, and 1.e, with explanations. Her admissions in her answer to the SOR and at the hearing are incorporated in my findings of fact. I make the following findings:

Applicant is a 49-year-old administrative financial management analyst for a federal contractor (Tr. 47). She has worked for her current employer since November 1998. She served in the U.S. Navy for 20 years and retired as a chief petty officer (E-7) shortly before beginning her current job. She held a clearance in the Navy and received her current clearance as a civilian in February 1999.

Applicant has been married since November 1981. Her husband retired from the Navy in January 1998 and is employed by a federal contractor (Tr. 53). He also holds a security clearance. They have a 22-year-old son; a 24-year-old daughter who is learning-disabled; and a 28-year-old stepson, with whom they have had no contact for about 10 years. Applicant currently has temporary custody of her two-year-old grandson, the child of her learning-disabled daughter (Tr. 42; AX V).

Starting in 1991, Applicant and her husband purchased vacation time shares at various locations in the U.S. to reduce vacation expenses. They purchased one in 1991, one in 1993, and one in 1995. They did not consider selling them when they found themselves financially overextended, because timeshares are difficult to sell (Tr. 71).

Starting in 1995 or 1996, Applicant and her husband cared for Applicant's mother-in-law until she recently passed away. They paid her medical expenses and assumed some of her debts (Tr. 38, 54; AX B at 2).). Shortly before they both retired from the Navy, they bought a house in preparation for retirement. Their financial situation before retirement was tight, and they sometimes missed payments and needed to negotiate with creditors (Tr. 59).

After retirement, they had credit card debt they had accumulated while on active duty (Tr. 40). From 1999 to 2002, they paid for tutors and counseling for their learning-disabled daughter (AX B at 3; Tr. 38).

Applicant's husband began working for a government contractor but was laid off when the contract expired (Tr. 39, 50). He was unemployed for about three months, and they began falling behind on their debt payments and receiving calls from creditors (Tr. 50). He found another job with a contractor but was laid off again when that contract expired after three or four months (Tr. 51). He was out of work for a total of about eight months. During his period of unemployment, they lived on Applicant's salary and their military retired pay. At the time, she was making an entry-level salary, around $40,000 annually (Tr. 57).

As they fell further behind on their debt payments, Applicant and her husband sought financial aid and legal advice through the Navy. They considered debt consolidation services but decided against them because the debt consolidation agencies charged a fee (AX B). They consulted with a civilian lawyer, who recommended a Chapter 13 bankruptcy (AX B). They filed a petition for Chapter 13 bankruptcy on December 2, 2002, and submitted a Chapter 13 payment plan. In May 2003, the payment plan was amended to require Applicant and her husband to surrender a 1998 Chaparral speedboat and one of their timeshare condominiums to satisfy secured debts. The property was surrendered and sold (AX E at 2).

In June 2003, while approval of the Chapter 13 payment plan was pending, Applicant and her husband vacationed for a week in the Dominican Republic. They used their timeshare program to cover the cost of lodging and spent a "couple hundred" apiece for airline tickets (Tr. 102).

The Chapter 13 payment plan finally was confirmed on July 14, 2003. It provided for payment of $560 per month for five months, and $1,423 per month thereafter (GX 6).

Two weeks later, Applicant and her husband requested dismissal of the petition, because the required payment of $1,423 per month was more than they had been paying to their creditors before they filed for bankruptcy protection (AX B at 2; AX F; GX 8). The petition was dismissed in July 31, 2003 (Government Exhibit (GX) 3).

After their bankruptcy petition was dismissed, Applicant and her husband contacted many of the creditors listed in the bankruptcy petition, including those alleged in SOR ¶¶ 1.c, 1.d, and 1.e.

The debt of $25,407, alleged in SOR ¶ 1.c, was a debt consolidation loan taken out around 2000 (Tr. 87). Applicant and her husband negotiated a payment plan, paying $400 per month and sometimes $500 per month. They paid the debt in full in October 2007 with a lump sum payment of $11,763 after they sold Applicant's mother-in-law's house (Tr. 89-90; AX I).

The balance on the debt of $23,650, alleged in SOR ¶ 1.d, is reflected by the creditor as $0 (AX R). The creditor for the $872 debt alleged in SOR ¶ 1.e informed Applicant that the account was "archived" and there are no monies due (AX Q).

They also negotiated a payment plan for their home mortgage, brought the payments up to date, and eventually refinanced it (AX A; AX H; Tr. 41). A department store charge account (Claim #1 on Bankruptcy Claims Register, GX 5), is now current with a $0 balance (AX O). A credit card debt (Claim #5) was settled (AX M). A bank loan (Claim # 8 or #9) was paid off (AX P). Several debts were disputed as attributable to identity theft (Claims #11-14) (AX B at 4; AX C at 3), and they no longer appear on Applicant's credit report.

Applicant's son began college in 2003. His tuition and fees are about $11,800 per year (AX K; Tr. 38).

Four years ago, Applicant and her husband purchased a parcel of undeveloped land for $140,000 as an investment property. They used the equity in their home to purchase the property and paid the purchase price in full (Tr. 95-96). In 2006, they purchased another timeshare property (Tr. 71). All their timeshare properties are paid off, except one camping timeshare, on which they are making payments of $79 per month. It will be paid off in March 2009 (AX B at 5; AX S).

Two years ago they purchased a truck for about $38,000 and a camper trailer for about $43,000, in preparation for their retirement. The payments are current on these two purchases. They plan to retire in about five years and live in the trailer (Tr. 94, 99).

Applicant submitted a personal financial statement in response to DOHA interrogatories in April 2007. She reported that she and her husband had a net monthly income of $10,678 and expenses of $7,503, leaving a net monthly remainder of about $3,175. The expenses included the $500 payments on the debt consolidation loan that is now paid off (GX 2 at 7). After the hearing, she submitted an updated and more detailed personal financial statement reflecting net monthly income of $10,151 and expenses of $9,128, leaving a net monthly remainder of about $1,023 (AX A at 2). The family expenses increased when they obtained custody of their grandson (Tr. 93).

Applicant drives a van she purchased in 1998. Her husband drives a compact car purchased around 2000 (Tr. 97). They have about $2,000 in savings (GX 2 at 7; Tr. 97). Applicant has a 401(k) retirement account with her current employer. She was unsure how much was in the account, but estimated it at more than $50,000 (Tr. 98). She does not know how much her husband's retirement account is worth. They no longer use credit cards; except for one gasoline card, which is current (Tr. 40, 44, 100). When they retire, they intend to live on their military retirements, their 401(k) accounts, and the proceeds from the sale of their home (Tr. 100).

Applicant testified all their debt payments are current, and her assertion is corroborated by the most recent credit report submitted by Department Counsel, which reflected only two negative entries: the charged off debt consolidation loan alleged in SOR ¶ 1.c and a credit card account (GX 11 at 3-4). The debt consolidation loan was paid off (AX I), and the credit card account reflects no balance due.

Applicant's testimony during the hearing was uncertain regarding resolution of some of the debts, because her husband handled the bankruptcy and handles all the family finances (Tr. 86). Her post-hearing submission provided more specificity regarding her financial situation.

Applicant's current civilian supervisor has known her for about 15 years. He interviewed her for her current job when he learned she was retiring from the Navy. He testified she works without supervision and has performed very well. Even though she has encountered stressful situations in her family life, it has never interfered with her duty performance (Tr. 121-24).

Applicant's current military supervisor, a Navy commander, testified he had worked with Applicant on a daily basis for about a year as of the date of the hearing. She has been candid about her financial and family problems. He described her duty performance as "absolutely incredible." She is the "go to" person in the organization. She is innovative, enthusiastic, and absolutely trustworthy. He testified it would take "about ten people" to replace her (Tr. 129-35).

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the 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 applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. 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). "[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

The SOR alleges Applicant filed for Chapter 13 bankruptcy in December 2002 (SOR ¶ 1.a), and her petition was dismissed in July 2003 (SOR ¶ 1.b). It also alleges three delinquent debts totaling about $49,929 (SOR ¶¶ 1.c, 1.d, and 1.e). The security concern relating to Guideline F is set out in AG ¶ 18 as follows:

> Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Several disqualifying conditions under this guideline could raise a security concern and may be disqualifying in this case. AG ¶ 19(a) is raised where there is an "inability or unwillingness to satisfy debts." AG ¶ 19(b) is a two-pronged condition that is raised where there is "indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt." AG ¶ 19(c) is raised when there is "a history of not

meeting financial obligations." AG ¶ 19(e) is raised when there is "consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis."

AG 19(a) is not raised because Applicant is not unable or unwilling to satisfy her debts. For a few years after she and her husband retired from the Navy, they were financially overextended, but all delinquent debts have been resolved and payments are current on all existing debts.

AG 19(b) is raised by Applicant's decision to take a vacation in the Dominican Republic while approval of their Chapter 13 payment plan was pending. While the amount spent was relatively small, using available funds for a vacation instead of satisfying delinquent debts was "frivolous" and "irresponsible" within the meaning of this guideline. AG 19(c) and (e) are raised by Applicant's history of delinquent debts, some of which were resolved only recently.

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

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

The first prong of AG ¶ 20(a) ("so long ago") is not established because some of the debts were not resolved until recently. The second prong ("so infrequent") is not established because Applicant had multiple delinquent debts that remained unresolved for several years.

The third prong ("unlikely to recur") is established. Applicant's mother-in-law has passed away, the expenses incurred for her care are resolved and will not recur, and the debts Applicant assumed from her mother-in-law have been resolved. Applicant and her husband have paid off all but one of their timeshare properties, brought their primary home mortgage payments up to date, and refinanced their home mortgage. They have no credit card debt. Their careers have progressed to the point where they have a net annual income of more than $120,000.

The fourth prong ("current reliability, trustworthiness, or good judgment") is established. Applicant and her husband have righted their financial ship and live a modest lifestyle. Applicant's supervisors regard her as honest and absolutely trustworthy. I conclude the mitigating condition in AG ¶ 20(a) is established.

Security concerns under this guideline also can be mitigated by showing that "the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances." AG ¶ 20(b). Both prongs, i.e., conditions beyond the person's control and responsible conduct, must be established.

Applicant encountered several conditions beyond her control: her husband's loss of employment for about eight months, the expenses incurred for the education of her learning-disabled daughter, the expenses incurred to care for her mother-in-law, and the debts incurred by her mother-in-law. She has not always acted reasonably in response to the financial demands that were beyond her control. Taking a vacation while the bankruptcy petition was pending was not reasonable or responsible, but the financial impact of this vacation was minimal. Disposing of an expensive boat and a vacation timeshare during the bankruptcy was reasonable, but it occurred at the direction of the bankruptcy judge and apparently was not voluntarily initiated by Applicant. However, after the bankruptcy was dismissed, Applicant and her husband finally recognized the gravity of their situation. They took aggressive steps to resolve their financial problems, and they have been successful. Based on their responsible conduct after the bankruptcy petition was dismissed, I conclude AG ¶ 20(b) is established.

Security concerns under this guideline also can be mitigated by showing that "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control." AG ¶ 20(c). This mitigating condition also has two prongs that may be either disjunctive or conjunctive. It the person has received counseling, it must also be shown that there are clear indications the problem is being resolved or under control. However, if the person has not received counseling, this mitigating condition may still apply if there are clear indications that the problem is being resolved or under control. Applicant and her husband sought financial counseling from Navy agencies before filing their bankruptcy petition. Applicant recently received financial counseling and budgeting advice from a Navy financial specialist to further reduce existing debts and increase her savings. Her financial situation is under control. I conclude AG 20(c) is established.

Security concerns under this guideline also can be mitigated by showing that "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." AG ¶ 20(d). The concept of good faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation." ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999). Evidence of past irresponsibility is not mitigated by payment of debts only under

pressure of qualifying for a security clearance. Starting with the dismissal of their bankruptcy petition in July 2003, Applicant and her husband began aggressively addressing their delinquent debts. All the delinquent debts alleged in the SOR as well as others not alleged have been resolved. I conclude AG ¶ 20(d) is established.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant is a mature woman who has worked for the Navy and held a clearance for most of her adult life. She was highly regarded while on active duty and she has earned a reputation for candor and trustworthiness as a contractor. She and her husband overextended themselves in their final years of military service, and for several years did not appear to appreciate the seriousness of their financial situation. However, after dismissing their bankruptcy petition, they commenced serious efforts to resolve their financial problems, and they have been successful. They are now financially secure and looking forward to retirement in a few years.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on financial considerations. Accordingly, I conclude she has carried her burden of showing that it is clearly consistent with the national interest to continue her eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25 of Enclosure 3:

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraphs 1.a-1.e:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

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LeRoy F. Foreman
Administrative Judge