DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
-----------------------	)	ISCR Case No. 08-03611
SSN: -----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric Borgstrom, Esquire, Department Counsel
For Applicant: Pro Se

February 6, 2009

Decision

HARVEY, Mark W., Administrative Judge:

Applicant's statement of reasons (SOR) alleged three delinquent debts. One debt was withdrawn as a concern. Another debt was successfully disputed. Applicant failed to mitigate financial considerations because he did not provide a reasonable explanation for his failure to resolve one delinquent debt. Eligibility for a security clearance is denied.

Statement of the Case

On October 16, 2006, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) or Security Clearance Application (SF 86) (Government Exhibit (GE) 1). On October 9, 2008, the Defense Office of Hearings and Appeals (DOHA) issued an 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, modified and revised. The revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, are effective within the Department of Defense for SORs issued after September 1, 2006. The SOR alleges security concerns under Guideline F (Financial Considerations). 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.

On November 5, 2008, Applicant signed his SOR response, and Applicant requested a hearing (GE 9). Department Counsel indicated he was ready to proceed on December 8, 2008, and on December 16, 2008, the case was assigned to me. At the hearing held on January 12, 2009, Department Counsel offered six exhibits (GEs 1-6) (Transcript (Tr.) 19),[1] and Applicant offered 12 exhibits (Applicant's Exhibit (AE A-L) (Tr. 22-23). Applicant objected to GE 3, a credit report, because it contained false information (Tr. 19-20). Applicant contended the report should show one debt was not Applicant's, another debt was disputed, and a third debt was a duplication of the disputed debt (Tr. 20). I admitted GE 3 with the stipulation that I understood that one debt was favorably resolved for Applicant, and the other two debts were disputed (Tr. 21). There were no other objections, and I admitted GEs 1-6 and AEs A-L (Tr. 21-23). Additionally, I admitted the Hearing Notice (GE 7), the SOR (GE 8), and his SOR response (GE 9). I received the transcript on January 26, 2009.

Findings of Fact[2]

The SOR lists two delinquent debts (excluding the debt in SOR ¶ 1.c, which was withdrawn) (Tr. 15-16; GE 8). The debt in SOR ¶ 1.a involved a credit card account, D, which was charged off in February 2002 in the amount of $7,805. In September 2004, D obtained a judgment for $10,097. The debt in SOR ¶ 1.b related to a bank account, M, charged off in December 2001 in the amount of $9,142. Applicant denied the allegations in SOR ¶¶ 1.a and 1.b asserting the debts were not lawful (GE 9). He did provide documentation and comments indicating he was familiar with these two accounts and once owed debts to these two creditors. 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 50-years-old (Tr. 24).[3] He has a certificate for high school completion, and attended college in business administration from 1986 to 1989, earning an associates degree (Tr. 6-7, 24). He has never held a security clearance (Tr. 7). From January 2004 to present (except for one month of unemployment in April 2004), he has been a contractor-truck driver (Tr. 25). He was also unemployed from June to October 1999, and August 2000 to December 2001, and February 2003 to July 2003. He attended tractor-trailer school from July to November 2003. He married his current

[1]GE 2, Applicant's responses to DOHA Interrogatories, was missing two pages (Tr. 11, 15, 21). After the hearing, Department Counsel provided the two missing pages, which I admitted and marked as GE 2, pages 4B and 4C.

[2]Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

[3]GE 1 (2006 security clearance application) is the source for the facts in this paragraph, unless stated otherwise.

spouse in 1978. His three children were born in 1978, 1980 and 1982. He has never served in the military. His security application did not disclose a police record, or a felony conviction. There is no indication of illegal drug abuse or mental disability. He has never left employment under adverse circumstances. When he completed his 2006 SF 86, he disclosed his dispute of the debts in SOR ¶¶ 1.a and 1.b. He argued in his SF 86 that these two SOR debts were void because of Section 14-a of New York statutes, and the creditors failed to respond to Applicant's certified letters.

General Financial Circumstances

Applicant and his spouse do not receive a salary and instead they are reimbursed by a corporation for their expenses while traveling (Tr. 33, 50; GE 2 at 3). Applicant, his spouse and his son are the officers in the corporation (Tr. 61). He lives in his parent's home on their farm in New York (Tr. 6, 35, 48; GE 2 at 4). He receives mail at his parent's New York address, but he lives in his corporation's truck (Tr. 49). The truck has a 22-foot box, and can carry up to 20,000 pounds (Tr. 58). The truck is worth approximately $50,000 and is debt free (Tr. 59). He does not have any assets (GE 2 at 4). The corporation owns his telephone (Tr. 35). The corporation pays for his food and clothing when he is on the road, and he is on the road almost continuously (Tr. 35). His son lives in his parent's home and his son pays the electric and cable bill (Tr. 36). Applicant does not have any credit card payments (Tr. 36). His only payment is $120 per month for a student loan (Tr. 36). His approach is to avoid all debts and live within his means (Tr. 57). When the corporation becomes profitable, Applicant will share in the profits (Tr. 34). The corporate officers have invested the corporate revenue into the corporation and not used the funds for salaries (Tr. 51). The corporation now owns the truck that Applicant drives (Tr. 34). In 2008, Applicant's income was $6,000 to 8,000 (Tr. 35). Applicant expects the corporation to be more profitable in the future (Tr. 37).

Applicant does not make enough money to pay federal taxes (Tr. 42-43). The corporation has a Nevada address for the business, which is an office suite (Tr. 42, 49). The corporation has a phone number in Nevada and a registered agent (Tr. 49). Nevada does not have a state income tax (Tr. 42). The corporation does file and pay taxes (Tr. 43, 50). He has not filed a federal income tax return for three years (Tr. 43).

All of Applicant's assets were used up litigating the custody of his granddaughter with the Department of Social Services (Tr. 60). Applicant estimated $200,000 to $250,000 was spent in the litigation (Tr. 60).

Debt in SOR ¶ 1.a (to creditor "D")

Applicant admits that he had an account with D and borrowed money from D (Tr. 27). He asserts the debt to D is void because the creditor charged an excessive interest rate and relies upon New York Consolidated Law Service (NY CLS) Section 5-511 (Tr. 29-30; GE 9 at 3). Section 5-511 provides that a contract seeking repayment of a loan is void, unless the loan is by a "savings bank, a savings and loan association or a federal savings and loan association," in such cases the interest will be forfeited (GE 9 at 4). Applicant further contends that the creditor committed a misdemeanor by filing a

document with the court stating, "the account had been stated and taken without objection" knowing that Applicant has sent a letter by certified mail disputing the debt (Tr. 29, 39; GE 9 at 3). Finally, the affidavit of service of the sheriff was applied with a rubber stamp, which he argued constituted forgery because the sheriff never actually saw the affidavit (Tr. 39; GE 9 at 3, 7; AE G, H).[4] D's subsequent use of the forged public record constituted an additional felony (GE 9 at 3). Applicant did not assert he was not served, instead he contended the service was not done properly because the notice was not attached to the door of his residence, as required under New York law (Tr. 53).

Finally, he asserted that D was not a member of the Federal Reserve, and D is not a national bank (Tr. 37-38). When Applicant opened his account with D, D was owned by a New York brokerage firm (Tr. 38). As such, D is not exempt from compliance with the laws of New York state (Tr. 38).

Applicant provided a statement from D, dated December 11, 2001, indicating: (1) current balance owed of $7,636; (2) credit limit of $7,500; (3) no payment made the previous month; (4) purchases using the card are charged an interest rate of 16.99%; (5) cash advances are charged an interest rate 20.99%; and (6) the address of the creditor is in Delaware (Tr. 28; GE 9 at 7-8). He provided a letter from the attorney representing D, dated February 11, 2002, listing: a balance due of $7,805 (AE F). Applicant responded with a certified letter, dated March 11, 2002, asking for a variety of documents to substantiate the debt (AE G). The March 11, 2002, letter denies possessing proof of existence of a contract relationship between the collection agency and Applicant (AE G). Applicant disputes the debt because the creditor was not responsive to his concerns about the excessive or usurious interest rates being charged (Tr. 27).

The original creditor, D, as plaintiff filed a lawsuit and included a document, dated September 12, 2003, indicating in the Second Cause of Action, paragraph 6, "On or about 02/11/2002, an account in the sum of $7,805.19 was stated by Plaintiff to Defendant(s) who received and accepted same without objection. Defendant(s) promised to pay said stated sum, but no part thereof has been paid" (GE H). The lawsuit indicates that D is a Delaware State Bank. Applicant attended some hearings concerning this debt (GE 2 at 4; GE 6 at 2). In an order dated August 31, 2004, the court specifically rejected Applicant's contention that he was not served, and stated, "Accordingly, an order may enter granting plaintiff summary judgment on its claim against defendant, and dismissing defendant's counterclaim." (GE 6 at 8-9). On September 20, 2004, the court issued a judgment against Applicant for $10,097 (GE 5).

Applicant has not filed any documents with the court disputing the debt because he does not have the time or money to hire an attorney (Tr. 26, 29). Applicant planned

[4]A handwritten signature of a deputy sheriff, dated November 6, 2003, appears above the stamped signature of the sheriff (GE 9 at 9). The affidavit of service states Applicant was notified by substituted service by affixing it to the door of Applicant's residence, and by mailing a copy to his residence. It also lists three attempts to achieve personal service. The signature of the deputy sheriff was notarized, and the notary's signature does not appear to be a stamped signature.

to pay off his student loan and then accumulate about $10,000 to address the issue (Tr. 29, 36). He had consulted some attorneys and they wanted a substantial fee in advance before they would assist him (Tr. 56). He did not want to reward the illegal activity of D by paying the debt (Tr. 46). He considered it a matter of integrity not to pay the debt (Tr. 46, 56-57). He was not going to pay the debt until after he had hired an attorney to address the issue (Tr. 55). Ultimately, if he lost his case he said he would pay the debt (Tr. 55).

Debt in SOR ¶ 1.b (to creditor "M")

Applicant admitted he opened a credit card account with M in approximately 1998 (Tr. 30). From time-to-time he probably made some late payments on his debt to M (Tr. 33). In around December 2001, he chose not to pay his debt to M because M was charging an excessive interest rate (Tr. 31, 40). He informed M using the telephone of his concerns about the interest rate he was being charged (Tr. 31). He thought M did not pursue the debt because M recognized it was not in their best interests (Tr. 44). M may have exposure under New York state laws for improper banking practices (Tr. 44).

Applicant provided a statement from M, dated January 21, 2002, indicating: (1) current balance of $9,142; (2) account holder since 1999; (3) no payment made the previous month; (4) interest rate charged is 22.98%; and the address of the creditor is in Delaware (GE 9 at 13). M is a large national bank. On September 5, 2002, M transferred the debt in the amount of $11,042 to a Texas collection agency (GE 9 at 23). On February 5, 2002, the account in SOR ¶ 1.a in the amount of $9,142 was transferred to a New York collection agency (GE 9 at 27). On July 23, 2003, the creditor in SOR ¶ 1.a transferred the debt in the amount of $9,112 to a creditor located in Florida for collection (GE 9 at 18, 19). On December 4, 2003, this account in the amount of $9,112 was transferred to a collection agency in California (Tr. 41; GE 9 at 14).

On March 11, 2002, November 22, 2002, August 15, 2003 and January 5, 2004, Applicant sent letters by certified mail to the new creditors in New York, New Jersey, Florida and California asking for a variety of documents from the creditor to prove the establishment and ownership of the debt (Tr. 41; GE 9 at 15-17, 20-22, 24-26, 28-30). He denied having a contract with New York, New Jersey, Florida and California collection agencies. *Id.* He disputed the debt. *Id.* At Applicant's Office of Personnel Management (OPM) interview on October 16, 2007, Applicant denied having a credit card or account from M (GE 2 at 4, 7). He also said on May 19, 2008, in response to an interrogatory about a debt to M stated, "I have not received any notice of any claim alleged or otherwise from them. I have no other actual knowledge regarding the alleged debt." (GE 2 at 7). However, he attached a bill from creditor M to his response (GE 2 at 18). M did not reply to Applicant's letter, instead the account was transferred to another creditor for collection (Tr. 41). The creditor acknowledges the account is disputed (Tr. 41). The creditor's failure to contradict or oppose Applicant's claims is an implicit concession that he is correct (Tr. 44-45). Finally, the failure to enforce the debt to M, has resulted in a statute of limitations defense to the debt (Tr. 45).

Applicant has not hired an attorney or filed any documents with a court disputing the debt to M (Tr. 32). He may accumulate funds and then hire an attorney to litigate the validity of the debt (Tr. 36-37).

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 relevant security concern are under Guideline F (Financial Considerations).

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 two financial considerations disqualifying conditions that could 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." ISCR Case No. 03-20327 at 3 (App. Bd. Oct. 26, 2006) provides, "Applicant's credit report was sufficient to establish the Government's prima facie case that Applicant had . . . SOR delinquent debts that are of security concern." Applicant's history of delinquent debt is documented in his credit report, his 2006 security clearance application, his response to DOHA interrogatories and his SOR response. After withdrawal of SOR ¶ 1.c, Applicant's SOR alleged two delinquent debts totaling about $19,000. The government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

"Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance." ISCR Case No. 07-00852 at 3 (App. Bd. May 27, 2008) (citing *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990)). Because the government has raised financial

considerations security concerns, the burden now shifts to Applicant to establish any appropriate mitigating conditions. Directive ¶ E3.1.15.

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's conduct does not warrant full application of any mitigating conditions. His financial problems are somewhat isolated because he currently has one large, established delinquent debt totaling about $10,000, which is supported by a judgment in 2004 for $10,000. The ongoing nature of this delinquent debt is "a continuing course of conduct" under the Appeal Board's jurisprudence. *See* ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)). Moreover, I am not convinced this debt "occurred under such circumstances that it is unlikely to recur and does not cast doubt on the [his] current reliability, trustworthiness, or good judgment." Since September 2004, a valid judgment against Applicant has existed and he has not acted to resolve this debt. Although he has been paying some of his debts, such as his student loan, and generally pays all bills with cash, he has failed to make any payments on this $10,000 judgment for more than four years.

AG ¶ 20(b) partially applies. Applicant's intermittent unemployment contributed to his financial problems. Litigation over the custody of his grandchild also contributed to his financial problems. As such, some of his financial problems are due to forces beyond his control. However, he did not provide sufficient information to establish that he acted responsibly under the circumstances. He did not demonstrate sufficient efforts

to address his sole enforceable delinquent debt for $10,000.[5] He also receives some credit for informing his creditors, D and M, that he was not going to pay these two debts, and for keeping his creditors informed of the status of the debts.

AG ¶ 20(c) partially applies because Applicant received financial counseling, and clearly understands financial matters. However, there are no indications that "that the problem is being resolved or is under control" because there has been no progress involving resolution of his delinquent debt. There is insufficient information to establish that Applicant showed good faith[6] in the resolution of his delinquent SOR debts because he did not establish that his failure to pay his delinquent debts was reasonable and necessary under the circumstances.

AG ¶ 20(e) applies to the debt in SOR ¶ 1.b because Applicant disputed his responsibility for the debt to M, and the three subsequent holders of the debts. He denied borrowing money or receiving a credit card from the three subsequent holders of the debts and quite reasonably asked for proof of the debt. However, no proof was forthcoming. The record does not have sufficient evidence to prove by a preponderance of evidence that his debt in SOR ¶ 1.b is valid for any particular creditor. Applicant also raised the issue of the 6-year statute of limitations under New York law for enforcement of the debt (based on contract). *See* N. Y. Civil Practice Law and Rules, Article 2, Section 213.[7] The debt in SOR ¶ 1.b is mitigated.

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[5]"Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with his or her creditors and attempted to negotiate partial payments to keep debts current.

[6]The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

> In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that 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.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy [or statute of limitations]) in order to claim the benefit of [the "good faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

[7]The South Carolina Court of Appeals succinctly explained the societal and judicial value of application of the statute of limitations:

> Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence and promote repose by giving security and stability

Applicant raised the applicability of New York usury law to negate the debt in SOR ¶ 1.a. National banks are not subject to state laws prescribing usurious interest, instead they are governed by Federal statutes and New York usury law is not a defense. *See National City Bank v. Levine*, 155 Misc 132, 277 NYS 664 (1933), *see generally Kimball v. National Bank of North America, N.A.*, 468 F.Supp 1069 (E.D. NY 1979), *aff'd without op*, 614 F.2d 1288 (2d Cir. 1979). Federal law permits national banks and state-chartered FDIC-insured depository institutions to charge the highest rate allowed by the laws of the state where the institution is chartered, even if such rate exceeds the usury laws in the state where the borrower is located. 12 U.S.C. §§ 85, 1831d. Applicant was clearly aware of the issue of where a bank is chartered as he provided lists of national banks, federal branches and agencies, credit card banks, and trust banks (AE B-E). The bank in SOR ¶ 1.a is a Delaware bank, not a New York bank, and thus New York usury laws are not applicable.

Applicant raised the issue of whether exceeding the usury cap under New York usury law voided the debt. CLS Gen Oblig § 5-513 provides that once a borrower starts to repay a usurious loan, the borrower can recover from lender only the amount of money borrower paid that was more than legal interest. *See Dollar Dry Dock Sav. Bank v. Bellino*, 206 App. Div. 2d 499, 615 NYS 2d 70 (1994). Under this case, the whole debt may not be void.

Assuming the initial agreement was not usurious, an obligation valid when created, is not rendered unenforceable by any subsequent usurious agreements between the parties, and it is only subsequent usurious agreements that are deemed void. *Dicter v. Viking Office Products, Inc.*, 119 App. Div. 2d 794, 501 NYS 2d 420 (1986). For example, in an action to invalidate a note as usurious, the plaintiff was not entitled to summary judgment on the grounds she was required to pay interest at the rate of 24% per year during a 3-month extension period. The argument that the new rate exceeded the maximum rate of 16% allowed under CLS Bank § 14-a failed because the defense of usury does not apply where interest exceeds the statutory maximum only after default or maturity. *See Hicki v. Choice Capital Corp.*, 264 A.D.2d 710, 694 NYS 2d 750 (1999). Applicant did not provide a copy of his original contract, which may have permitted the creditor to transfer or assign the debt. The original contract may have had a Delaware address. If Applicant was late on a payment, the creditor may have been permitted to exceed 16% interest. Applicant did not establish

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> to human affairs. The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation. Significantly, statutes of limitations provide potential defendants with certainty that after a set period of time, they will not be ha[iled] into court to defend time-barred claims. Moreover, limitations periods discourage plaintiffs from sitting on their rights. Statutes of limitations are, indeed, fundamental to our judicial system.

Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 175-76, 609 S.E.2d 548, 552 (S.C. Ct. App. 2005) (internal quotation marks and citations omitted). The reduction in the magnitude and number of debts that creditors can legally enforce because of the application of the statute of limitations reduces the potential vulnerability to improper financial inducements, and the degree that a debtor is "financially overextended," is also reduced. However, it does not negate the debtor's past conduct, which failed to take more aggressive actions to resolve the financial jeopardy.

whether or not the original interest rate was usurious, whether he ever had a default (a late payment may result in a default), or the interest rate may have otherwise changed over the period of the loan.

I conclude Applicant's overall conduct in regard to his delinquent debt in SOR ¶ 1.a casts doubt on his current reliability, trustworthiness, and good judgment. He failed to resolve or pay or offer to pay the creditor holding this judgment. He failed to make partial payments on this debt after the 2004 judgment was adjudicated against him. He did not provide good cause for his failure to pay or at least to set up a payment plan, and make some payments despite having an opportunity to do so. Based on my evaluation of the record evidence as a whole, I conclude financial considerations are not mitigated.

Whole Person Concept

Under the whole person concept, the 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. The 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) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

The ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept. AG ¶ 2(c). I hereby incorporate all of my comments under the preceding discussions of the pertinent adjudicative guidelines into this section.

There is some evidence tending to mitigate Applicant's conduct under the whole person concept. His dedication to his work and his country is a very positive indication of his good character and trustworthiness. He is loyal to his country. Applicant's record of good employment and law-abiding character weighs in his favor. There is no evidence of any security violation, or criminal activity. Some of his financial problems arose from his periodic unemployment, and the expensive custody litigation involving his grandchild. His corporation is paying his expenses, but is not paying him additional funds that he could use to address this debt. He said his pay from the corporation in 2008 was only $8,000, which raises the concern that in 2008 he lacked the ability to address this debt. There is no allegation that any non-SOR debts are delinquent. These factors show some responsibility, rehabilitation, and mitigation.

The mitigating evidence under the whole person concept and the adjudicative guidelines is not sufficient to warrant access to classified information. Applicant's decision not to file a federal income tax return the last three years raises some concern about his financial well being and compliance with tax law. Willful failure to file an income tax return may violate 26 U.S.C. § 7203. A taxpayer's failure to file may be willful even though he believed he had no taxable income or insufficient taxable income to be required to file return. *See United States v. McCabe*, 416 F.2d 957 (D. Wisc. 1969). However, violation of 26 U.S.C. § 7203 is not alleged in the SOR, and all potential defenses were not explored at his hearing. I decline to infer anything negative against Applicant concerning his failure to file income tax returns for the last three years. Similarly, assuming he did not file an individual New York state income tax return, I decline to draw any adverse inference from his failure to file or pay such taxes. Applicant's sole remaining financial considerations security concern is his $10,000 judgment, which was adjudicated in September 2004. This $10,000 debt is substantial. He has been continuously employed for four years, and his intermittent unemployment does not account for the failure to resolve or make any offers to make partial payments to resolve his sole, legally enforceable delinquent debt. The SOR ¶ 1.a creditor's failure to pursue garnishment or further enforcement action does not mitigate Applicant's lack of financial responsibility. Applicant has been aware of the security significance of this delinquent SOR debt since he received the SOR in October 2008, and his efforts to resolve his delinquent debt are inadequate in that he should have attempted to negotiate partial payments with the creditor or paid the creditor, and did not do so. Further, he insists he will not pay the creditor in SOR ¶ 1.a until after he has accumulated sufficient funds for litigating the validity of this debt, when he has already lost in court, resulting in a judgment for $10,000.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the financial considerations security concern. 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 and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated 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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant (Withdrawn)

Conclusion

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 Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

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Mark W. Harvey
Administrative Judge