DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 08-04836
	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel
For Applicant: Sheldon I. Cohen, Esquire

June 30, 2009

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings, exhibits, and testimony, I conclude that Applicant failed to rebut or mitigate the Government's security concerns under Guideline F, Financial Considerations, and Guideline E, Personal Conduct. His eligibility for a security clearance is denied.

Applicant completed and signed an Electronic Questionnaire for Investigations Processing (e-QIP) on June 27, 2007. On August 19, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline F, Financial Considerations, and Guideline E, Personal Conduct. 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 in writing and elected to have a hearing before an administrative judge. His answer to the SOR was received by DOHA on November 13, 2008. The case was assigned to me on January 5, 2009.

Applicant and Department Counsel agreed to a hearing date of March 2, 2009. It was necessary to continue the hearing because of inclement weather. The hearing was rescheduled for April 6, 2009, and I conducted the hearing as scheduled.

The Government called no witnesses and introduced 6 exhibits, which were marked Ex. 1 through 6 and admitted to the record without objection. The Government provided for administrative notice general information from the web site of the U.S. Courts on the background and general provisions of the Servicemembers' Civil Relief Act and its applicability to bankruptcy, stays of proceedings where the servicemember has notice, and stays or vacation of execution of judgments, attachments and garnishments. I marked this document as Hearing Exhibit (HE) 1. The Government also provided for administrative notice excerpts from the statutory law of the State where Applicant resided on the applicability of the Servicemembers' Civil Relief Act to default judgments, the enforcement of liens, and the rights, benefits, and protections accruing to a servicemember upon call to active duty. I marked the document containing the excerpts from the State statutes as HE 2.

Applicant testified on his own behalf and called four witnesses, his wife and three attorneys who were representing him in various matters. He offered a list of 71 exhibits identified as Ex. A through Ex. SSS. All of Applicant's exhibits were marked and admitted to the record, with the following exceptions: Exs. BB and QQ were withdrawn prior to the hearing and were not further identified; Ex. III, JJJ, and KKK were admitted, although they contained handwritten notations which Department Counsel did not concede had evidentiary value; sections of Exs. FFF, GGG, and HHH were offered as legal argument and were admitted for whatever limited factual value they might have in this case; and facts in Ex. OO and Ex. NN were admitted for administrative notice. DOHA received the transcript (Tr.) of the hearing on April 15, 2009.

Preliminary Matter: Motion *In Limine*

On February 27, 2009, Applicant filed a Motion *In Limine*[1] and requested that one of his witnesses, an attorney with expertise in the Soldiers' and Sailors' Relief Act of

[1]The Parties filed the following documents related to Applicant's Motion *In Limine*: Applicant's Motion *In Limine* for Expert Witness to Be Present During Testimony (February 27, 2009); Department Counsel's Response to Applicant's Motion in Limine (March 20, 2009); Applicant's Reply to Department Counsel's Response to Applicant's Motion *In Limine* (April 2, 2009); Department Counsel's Supplemental Response to Applicant's Motion in Limine (April 2, 2009); Supplement to Applicant's Reply to Department Counsel's response to Applicant's Motion *In Limine* (April 3, 2009). These documents are cumulatively identified as HE 3 and included in the hearing record.

1940 and the Servicemembers' Relief Act of 2003, be qualified as an expert witness and be permitted to be present during the testimony of Applicant and three additional witnesses in order to clarify any facts presented in evidence that would be related to his expert testimony. In making this request, Applicant relied on Rule 703 of The Federal Rules of Evidence.

Department Counsel opposed Applicant's Motion in Limine and requested that it be denied. In requesting denial of the Motion, he noted that under The Federal Rules of Evidence, legal conclusions and expressions of legal opinions are generally not admissible as expert opinions. Additionally, Department Counsel observed that expert witnesses must offer opinions based on facts that are in record evidence. He stated a concern that the proffered expert witness might offer opinions based on incomplete sets of facts and might not address factual matters not included in Applicant's exhibits, "and which cannot be reasonably expected to be presented or adduced at a DOHA hearing." (Department Counsel's Response to Applicant's Motion in Limine at 2.)

At the commencement of the hearing, the Parties presented additional oral argument regarding Applicant's Motion in Limine. After hearing their arguments, I concluded that Applicant's witness could appear in the proceeding as a fact witness and not as an expert witness. Accordingly, I denied Applicant's Motion in Limine.

Findings of Fact

The SOR contains ten allegations of disqualifying conduct under AG F, Financial Considerations (SOR ¶¶ 1.a. through 1.j.) and two allegations of disqualifying conduct under AG E, Personal Conduct (SOR ¶¶ 2.a. and 2.b.). In his Answer, Applicant denied all twelve allegations in the SOR.

Applicant is 56 years old and employed as a flight test engineer by a government contractor. He has worked for his present employer for seven years. He holds a Bachelor of Science degree in Professional Aeronautics and is pursuing a Master of Science degree in Aerospace. In 1998, he retired from the U.S. military after 23 ½ years of service. (Ex. 1; Ex. G; Tr. 289-290.)

Applicant has been married twice. He married his first wife in 1971; he and his first wife divorced in 1996. Applicant married his second wife in 1997. Applicant's second wife has had a career in Nursing for approximately 35 years. In 1989, she received a Master of Science degree in Nursing and is currently a family nurse practitioner. After receiving her Master's degree, she joined a reserve unit of the U.S. military. She expects to be promoted to Captain (O-6) in the summer of 2009. (Ex. 1; Tr. 71, 90-91, 128-129.)

On their personal financial statement, Applicant and his wife report assets totaling $1,986,000, liabilities of $815,000, and a net worth of $1,171,200. Among their assets are two farms, a mobile home, and two houses. Their total gross monthly income is $27,234, and their total monthly expenses are $13,476. They list monthly contingent

liabilities of $8,475. Their total monthly expenses, including contingent liabilities, are $21,951. (Ex. A; Ex. B; Tr. 121, 301-304.)

Soon after he retired from the military in 1998, Applicant and his wife formed two corporations, one to establish and operate a hardware store and the other to own the commercial real estate where the hardware store was located. Applicant and his wife were the sole shareholders, managers, and owners of the businesses. The businesses were financed by two bank loans with Bank X. One loan, for $360,000, was for the real property. The second loan, for $700,000, was secured by the hardware store business and other real property that Applicant and his wife owned. Both loans were guaranteed by the Small Business Administration (SBA) and were personally guaranteed by Applicant and his wife. In 1998/1999, during its first year of business, the hardware store had twelve to fifteen employees and made approximately $1.3 million. Applicant worked full-time at the business; his wife continued her full-time work as a nurse practitioner and worked at the hardware store some evenings and on weekends. (Ex. EE; Ex. FF; Tr. 35-36, 74-75, 131, 242-243, 314-315.)

In 1999, Applicant acquired two credit card accounts which he used to pay for business expenses of the hardware store corporation. After the terrorist attacks of September 11, 2001, hardware sales fell off, and Applicant experienced financial difficulties with the business. Applicant and his wife asked Bank X to extend additional credit to them, but the bank refused to do so, stating that the real property that Applicant had provided as collateral had diminished in value. Applicant and his wife were unable obtain loans from other banks because all of their collateral had been pledged to Bank X. The business continued to lose money, and Applicant and his wife found it necessary to reduce the number of employees in the business to five or six. In February 2003, Applicant took a full-time job with his present employer and he and his wife, who remained employed as a nurse practitioner, continued to manage the hardware store. (Tr. 35-37;75-80; 329-330.)

On June 13, 2005, Applicant's wife was called to active military duty, and she has served on continuous active duty in the continental U.S. since that time. By letter dated June 15, 2005, Applicant's wife wrote to Bank X, cited her call to active military service, and requested that interest on the hardware store loan, which was guaranteed by the SBA, be reduced to 6% for the duration of her active military service as provided by section 207(a)(1) of the Servicepersons' Civil Relief Act (SCRA), P.L. 108-189 – Dec. 19, 2003[2]. Applicant and his wife also requested that the interest on the commercial property loan be reduced to 6%, as permitted by SCRA. The bank complied with this request. By letter dated February 21, 2006, an officer of Bank X notified Applicant and his wife that the SBA had advised the bank that the hardware store loan was not eligible for the 6% interest reduction under SCRA. The hardware store business closed in April 2006. On July 13, 2006, the commercial real estate business owned by Applicant and his wife filed a Chapter 11 bankruptcy petition. (Ex. GG; Ex. AAA; Ex. OOO; Tr. 75-80.)

[2] *See* 50 U.S.C. app. 527.

Applicant and his wife hired a law firm to represent the real estate business in the bankruptcy. In July 2006, the law firm filed the Chapter 11 bankruptcy petition and all related papers on behalf of the business. It also represented Applicant in negotiating a consent order. Applicant did not believe that the law firm adequately represented his interests regarding SCRA when it negotiated the consent order on his behalf with Bank X.[3] The bankruptcy court awarded attorneys fees to the law firm. Applicant refused to pay the law firm's fees of approximately $24,000. The law firm brought a claim against Applicant for its fees, and a warrant in debt action was filed against Applicant on June 18, 2008. This delinquent debt was alleged at SOR ¶ 1.i., and it has not been satisfied. Applicant denies the debt and believes the law firm owes him a refund. (Ex. 3 at 15; Ex. CCC; Ex. DDD; Tr. 380, 411-412.)

The bankruptcy court found that, before filing his petition in bankruptcy, Applicant had defaulted on two deeds of trust held by Bank X. As of September 27, 2006, the payoff for the two deeds of trust was in excess of $700,000. Applicant made no payments on the two obligations after filing his petition. On July 24, 2006, Bank X filed a motion for relief from the automatic stay under Chapter 11, which the bankruptcy court heard and granted in part and denied in part. Applicant was awarded time to try to sell the properties and the inventory of the hardware store, which he was unable to do. Bank X subsequently sold the properties at a sheriff's sale.[4] Applicant was responsible for a deficiency of $358,000, identified at SOR ¶ 1.h. The bankruptcy was dismissed by order of the bankruptcy court dated January 4, 2008. The debt had not been satisfied as of June 6, 2008. Applicant does not believe he is legally obligated to pay the debt, even though he personally guaranteed the two deeds of trust. (Ex. VV; Ex. AAA; Tr. 271-272, 311, 328-329.)

During the 4½ year period between September 11, 2001 and the closing of his hardware store in April 2006, Applicant encountered numerous business difficulties, which resulted in additional financial delinquencies alleged in the SOR.

The SOR alleged that Applicant owed two debts to a credit card company, and, as of June 6, 2008, these debts had not been satisfied. One debt was for approximately $4,247 and the other debt was for approximately $5,379.[5] Both debts had been charged off by the creditor in July 2004. (SOR ¶¶ 1.a. and 1.b.)

In his Answer to the SOR, Applicant denied both debts. The record reflects that, on April 25, 2005, a check for $378.93 was remitted to the creditor authorizing payment from the hardware store corporate account for one of the two accounts. The record also

[3] Applicant stated that "the bankruptcy was a vehicle only to get a ruling. . . on the Servicemembers Civil Relief Act application" to the hardware store debt and the commercial property business debt. (Tr. 324.)

[4] Applicant relied on Section 706 (a) and 706 (b) of SCRA to assert his belief that the bank was not authorized to sell his assets and collateral at the sheriff's sale. *See* 50 U.S.C. app.596.

[5] Applicant distinguished the two accounts: "One was the typical [credit card] that you pay off [in] full every 30 days. The other one . . . was revolving. You had a minimum monthly payment." (Tr. 330.)

reflects at that in March and April 2005, the creditor gave Applicant formal notice amending the terms of his small business corporate account to hold him personally liable for charges to the account, as follows:

> The Company and the Authorizing Officer are liable to us for all Charges on the Card Account made in connection with all Corporate Cards. If you are a Corporate Cardmember you are liable to us for all Charges made in connection with the Card issued to you, even though we may send bills to the Company and not to you.

(Ex. III; Ex. JJJ; Ex. KKK.)

Applicant acknowledged that he learned in 2005 that the creditor was holding him and his wife personally responsible for the unpaid debts. He denied personal responsibility for the debts and stated: "I do not believe they are the debts [of me and my wife]. They are the debts of [the hardware store]. I attempted to pay [the credit card creditor] morally, as a moral obligation, until I realized that [the credit card creditor] had arbitrarily taken the debt and moved it to me personally." (Tr. 219, 329-332, 335.)

In September 2007, Applicant wrote to the creditor and stated again his opinion that he was not the debtor on the accounts. He stated that the hardware store corporation was responsible for payment of the debts. One of Applicant's witnesses was an attorney he had hired in December 2008 to assist him in dealing with the two credit card debts. The attorney stated that he had advised Applicant that he did not think the credit card company can validly request payment of the debt from Applicant and his wife. In February 2009, the attorney wrote again to the credit card company and disputed Applicant's responsibility to pay the debt. As of the date of Applicant's hearing, the credit card company had not responded to the attorney's letter, and Applicant had taken no action to pay or settle the debts. (Ex. K; Ex. QQQ; Tr.199-203, 225-227, 393-396.)

The SOR alleged that Applicant owed his state of residence approximately $91,000 in delinquent taxes for 2002 and 2003, and, as of June 6, 2008, the debt had not been satisfied. (SOR ¶ 1.c.) In his Answer to the SOR, Applicant denied the debt.

An attorney representing Applicant in his state and federal tax matters appeared as a witness and identified the state tax delinquencies as sales and withholding taxes related to the hardware store business. The attorney identified the delinquency attributed to Applicant and his wife as a converted assessment. Applicant's state of residence assesses delinquent business taxes against responsible officers following the closing of a business. Under the principle of converted assessment, the state takes the corporate tax debt, dollar for dollar, and charges it to the responsible officers. (Tr. 139.)

The record reflects that in December 2003, Applicant, on behalf of the hardware corporation, signed an agreement with the state to pay the delinquent taxes, beginning in January 2004. The terms of the agreement were six monthly payments of $2,500 and

a balloon payment of $75,000. Applicant made payments of $2,500 on each of the following months: January 2004; February 2004; March 2004; April 2004; May 2004; and June 2004. Thereafter, he made no more payments. Applicant stated he made payments until his wife prepared to enter active duty in June 2005, but the record does not support this statement. He also stated that he stopped making payments because the corporation lacked the money to make the balloon payment of $75,000. (Ex. RRR; Tr. 347-350.)

On June 26, 2005, Applicant, on behalf of himself and his wife, wrote to the state taxing authority and reported his wife's call to active military duty on June 13, 2005. Relying on Section 207 of SCRA, Applicant requested that the interest charged on the pre-existing tax delinquency be capped at the statutory six percent during the time of his wife's active duty service.[6] (Ex. O.)

The record does not contain a reply from the State taxing authority to Applicant's request, nor does it reflect any payments made by Applicant after he sent the letter. On April 4, 2007, the State taxing authority served a notice of tax lien and demand for payment of state taxes on a bank account in the name of Applicant's hardware store. The state taxing authority demand letter required that the bank levy "all available funds, up to the amount due, to the Department of Taxation to pay your debt." The demand letter identified the tax delinquency debt as $85,212.78. On May 23, 2008, the state taxing authority served the hardware store with a consolidated bill and notice to levy, with the notation that immediate action was required. This letter identified that balance due as $91,235. Applicant estimates that the delinquent tax, exclusive of interest and penalties is approximately $36,000. (Ex. P; Ex.Q; Tr. 166)

By letter to the state taxing authority dated July 11, 2008, Applicant requested a stay of the notice of intent to levy. In support of his request, Applicant cited his wife's continuing active duty military service, his preparation of legal action against the bank which had lent him money to establish his two businesses and which had foreclosed on the business mortgages and sold the business assets pledged as collateral, and what he believed to be his rights and his wife's rights under section 207 and section 706 of SCRA.[7] (Ex. R.)

On August 13, 2008, the state taxing authority replied to Applicant's request for a stay of the notice of intent to levy. The state taxing authority stayed collection activity on Applicant's wife's portion of the account and stated that it would pursue collection on Applicant's portion of the account. On January 6, 2009, Applicant authorized a law firm representing him to file an offer of compromise on his behalf with the state taxing authority and to request thereby a release of the lien. In the offer of compromise, Applicant proposed to pay the state taxing authority $30,000 over a period of 36 months to satisfy a converted tax assessment for delinquencies dating to tax years 2000 to

[6] *See* 50 USC app. 527.

[7] *See* 50 USC app. 527 and 50 USC app. 596.

2003. As of the date of Applicant's hearing, no reply had been received from the state taxing authority to the offer of compromise. (Ex. S; Ex. T; Tr.145-146.)

The SOR alleged that Applicant owed the Federal government approximately $88,000 in delinquent federal withholding taxes since about December 2004, and, as of June 6, 2008, the debt had not been satisfied. (SOR ¶ 1.d.) In his Answer to the SOR, Applicant denied the debt.

The federal tax delinquencies arose when the hardware store business failed to withhold required payroll taxes for its employees. The record reflects that in November 2005 Applicant contacted the federal Internal Revenue Service (IRS) and offered to pay the hardware store's outstanding federal tax debt, including penalties and interest, by March 17, 2006. By letter dated November 29, 2005, the IRS accepted Applicant's offer and identified the total amount due as $147,514.61. The record also reflects that a federal tax lien was filed June 13, 2005 and released May 14, 2008, showing an unpaid balance of assessment of $22,354.15. In 2008, the IRS assessed the unpaid business tax debt against Applicant and his wife personally. Applicant admits to an outstanding federal tax debt of $40,000 to $50,000, minus interest and penalties. (Ex.U; Ex. W; Tr. 146-147, 359-362.)

On February 24, 2009, Applicant filed claims with the IRS for refund and requests for abatement of interest and penalties accruing to delinquent employment taxes for tax quarters commencing in January 2002 and ending September 2005. Applicant supported his claims for refund and requests for abatement with the following rationale:

> [Applicant and his wife] were assessed penalties and interest during the time that [Applicant's wife] was called up for active duty. Pursuant to the SCRA, Public Law 108-189, Section 207, there is a limit of 6% interest which can be assessed, while someone is in military service. Also, pursuant to SCRA, Public Law 108-189, Section 510, penalties and interest are supposed to be deferred upon request while the taxpayer is in military service.

(Ex. LLL.)

On February 24, 2009, Applicant also filed claims for refund and requests for abatement of interest and penalties accruing to his income taxes for tax years 2003 and 2004. His arguments in support of his request relied on the rationale expressed above in Ex. LLL. At his hearing, Applicant stated his intention to set up a payment plan for the delinquent employment and income taxes after the IRS adjusts the interest and penalties as he requested in his claims for refund and requests for abatement. He stated that he had sufficient resources to pay the principal amounts owed. The attorney-witness advising him on his state and federal tax delinquencies stated that, based on his knowledge of federal tax law, Applicant would not waive or forfeit his request for abatement if he paid the principal tax debt before receiving a decision on the abatement request. (Ex. MMM; Tr. 162-166, 362-363.)

The SOR alleged that Applicant owed delinquent county property taxes that had not been satisfied as of June 6, 2008. SOR ¶ 1.e alleges that Applicant owed approximately $1,459 in delinquent county property taxes for 2004, and SOR ¶ 1.g. alleges that he owed approximately $1,649 in delinquent county property taxes for 2005. Applicant denied the allegations. He stated that when the bank seized his property and sold it at a sheriff's sale, it overpaid all outstanding county property taxes by about $5,000. He did not provide documentation to corroborate his statement. Schedule E of Applicant's Chapter 11 bankruptcy petition lists the 2004 and 2005 county property tax delinquencies. Applicant's Ex. AA contains photocopies of five checks made by Applicant and his wife and payable to the county taxing authority. The checks bear the following dates and amounts: October 6, 2008: $1,012.22; September 15, 2008: $6,397.10; September 11, 2008: $414.32 (specified as payment of 2008 taxes); March 23, 2008: $655 (specified as payment of 2007 taxes); and January 26, 2008: $2,110. It is unclear from the record whether any of these checks was in payment of the 2004 and 2005 delinquencies alleged in the SOR. Applicant stated that the check for $6,397 was for delinquent property taxes owed by the hardware store. He further stated that he and his wife personally paid the delinquent corporate taxes with the September 15, 2008 check for $6,397. The record contains a letter to Applicant from the county taxing authority, dated February 17, 2009, which states that real estate taxes for the commercial property company have been paid and no amounts are outstanding and due. (Ex. AA; Ex. KK; Ex. V V; Tr. 365-371.)

The SOR alleges that Applicant owes a creditor $1,697 on an account delinquent since November 2005. (SOR ¶ 1.f.) Applicant acknowledged the debt in response to DOHA interrogatories. He was unable to provide further information on the status of the debt or to provide a receipt indicating that the debt had been satisfied. (Ex. 3 at 15; Tr. 372-377.)

The SOR alleged that Applicant owed a delinquent debt of $1,075 to the U.S. Trustee that presided over his Chapter 11 bankruptcy. (SOR ¶ 1.j.) Applicant denied the debt, stating that it was not a personal debt but a corporate debt owed by the commercial property company which he and his wife established. He acknowledged that the commercial property company no longer had any assets with which to pay its debts. (Ex. 3 at 16; Tr. 390-391.)

Applicant completed and certified an e-QIP on June 27, 2007. Section 28a on the e-QIP asks: "In the last 7 years, have you been over 180 days delinquent on any debt(s)?" Applicant answered "No" to the question at Section 28a. Section 28b on the e-QIP asks: "Are you currently over 90 days delinquent on any debt(s)?" Applicant answered "No" to the question at Section 28b.

The SOR alleged that Applicant deliberately falsified material facts by responding "No" to the questions at Section 28a and 28b. (SOR ¶¶ 2.a. and 2.b.) Applicant denied deliberate falsification and stated that he answered Sections 28a and 28b correctly as an individual. He stated that he did not, as an individual, have any debts that were

delinquent over 180 in the past seven years and he did not, as an individual, have any current debts that were over 90 days delinquent. (Tr. 391-392.)

Applicant did not seek advice from his security officer before answering the questions. He was familiar with the questions posed on security clearance applications because he had answered such questionnaires many times during his military career, and he was confident in deciding for himself how he would answer the questions. When he completed and submitted his security clearance application, he was aware that he had personally guaranteed, and therefore was personally liable for, the business loans. After he completed his SF-86, he discussed denial of his SCRA claims with his security officer and provided her with a letter written by a military legal assistance attorney requesting assistance from the Justice Department in the matter. (Ex. CC; Tr. 433-434, 437-439.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "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.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, the administrative judge applies these guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. 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.

Section 7 of Executive Order 10865 provides that 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." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

> 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.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly under AG ¶ 19(c), "a history of not meeting financial obligations" may raise security concerns.

The record reflects that Applicant experienced difficulties in meeting the obligations of his businesses in at least 2003, and those difficulties continue to the present time. While Applicant denied all ten allegations of financial delinquency in the SOR, the record evidence establishes that the financial delinquencies exist and that Applicant initiated and carried out the actions that resulted in the debts alleged. Applicant and his wife were the sole responsible financial agents of the two businesses they established.

Applicant and his wife took out loans, which they personally guaranteed, to establish the two business corporations. A business downturn after September 11, 2001 had a negative affect on the businesses. Applicant was unable to pay the interest on the loans he took out to establish the businesses. Moreover, the businesses incurred debts, for which they were responsible and which they did not pay. Additionally, the businesses were responsible for paying federal, state, and county property taxes, which they also failed to pay.

The businesses failed in 2006. After the businesses shut down, creditors, including state and federal taxing authorities, looked to Applicant and his wife to satisfy the delinquent debts incurred by the businesses. This evidence is sufficient to raise security concerns under disqualifying conditions AG ¶¶ 19(a) and 19(c).

The guideline includes examples of conditions that could mitigate security concerns arising from financial difficulties. Several Guideline F mitigating conditions could apply to the security concerns raised by Applicant's financial delinquencies. Several mitigating conditions could apply to Applicant's case. If the financially delinquent 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," then AG ¶ 20(a) might apply. If "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," then AG ¶ 20(b) might apply. If "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," then AG ¶ 20(c) might apply. If "the individual initiated a good faith effort to repay overdue creditors or otherwise resolve debts," the AG ¶ 20(d) might apply. Finally, if "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," then AG ¶ 20(e) might apply.

Applicant established his businesses in 1998. His hardware store business fell off after the terrorist attacks on September 11, 2001. Applicant and his wife acted responsibly by turning to other employment to acquire cash and by reducing the number of individuals they employed in the hardware store. They sought to have their interest payments lowered under SCRA. However, they allowed their business loans and debts of the hardware store business to become delinquent. They did not timely file payroll

taxes for their employees. They appeared to have adversarial relationships with most of their creditors and did not seek, in good faith, to pay or settle their debts. Some of their actions were not responsible under the circumstances.

While Applicant admitted the debts existed and that they had been incurred by companies that he and his wife established and were solely responsible for, he denied personal responsibility for the debts and did not pay them, even though he provided personal financial information that established his present ability to pay or resolve the debts. As an affirmative defense, he asserted he should not be held personally responsible for the corporations' debts. He also asserted he should not be responsible to pay court-ordered debts or debts that he believed did not reflect creditors' compliance with SCRA. He stated he did not believe he should be personally responsible for paying the delinquent debts and taxes of the corporations, which were no longer in existence. From his perspective and in his opinion, the debts were unenforceable.

In light of his financial situation, Applicant had the burden of presenting evidence to demonstrate extenuation or mitigation sufficient to warrant a favorable security clearance determination. His assertions that his debts were personally unenforceable do not mitigate security concerns about his judgment and reliability demonstrated by his failure to timely satisfy his substantial unresolved debt.

DOHA's Appeal Board has concluded that reliance on the unenforceability of a debt does not constitute a good faith effort to resolve the debt within the meaning of the Directive. The Appeal Board has noted that "a security clearance adjudication is not a proceeding aimed at collecting an applicant's personal debts. Rather it is a proceeding aimed at evaluating an applicant's judgment, reliability, and trustworthiness. Accordingly, even if a delinquent debt is legally unenforceable under state law, the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner." ISCR Case No. 07-09966 at 3 (App. Bd. June 25, 2008).

Applicant denied responsibility for the financial delinquencies alleged in the SOR. In support of his denials, he asserted affirmative defenses based on his layman's understanding of the applicable law. He also presented three attorney-witnesses who testified about the advice they had given him. None of Applicant's objections to paying the delinquent debts alleged in the SOR has been tested or resolved in a definitive legal proceeding. He has the resources to settle or pay his debts should he choose to do so.

Applicant provided documentation to corroborate that he had paid all delinquent personal property taxes owed to his county. County personal property tax delinquencies for 2004 and 2005 were alleged at SOR ¶¶ 1.e. and 1.g.

I conclude that AG ¶¶ 20(a), 20(c), 20(d), and 20(e) do not apply in mitigation to the facts in Applicant's case. I also conclude that AG ¶ 20(b) applies in part in mitigation.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

When he answered "No" to questions 28a and 28b on the e-QIP he signed and certified on June 27, 2007, Applicant was aware of the several financial delinquencies derived from the two businesses he incorporated in 1998. These delinquencies were alleged at SOR ¶¶ 1.a. through 1.h. Applicant was also aware that he had personally guaranteed the loans he had acquired to establish the businesses. Applicant's "No" answers indicate falsification of material facts and raise security concerns under AG ¶¶ 16(a). AG ¶ 16(a) reads: "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities."

Several Guideline E mitigating conditions might apply in this case. If Applicant "made prompt, good-faith efforts to correct his omission, concealment, or falsification before being confronted with the facts," AG ¶ 17(a) might apply. If "the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of an authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process" and "[u]pon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully," AG ¶ 17(b) might apply. If "the offense was so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," AG ¶ 17(c) might apply. If "the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur," AG ¶ 17(d) might apply. If "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress," then AG 17(e) might apply.

Applicant denied that he deliberately falsified his answers to questions 28(a) and 28(b) on the e-QIP he signed and certified on June 25, 2007. He stated that he read the questions carefully, concluded that they applied to him personally, and thus did not report the corporate debts because he did not consider them to be his personal debts.

When he completed the e-QIP in June 2007, Applicant knew that the hardware store business was no longer in existence and at least one creditor had put him on notice that it considered him responsible personally for paying the delinquent debts of the hardware store. He also knew that he had personally guaranteed the loans he received when he established his hardware store business, and he knew he had defaulted on those loans. He did not seek counsel from his security officer when he completed his e-QIP. He explained that he had completed security clearance applications many times in the past during his military career, and he was confident he knew how to answer the questions accurately. He stated that he later provided the security officer with documents about his claims under SCRA. He knew that he owed large sums to various creditors and that the SCRA does not negate his responsibility to pay the debts. The SCRA permits delay in payment and caps interest payments. The debts still exist, and SCRA does not end Applicant's responsibility to pay his creditors.

Applicant's answers to Questions 28(a) and (b) were incorrect. Incorrect answers are not the same as deliberately false answers.[8] However, when his answers are examined in light of what he acknowledged he knew at the time, the reasons he had for not accepting personal responsibility for his debts, and the motives he might likely have to conceal his substantial financial delinquencies from the government, I conclude that direct and circumstantial evidence supports a finding of deliberate falsification. I also conclude that none of the Guideline E mitigating conditions applies to the facts of Appellant's case.

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 relevant 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

[8] The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

> (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

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.

Under AG ¶ 2(c), 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's financial problems associated with his business ventures began when he was a mature adult. He was aware of his financial problems and contested them by denying personal responsibility for them. He is aware that the corporations he established are no longer in business and no longer possess assets that can be used to pay or settle debts. He failed to accept responsibility for debts he incurred in establishing and operating a business, and he failed to candidly acknowledge and report those debts to the government on his security clearance application.

Applicant has taken action, albeit recent, to address his county personal property tax delinquencies. At his hearing, he provided documentation corroborating his statement that he is no longer in arrears on his county property taxes. However, these actions are recent and do not demonstrate a track record of satisfaction of debt consistently over time. It is not clear that Applicant has accepted his obligations to creditors.

Overall, the record evidence leaves me with questions and doubts at the present time as to Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate the security concerns arising from his financial delinquencies and personal conduct.

Applicant can reapply for a security clearance one year after the date of this decision. If he wishes, he can produce new evidence that addresses the Government's current security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a. through 1.d.:	Against Applicant
Subparagraph 1.e.:	For Applicant

Subparagraph 1.f.:	Against Applicant
Subparagraph 1.g.:	For Applicant
Subparagraphs 1.h. through 1.j.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Subparagraph 2.b.:	Against Applicant

Conclusion

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

_____
Joan Caton Anthony
Administrative Judge