DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-06299
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Kathryn D. MacKinnon, Esq., Department Counsel
For Applicant: *Pro se*

December 19, 2008

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on January 7, 2008. On August 8, 2008, 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. 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 adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant acknowledged receipt of the SOR on August 15, 2008; answered it on September 2, 2008; and requested a hearing before an administrative judge. DOHA

received the request on September 5, 2008. Department Counsel was ready to proceed on September 23, 2008, and the case was assigned to me the following day. DOHA issued a notice of hearing on September 26, 2008, scheduling the hearing for October 23, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified on her own behalf and submitted Applicant's Exhibits (AX) A through K, which were admitted without objection. I granted Applicant's request to keep the record open until November 7, 2008, to enable her to submit additional documentary evidence. DOHA received the transcript (Tr.) on October 31, 2008.

Applicant timely submitted AX L through DD by email, but some of her documents did not transmit completely. Email correspondence documenting her transmission difficulties is attached to the record as Hearing Exhibit (HX) I. I granted her additional time to retransmit her documents, which were received on November 13, 2008. AX L through DD were admitted without objection. I received Department Counsel comments concerning AX L through DD on December 4, 2008; and they are attached to the record as HX II. On December 12, 2008, I discovered that AX Z was incomplete, and I notified the Applicant. I received a complete copy of AX Z on December 15, 2008, and the record closed on that date.

Correction of SOR

On my own motion, and without objection from either party, I amended the SOR to correct the spelling of Applicant's middle name (Tr. 5).

Findings of Fact

In her answer to the SOR, Applicant admitted all the allegations in the SOR. Her admissions are incorporated in my findings of fact.

Applicant is a 45-year-old executive assistant employed by a defense contractor. She has worked for her current employer since May 2007. She previously worked as an executive assistant for a private corporation from October 1990 to April 2001, was unemployed from April 2001 to July 2003, worked as an executive assistant for a defense contractor from July 2003 to March 2007, and was unemployed for about two months before starting her current job. She has never held a security clearance.

Applicant was married in November 1985. She has a 27-year-old stepchild and two sons, ages 19 and 20 (Tr. 56). She and her spouse are still married but have been living apart since he left the household and moved to another state in August 2007 (Tr. 105).

Because Applicant's younger son has significant learning disabilities (AX Z), she has enrolled him private schools. Even though her son receives substantial financial aid, Applicant spent more than $21,000 for his tuition, board, and room during the academic year 2006-07 (AX X at 2) and more than $14,000 for 2007-08 (AX Y at 2). For

academic year 2008-09, his educational expense will be about $6,326 (AX AA at 5). Applicant anticipates that this educational expense will be reduced in September 2009, because her son has been awarded a full-tuition scholarship for college (AX L at 2).

Applicant's older son attended a private military school at a cost of about $23,000 per year (AX W). He is now a college student, and his tuition, board, room, and school expenses are about $22,000 per year (AX BB). Her older son has applied for a scholarship (AX L at 1), but there is no evidence he has received it.

Applicant's father-in-law passed away in May 1989. She and her spouse paid his burial expenses (AX V). Shortly thereafter, her brother was killed, and they also assumed responsibility for his funeral expenses (Tr. 44). At the same time, Applicant's mother-in-law was dying of cancer, and they supported her financially until her demise. When her mother-in-law died, they discovered she had no insurance, and they paid her funeral expenses (Tr. 45).

Applicant and her spouse sold their home in August 1993 (AX R at 2-6), but they did not report a capital gain on their federal income tax because they invested their profit in a new home (AX R at 18). The Internal Revenue Service (IRS) assessed a capital gains tax on the profit from the sale of their home. They protested the assessment of a capital gains tax because the gain was reinvested in another personal residence of greater value (AX J). In January 1996, an explanation of the additional tax assessment was mailed by the IRS, but it was mailed to an outdated address, as was a deficiency notice in October 1996 (AX H at 1-5).

Using the proceeds from the 1993 home sale, Applicant and her spouse purchased property and obtained a construction loan to build their "dream home" in March 1994 (AX R at 7-12). Her spouse, in addition to working full-time for the local fire department, served as general contractor and builder for the house (AX R at 18). They were forced to borrow additional funds when they encountered unforeseen problems such as a natural water spring under the property (AX R at 13-14).

Applicant's spouse was involuntarily retired for disability in August 1994, at about half his previous pay of $65,000 per year (AX S at 2). He was unable to complete construction of the house because of his disability and the technical problems they encountered (AX R at 18). They were never able to live in the unfinished house, and they sold it in October 1996 (AX R at 16-17).

At the hearing, Applicant admitted she knew they had an outstanding tax debt when they purchased the "dream home" property (Tr. 76). When asked if she chose to roll the profit from the 1993 sale into the new house instead of paying the tax debt, she stated she "really didn't think about that at the time."

Applicant and her spouse were assessed with delinquent state taxes for several tax years starting in 1992 (AX H at 6). The delinquent state taxes accrued because Applicant was living in one state and working in another, and his employer (the fire

department) did not withhold income tax for their state of residence (Tr. 75). Because of the expenses they had occurred caring for family members and attempting to complete construction of their home, they were unable to pay the taxes. In April 1996, a state tax lien for $548 was filed against Applicant and her spouse (GX 3 at 3; AX F).

Applicant's spouse found employment in November 1998, earning about $41,500 per year (AX R at 19), In February 1999, Applicant and her spouse purchased a new home (AX R at 20-23). They filed a petition for Chapter 7 bankruptcy in February 2000, and they received a discharge in June 2000. Applicant's e-QIP reflects that debts totaling about $25,411 were discharged.

Applicant negotiated a payment plan for their delinquent federal taxes, and she made payments from 1994 to 2000. She stopped making regular payments after they purchased their new home in 1999, because she could no longer afford the payments (Tr. 89).

Another state tax lien for $27,575 was filed against Applicant and her spouse in January 2004 (GX 3 at 5; AX E). In March 2005, a tax levy was imposed on her wages to collect delinquent federal taxes for tax year 1997 (GX 1 at 27; AX U). A third state tax lien for $9,206 was filed against Applicant in January 2006 (GX 4 at 1; AX G).

Applicant's father passed away in May 2006. She paid his funeral and burial expenses, totaling about $7,740 (AX DD).

In March 2007, Applicant and her spouse sold the home they had purchased in February 1999 (AX R at 26-28), at a profit of about $130,000 (Tr. 59). They used the profits to pay off car loans, a portion of the tax liens, credit card debts, and tuition for their sons (Tr. 62-64). Applicant now lives with her mother, cares for her, and pays her monthly rent of $850 (Tr. 49, 52).

Applicant's federal tax debt for 1994 was paid as of October 2002 (AX C), her federal tax debt for 1996 was paid as of May 2006 (AX D), and her federal tax debt for 1993 was paid as of October 2007 (AX B). The federal tax lien for tax year 1997 has been released (AX P at 2).

The state tax lien filed in April 1996 was released in February 2000 (AX A, B, and Q). The balance on the state tax lien filed in January 2004 has been reduced to about $11,448 (AX N). The state tax lien filed in January 2006 has increased to $10,572 because of accrued interest (AX O).

Applicant's net monthly income is about $4,000. Her husband has been unemployed since late 2004, but he receives disability retirement pay of about $3,500 per month (Tr. 51). She testified her husband does not help her with expenses, and that she is "95 percent" responsible for resolving the tax liens and supporting herself, her mother, and their two sons (Tr. 55). She has four credit cards and two charge accounts with a total balance of about $5,500, on which all payments are current (Tr. 57). She

owns an eight-year-old SUV, but she recently purchased a small, 14-year-old car for $500 to reduce her fuel costs.

Applicant applied for a second job with the U.S. Postal Service in September 2008. She had completed her interviews and was awaiting medical clearance as of the date of the hearing (AX K; Tr. 48).

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 have 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

Guideline F, Financial Considerations

The concern under this guideline 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(g) is raised by "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same."

Applicant's financial history raises AG ¶¶ 19(a), (c), and (e). AG ¶ 19(b) is not raised because there is no evidence of "frivolous or irresponsible spending." AG ¶ 19(g) is not raised, because the tax liabilities alleged in the SOR did not arise from failure to file returns. Instead, they arose from a dispute about capital gains taxes on the home sale in 1993, the failure of her spouse's employer to withhold state taxes, and their failure to pay the taxes that were due .

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 19(a), (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 the delinquent taxes have not been resolved. The second prong ("so infrequent") is not established, because Applicant's financial record reflects numerous delinquent debts. However, the third prong ("under such circumstances that it is unlikely to recur") is established. The fiasco surrounding Applicant's efforts to build a "dream home" was fraught with unusual circumstances such as the discovery of an underground spring. The delinquent federal tax debt arose from a disputed assessment of capital gains taxes on the sale of a personal residence, and it is not likely to recur because Applicant no longer owns any real estate. The delinquent state tax debts arose because her spouse worked in one state and lived in another, a situation that is not likely to recur.

The fourth prong ("does not cast doubt") is not established. In some respects, Applicant has reacted to her financial problems responsibly. She has incurred considerable debt caring for her in-laws and her immediate family, motivated by a strong sense of familial obligation. On the other hand, her decision to purchase real estate in 1994 and again in 1999 while facing significant delinquent tax debt suggests bad judgment. Her decision to send her learning-disabled younger son to a private school was reasonable, but deferring resolution of her tax debts in order to send her older son to an expensive boarding school is not justified by the evidence in this record. While a private school may be reasonable or even necessary to provide personal attention, smaller classes, discipline, or specific values, Applicant has not provided any such justification regarding her older son, nor has she established the reasonableness of deferring payment of her delinquent taxes in order to defray the cost a boarding school instead of traditional arrangement where the student lives at home. I conclude the fourth prong of AG ¶ 20(a) is not 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 has encountered numerous conditions beyond her control: the unforeseen technical difficulties in building the "dream house," her spouse's disability, her younger son's learning disability, the illness and deaths of her father-in-law, brother, and father, and abandonment by her spouse. Applicant's spouse abandoned the household in August 2007, long after the debts alleged in the SOR were incurred and became delinquent. Nevertheless, the other conditions beyond her control are sufficient to establish the first prong of AG ¶ 20(b).

When Applicant filed her bankruptcy petition in February 2000, it was a reasonable and prudent response to the debts incurred as a result of illnesses and deaths in the family and the financial drain of the "dream home" fiasco. On the other hand, using available assets in March 1994 and again in February 1999 to purchase a home instead of resolving the delinquent taxes was not responsible conduct. Incurring large educational debts to accommodate her younger son's learning disabilities was responsible conduct, but there is no similar justification established on the record for the expense of a private boarding school for her older son. I conclude the second prong of AG ¶ 20(b) is not 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). "[A]n applicant is not required, as a matter of law, to establish that [he/she] has paid off each and every debt listed in the SOR . . . All that is required is that an applicant demonstrate that [he/she] has . . . established a plan to resolve [his/her] financial problems and taken significant actions to implement that plan." ADP Case No. 06-18900 (App. Bd. Jun. 6, 2008).

Applicant and her spouse sold the family home in March 2007 and used the proceeds to pay off debts. She lives frugally and has applied for a second job so that she can resolve her remaining tax debt. On the other hand, she chose to use her limited financial assets to purchase the property and construct the "dream home" in 1994, purchase another home in 1999, and enroll her older son in an expensive boarding school instead of settling her tax debts. The federal tax lien for 1997 was not resolved by voluntary payment, but by a tax levy on her pay. I conclude AG ¶ 20(d) is established for the debts discharged by bankruptcy alleged in SOR ¶ 1.a and the state tax lien alleged in SOR ¶ 1.d. It is not established, however, for the state tax liens alleged in SOR ¶¶ 1.b and 1.c and the federal tax lien alleged in SOR ¶ 1.e.

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) 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 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 under in my discussion of Guideline F, but some warrant additional comment.

Applicant is an intelligent, articulate, mature woman who presented herself at the hearing as candid and sincere. She is deeply devoted to her family, and she has been beset with numerous financial setbacks. She has not spent money selfishly or frivolously. However, she has not been diligent in resolving her tax debts. While some of her financial decisions, standing alone, might not raise security concerns, her financial record as a whole raises concerns about her judgment and reliability. The likelihood of recurrence cannot be discounted in light of her pattern of inattention to her delinquent taxes. Her continuing tax debt makes her vulnerable to pressure, coercion, exploitation, or duress.

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 not mitigated the security concerns based on financial considerations. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with the national interest to grant 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:

Paragraph 1, Guideline F (Financial Considerations):	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant

Conclusion

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

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LeRoy F. Foreman
Administrative Judge