



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
-----) ISCR Case No. 08-07602
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Kathryn D. MacKinnon, Esquire, Department Counsel
For Applicant: *Pro Se*

May 15, 2009

Decision

HARVEY, Mark W., Administrative Judge:

Applicant failed to mitigate the financial considerations security concerns. Although he settled and paid, paid or otherwise resolved 14 of 21 statement of reason (SOR) debts, and two debts are in payment plans, five large debts totaling about \$350,000 were not resolved. There is insufficient information about his overall financial situation and these five debts to mitigate security concerns. Access to classified information is denied at this time.

Statement of the Case

On August 21, 2007, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86) (Government Exhibit (GE) 1). On September 18, 2008, the Defense Office of Hearings and Appeals (DOHA) issued an SOR detailing the basis for its preliminary decision to deny Applicant eligibility for access to classified information, citing security concerns under Guideline F (Financial Considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), 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. 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 his security clearance, and recommended referral to an administrative judge to determine whether his clearance should be granted, continued, denied, or revoked.

On October 9, 2008, Applicant responded to the SOR and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on October 16, 2008. The case was assigned to me on January 22, 2009. On February 6, 2009, DOHA issued a hearing notice. The hearing was held on March 4, 2009. At the hearing, Department Counsel offered four exhibits (GE 1-4) (Transcript (Tr.) 27), and Applicant offered 17 exhibits (AE A-R). There were no objections, and I admitted GEs 1-4 (Tr. 27), and AE A-R. Additionally, I admitted the SOR, response to the SOR, the hearing notice, and the amended hearing notice (GEs 5-8). I attached Department Counsel's closing argument as hearing exhibit (HE) I. I received the transcript on March 23, 2009. I initially held the record open until April 10, 2009 (Tr. 18-19). At Applicant's request I held the record open until May 11, 2009. After the hearing Applicant submitted 29 exhibits (AE S-AT). I received Department Counsel's closing argument on May 6, 2009 (GE 9; HE I), and her response to Applicant's final exhibit (HE II; AE AT). I attached emails from Applicant, Department Counsel, and me, to the record as HE III. These emails discuss setting the date for the hearing, holding the record open for additional documents, jurisdiction, and the absence of objections to documents (HE III). I closed the record on May 11, 2009.

Findings of Fact¹

In his SOR response, Applicant admitted responsibility for the SOR debts in ¶¶ 1.a to 1.g, 1.i, 1.k to 1.p, and 1.r to 1.u; and he denied responsibility for SOR debts in ¶¶ 1.h, 1.j and 1.q. He said SOR ¶¶ 1.n and 1.i are duplications.

Applicant is 37 years old network engineer with 13 years of information technology experience (Tr. 8-9). He is a high school graduate, and attended two years of college (Tr. 8). He has an interim Secret clearance (Tr. 8-9). In 1996, he discharged his unsecured debts using a Chapter 7 bankruptcy (Tr. 169-170). In 1999, he married (AE R). In 2000 and 2003, his two children were born (AE R). He separated from his spouse in 2004, and moved in with his parents (Tr. 55). He had a job from 1999 to 2006; however, he was discharged from this employment because he spent so much time trying to resolve family problems (Tr. 55-56, 132). The family court records relating to his divorce list 16 pages of meetings, hearings, motions, orders and arbitrations, mostly concerning disputes over property, support, allegations of abuse and obstruction of visitation (AE Q, R). The court granted his divorce in January 2008 (AE A at 5).

¹Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

After losing his seven-year employment in June 2006, he was intermittently unemployed for brief periods of time (Tr. 134-137). Applicant started his employment with his current employer in April 2007 (Tr. 138). In January 2008, he became a subcontractor (Tr. 150). He is the sole employee of his company (Tr. 151).

In 2005, Applicant took money out of his 401K account and he began to invest in real estate (Tr. 56, 131, 132, 135). He purchased five houses (Tr. 56, 129, 131, 132, 136). His spouse and Applicant ended their separation, and their family moved into one of the investment houses (Tr. 56-57, 129-130). He sold two houses for a profit (Tr. 131-132). He refinanced his mortgages or obtained second mortgages to raise money (Tr. 131-132). He was able to pay the mortgages on the three houses until 2007 (Tr. 130-131). Those three houses subsequently were foreclosed, resulting in substantial deficiencies.

Financial Considerations

Applicant attributed his financial problems to his divorce and the downturn in the real estate market (Tr. 25-26). His September 29, 2007, credit report showed his accounts were in good standing (Tr. 140; GE 4). The total payments on his mortgages were about \$13,000 to \$17,000 per month, and without tenants he had a major financial problem (Tr. 141). Due to the neglect of his tenants, two of his houses were in shambles (one had serious water damage) and could not be rented (Tr. 141, 143). His main debts resulted from three houses that were into foreclosure. Those three houses had a total of five mortgages (AE S at 1-2).

Applicant paid or satisfactorily disputed 14 debts, which are the debts in SOR ¶¶ 1.a to 1.g, 1.k, 1.p to 1.u. Two debts are in current payment plans, which are the debts in SOR ¶¶ 1.h and 1.j. There is insufficient evidence to resolve five debts, which are the debts in SOR ¶¶ 1.i, 1.l, 1.m, 1.n, and 1.o. The source, status, and amount of his individual SOR debts are more specifically described as follows (paragraph letters correspond with the SOR subparagraphs):

(a) Credit card debt of \$12,216 was settled for \$3,665 and paid on January 28, 2009 (Tr. 59-65; GE 3; AE B and C; AE S at 2);

(b) Bank debt of \$1,470 was settled for \$642 and paid on January 29, 2009 (Tr. 66-69; AE D and E at 4; AE S at 2);

(c) On February 27, 2009, Applicant and creditor reached a settlement agreement to resolve his share trading debt of \$11,349 (Tr. 69-73; AE F; AE V). The settlement agreement with the creditor required Applicant to make three payments of \$1,891 (totaling \$5,674), with a payment required every thirty days (Tr. 72; AE F). The first payment was required along with a signed settlement agreement (AE F). At his hearing, he said on February 28, 2009, or March 1, 2009, he made one payment of \$1,891 (Tr. 72). However, he noted the payment was not reflected in his monthly bank statement (AE E). On March 20, 2009, the creditor offered to settle the \$11,349 debt for

\$3,404 (AE V). The March 20, 2009, settlement agreement did not indicate any payments were made, and the balance owed was the same as on the February 27, 2009, settlement agreement. He provided his customer copy of a MoneyGram, dated April 3, 2009, showing payment of \$3,404 to the creditor, resolving this debt (Tr. 73; AE S at 2; AE U).

(d) Credit card debt of \$3,997 was settled for \$1,400 and paid on February 13, 2009 (Tr. 74-77; AE E at 3; AE G; AE S at 2).

(e) Department store credit card debt of \$3,868 was settled for \$1,547 on January 29, 2009, and paid (Tr. 78-79; AE E at 4; AE H; AE S at 2; AE O at 47).

(f) Debt of \$22,320 with a payment plan, dated February 11, 2009, with payments to be made on February 28, March 30, and April 29, 2009 (Tr. 80-81; AE E at 7; AE I). He provided a settlement for an account, dated April 8, 2009, showing three monthly payments of \$3,720 required to resolve the debt (AE AA, AE AB). He provided proof that he paid \$3,720 on March 31, 2009, and April 29, 2009 (Tr. 81; AE S at 2; AE AB). On May 11, 2009, I received a receipt from creditor indicating Applicant paid the creditor \$11,160 on April 30, 2009, settling and resolving this debt (AE AT).

(g) Credit card debt of \$6,018 was settled for \$1,806 on January 28, 2009, and paid on February 28, 2009 (Tr. 81-83; AE E at 4; AE J; AE S at 2; AE AC; AE AD).

(h) Child support debt of \$6,312—payment summary shows he made every monthly payment of \$1,300 starting in February 2008 (Tr. 83-87; AE K). According to the statement, he is paying \$278 monthly towards his arrears (AE K; AE S at 3). According to his credit report of April 29, 2009, in April 2009, arrears were down to \$6,097 (AE AO at 84). His account is current in so far as the collection agency is satisfied that he is making progress reducing his arrearage (AE K, AE S at 3).

(i) Applicant had a mortgage past due debt of \$48,450 with a loan balance of \$398,000 (Tr. 87-89; SOR ¶ 1.i). In February 2005, Applicant purchased a property to use as a rental (AE A at 1-2). In January 2007, his tenants moved out and Applicant unsuccessfully attempted to sell the property (AE A at 2). His credit report, dated August 21, 2008, indicates he initiated a mortgage on the property in October 2006 (GE 3 at 3). According to his August 21, 2008, credit report, the initial amount of the October 2006 mortgage was \$351,000; the monthly payment was \$3,165; and the current balance was \$398,000 (GE 3 at 3). The lender foreclosed on the loan (Tr. 88). At the time of his hearing, Applicant said he did not have any documentation from the foreclosure sale (Tr. 87-88). Applicant thought the property was sold for a sufficient amount to cover the mortgage (Tr. 88; AE C at 1; AE S at 3). He stated, "So, it's foreclosed on, but I believe they got the full value for the property. . . . But regardless, they got their money that was owed." Department Counsel asked, "So if I understand your testimony, you believe it was sold for the full amount of the mortgage and you owe nothing?" He responded, "That's correct." (Tr. 88). His basis for believing he did not owe anything was a credit report that did not indicate he owed anything on the debt (AE C at 1). After his hearing,

he provided documentation showing he executed a mortgage for \$351,500 on September 12, 2007 (AE AE at 18). The auction on September 17, 2008, resulted in a sales price of \$174,250 (AE AE at 3). He did not provide a recitation or summary of the costs and the amount of the deficiency on this property. This property did not have a second mortgage (AE S at 2). Applicant's April 29, 2009, credit report indicates, "Credit grantor reclaimed collateral to settle defaulted mortgage account information disputed by consumer" (AE AO at 16). It also shows amount past due as \$0 (AE AO at 16). However, there is no court document or letter from the credit grantor agreeing to accept the property to settle the debt or declining to seek a deficiency judgment against Applicant. There is insufficient evidence to conclude Applicant does not owe about \$224,000 plus costs and interest on this property (based on the difference between the current loan balance (about \$398,000) and the amount received from the foreclosure (\$174,250)). Auction and trustee costs as well as interest may add to the \$224,000 potential deficiency.

(j) From January 9 to February 18, 2009, Applicant made payments of \$1,317, \$1,327, \$1,327 and \$1,307 on his automobile BMW lease debt of \$3,940 (Tr. 90-92; AE E at 2-3, 6). The BMW-lease originated in February 2006, and the lease amount was \$80,725 (AE T at 21, AE AO at 23, 25). He is current on his BMW-lease payments (Tr. 92; AE S at 3).

(k) Credit card debt of \$12,024 was settled for \$4,000 on February 4, 2009, and the debt was paid on April 7, 2009 (Tr. 93-97; GE 2 at 2; AE L; AE S at 3; AE T at 5; AE AF).

(l) Real estate mortgage loan with \$27,339 in arrears on the \$276,000 mortgage that was foreclosed (Tr. 98-105; AE M). On November 19, 2008, the property was sold for \$301,400 (Tr. 100; AE M; AE Y). Applicant had previously purchased the property on February 14, 2005, for \$273,800 (AE M at 2, state tax record). Applicant's credit report of April 9, 2009, showed the amount of the overdue interest as \$47,844, with monthly payments of \$2,278 (AE AO at 11, 74, 82). The sale resulted in a deficiency of \$20,816, which includes a Trustee Commission of \$15,070 and accrued interest of \$13,640 (AE Z). Applicant did not receive any proceeds from the sale (Tr. 102). The debt in SOR ¶ 1.n of \$69,000 is the debt owed on the second mortgage account, which Applicant still owes (Tr. 106; AE S at 3). For the debt in SOR ¶ 1.l, I conclude Applicant owes the deficiency amount of approximately \$21,000.

(m) Truck loan debt of \$27,339 involved Applicant's purchase of a used truck on January 5, 2007 (Tr. 107-116; AE AG). The truck was damaged by vandalism and had mechanical trouble (Tr. 107-116). In December 2008, Applicant signed an agreement to have the vehicle repaired with an estimate of \$6,673 (AE N). However, another portion of the estimate indicates the total job will cost \$13,174 (AE N). Applicant signed that portion of the estimate and agreed to be responsible for paying \$6,500 (AE N). Some repairs were made and Applicant thought the vehicle repair company may have placed a mechanic's lien for \$6,000 on the vehicle (Tr. 109, 113; AE N). The estimate also shows monthly storage costs of \$1,000 (AE N). Applicant said he paid his deductible

and his insurance was disputing the amount of the repairs (Tr. 165). Applicant agreed with Department Counsel's statement that he paid \$6,500 and the insurance company was supposed to pay the remainder of \$13,173 bill (Tr. 165). He said he had proof of the \$6,500 payment, Department Counsel asked for proof of it, and Applicant agreed to provide it (Tr. 166; AE S at 3). Applicant financed \$30,212 (AE AG). Applicant's credit report of April 29, 2009, showed a balance of \$28,990 and a past due amount of \$3,202 (AE AO at 31). An undated document indicates the vehicle repair firm is undertaking a non-judicial sale of the truck (AE AG). Applicant did not provide any documentation showing he paid any of the repair bill. I conclude Applicant owes about \$28,000 on this debt.

(n) Real estate mortgage loan of \$69,000 is in settlement negotiations (Tr. 106-107; AE S at 3). This is the same creditor as in SOR ¶ 1.1 (AE S at 3). Applicant's credit report of April 29, 2009, shows this account in delinquent status (AE AO at 73). I conclude Applicant owes about \$69,000 on this debt.

(o) Mortgage loan of \$359,650 pertained to Applicant's personal residence (Tr. 116). His former wife stayed in their residence after the divorce (Tr. 116-117). The mortgage was not paid and the house went into foreclosure (Tr. 117). On August 29, 2005, Applicant purchased the property for \$499,000 (AE P at 1). On December 17, 2007, the sale price was \$374,808 and notification of the owner was by newspaper (AE P at 1; AE AJ). A 2008 IRS Form 1099-A shows a fair market value of \$372,165 (AE O). Applicant has a taxable gain in income of about \$12,000; however, he can offset that with expenses on his transaction. The court issued a final order on the foreclosure on April 29, 2008 (AE P at 7). The expenses of sale were \$22,540 (AE P). On April 29, 2008, the court issued a final order (AE P). On September 15, 2008, Applicant challenged the sale (AE P at 3-6). On January 16, 2009, the court issued an order denying Applicant's requested exceptions (AE P at 2). Ultimately, he had a remaining deficiency of \$17,856 (AE P at 8). This deficiency included a "Trustee's Commission" of \$18,740 (AE P at 8). However, Applicant thought he did not owe the creditor on the first mortgage anything (Tr. 122). There was a second mortgage on the property of \$158,616 (AE P at 12), which Applicant settled for \$5,000 (Tr. 121-122; AE P at 12). The \$5,000 from Applicant was due on March 6, 2009 (Tr. 122; AE P at 12). A letter from the creditor, dated April 2, 2009, shows the \$5,000 was paid, resolving this debt (AE AK, AL). Applicant understands that he will still owe a substantial federal tax bill as a result of the release of liability for this second mortgage (the savings is about \$153,000) (Tr. 167-168). Of course, he will be able to offset most of the tax liability with his loss on the investment property. In sum, Applicant currently owes the first mortgage about \$17,000.

(p) Utility debt of \$230 was unresolved because the creditor could not locate information on the account (Tr. 125-128). Applicant thought it might be a debt from one of the tenants in one of Applicant's houses (Tr. 141; AE S at 3). On April 7, 2009, the creditor wrote and requested that the credit reporting agency remove the debt from Applicant's report (AE AI).

(q) Applicant said a home improvement loan of \$944 was paid, and Applicant promised to provide proof of the payment (Tr. 122). However, no proof of payment was provided. Applicant's credit report of April 29, 2009, shows a credit card account to a different creditor with an amount of \$949 with a zero balance, and paid as agreed (AE AO at 34). It is listed in the closed accounts section of the report (AE AO at 43-44).

(r) Insurance debt of \$225 was unresolved until after his hearing because Applicant forgot about this debt (Tr. 127-128). On April 7, 2009, Applicant received a letter indicating the debt was paid on June 18, 2007 (AE AH, AM).

(s)-(u) Traffic ticket debts of \$100, 105 and 100, respectively (Tr. 28; GE 4 at 20). At his hearing, Applicant said these tickets were unresolved (Tr. 129). However, he promised to check into the tickets and to pay if they were his responsibility (Tr. 129). He paid two tickets of \$105 each on March 18, 2009 (AE AN). The ticket-debts did not appear on his March 3, 2009, credit report (GE 2). I find For Applicant on these three alleged debts.

Applicant contended that the only mortgage account he still owed was listed in SOR ¶ 1.n (\$69,000) (Tr. 159-160).

Applicant disclosed a non-SOR, second mortgage debt of about \$47,000 that he disputed (GE 2 at 3; GE 4 at 18; AE AO at 5, 78, 86-87). The loan was made in February 2006 (GE 4 at 18). By August 2007, the past due amount was \$1,189 (GE 4 at 8). The dispute is noted in his April 29, 2009 credit report (AE AO at 78). On his April 29, 2009, credit report, the past due amount was listed at \$9,973 (AE AO at 5, 78, 86-87). Applicant provided a warranty deed dated November 16, 2006, in which he promises clear title on the property (AE AP). Applicant did not provide a copy of the agreement between himself and the creditor, or explain how the warranty deed resolved the delinquent debt. Because this document was not listed in the SOR, I decline to make an adverse finding based on this debt.

Applicant does not receive any rent income (Tr. 161). He has not bought any new cars or taken out any new credit cards in the last year (Tr. 161). He has not recently purchased any expensive items (Tr. 162). He believed he would have all of his remaining debt paid in five months (Tr. 162). After he eliminates his delinquent debt, he plans to move out of his mother's residence (Tr. 163, 164). He promised to resolve the debts in SOR ¶¶ 1.n and 1.m (Tr. 164).

Applicant provided a receipt showing a non-SOR credit card account with a balance of \$2,598 was paid on March 10, 2009 (AE X).

Applicant did not maintain a formal budget of his accounts (Tr. 145). After taxes, his current income is about \$14,000 (Tr. 146). In December 2008, he moved back in with his mother and he pays her \$1,500 a month for rent (Tr. 147). He also pays for groceries (Tr. 147). He pays \$1,300 a month for his BMW lease (Tr. 148). In April 2009,

the lease is up and he intends to obtain a less expensive vehicle (Tr. 148). His child support payment is \$1,300 per month (Tr. 149).

On November 1, 2007, an Office of Personnel Management (OPM) investigator interviewed Applicant (AE A). Applicant disclosed his gross monthly income was \$10,000, and his monthly expenses totaled \$6,674 (AE A at 3). Four expenses were \$500 or more: (1) \$3,000 for rent; (2) \$500 for utilities; (3) \$650 for car expenses; and (4) \$1,574 for alimony/child support/day care (AE A at 3). His monthly debt payments total \$12,377, and six debts required monthly payments exceeding \$300: (1) creditor in SOR ¶ 1.o plus a home equity loan for \$36,000 (see AE T at 22) (\$3,000 monthly payment); (2) SOR ¶ 1.i (\$3,165 monthly payment); (3) SOR ¶¶ 1.l and 1.n (\$2,858 monthly payment); (4) SOR ¶ 1.j (\$1,316 monthly payment); (5) SOR ¶ 1.m debt (\$640 monthly payment on \$28,890 debt-see AE T at 9; AE AO at 31); and (6) non-SOR debt (\$475 monthly payment on \$47,500 debt-see AE T at 8). Once Applicant divests himself of the three homes, his monthly expenses would only exceed his income by \$28 (AE A at 3). Department Counsel requested an updated personal financial statement, and Applicant agreed to provide one (Tr. 158-159, 171). However, Applicant did not subsequently provide an updated personal financial statement.

Applicant provided a checking account statement for January 2, 2009, to March 3, 2009 (AE E). This statement lists more than \$30,000 in debits, and several deposits are crossed out (AE E). When asked about how he had so much money in his account, Applicant explained that when he became a contractor “it freed up more money” (Tr. 172). He also raised the possibility of third-party, private real estate investors providing funds, and then concluded, “So I didn’t get a lump sum from anywhere. It’s just that more money was available to me because of the way I was getting paid from [] my current [] employer.” (Tr. 172).

Applicant has not received financial counseling (Tr. 172). He agreed to seek financial counseling (Tr. 173). He did not provide evidence that he completed financial counseling.

Character evidence

Applicant’s fiancé has known Applicant since 2006 (Tr. 31, 51). She explained that Applicant’s divorce and court-ordered child support took a toll on Applicant’s finances (Tr. 31, 42, 48). The judge ordered him to pay his arrearage in child support, even though he had paid quite a large amount of the children’s expenses (Tr. 48-49). He had to pay for daycare, and medical insurance (Tr. 33). His former spouse stopped making car payments and he was legally responsible for the car loan (Tr. 33). He hired a company to recover the car (Tr. 46-48). The car was recovered and sold (Tr. 53). His tenants moved out of his two houses for various reasons (Tr. 32). They left the properties in poor condition and Applicant could not afford repairs (Tr. 32, 46-47). One had significant water damage (Tr. 46). She attended Applicant’s court hearings, relating to his divorce (Tr. 35, 44-45). She assisted Applicant in the organization of his financial records (Tr. 43). He worked some extra hours to increase his income (Tr. 51). Applicant

is loyal, very reliable and responsible (Tr. 33-34). He has excellent work habits and is very trustworthy (Tr. 34).

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 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 [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, I conclude the relevant security concern is under Guideline F (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 [] delinquent [SOR] debts that are of security concern." Applicant's history of delinquent debt is documented in his credit reports, his SOR response and at his hearing. Because Applicant's 1996 Chapter 7 bankruptcy was not listed in the SOR, I decline to consider it under AG ¶ 19(c).² However, 21 delinquent debts were listed in the SOR, and in Applicant's SOR response he admitted responsibility for all except three of them. He failed to ensure his creditors were paid as agreed. The government established the disqualifying conditions in AG ¶ 19(a) and further inquiry about the applicability of mitigating conditions is required.

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20(a)-(e) are potentially applicable:

² His 1996 bankruptcy is considered under the whole person concept, at pages 14-15, *infra*.

(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 AG ¶¶ 20(a), 20(b) or 20(e) because he did not act more aggressively and responsibly to resolve his delinquent debts. His delinquent debts are "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)).

Applicant receives partial credit under AG ¶¶ 20(a) and 20(b) because his financial problems initially resulted because of his acrimonious divorce and his brief intermittent periods of unemployment. The real estate downturn was even more important and damaging to his financial situation. He receives substantial mitigating credit because he established these unforeseeable events and linked them to his financial predicament. However, I am not convinced his financial problems occurred under such circumstances that they are unlikely to recur and do not cast doubt on his current reliability, trustworthiness, or good judgment.

Applicant's financial problems began in 2007, and by 2008 almost all of the SOR debts were delinquent. The SOR was issued in October 2008. Nevertheless, he did not begin paying his SOR debts until January 2009. From January to April 2009, he aggressively endeavored to resolve his delinquent debts. He settled and paid, paid or otherwise resolved 14 of 21 SOR debts, and two debts are in payment plans, which are apparently satisfactory to the creditors. His actions on these 16 SOR debts show he

acted responsibly under the circumstances for those 16 debts.³ AG ¶ 20(e) applies to SOR ¶¶ 1.p, 1.q and 1.s to 1.u. Those five debts were either paid, or the creditor could not locate the account. I consider them to be successfully disputed.

AG ¶ 20(c) does not fully apply. Applicant did not receive financial counseling and there are not “clear indications that the problem is being resolved or is under control.” However, he receives some credit because he has a sophisticated knowledge of debts, settlements, mortgages, and finances. He understands the security implications of delinquent debt. He has also established some, but not full mitigation under AG ¶ 20(d) because he showed some good faith⁴ in the resolution of his SOR debts through his negotiation and settlement of other resolution of 16 of his 21 SOR debts. He also has shown good faith in the restoration of currency for two of his SOR debts that are in payment plans. However, he cannot receive full credit because five large debts totaling about \$350,000 were not sufficiently established as resolved. He lived beyond his means (as indicated, for example, by his February 2006 BMW lease, totaling \$80,725) and he did not show financial responsibility when he refinanced his properties, and took out second mortgages in order to pull more cash out of the properties. He did not provide sufficient information about what he did with the funds he borrowed on those mortgages. There is insufficient documentary evidence of his financial actions over the last four years to fully establish mitigating under AG ¶¶ 20(c) or 20(d).

The lack of sufficient financial information was emphasized as a possible security concern in ISCR Case No. 06-20964 at 4-7 (App. Bd. Apr. 10, 2008), where the Appeal

³“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 the Applicant maintained contact with his or her creditors and attempted to negotiate partial payments to keep debts current.

⁴The 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)).

Board focused on the judge's responsibility to determine where an Applicant obtained a large sum of money to pay debts listed in the SOR stating:

. . . the Judge has significantly undercut the validity of his analysis of matters in mitigation in this case by focusing only on the current status of the debt owed the IRS and by not considering Applicant's overall debt picture. While it is true that the outstanding debt to the IRS has been substantially reduced through refund intercepts and payments made by Applicant and his wife, Applicant and his wife have made most of this progress by incurring new debt in the form of a \$30,000 loan and \$6,200 worth of credit card charges. The record evidence clearly indicates that Applicant has, in effect, done little more than transfer a large part of his outstanding IRS debt to new, apparently current, debts with private lenders. Any comprehensive evaluation of Applicant's current financial status (which includes a determination of just how mitigating Applicant's partial satisfaction of his IRS debt is in the context of the totality of the record evidence) must contain an acknowledgment of this fact along with some analysis of how it affects Applicant's security worthiness. Yet the "Conclusions" section of the Judge's decision contains no such analysis, and the Judge instead restricts his comments solely to the reduction of the IRS debt and the plan to retire the debt in the future. By failing to discuss the significance of the debts incurred to reduce the IRS debt, including some evaluation of Applicant's future ability to repay the private debts in addition to the remaining IRS debt, the Judge ignored an important aspect of the case. This was error.

Id. at 4. From January to April 2009, Applicant paid \$48,946 as indicated below to resolve most of his SOR debts:

(1) January 2009 (\$8,471): 1.a (\$3,665), 1.b (\$642), 1.e (\$1,547), 1.h (\$1,300); 1.j (\$1,317);

(2) February 2009 (\$4,027): 1.d (\$1,400), 1.h (\$1,300), 1.j (\$1,327);

(3) March 2009 (\$11,557): 1.f (\$3,720), 1.h (\$1,300), 1.j (\$1,327), 1.o (2nd mortgage \$5,000); 1.s to 1.u (\$210); and

(4) April 2009 (\$24,891): 1.c (\$3,404), 1.f (\$3,720), 1.f (\$11,160), 1.h (\$1,300), 1.j (\$1,307), 1.k (\$4,000).

Applicant agreed to provide a personal financial statement, indicating his income, all of his expenses, and debt payments each month (Tr. 158-159). I reinforced the importance of including every debt on his personal financial statement, especially in light of his negative income statement provided to the OPM investigator (Tr. 170-171). However, Applicant did not provide a personal financial statement. He did not provide proof that he paid his share of the repairs on his truck (SOR ¶ 1.m). He erroneously

stated he had a payment plan and made the initial \$1,891 payment on the debt in SOR ¶ 1.c. He said he thought the sale price on one property was sufficient to cover the mortgage when the actual sale price was \$224,000 less than the mortgage plus interest. See discussion relating to SOR ¶ 1.i, *supra* at page 4. I do not intend to imply Applicant is dishonest, but point out these mistakes to emphasize the importance of receiving complete documentation in this case so that I can better understand the flow of financial transactions and better determine the issue of financial responsibility.

In sum, Applicant should have been more diligent and made greater efforts sooner to resolve his delinquent debts. His actions to date are insufficient to fully apply any of the mitigating conditions.

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 have incorporated my comments under Guideline F in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Some mitigating evidence under the whole person concept tends to support approval of a security clearance. Applicant is 37 years old with an established employment record. There is no evidence of any security violation. He is a law-abiding citizen. Applicant has demonstrated his loyalty, patriotism and trustworthiness through his service to the Department of Defense as a contractor and through his hard work in the private sector for a well known and widely respected corporation. His current financial problems were caused by three factors beyond his control: (1) his divorce, (2) the real estate downturn, and (3) intermittent, brief periods of unemployment. Ultimately, he settled and paid, paid or otherwise resolved 14 of 21 SOR debts, and two debts are in current payment plans. He also resolved several other non-SOR debts. He made dramatic progress on debt resolution from January through April 2009. He documented expenditures of \$48,000 in January through April 2009 to resolve his delinquent debts.

Several SOR debts were resolved earlier or were properly disputed. He is a patriotic U.S. citizen and I have no concern that he would jeopardize national security for pecuniary gain.

The evidence against mitigating Applicant's conduct is more substantial at this time. Applicant has a long history of financial problems. His debts were discharged in 1996 through a Chapter 7 bankruptcy. The significance of his Chapter 7 bankruptcy is low because it is temporally remote, except to show his current financial problems are not isolated. In 2007 to 2009, he generated about 20 delinquent SOR debts. He admitted responsibility for 18 delinquent SOR debts. He failed to obtain financial counselling. He received the SOR in October 2008, and did not establish significant effort to resolve his debts until January 2009. Although he showed excellent effort over the last four or five months to resolve his delinquent debts, he could have acted more aggressively to avoid delinquent debt, to seek debt repayment or resolution, and to better document his remedial efforts over the past two years. He failed to clearly and convincingly explain how he raised \$48,000 to satisfy his delinquent debts from January through April 2009. He failed to provide an updated personal financial statement. These factors show some financial irresponsibility and lack of judgment. Applicant will have a significant tax debt because of his resolution of some of his debts without making full payment. For example, on April 2, 2009, he paid a creditor \$5,000 to resolve a debt of about \$158,000. He will owe at least \$50,000 federal taxes as a result of the release of liability for this second mortgage (the savings is about \$153,000 and I assume his marginal tax rate will be about 30%). This tax debt will be offset from the losses resulting from the decrease in value of his real estate investments. Most importantly, the five debts in SOR ¶¶ 1.i (\$224,000), 1.l (\$21,000), 1.m (\$28,000), 1.n (\$69,000), and 1.o (\$17,000) were not sufficiently proven to be satisfactorily resolved. There was simply not enough documentary evidence for me to be confident that Applicant would not have future deficiency judgments issued on these five debts. Moreover, he is likely to have a substantial federal tax problem, assuming he does not repay these debts in full when they are finally resolved. Because "[f]ailure 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," I have lingering doubts about Applicant's worthiness to hold a security clearance at this time.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude Applicant has failed to provide sufficient evidence to fully mitigate the financial considerations security concerns at this time.

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 failed to provide sufficient evidence to mitigate or overcome the government's case.

For the reasons stated, I conclude he is not eligible for access to classified information at this time.

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 to 1.h:	For Applicant
Subparagraph 1.i:	Against Applicant
Subparagraphs 1.j and 1.k:	For Applicant
Subparagraph 1.l to 1.o:	Against Applicant
Subparagraphs 1.p to 1.u:	For Applicant

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 a security clearance is denied.

Mark W. Harvey
Administrative Judge