DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 08-09794
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

February 27, 2009

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Decision

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GALES, Robert Robinson, Chief Administrative Judge:

Applicant failed to mitigate the security concerns regarding financial considerations. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On November 28, 2007, Applicant applied for a security clearance and submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a Security Clearance Application. On December 12, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive). The SOR alleged security concerns under Guidelines F (Financial Considerations) and E (Personal Conduct), and detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security

clearance for Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

It should be noted that on December 29, 2005, the President promulgated revised *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information*, and on August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing implementation of those revised Adjudicative Guidelines (hereinafter AG) for all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended and modified (Regulation), in which the SOR was issued on or after September 1, 2006. The AG are applicable to Applicant's case because his SOR was issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on December 18, 2008. In a sworn, written statement, dated January 7, 2009, Applicant responded to the SOR allegations and requested a decision without a hearing. On January 26, 2009, pursuant to section E3.1.7 of Enclosure 3 of the Directive, Department Counsel requested a hearing before an Administrative Judge. Department Counsel indicated the Government was prepared to proceed on January 23, 2009, and the case was assigned to me on January 26, 2009. A Notice of Hearing was issued on January 28, 2009, and I convened the hearing, as scheduled, on February 9, 2009.

During the hearing, nine Government exhibits and one Applicant exhibit were admitted into evidence without objection. Applicant testified. The transcript of the hearing (Tr.) was received on February 13, 2009.

The record was kept open until February 18, 2009, to enable Applicant to supplement the record. Applicant took advantage of that opportunity and, on February 16, 2009, he submitted one additional document (marked as Applicant Exhibit B) which was admitted without objection.

Findings of Fact

In his Answers to the SOR, Applicant admitted the factual allegations in ¶ 1.e. of the SOR. He denied the remaining allegations.

Applicant is a 41-year-old employee of a defense contractor, and he is seeking to retain a TOP SECRET security clearance which was previously granted to him in 2003.[1] He served honorably on active duty with the U.S. Navy from July 1986 until March 1994.[2] He has been employed by the same defense contractor since October 1999, and currently serves as a senior technician.[3]

[1] Government Exhibit 1 (e-QIP, dated November 28, 2007), at 22.

[2] *Id.* at 17.

[3] *Id.* at 9-10.

Applicant was married in 1990, and has one child, who is 16 years of age.[4]

In 1992, with $10,544 of total liabilities, Applicant filed for bankruptcy protection under Chapter 13.[5] In August 1995, all payments under the bankruptcy plan having been completed, a discharge was granted.[6]

In May 2005, Applicant supposedly voluntarily co-signed for a friend's $130,000 home equity line of credit.[7] The scheme was for Applicant to purchase the house in his name and, in exchange for $10,000, to give his friend a quitclaim so he could refinance it.[8] The friend apparently did not make his required monthly payments on the loan and the unpaid balance quickly increased. Applicant was never informed, either by the friend or the mortgage lender, that the payments were delinquent.[9] Furthermore, since he did not reside in the house, he had no interest in the loan status.[10] The account was subsequently turned over for collection, and the $140,000 balance was eventually charged off to profit and loss.[11] Applicant attempted to have his name removed from the loan, without success.[12] He acknowledges that, under the law, he is legally responsible for the debt, but he has no intention of paying it.[13] Furthermore, he has made no effort to go after the beneficiary of the loan because they are "friends,"[14] and the friend is unemployed.[15] His only present interest in the issue is to dispute and have the negative loan report deleted from his credit report because the house was lost to foreclosure and he has no means to pay the balance.[16]

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[4] Tr. at 35.

[5] Government Exhibit 2 (Voluntary Petition, filed June 24, 1992).

[6] *Id.* (Discharge of Debtor, dated August 9, 1995).

[7] Government Exhibit 5 (Combined Credit Report, dated December 11, 2007), at 10; Tr. at 36-38. It should be noted that the credit report indicates the mortgage was not a joint mortgage, but rather an individual one.

[8] Tr. at 78, 81-82.

[9] *Id.* at 61, 63.

[10] *Id.* at 61.

[11] Government Exhibit 9 (Equifax Credit Report, dated February 7, 2009), at 2; Tr. at 36.

[12] Tr. at 38-39.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 82.

[16] *Id.* at 40-41.

In January 2006, a state tax lien was filed against Applicant, related to the residence he financed in his name, in the amount of $130.00.[17] Applicant disputed the lien, claiming he never received notice of it and was unaware of it.[18] The lien, for unpaid property taxes and penalties, was finally released on February 12, 2009.[19]

In June 2005, Applicant again supposedly voluntarily co-signed for another friend's $156,000 2nd mortgage.[20] The friend has apparently not made his required monthly payments on the loan and, when last reported in February 2009, was $29,918 delinquent on loan payments on a balance of $155,000.[21] Applicant acknowledges his legal responsibility for the loan, but has taken no steps to arrange payments or otherwise resolve the delinquency.[22]

Applicant resides in a home (since 1997)[23] which he contends was refinanced with a particular lending institution with his wife listed as the sole lender.[24] They did so because Applicant wanted to keep his credit "clear."[25] Her 1st mortgage on the house is estimated as $340,000 with the 2nd estimated as $90,000 to $92,000.[26] He denies that either mortgage has ever been delinquent.[27] Applicant's credit reports convey a different story. While there are a number of mortgage lenders referred to therein, reflecting several years of mortgages made, paid, closed, delinquent, charged off, and transferred, the particular lending institution is reflected as well. There is a 1st mortgage in the amount of $616,000, made in December 2004, which was subsequently transferred to another unspecified lender because of over 120 days delinquency.[28] There is also a home equity line of credit or 2nd mortgage in the amount of $93,000, made in May 2005, which was subsequently sent to collection for being delinquent, and eventually charged off to profit and loss.[29] Applicant contends the 2nd mortgage has a

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[17] Government Exhibit 4 (LexisNexis® Judgment and Lien Filings (based on Social Security Number), dated January 1, 2006)..

[18] Tr. at 74, 85.

[19] Applicant Exhibit B (Release of Tax Lien, dated February 12, 2009).

[20] Government Exhibit 5, *supra* note 7, at 12; *Id.* at 44, 81. It should be noted that the credit report indicates this mortgage too was not a joint mortgage, but rather an individual one.

[21] Government Exhibit 9, *supra* note 11, at 3.

[22] Tr. at 44-45.

[23] Government Exhibit 1, *supra* note 1, at 9.

[24] Tr. at 46, 48, 64.

[25] *Id.* at 64.

[26] *Id.* at 46.

[27] *Id.* at 47-48, 64, 72.

[28] Government Exhibit 5, *supra* note 7, at 11; Government Exhibit 9, *supra* note 8, at 3.

[29] *Id.* Government Exhibit 5, at 10-11; *Id.* Government Exhibit 9, at 2.

zero balance and that the debt has been satisfied.[30] In part, he is accurate. There is a zero balance, not because he paid the balance, but because the account was charged off to profit and loss.

Applicant estimates his monthly mortgage payments on his residence to be $2,200 on the 1st mortgage and $400 or $415 on the 2nd mortgage.[31] He and his wife earn a monthly net salary of about $5,800, with about $5,000 in expenses.[32] With the exception of the purported mortgage deficiencies on the mortgages for his friends' homes, all their other accounts and expenses are now current.[33] As already noted, he steadfastly denies either of the mortgages on his personal residence is delinquent.[34]

On November 28, 2007, when Applicant completed the e-QIP, there were two questions of particular significance pertaining to financial matters. Section 28, question a. asked: "In the last 7 years, have you been over 180 days delinquent on any debt(s)?" Section 28, question b. asked: "Are you currently over 90 days delinquent on any debt(s)?" He responded "no" to both questions,[35] and certified that his responses were true, complete, and accurate.[36] They were not. He continued to deny any such delinquencies.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the 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.

An Administrative Judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied 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 meaningful decision.

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[30] Applicant's Answer to SOR, dated January 7, 2009.

[31] Tr. at 53-54.

[32] *Id*. at 57-58.

[33] *Id.* at 59-60.

[34] *Id.* at 47-48, 64, 72.

[35] Government Exhibit 1, *supra* note 1, at 23.

[36] *Id.* at 1.

Since 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.

In the decision-making process, facts must be established by "substantial evidence."[37] The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the Applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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." Accordingly, 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.

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

[37] "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1).

> 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. Likewise, under AG ¶ 19(b), "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," may also be potentially disqualifying. Similarly, under AG ¶ 19(c), "a history of not meeting financial obligations" may raise security concerns as well. The evidence is sufficient to establish AG ¶¶ 19(a), 19(b), and 19(c).

In 2005, Applicant chose to either co-sign for or individually apply for mortgage loans on houses for two friends, although he later acknowledged he did not know one of those "friends" very well. In fact, what he characterized as merely helping friends, was seemingly much more than that, for he admitted the existence of a financial scheme to initially take out the mortgage for at least one of his friends with an anticipated quitclaim deed to be issued for a $10,000 payment. Considering the circumstances of the loans, his actions, if not actually frivolous, were definitely irresponsible. Both friends failed to make their monthly mortgage payments. One mortgage delinquency was charged off to profit and loss and the other one is simply very delinquent. Both homes are now vacant. Since he did not reside in either house, he had no interest in the loan status. He acknowledges that, under the law, he is legally responsible for the debt, but has no intention of paying either mortgage, and has made no effort to go after the beneficiaries of either loan because he is a "friend" of one who is unemployed, and he does not know where the other one resides. His only present interest in the issue is to dispute them and have the negative loan reports deleted from his credit report. Also, he claims he does not have sufficient money to pay off the loans.

While neither of the two houses has gone to foreclosure, such actions are apparently on hold and have not yet taken place. This situation presents an interesting conundrum, for if the foreclosures do occur, under state law, Applicant may not be liable for either the unpaid mortgages or the deficiencies, and the lien holders would be limited to the property. Under California law, there is a provision called the Anti-Deficiency Statute,[38] which states in relevant part:

> No deficiency judgment shall lie in any event after a sale of real property or an estate for years therein for failure of the purchaser to complete his or her contract of sale, or under a deed of trust or mortgage given to the vendor to secure payment of the balance of the purchase price of that real property or estate for years therein, or under a deed of trust or mortgage on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the

[38] Cal. Code Civ. Proc. § 580(b).

> purchase price of that dwelling occupied, entirely or in part, by the purchaser.

Under this section, generally if there is a foreclosure on a dwelling and there is a deficiency, the lender has no recourse regarding "purchase money loans," also called "non-recourse loans," the amounts set forth in both the 1st and the 2nd mortgages used to finance the dwelling purchase. The collateral or dwelling is considered full satisfaction. However, there is a caveat, for the protection is afforded only if the borrower actually dwells in the property, a fact which has not been met for either house in this instance. In addition, there is another pertinent law, called the One Form of Action Rule,[39] which states in relevant part:

> There can be but one form of action for the recovery of any debt, or the performance of any right secured by mortgage upon real property.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial considerations. Under AG ¶ 20(a), the disqualifying condition may be mitigated where "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." When "the conditions that resulted in the financial problem were largely beyond the person's control (e.g., the loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances" is also potentially mitigating under AG ¶ 20(b). Evidence that "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control" is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."[40] Also, AG ¶ 20(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" may apply. Except for SOR allegation 1.e., the evidence is insufficient to establish AG ¶¶ 20(a), 20(c), 20(d), or 20(e). As to that allegation, the evidence is sufficient to establish AG ¶¶ 20(a), 20(b), 20(c), and 20(d).

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[39] Cal. Code Civ. Proc. § 726(a).

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

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

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

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

> 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.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 16(a), "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," is potentially disqualifying. The evidence is sufficient to establish AG ¶ 16(a), for Applicant either knew, or should have reasonably known, the actual facts of the delinquencies, when he completed the e-QIP questions.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct, but none of them apply here.

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) 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant chose to either co-sign for

or individually apply for mortgage loans on houses for two friends, although he later acknowledged he did not know one of those "friends" very well. He subsequently admitted the existence of a financial scheme. Considering the circumstances of the loans, his actions, if not actually frivolous, were definitely irresponsible. Since he did not reside in either house, he possessed no interest in the status of either loan, despite knowing he is legally responsible for the debts. Furthermore, he has no intention of paying either mortgage, and he has made no effort to go after the beneficiaries of either loan. His only present interest in the issue is to dispute them and have the negative loan reports deleted from his credit report. (*See* AG ¶¶ 2(a)(1), 2(a)(2), 2(a)(5), and 2(a)(7).)

Of course, the issue is not simply whether Applicant's mortgage debts are resolved; it is whether his financial circumstances and personal conduct raise concerns about his fitness to hold a security clearance. I am mindful that while any one factor, considered in isolation, might put Applicant's actions in a sympathetic light, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.[41] Considering the circumstances behind the mortgage loans for his friends, his total disinterest in the status of those loans, the lack of any effort to resolve the loans either with his friends or the mortgage lenders, his declared intention not to pay the loans, and his lack of candor in the e-QIP, his actions are sufficient to raise continuing security concerns. (*See* AG ¶¶ 2(a)(6) and 2(a)(9).)

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

Formal Findings

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

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

[41] *See U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); *See also* ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006)

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.

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ROBERT ROBINSON GALES
Chief Administrative Judge