DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:)
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XXXXXXXXXX, XXXXX) ISCR Case No. 09-00476
SSN: XXX-XX-XXXX
)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esq., Department Counsel
For Applicant: *Pro se*

April 30, 2010

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate Guideline F (financial considerations) security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On August 28, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On April 13, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline F for Applicant. 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on June 4, 2009. Department Counsel was prepared to proceed on July 28, 2009. The case was assigned to me on July 30,

2009. DOHA issued a notice of hearing on August 21, 2009, scheduling the hearing for September 24, 2009. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 8, which were received without objection. The Applicant offered Applicant Exhibits (AE) A through E, which were received without objection, and he testified on his own behalf.

I held the record open until October 9, 2009, to afford the Applicant the opportunity to submit additional documents on his behalf. Applicant submitted AE K through U, which were received without objection. DOHA received the hearing transcript (Tr.) on October 2, 2009. The record closed on October 9, 2009. On February 16, 2010, I received an e-mail from the Applicant advising that he would be contacting the creditor for SOR ¶ 1.i. (charged off account for $67,937) to confirm the debt was paid as well as provide status updates on the remaining unresolved SOR debts. (Feb. 16, 2010 e-mail marked as Ex. I.) As of the decision issuing date, I have not received any additional information from the Applicant.

Findings of Fact

Applicant admitted all of the SOR allegations. His admissions are accepted as findings of fact.

Background Information

Applicant is a 47-year-old circuit design electrical engineer, who has been employed by a defense contractor since July 2007. He seeks to renew his secret security clearance, which he has successfully held for approximately 12 years. Maintaining a clearance is not a condition of his continued employment; however, without a clearance, he will be limited to working on non-classified programs. (GE 1, GE 3, Tr. 17, 21-22, 33-35.)

Applicant graduated from high school in June 1981. He later attended a university from August 1995 to August 2000, and was awarded a Bachelor of Science degree in Electrical Engineering in May 2000. He has never married and has no dependents. (GE 1, GE 3, Tr. 35-37.)

Financial Considerations

Applicant's background investigation addressed his financial situation and included the review of his August 2000 security clearance application (SF-86), his August 2008 e-QIP as well as his April 2001, September 2008, March 2009, April 2009, and July 2009 credit reports. (GE 1 – 8.)

Applicant's SOR identified 12 separate debts - one past-due account, one tax lien, two collection accounts, and eight charged-off accounts, totaling $215,797. (SOR ¶¶ 1.a. – 1.l.)

Until 2006, Applicant was financially solvent, had a credit score in the 700s, owned property, had a viable retirement account, and money in the bank. In mid-2006, his former fiancée introduced him to an investment group that identified investors with good credit, such as the Applicant to (1) cash out the equity in their homes, (2) open credit card accounts and withdraw the maximum cash advances allowed, and (3) cash out their retirement plans and turn those funds over to the investment group. The investment group in turn would buy homes, rent them, and the rental income they received from tenants would theoretically cover the monthly mortgage payments. The investment group represented to the investors that they would reap quick returns up to three times their investment in a relatively short time.

Applicant owned a single family home and a condominium. He refinanced those two properties and turned over the equity he received to the investment group. In mid-2006, the investment group bought two properties with those funds and listed the Applicant as the owner of those two properties. Applicant was to forward monthly mortgage bills to the investment group for reimbursement. Applicant remained legally responsible for all payments on these newly acquired properties. (Response to SOR, AE E, Tr. 60, 85-88.)

The investment group also opened credit cards in Applicant's name and withdrew the maximum amount of cash possible from these newly opened accounts. The investment group invested these funds in "something" that was supposed to double Applicant's money in one year. As with the real property, Applicant was to forward credit card bills to the investment group for reimbursement of minimum monthly payments. As with mortgage payments, Applicant remained legally responsible for making the minimum payments on these credit cards. (Response to SOR, AE E.) Applicant explained that only "two or three" of the credit cards on the SOR were his. He also stated he expected his return "in six months to a year . . . would be, you know, two, three times what it was."(Tr. 43, 85-88.)

Applicant liquidated his IRA and Roth IRA, also with an understanding he would net a substantial and quick return. Applicant stated he handed over "close to [a] half a million [dollars] ($500,000)" to the investment group in total. (Response to SOR, Tr. 58-59.)

In January 2007, a law firm filed a class action suit against the investment group and was granted a temporary restraining order against the investment group, which among other things, froze all funds held by them. At his hearing, Applicant was unable to provide any status updates of this litigation. He testified that he has not had any communication from the law firm representing the plaintiffs since their initial January 2007 letter. The investment group was unable to dispense funds to investors, funds they needed to cover their monthly mortgage and credit card payments. This had disastrous financial repercussions for the Applicant. (Response to SOR, AE E, Tr. 44, 88-91.) Until then, Applicant received sufficient funds from the investment group to cover monthly expenses related to his investment expenses. As far as profit or return on his $500,000 investment, Applicant testified that he received nothing or "zero" from the investment group. (Tr. 59, 85-88.)

To deal with his pressing debt, Applicant retained the services of a law firm specializing in debt resolution (law firm) in January 2009. He had been referred to this law firm by a credit counseling service in December 2008. (Response to SOR, AE E (Section 2).) Applicant submitted a list of creditors to the law firm and they in turn negotiate settlements with creditors. Applicant remits $587 per month by direct debit to the law firm to fund his client trust fund. The law firm's fee for their services as well as payments to creditors comes directly from a client trust fund. (Response to SOR, AE A, AE E(Section 2).)

Applicant identified the following debts for resolution: (1) SOR ¶ 1.a. credit card charged off account $7,291, (2) SOR ¶ 1.b. credit card charged off account $13,738, (3) SOR ¶ 1.c. credit card charged off account $3,631, (4) SOR ¶ 1.d. credit card charged off account $6,755, (5) SOR ¶ 1.e. credit card charged off account $1,658, (6) SOR ¶ 1.f. credit card charged off account $9,835, (7) SOR ¶ 1.g. credit card charged off account $4,854, and (8) SOR ¶ 1.l. credit card collection account $6,958.

In January 2009, the law firm wrote to each of the eight identified creditors with what could be referred to as a "no contact letter." As of the hearing date, the law firm had settled and paid the three creditors identified in SOR ¶¶ 1.e., 1.f., and 1.g. (AE A, AE E, AE O, Tr. 37, 61-67.) Post-hearing, Applicant submitted documentation that the creditor in SOR ¶1.k. tax lien $196 had been paid. (AE S, Tr. 81.) These four debts are the only debts from the 12 debts alleged for which Applicant submitted sufficient documentation of payment or resolution. (Tr. 76-81.)

Additionally, and most significant are the deficiencies or indebtedness owed on three properties. These debts are: (1) SOR ¶ 1.h. lender charged off account $70,749, (2) SOR ¶ 1.i. lender charged off account $67,937, and (3) SOR ¶ 1.j. past-due account $22,195 with a balance of $522,000. Applicant was issued a Form 1099-A in the respective amounts of $70,749.44 and $522,000 for the properties associated with debts in SOR ¶¶ 1.h. and 1.j. In July 2009, Applicant received notification that the lender holding the note for the debt in SOR ¶ 1.i. had transferred the loan to another lender. At his hearing, Applicant testified that he received a Form 1099-A from the original lender, but was unable to locate it. To date Applicant has not provided a Form 1099 for this debt. (Response to SOR, AE E, AE E, pgs 30 and 34, AE R, AE V, Tr. 67-75, 80-81.)

Post-hearing, Applicant submitted a Certificate of Counseling documenting that he had completed credit counseling in August 2008. (AE N, Tr. 83-84.) Applicant testified that he earns approximately $80,000 per year and estimated that after he pays all his monthly bills, he has a net remainder of $1,500 per month. He no longer is a home owner and rents an apartment; however, he hopes to save enough to purchase another home. He is in the process of rebuilding his retirement account. (Tr. 92-95, AE P, AE Q.)

Character Evidence

Applicant's department manager testified on his behalf. He stated that he has known the Applicant "about two years" and observes him on a daily basis. He described Applicant as "hard working, "very reliable," "solid," "valued employee," and has "a hundred percent confidence" in Applicant. He described Applicant's duties and added that if Applicant were not granted a security clearance "our national defense would be greatly reduced." (Tr. 17-27.)

Applicant submitted several certificates which include an award from a blood bank for volunteer donations in 2006, a company award for his contributions for persons with disabilities in 2008, and another company award for outstanding job performance in 2008. Applicant submitted performance evaluations for the years 2004 through 2009 that reflect sustained solid performance. (AE B – D.)

Policies

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

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

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The

Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude one 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." Applicant's history of delinquent debt is established by his admissions and evidence presented. As indicated in SOR ¶¶ 1.a. to 1.l., he had 12 delinquent debts totaling $215,797 that have been in various states of delinquency since 2007. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c).

Five financial considerations mitigating conditions under AG ¶¶ 20(a)-(e) are potentially applicable:

> (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
>
> (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;
(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant's conduct does not warrant application of AG ¶¶ 20(a) or 20(b). Because there is more than one delinquent debt, his financial problems are not isolated. It was not until 2009 that Applicant retained the services of a law firm for debt resolution. Of eight debts referred to the law firm, only three have been satisfied. Applicant also paid one small debt separately. Therefore, his debt is "a continuing course of conduct" under the Appeal Board's jurisprudence. See ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)). Applicant's situation was of his own doing. He engaged in financial behavior that "threw caution to the wind" leaving himself completely vulnerable in a "get rich quick" scheme. Applicant's collective behavior raises serious questions about his good judgment. *See* ISCR Case No. 08-08435 (App. Bd. July 16, 2009.) The record does not support a conclusion that Application's debt arose from causes outside his control. There is no evidence that Applicant took any affirmative steps to resolve his debts until January 2009 leaving them dormant for one year.[1]

AG ¶ 20(c) is not applicable. Although Applicant did seek financial counseling, there are no clear indications that his financial status is under control. There is sufficient information to establish partial application under AG ¶ 20(d).[2] Applicant has paid or

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

[2]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) in order to claim the benefit of [the "good-faith" mitigating condition].

resolved four of the twelve debts alleged. He testified that he has a $1,500 net remainder after all his monthly bills are paid, yet he remits only $587 per month to the law firm to pay down his remaining debts. This explains, in part, why only three of the twelve debts are paid off. He paid his $196 tax lien separately. Applicant offered no evidence that he is disputing any of the debts alleged. AG ¶ 20(e) is not applicable.

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).

There is evidence against mitigating Applicant's conduct. The SOR lists 12 debts totalling $215,797. Applicant refinanced his two properties for purpose of using the equity in investment properties. He cashed out his retirement plans for the purpose of using that cash for investment purposes. Lastly, he authorized the investment group to open credit cards in his name for the purpose of drawing cash advances for investment purposes. Applicant surrendered all of his net worth, retirement accounts, and good credit to the investment group. They had convinced him he would reap a return of two to three times his investment in a relatively short time. According to Applicant's testimony, he lost approximately $500,000 and received nothing in return. His lack of judgment and due diligence raises serious questions about his judgment and security worthiness. Many creditors are still waiting to be repaid and will most likely be required to accept less than full payment and three creditors owed significant balances on real estate holdings most likely will never be paid.

The mitigating evidence under the whole-person concept is insufficient to overcome the situation Applicant has created of his own doing. The volatile real estate market over the past several years does not excuse Applicant's irresponsible behavior. I took note of his good employment record with a defense contractor, his contributions to the community, and the fact that he is a law-abiding citizen. His monthly expenses are

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(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)).

current. The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:

> In evaluating Guideline F cases, the Board has previously noted that the concept of "'meaningful track record'" necessarily includes evidence of actual debt reduction through payment of debts." However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he has ". . . established a plan to resolve his financial problems and taken significant actions to implement that plan." The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) ("Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.") There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted). I do not view Applicant's monthly payment of $587 he sets aside for debt repayment while retaining a net monthly remainder of $1,500 as "significant action." Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the concerns arising from his financial considerations.

In fairness to the Applicant, this decision should not be construed as a determination that he cannot or will not attain the state of financial stability necessary to justify the holding of a security clearance. To the contrary, his mitigating evidence and whole-person analysis suggests a sound potential for positive reform and outstanding accomplishments in the defense industry. Should Applicant be afforded an opportunity to reapply for a security clearance, he may well demonstrate persuasive evidence warranting a favorable result.

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 adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

Formal Findings

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

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a. - 1.d.:	Against Applicant
Subparagraphs 1.e. – 1.g.:	For Applicant
Subparagraphs 1.h. – 1.j.:	Against Applicant
Subparagraph 1.k.:	For Applicant
Subparagraph 1.l.:	Against 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.

Robert J. Tuider
Administrative Judge