



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 09-08326

Appearances

For Government: Fahryn E. Hoffman, Esquire, Department Counsel
For Applicant: *Pro se*

June 14, 2011

Decision

HARVEY, Mark, Administrative Judge:

Applicant's SOR lists eight delinquent debts totaling \$269,051. He made insufficient progress resolving these debts. He failed to disclose his delinquent debts and the suspension of his security clearance on his 2009 security clearance application. He committed offenses that resulted in prefferal of charges and his resignation in lieu of trial by court-martial. He received an Other Than Honorable characterization of his service on his most recent DD Form 214. Eligibility for access to classified information is denied.

Statement of the Case

On September 16, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF 86) (GE 1). On August 4, 2010, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guidelines F (financial considerations) and E (personal conduct). (Hearing Exhibit (HE) 2) 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 a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked. (HE 2)

On August 31, 2010, Applicant responded to the SOR. (HE 3) On November 3, 2010, DOHA amended the SOR. On November 12, 2010, Department Counsel indicated she was ready to proceed on Applicant's case. On November 16, 2010, DOHA assigned Applicant's case to me. On November 30, 2010, DOHA issued a hearing notice. (HE 1) On December 1, 2010, Applicant responded to the Amended SOR. (HE 4) On December 15, 2010, Applicant's hearing was held. At the hearing, Department Counsel offered 6 exhibits (GE 1-6) (Tr. 29-30), and Applicant offered 26 exhibits, which were pre-marked. (Tr. 17, 31-32; AE A, A1-A25) There were no objections, and I admitted GE 1-6, AE A, and AE A1-A25. (Tr. 30, 32) Additionally, I admitted the hearing notice, SOR, and Applicant's response to the SOR and Amended SOR response, which included the Amended SOR, as hearing exhibits. (HE 1-4) On January 3, 2011, I received the transcript. I held the record open until May 18, 2011. On May 17, 2011, I received 15 additional exhibits. (AE B-1 to B-15) There were no objections to Applicant's post-hearing exhibits, and I admitted them into evidence.

Findings of Fact¹

Applicant's SOR response admitted responsibility for SOR debts ¶¶ 1.d and 1.e. and to the allegations in Amended SOR ¶¶ 2.c, 2.d, and 2.e. (HE 3, 4)² He denied the other SOR allegations; however, he did make some limited admissions to several SOR allegations, which will be addressed below. He also provided some extenuating and mitigating information. (HE 3, 4) His admissions are accepted as factual findings.

Applicant is 49 years old, and he has been employed by a government contractor for 17 months. (Tr. 5, 42) As a contractor employee, he trains military personnel on operations and information flow at various command and staff levels. (Tr. 42-43) He was born in the Dominican Republic and is one of 13 children. (Tr. 20) Several of his siblings or siblings-in-law are married to field grade officers in the U.S. military or to law enforcement officials. (Tr. 20) Applicant's father is a retired E-7. (Tr. 20) Applicant has been married for 23 years, and his children are ages 13, 18, and 21. (Tr. 41)

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits. With the consent of all parties, Applicant's opening statement was considered as substantive evidence. (Tr. 29)

² I amended SOR ¶ 2(c) to conform with Applicant's response to the Amended SOR by changing the word "conducted" to "convened" because Applicant resigned from the Army before his Article 32 investigation was conducted, but after it was convened. (Tr. 13)

Applicant earned a high school diploma in 1980. (Tr. 5) He graduated from a Latin American Army Command and Staff College in 1993 and from the U.S. Army's Command and General Staff College in 1999. (Tr. 6) He was awarded a Masters Degree in Latin American Studies in 2001 and a Masters Degree in Business Administration in International Business in 2003. (Tr. 5-6)

Financial Considerations

Applicant's SOR lists eight allegedly delinquent debts totaling \$269,051. The status of those eight SOR debts is as follows:

SOR ¶ 1.a mortgage debt (\$253,431)—UNRESOLVED. Applicant purchased a residential property in the mid-1990s, and the Department of Veterans Affairs (VA) guaranteed \$36,000 of the loan. (Tr. 51-52, 56, 65; GE 2 at 8) Applicant was unsure when he made the most recent payment on the mortgage. (Tr. 61) In 2003, Applicant asked the creditor for the status on his mortgage account. (Tr. 59) He learned that as of March 19, 2003, he owed \$209,745 to the creditor, which included \$46,404 in unpaid principal and \$32,249 in "Mortgage Insurance Premium." (Tr. 54, 59; GE 2 at 11)³ He learned the property was going into foreclosure "because there were so many, so many late payments, that [he] hadn't had the ability to pay on that, so basically [his] thought process was to go into foreclosure." (Tr. 59-60) He emphasized his knowledge that "the VA guaranteed that [he] wouldn't lose [his VA loan eligibility] because of that, because that's one of the reasons why they lend to veterans because it's guaranteed." (Tr. 59-60) In July 2005, the mortgage creditor filed a judgment against Applicant for \$253,431. (SOR ¶ 1.a; Tr. 56-57; GE 2 at 23) Applicant said he was overseas or in a different state from the property when the judgment was filed, and he was not aware of it. (Tr. 55, 57) Applicant thought the VA took over the ownership of the property. (Tr. 64) Applicant said that in 2008, the property was auctioned for \$119,000. (Tr. 53, 55) Applicant said that the VA paid the deficiency. (Tr. 53; SOR response) He did not provide any documentation about the auction or to support his belief that the VA paid the deficiency. Applicant said he received a tax document relating to the sale; however, he could not find it. (Tr. 55) On August 28, 2009, the VA wrote Applicant that the VA paid \$36,000 towards Applicant's delinquency, and his entitlement could not "be restored until VA's loss on the loan has been fully repaid." (GE 2 at 8; GE 3 at 5) After Applicant received the SOR, he checked with the court, and there was a judgment filed against him. (Tr. 67) In August 2010, Applicant asked the creditor on the judgment about the debt and learned it had been transferred; however, Applicant did not indicate which bank held the debt nor did he describe any efforts to resolve the debt with the new creditor. (Tr. 67-68) He did not provide a release or satisfaction of the judgment or any documentation from

³On October 12, 2009, an Office of Personnel Management (OPM) investigator interviewed Applicant concerning this debt. (AE A22 at 3) The OPM summary reads, "Until the lawsuit was filed during July 2005, the subject was unaware there was a problem with the mortgage, or that the renters had vacated the residence several months before. (AE A22 at 3) He also told the OPM investigator that he believed the Veterans Administration paid off the mortgage and the judgment was satisfied. *Id.* The SOR did not allege that Applicant lied to the OPM investigator about when he learned his mortgage was delinquent, and that he believed that the VA satisfied the judgment.

the VA indicating the VA was not interested in recouping the VA's \$36,000 loss of funds. See n. 16 *infra*.

SOR ¶ 1.b telecommunications debt (\$522)—UNRESOLVED. Applicant said the debt was transferred. He said he paid it, and he promised to try to find the letter from the creditor so that he could provide it to DOHA. (Tr. 69-71; SOR response) However, he did not provide any documentary evidence the debt was paid or otherwise resolved.

SOR ¶ 1.c student loan debt (\$2,095)—FORBEARANCE. Applicant provided a letter indicating his student loan was in forbearance and not delinquent. (Tr. 75; SOR response) An August 30, 2010 letter from the creditor indicated the forbearance would expire nine days before Applicant's hearing, and a \$723 payment would be due on December 4, 2010. (Tr. 76) Applicant did not make any payment to the creditor; however, he believed he would send \$400 after discussing a payment plan with the creditor. (Tr. 77-78) He also thought the creditor should send him another bill before he makes a payment. (Tr. 78) He was also too distracted about other matters to take care of this debt in December 2010. (Tr. 79) After his hearing, he provided a letter indicating his student loans, totaling more than \$80,000, were in forbearance until May 31, 2016. (AE B11) He did not provide documentation explaining how he convinced the creditor to approve the forbearance.

SOR ¶¶ 1.d and 1.e credit union debts (\$5,223 and \$3,140)—PAYMENT PLAN. On October 12, 2009, an OPM investigator interviewed Applicant concerning these two debts. (AE A22 at 3-4) For SOR debt 1.d, Applicant explained that he purchased a motorcycle, which was voluntarily repossessed. For SOR debt 1.e, he had a line of credit. He fell behind on his payments for both debts after he was discharged from the Army. He said he would arrange a payment plan for both debts within 45 days. Applicant said he made four \$200 payments from September to December 2010, and he said he will begin making \$400 monthly payments in January 2011. (Tr. 80-81; SOR response) On August 24, 2010, the creditor wrote that this payment plan is satisfactory to the creditor. (Tr. 80; SOR response enclosure 4)

SOR ¶ 1.f bank debt (\$3,473)—UNRESOLVED. Applicant said he gave a car to his brother, and his brother was supposed to repay the loan on the car. His brother made one \$1,000 payment to the creditor, and his brother promised to pay the remainder of the debt. (Tr. 82) He did not provide proof of any payments to the creditor.

SOR ¶ 1.g credit card debt (\$945)—UNRESOLVED. Applicant said he paid the debt before January 2010. (Tr. 83-84; SOR response) He expected the creditor would provide verification of payment to the credit bureaus. (SOR response) He did not provide proof of payment. (Tr. 84-85)

SOR ¶ 1.h insurance debt (\$222)—PAID. In response to interrogatories, Applicant provided to DOHA a photocopy of the front of a check, dated January 26, 2010, written to the creditor to show payment (GE 2 at 12); however, at his hearing he disclosed that after he wrote the check, he stopped payment because the insurance

company told him he did not owe anything. (Tr. 85-86) His response to interrogatories indicated, "I feel it is best to pay the said amount and close out this debt in order that it will not [] effect my being granted a security clearance." (GE 2 at 4) However, the delinquent debt was still on his credit report. (Tr. 86-87) He provided an insurance card effective January 29, 2010, and said the insurance company would not have provided the card if he owed a delinquent debt to the insurance company. (Tr. 87) He is no longer with the insurance company that sent the derogatory information to the credit reporting company. (Tr. 87; SOR response at enclosure 2) He is credited with resolving the debt because receipt of the insurance card is persuasive evidence that the debt was paid.

On October 12, 2009, an OPM investigator discussed a delinquent credit card debt owed to a nonappropriated fund activity, and the total amount owed was \$5,200.⁴ (AE A22 at 4) Applicant promised to work out a payment plan in the next 45 days. *Id.* On February 25, 2011, the Internal Revenue Service (IRS) notified Applicant that his entire tax refund of \$7,209 had been intercepted to pay two debts owed to the nonappropriated fund activity who issued the credit card discussed previously in this paragraph. (AE B10)

On October 12, 2009, Applicant told the OPM investigator that he planned to work out payment plans with all of his creditors and then use a debt consolidation service to pay the creditors. (GE 2 at 25; AE A22 at 5) No effectuated debt consolidation plans are included in the record.

After his hearing, Applicant provided a budget. (Tr. 95; AE B14) His budget showed monthly income of \$8,562; monthly expenses of \$7,220; and \$1,342 for savings and discretionary spending. (AE B14) He did not indicate any payments for his SOR creditors. (AE B14) He said he could also provide medical records about his depression (Tr. 109); however, he failed to do so.

Personal Conduct

On September 23, 2005, Applicant's access to classified information was suspended because he was under investigation for altering his officer evaluation report (OER). (AE A13 at ¶ 1) The document suspending his clearance stated that there were "indications of fraudulent travel vouchers, government travel card fraud, and other trustworthiness issues" as the basis for the suspension.⁵

On or about April 2006, Applicant was charged with two specifications of being absent without leave (AWOL), in violation of Article 86, Uniform Code of Military Justice (UCMJ); one specification of failing to obey an order or regulation, in violation of Article 92, UCMJ; five specifications of making a false official statement, in violation of Article

⁴ This debt is not listed on the SOR.

⁵ AE A13 at ¶ 2. On July 27, 2006, Applicant's security manager recommended revocation of his security clearance. (AE A13 at ¶ 3)

107, UCMJ; four specifications of larceny, in violation of Article 121, UCMJ; 11 specifications of fraud, in violation of Article 132, UCMJ; and one specification of conduct unbecoming an officer, in violation of Article 133, UCMJ. (SOR ¶ 2.c) His charges were referred to an Article 32, UCMJ, investigation on or about April 12, 2006. (SOR ¶ 2.c)

Applicant briefly discussed the basis of his charges, and his decision to resign in lieu of trial by court-martial. He said his lawyer provided “inadequate advice.” (AE A) He said the basis of the 20 specifications was “one isolated incident in over 20 yrs of ‘Honorable’ service.” (AE A at 1) He previously received multiple DD Form 214s describing his service as honorable from the Army. (AE A at 1) He attributed his problems during his most recent Army assignment to his exit brief from an overseas assignment, which “cost a lot of people’s career and caused a lot of changes” where he was assigned. (Tr. 21-22) He conceded that when he was assigned overseas, he signed a form, that he was not permitted to sign, that could be used to receive government funds. (Tr. 107) He acknowledged he was culpable for this conduct. (Tr. 107-08)

On June 1, 2006, the charges against Applicant were dismissed because the Army accepted his resignation. (Tr. 32; AE A1; HE 4 at 1) On June 16, 2006, Applicant was formally notified that his resignation from the Army was approved, and that his characterization of service was under Other Than Honorable conditions.⁶ (SOR ¶ 2.d; GE 3 at 80-82) Applicant admitted this SOR allegation. (HE 4)

In December 2010, the Army recalculated Applicant’s credits for reserve duty and provided him a “20-Year Letter.” His status was changed to retired from the Army, and he will receive retirement pay at age 60, subject to an offset for Special Separation Benefit (SSB) pay received. (Tr. 19, 32; AE A2)⁷

Applicant did not provide copies of his charge sheet or any documentation about the investigations.⁸ Applicant claimed that his lawyer told Applicant that he had a 90 percent chance of winning his case; however, it might take a year or two to complete the investigation. (Tr. 24; AE A15 at Block 15) His lawyer was located a substantial distance from Applicant’s location. (Tr. 26; AE A15 at Block 15) He decided to resign

⁶ Two weeks before his hearing, he requested that the Army upgrade his discharge from other than honorable to honorable. (Tr. 113; AE A15)

⁷ His 1993 DD Form 214 shows an SSB Payment of \$52,000. (AE A6)

⁸ Applicant was investigated three times for fraud. (Tr. 23) The third time he was suspended from military duties for eight months. (Tr. 24) Department Counsel checked with the major command legal office that processed Applicant’s resignation, and that office was unable to locate a copy of Applicant’s file. (Tr. 38, 71-74, March 21, 2011 Memorandum from Department Counsel) Records may be available at the Army Office of the Judge Advocate General (OTJAG), which processed his resignation to the Assistant Secretary of the Army, the 4-star level headquarters or personnel office that endorsed Applicant’s resignation to OTJAG, the command level that preferred charges against Applicant, or from the restricted fiche of Applicant’s Official Military Personnel File. My file does not contain a charge sheet or any investigative records relating to Applicant’s charges.

because he “didn’t want to waste the Government’s money,” he did not want to destroy or derail other military officer’s careers, and he “was suffering from depression.” (Tr. 25-26; AE A) He said that the VA subsequently determined he was suffering from “precombat stress,” and he had 16 people living in his house as a result of Hurricane Katrina. (Tr. 25) Resignation was the best choice for Applicant and the Army. (Tr. 26)

On September 16, 2009, Applicant completed his 54-page SF 86. (GE 1) He disclosed that he was charged under Article 132, UCMJ and he submitted a resignation “for the good of the service in lieu of general court-martial.” (GE 1) He said the circumstances were “under other than honorable.” (GE 1 at 26) He described the charges as a “misunderstanding” relating to a personality conflict with his rater over mission objectives. (GE 1 at 26) He did not list any other charges preferred against him, even though the maximum punishment for some of them carry more than a one-year maximum confinement. See e.g., Article 107, UCMJ (5 year maximum punishment). In Section 22c, he answered “No” to the question, “Have you ever been charged with any felony offense? (Include those under the Uniform Code of Military Justice.)”⁹

Applicant’s responses to some questions on his SF 86 are detailed. (GE 1) For example, in Section 13 Employment Activities, he listed six employers over the last seven years, and for Section 18 Relatives, he listed 14 relatives. (GE 1)

Section 25b of his SF 86 asks, “Investigations and Clearance Record. b. To your knowledge, have you EVER had a clearance or access authorization denied, suspended, or revoked; or been debarred from government employment?” Applicant answered, “No” to this question. On September 23, 2005, Applicant was debriefed and his access was suspended pending completion of an Army Regulation (AR) 15-6 investigation. (SOR ¶ 2.e; GE 3 at 79) Applicant admitted the SOR allegation. (HE 4)

Section 26 of his September 16, 2009 SF 86 asks a series of questions about Applicant’s financial responsibility. Section 26b asks, “In the last 7 years, have you had any possessions or property voluntarily or involuntarily repossessed or foreclosed?”¹⁰ Section 26m asks, “In the last 7 years, have you been over 180 days delinquent on any debt(s)?” and section 26n asks, “Are you currently over 90 days delinquent on any debt(s)?”¹¹ Applicant answered, “No” to all three questions. (SOR ¶¶ 2.a and 2.b)

⁹ The SOR did not allege that he provided false or misleading information about his charges on his 2009 SF 86.

¹⁰ SOR ¶ 2a indicates the pertinent question is in his 2009 SF 86 § 26d, which asks “In the last 7 years, have you had any judgments against you that have not been paid?” The drafter of the SOR apparently relied upon a previous version of the SF 86. The information sought is similar and this discrepancy is not material in this case.

¹¹ SOR ¶ 2b incorrectly indicates the pertinent questions on his 2009 SF 86 are in §§ 26a and 26b, which ask the same questions as in his 2009 SF 86, which are in §§ 26m and 26n. This discrepancy is not material.

Applicant said that when he completed his SF 86, he did not disclose the repossession of this property because he “did not read the question” that sought this information. (Tr. 63, 88) Alternatively, he believed that because the property went to auction, “so for all intents and purposes, in my thought process, it was cleared up. I had no issues.” (Tr. 63) He “had no knowledge of the negative information that was posted in [his] credit report.” (SOR response) He noted that he wished he had run a credit report before completing his SF 86, and he would have answered differently. (Tr. 88)

When he signed the undated document entitled “SECURITY TERMINATION STATEMENT” concerning revocation of his security clearance, he claimed that he thought he was signing a document concerning loss of access to a location because of being relocated. (Tr. 26; AE A at 2; AE A18; GE 3 at 85) He never received the July 27, 2006 letter stating that his security clearance was revoked. (Tr. 26-27; AE A at 2; A13)¹²

Medals and Awards Listed on Applicant’s Resume

Applicant’s August 1, 1993 and October 1, 2005 DD Form 214s list a Pathfinder Badge, Senior Parachutist Badge, Army Commendation Medal, National Defense Service Medal, Army Service Ribbon, Overseas Service Ribbon, Ranger Tab, and Air Assault Badge. (AE A5, AE A6) A DD Form 214 is an important official document, and it is a fairly reliable description of military service, as military personnel offices are not supposed to place information on this document without appropriate substantiating documentation.

Applicant’s Officer Evaluation Reports (OERs) describe his outstanding duty performance, integrity, reliability, and responsibility. (AE A7) There is an unexplained gap in his OERs from May 20, 1998 until October 1, 2003. (AE A7) He was promoted to lieutenant colonel in June 2003, and he is credited in the whole-person concept, *infra* at page 16, with having outstanding OERs. His OERs for October 1, 2003 to September 30, 2004 and October 1, 2004 to February 18, 2005 describe outstanding service in South America, not Southwest Asia. (AE A7)

Applicant’s DD Form 214 does not include a Bronze Star or show any service in combat zones; however, Applicant was not available to sign the DD Form 214 and the comment section, Block 18, indicates that a “DD Form 215 will be issued to provide missing information.” (Tr. 34; AE A at 2; AE A14)

Applicant said he deployed to Southwest Asia (SWA). (Tr. 115) He submitted a resume showing award of a Combat Infantry Badge (CIB), Expert Infantry Badge (EIB), Bronze Star Medal (BSM), Kuwait Liberation Medal (Saudi Arabia), Southwest Asia Service Medal, and Meritorious Service Medal (MSM). (Tr. 116-117; AE A8, AE A9 at 13 (except for the CIB)) His resume’s chronological record of duty assignments does not show any assignments in SWA. (AE A8 at 3) However, he said he was assigned to

¹² The July 27, 2006 memorandum from Applicant’s security manager is addressed to the U.S. Army Central Personnel Security Clearance Facility, and there is no indication on the memorandum that it was provided to Applicant.

Fort Bragg from May 1989 to July 1990, and I take judicial notice of the fact that his division was frequently deployed and was deployed to SWA in 1990 for Desert Shield/Desert Storm. (AE A8 at 3; AE A9 at 11-12)

Applicant agreed to provide the award certificates and OERs to support the awards. (Tr. 116, 118) He said he had all of his OERs. (Tr. 119) His OERs would likely show whether he was assigned to SWA and Kuwait at the requisite time to receive the two ribbons. I told him this documentation was important because his DD Form 214s did not show any of these medals. (Tr. 116) He said when some of his DD Form 214s were prepared he was not paying attention to his records. (Tr. 117)

After Applicant's hearing, he provided his Officer Record Brief (ORB). (AE B1) It lists a Bronze Star Medal and MSM, EIB; however, it does not list a Kuwait Liberation Medal or CIB. (AE B1) It lists a six-month assignment to Central Command in 2002, which has jurisdiction over SWA and for five months to Kuwait and Saudi Arabia in 2005. Although an ORB is not the most reliable personnel document concerning awards and assignments, I draw no adverse negative inference from his failure to provide the promised award certificates and OERs, and credit Applicant, for purposes of his security clearance, with meritorious, honorable service in a combat zone.

Other Character Evidence

Applicant provided statements from multiple character witnesses, which lauded his diligence, dedication, trustworthiness, professionalism, enthusiasm, organizational skills, computer literacy, expertise, commitment, and contributions to mission accomplishment. (SOR response, AE A23, AE B15) His character witnesses have knowledge of Applicant primarily through the work environment. However, they did not include in their basis of knowledge a description of the basis of his Other Than Honorable discharge from the Army or of the charges preferred against him. They did not discuss his history of financial problems.

Applicant provided good service to the Army up until the time he committed the conduct resulting in his charges and specifications and to his employer after leaving the Army, as demonstrated by his awards, promotions, positive evaluations, and pay raises. (Tr. 19; AE B6; B7; B8; B9) He has held a security clearance for 20 years without any evidence of security violations. (Tr. 20)

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 applicant's eligibility for access to classified information "only upon a finding that it is

clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines. 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 overarching adjudicative goal is a fair, impartial, and commonsense 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. 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 about 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 concerns are under Guidelines F (financial considerations) and E (personal conduct).

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 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." In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). Applicant's history of delinquent debt is documented in his credit reports, his OPM personal subject interview (PSI), and his statement at his hearing. Applicant's SOR lists eight debts totaling \$269,051. Some of his debts have been delinquent for more than five years. His largest debt of more than \$200,000 has not been resolved. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 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 in resolving his debts warrants partial application of AG ¶¶ 20(b), 20(c), and 20(d).¹³ Although Applicant did not receive financial counseling, he generated a budget, and he has extensive knowledge of finances. He understands what he must do to maintain a budget and pay his debts. He showed some good faith when he admitted responsibility for his SOR debts. Applicant's financial situation was damaged by insufficient income, and a period of unemployment after he left active Army service in 2006. However, his financial circumstances have been stable since at least October 2009 because he was employed without any periods of unemployment.

Applicant did not establish that he acted responsibly under the circumstances. He did not take reasonable actions to investigate and document resolution of the debts in SOR ¶¶ 1.a, 1.b, 1.f, and 1.g. I have credited Applicant with mitigation of the debts in SOR ¶¶ 1.c (forbearance), 1.d (payment plan), 1.e (payment plan), and 1.h (paid). He did not prove he maintained contact with all of his creditors.¹⁴ Prior to his hearing, his

¹³The 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].

(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)).

¹⁴"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

payments to his creditors were very limited. Most of his delinquent SOR debt is not being resolved and is not under control because over the last 12 months his SOR debts are increasing faster than they are being paid.

Applicant did not provide any documentary evidence showing disputes of any SOR debts. In sum, Applicant's efforts are insufficient to fully mitigate financial considerations security concerns.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

AG ¶ 16 describes four conditions that could raise a security concern and may be disqualifying this case:

(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; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.¹⁵

whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

¹⁵The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

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

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)). See also ISCR Case No. 08-05637 at 3 (App. Bd. Sept. 9, 2010) (noting an applicant's level of

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior . . . ; and (3) a pattern of dishonesty or rule violations.

Applicant admitted that on his September 16, 2009 SF 86, he failed to disclose debts that were currently delinquent more than 90 days, and debts that were delinquent more than 180 days in the last seven years. He also failed to disclose the suspension or revocation of his security clearance. I do not believe his hearing statement that he did not read or notice these three questions. He has detailed responses to several questions on his 2009 SF 86, and he is an intelligent and well-educated person who has earned two masters degrees. He has held a security clearance for 20 years and knows the importance of carefully completing documents, such as his SF 86. I find he intentionally and deliberately failed to disclose the information requested on these three questions on his 2009 SF 86.

It is unproven that Applicant was aware of the judgment entered against him until after he completed his 2009 SF 86. The conduct that resulted in the charges and ultimately his resignation from the Army has not been rebutted or refuted. However, SOR ¶¶ 2.c and 2.d related to administrative results of his charged conduct. Those two allegations are merged into SOR ¶ 2.c, and SOR ¶ 2.d is found for Applicant.

AG ¶ 17 includes seven conditions that could mitigate security concerns including:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or

education and other experiences are part of entirety-of-the-record evaluation as to whether a failure to disclose past-due debts on a security clearance application was deliberate).

legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

None of the mitigating conditions fully apply because Applicant intentionally and deliberately provided false information in his responses to three questions on his September 16, 2009 SF about his delinquent debts and security clearance history. I do not believe his statement at the hearing about not reading the questions. Additionally, his charged conduct is serious and still relatively recent. His charges were not sufficiently addressed for Applicant to meet his burden of showing they are mitigated.

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 Guidelines F and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Although the rationale for reinstating Applicant's clearance is insufficient to support a security clearance, there are several factors tending to support approval of his access to classified information. Applicant is 49 years old. He is sufficiently mature to understand and comply with his security responsibilities. He deserves substantial credit for volunteering to support the U.S. Government as an employee of a contractor and during his 23 years of Army service. He earned several military awards, successfully completed some military courses, rose to the grade of lieutenant colonel, and received some outstanding OERs and evaluations. He provided some laudatory character references. He is credited with serving honorably in a combat zone and earning a Bronze Star, MSM and various awards. He earned a bachelor's degree and two master's degrees. There is every indication that he is loyal to the United States and his employer. There is no evidence that he abuses alcohol or uses illegal drugs. His unemployment after leaving active service contributed to his financial woes. Several character witnesses provided statements lauding his diligence, professionalism, and responsibility. These factors show some responsibility, rehabilitation, and mitigation.

The whole-person factors against reinstatement of Applicant's clearance are more substantial at this time. Applicant's SOR lists eight debts totaling \$269,051. He did not take reasonable actions to investigate and document resolution of the debts in SOR ¶¶ 1.a (\$253,431), 1.b (\$522), 1.f (\$3,473), and 1.g (\$945). There was some evidence of non-SOR allegations: (1) he has a \$36,000 delinquent debt to the VA for failing to repay his VA loan guarantee on his foreclosed residence; (2) his debt to a nonappropriated fund activity was paid by the IRS seizing his federal income tax refund in 2011; (3) he lied to the OPM investigator about when he learned of the problems relating to his mortgage and its current status; (4) he presented a resume showing various military awards he may not have earned; and (5) he suffers from depression. I decline to consider any of these allegations as adverse information, weighing against approval of his security clearance.¹⁶ I base the denial of his clearance solely on the SOR allegations that I find against him as indicated below.

¹⁶ See *supra* n. 3, 4, and 9. In addition, the SOR did not allege the conduct alleged in these three footnotes. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

(citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). I decline to consider the non-SOR misconduct for any purpose because Applicant did not have a sufficient opportunity to fully address these allegations at his hearing.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude financial considerations and personal conduct concerns are not mitigated. Eligibility for access to classified information is denied.

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 and 1.b:	Against Applicant
Subparagraphs 1.c, 1.d, and 1.e:	For Applicant
Subparagraphs 1.f and 1.g:	Against Applicant
Subparagraph 1.h:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraphs 2.b and 2.c:	Against Applicant
Subparagraph 2.d:	For Applicant
Subparagraph 2.e:	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.

MARK HARVEY
Administrative Judge