



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



In the matter of:)
)
) ISCR Case No. 10-00464
)
Applicant for Security Clearance)

Appearances

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

November 21, 2011

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is granted.

Statement of the Case

Applicant signed an Electronic Questionnaire for Investigations Processing (e-QIP) on June 11, 2010. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on February 15, 2011, detailing security concerns under Guideline F, financial considerations, that provided the basis for its preliminary decision to deny her a security clearance. 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 For Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant received the SOR on February 23, 2011. She answered the SOR on March 10, 2011. Applicant requested a decision on the record in lieu of a hearing. On March 23, 2011, Department Counsel requested a hearing before an administrative judge. Department Counsel was prepared to proceed on April 28, 2011, and I received the case assignment on May 5, 2011. DOHA issued a Notice of Hearing on May 17, 2011, for a hearing on June 17, 2011. Due to scheduling changes, I cancelled this hearing. DOHA issued a second notice of hearing on July 11, 2011, and I convened the hearing as scheduled on July 27, 2011. The Government offered exhibits marked as GE 1 through GE 5, which were received and admitted into evidence without objection. Applicant testified. She submitted exhibits marked as AE A through AE C, which were received and admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on August 11, 2011. I held the record open until August 18, 2011, for Applicant to submit additional matters. Applicant timely submitted AE D through AE L, which were received and admitted without objection. The record closed on August 18, 2011.

Procedural Ruling

Notice

Applicant received the hearing notice on July 18, 2011, less than 15 days before the hearing. (Tr. 8.) I advised Applicant of her right under ¶ E3.1.8 of the Directive to receive the notice 15 days before the hearing. Applicant affirmatively waived her right to the 15-day notice. (*Id.*)

Findings of Fact

In her Answer to the SOR, Applicant admitted the factual allegation in ¶ 1.a of the SOR. Her admission is incorporated herein as findings of fact. She denied the general allegation under Guideline F that she did not live within her financial means.¹ She also provided additional information to support her request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 49 years old, works as a program quality engineer for a Department of Defense contractor. She has worked for her employer since 1989. Her site leads describe her as a valued and trusted employee. She is respected by her co-

¹When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). 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. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

workers and management because of her expertise in process management and her skills in working with all levels of employees and management.² She has never received any employee corrective action. She has held a clearance since 1989. Her clearance has never been revoked or suspended nor has she received any reprimands, admonishments, or warnings for violations of security rules.³

Applicant graduated from college in December 1986 with a Bachelor of Science degree in aerospace engineering. Since college, she has worked as an engineer. She married in March 1990 and has a 17-year-old son. Her husband graduated from college with a degree in environmental design. He worked as an architectural project manager.⁴

In 2001, Applicant and her husband decided to build their dream house. They purchased 2.25 acres of land, her husband designed their house, and she designed the mechanical and septic systems, efforts which saved them design costs. Once she obtained the building permits, he left his job to build the house, including digging the footings, pouring the concrete, and constructing the interior. They believed that if he did much of the construction work himself, their construction costs savings would be greater than his salary. They also saw the new house as a great investment for their retirement savings and their son's education. They received an occupancy certificate in 2003, and her husband completed the majority of the work on the house by late 2004. He then returned to work as an architectural project designer. In January 2009, his employer laid him off when the construction industry declined significantly in the economic downturn. He did not receive a severance package nor did he have stock options in his company. He remains unemployed and has exhausted his unemployment benefits. He is now trying to build his own business.⁵

In 2003, Applicant and her husband obtained a \$391,000 primary mortgage at a 6% fixed interest rate on their property. In August 2004, Applicant and her husband obtained an equity line of credit of \$80,000. In addition to this money, they used all of their savings and retirement money to finish the home. On December 1, 2006, Applicant and her husband refinanced their home, which eliminated the above mortgage and equity line of credit. At this time, their property appraised for \$850,000. They rejected a suggestion to take a "125% loan to value loan" and took a \$550,000 fixed interest rate mortgage loan, which they considered safe. They did not see any risk in this loan because they had stable jobs, and the economy was strong. From this loan, they received \$75,000, which they used to build an outdoor barbecue, to pay some bills, and

²Her site leads did not indicate that they had knowledge of her mortgage debt problem. AE A; AE B.

³Response to SOR; GE 1; AE A; AE B; Tr. 15-16, 27-30.

⁴GE 1; Response to SOR; Tr. 15, 21-22, 26, 61-64.

⁵Response to SOR; Tr. 30, 32, 62-63.

to pay for the construction of a pool. At the end of 2006, their home had \$300,000 in equity.⁶

After Applicant's husband lost his job in January 2009, they continued to pay the mortgage on their dream home. In February 2009, Applicant called their mortgage lender with a request to refinance their mortgage at a lower interest rate. During this conversation, Applicant learned for the first time from the mortgage lender that their home was now worth less than the amount of their mortgage. (Their loan was "under water".) To refinance, the lender required 5% of the equity. Because they had no equity, they could not refinance. The mortgage lender declined to discuss refinancing with her.⁷

Over the next several months, Applicant talked with the mortgage lender by telephone in an effort to refinance her house. At one point, the mortgage lender offered to extend the time to pay the loan from 30 years to 40 years with a minimal reduction in her 6% interest rate. In April 2009, Applicant paid for an appraisal of her home. This appraisal valued her home at \$400,000 on April 30, 2009. In May 2009, Applicant prepared and mailed a 200-page financial analysis and letter of hardship to her mortgage lender. In June 2009, she stopped her mortgage payments as her six-month emergency savings had been exhausted, and the mortgage lender refused to discuss restructuring her loan until she was three months behind in the mortgage payments.⁸

Applicant notified her security office on June 1, 2009 that she would no longer be paying her mortgage. She further advised that the mortgage lender had told her she was not eligible for a refinance because she was "upside down" on her mortgage and had a conventional loan. On November 11, 2009, she wrote a status letter to her security office, indicating that her mortgage lender assigned her a negotiator who would be sending her a package, which she had not yet received. She also indicated that she had spoken to lawyers, realtors, and bankers about her situation, and that she had few options. She did not intend to file bankruptcy, but believed her house would go to foreclosure.⁹

Over the next months, Applicant's mortgage lender made sporadic contact with her by telephone or mail. Because the value of her home had declined, Applicant sought a new mortgage for the current value of her home, and the mortgage lender refused to grant her request. The contacts always came to the same conclusion about her options, which were foreclosure, short-sale, or deed in lieu of foreclosure. By early 2011, the contacts had ceased. In February 2011, Applicant and her husband received notice from the mortgage lender that their property would be sold on May 9, 2011 at a Trustee's sale. The house sold on June 9, 2011 for \$324,001, leaving an indebtedness

⁶Response to SOR and Attachment 11; AE G; AE L; Tr. 32-35.

⁷Response to SOR; Tr. 49.

⁸Response to SOR and Attachments 6-8, 15; Tr. 18, 49-50.

⁹Response to SOR and Attachments 9 and 10; Tr. 18-19.

of approximately \$280,000. They have not received a 1099-C from the mortgage lender. From June 2009 until July 2011, Applicant and her husband lived in their home without paying the mortgage payment, but continued to pay the utility bills and other costs associated with the property. They continued to maintain the property as required by the Deed of Trust. When the house sold, they gave the new owner a refundable \$1,000 security deposit to protect the property against damage, because they remained in the house for another five weeks while they searched for a new place to live. The owner returned their deposit.¹⁰

Applicant currently earns \$9,154 a month in gross income and \$5,723 a month in net income. Her earnings statement reflects \$915 a month to her company voluntary savings plan and \$91 a month to designated giving. She lists her current monthly expenses as follows: \$1,500 for rent, \$800 for food and household goods, \$500 for electric, \$50 for water, \$17 for trash, \$300 for medical expenses, \$100 for gasoline, \$694 to 401k, \$250 to credit card debt, \$1,000 to charities, \$110 on phones, \$200 on car or house repairs, \$54 for internet and cable, and \$400 for her son's extracurricular activities. She has a remainder of \$756 a month. At the hearing, Applicant testified to spending about \$1,500 on food, but she lowered this amount by \$700 in her budget.¹¹ The amount listed in her budget for her 401k account is lower than the savings amount shown on her earnings statement. A 401k account comes through an employer and is deducted from one's pay. It is unclear if the discretionary savings account at work is the same as her 401k account or in addition to her 401k account, because her earnings statement does not separate the two accounts and neither did Applicant. However, in her net worth statement, Applicant clearly identifies a 401k account with her employer. I find that these accounts are the same.¹²

At the time her husband lost his job in 2009, Applicant's mortgage payment was \$3,300 a month, plus \$510 a month for her escrow account. Her other expenses on her dream home included \$320 for electric, \$80 for water, \$17 for trash, \$800 for food, \$110 for cell phone, \$54 for cable and internet, \$100 for gasoline; \$400 for household and car repairs plus miscellaneous expenses, and \$300 for medical, for a total expense of \$5,991, with a net loss of approximately \$250 a month based on her 2011 income. In 2009, her gross income was less than her current income, but her actual deductions are not known including her savings contributions.¹³

Applicant submitted her tax returns for 2009 and 2010. Her 2009 tax return reflects itemized deductions of \$23,117. Since she only paid her mortgage for five

¹⁰Response to SOR and Attachments 3 and 5; AE E; AE G; Tr. 18, 48-49, 51-52.

¹¹AE J shows Applicant's income and expenses for 2008, if no foreclosure, and for 2011. In 2008, she spent \$1,600 a month on food and household goods. This budget indicates higher expenses in many categories than she is currently spending.

¹²AE C; AE I; AE J; Tr. 57-60.

¹³AE J.

months, this amount is in excess of any mortgage deduction she would received in 2009. Her 2010 tax return indicates an itemized deduction of \$11,400, which would not include a deduction for mortgage interest as she was not paying her mortgage. Both returns show unemployment income for her husband.¹⁴

Applicant also provided information on her assets. She has \$54,000 in her 401k and \$30,000 in another IRA account. While building her house and twice when she was sick, she depleted her work savings accounts. Her past illnesses created a future concern about financial burdens on her family should she become ill, and there are no funds for the family to pay the bills. She does not have car payments. The credit reports of record reflect that she pays, and has paid, all her bills as agreed, except for this mortgage.¹⁵

At the hearing, Applicant estimated that she donated approximately \$10,000 a year to charity. She considered the following payments to be important discretionary allotments from her income: 1) \$10,000 in charitable donations, 2) \$400 a month on her son's extra-curricular activities, and 3) savings for unanticipated expenses. She weighed the loss of her husband's income, her earlier depletion of her work-savings accounts, her discretionary spending choices against her mortgage payments when making her decision to stop paying her mortgage. She also talked with mortgage professional, lawyers, and realtors before deciding not to continue her mortgage payment.¹⁶

Shortly before the hearing and after the mortgage lender had foreclosed on her property on June 9, 2011, Applicant received a letter from the lender indicating several matters and stating that she owed \$622,574 on her loan as of July 4, 2011. A few days later the mortgage lender mailed Applicant a second letter indicating that its prior letter was sent in error and to disregard the letter.¹⁷

Applicant stated that she talked with lawyers, who advised the under the state anti-deficiency statute, she would not be liable for any unpaid balance of her mortgage loan. Applicant provided a copy of the state statute, which states as follows:

33-729 Purchase money mortgage; limitation of liability

A. Except as provided in subsection B, if a mortgage is given to secure the payment of the balance of the purchase price, or to secure a loan to pay all or part of the purchase price, of a parcel of real property of two and one-half acres or less which is limited to and utilized for either a single

¹⁴AE H.

¹⁵Response to SOR, Attachments 2 and 12; GE 4; GE 5; AE C; Tr. 58.

¹⁶Tr. 21-23.

¹⁷AE K.

one-family or single two-family dwelling, the lien of judgment in an action to foreclose such mortgage shall not extend to any other property of the judgment debtor, nor may general execution be issued against the judgment debtor to enforce such judgment, and if the proceeds of the mortgaged real property sold under special execution are insufficient to satisfy the judgment, the judgment may not otherwise be satisfied out of other property of the judgment debtor, notwithstanding any agreement to the contrary.

B. The balance due on a mortgage foreclosure judgment after sale of the mortgaged property shall constitute a lien against other property of the judgment debtor, general execution may be issued thereon, and the judgment may be otherwise satisfied out of other property of the judgment debtor, if the court determines, after sale upon special execution and upon written application and such notice to the judgment debtor as the court may require, that the sale price was less than the amount of the judgment because of diminution in the value of such real property while such property was in the ownership, possession, or control of the judgment debtor because of voluntary waste committed or permitted by the judgment debtor, not to exceed the amount of diminution in value as determined by the court.¹⁸

State law provides that the mortgage loan given to Applicant is a nonrecourse loan. The Trustee's Deed Upon Sale indicates that Applicant's property sold on June 9, 2011. This document does not reflect any diminution in the value of this property because of waste, as defined in the statute, by Applicant. She and her family remained in the property and continued to maintain the property until its sale. The final sale document does not show that Applicant owes any money due to waste of the property, and under state law, she does not have a deficiency balance.¹⁹

Applicant did not provide a copy of a 1099-C form, a federal tax form. Her property sold in 2011 and the mortgage lender should issue her a 1099-C by February 1, 2012 to use with filing her 2011 federal taxes, which are due by April 15, 2012.

Congress passed the Mortgage Forgiveness Debt Relief Act of 2007, then later extended its provisions through calendar year 2012. This federal statute allows taxpayers to exclude income from the discharge of debt on their principal residence on their taxes for the year in which the debt was cancelled. The statute also provides some exceptions on what is taxable income from cancelled debt, and specifically identified non-recourse loans as non-taxable income. A non-recourse loan is a loan for which the lender's only remedy when default occurs is to repossess the property financed or used as collateral. The lender has no further right to pursue the debtor personally for any

¹⁸AE F.

¹⁹*Id.*; AE E.

balance due. See www.irs.gov/individuals/article/0,,id=179414,00.html (The Mortgage Forgiveness Debt Relief Act and Debt Cancellation). Property sold at a Trustee's sale is treated for tax purposes as a sale of the residence, which requires the mortgage lender to issue a 1099-C. The lender should check the box on the form which indicates that the individual is not personally liable. The lack of liability arises from the state anti-deficiency statute.

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 used 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.

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

The administrative judge's decision to grant a clearance is not a final decision unless the parties choose not to appeal. See Directive ¶¶ E3.1.28 to E3.1.39. The DOHA Appeal Board²⁰ may reverse the administrative judge's "decision to grant, deny,

²⁰Fact finding and credibility determinations are reserved exclusively for the administrative judge who is in a position to observe the demeanor of the witnesses. See *See v. Washington Metro. Area Transit Auth.*, 36 F.3d at 375, 382 (4th Cir. 1994). The Appeal Board has noted that it does not make "*de novo* findings of fact." ISCR Case No. 08-06058 at 3 n.1 (App. Bd. Sept. 21, 2009). Appeal Boards and federal courts review the administrative judges' factual determinations to ensure they are supported by substantial evidence in the record. See, 36 F.3d at 382; *Dehue Coal Company v. Ballard*, 65 F.3d 1189, 1193-1194 (4th Cir. 1995).

or revoke a security clearance if it is arbitrary, capricious, or contrary to law.” ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (citing Directive ¶¶ E3.1.32.3 and E3.1.33.3.).²¹ The federal courts generally limit appeals to whether or not the agency complied with its own regulations.²²

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 an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally

Review authorities defer to the administrative judges’ credibility determinations and inferences from the evidence. *Id.* The federal courts review Appeal Board decisions without giving deference to the factual findings of the Appeal Board. *See*, 36 F.3d at 380 (citations omitted). The Appeal Board cannot “substitute its own fact findings and judgment for” those of the administrative judge. *Id.* at 382. In 2005, the Second Circuit cogently articulated how appellate authorities resolve errors Immigration Judges make at the hearing level. In *Lin v. DoJ*, 428 F.3d 391, 395 (2nd Cir. 2005), the court explained that in the resolution of error, an appellate authority is required to:

(1) defer to the IJ’s fact-finding and affirm [the hearing judge’s decision] when the fact-finding is based on specific and cogent reasons not infected by legal error; (2) remand where identified errors leave [the appellate authority] in doubt whether the IJ would have reached the same result absent the errors; (3) affirm, despite IJ errors, when the [appellate authority] can confidently predict that the IJ would necessarily reach the same result absent errors; and (4) grant the [appeal of the hearing judge’s decision] only in those extremely rare instances where substantial evidence does not exist to support the IJ’s decision.

Judge White’s dissenting opinion explains why credibility determinations and ultimately the decision whether to grant or deny a clearance should be left to the judge who makes such determinations. *See* ISCR Case No. 05-01820 at 5-7 (App. Bd. Dec. 14, 2006). *See also* ISCR Case No. 04-06386 at 10-11 (App. Bd. Aug. 25, 2006) (Harvey, J., dissenting) (discussing limitations on Appeal Board’s authority to reverse hearing-level judicial decisions and recommending remand as a remedy to resolve material, prejudicial error). *See also FCC v. Allentown*, 349 U.S. 358, 364 (1955).

²¹Although the Administrative Procedure Act (APA) does not apply to security clearance determinations, the “arbitrary, capricious, or contrary to law” standard is derived from the APA. *See Webster v. DOE*, 486 U.S. 592, 598 n.5 (1988) (quoting 5 U.S.C. § 706(2)(A)). *See also United States v. Gregory*, 534 U.S. 1, 6-8 (2001) (noting the standard for Merit Systems Protection Board under 5 U.S.C. § 7703 is the same as for the APA and describing the standard as “extremely narrow” and limited to determining whether “minimal standards set forth in statute” are met).

²²*See El-Ganayni v. DOE*, 2010 U.S. App. Lexis 548 (3d Cir. Oct. 28, 2009) (limiting constitutional challenges to a security clearance determination because merits of an agency’s security clearance decision are not reviewable); *Makky v. Chertoff*, 541 F.3d 205, 212 (3d Cir. 2008) (citing *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) and stating that “there is no judicial review of the merits of a security clearance decision”). However, federal courts will review an agency decision to ensure compliance with agency regulations. *Id.* at 212-213 (citing *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996)). Here the controlling “regulation” is the Directive and Executive Order cited at page 1, *supra*. The controlling standard of review of administrative judicial decisions is “arbitrary, capricious, or contrary to law.” Directive ¶¶ E3.1.32.3.

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

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 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 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

In 2009, Appellant stopped paying her mortgage payment after her husband lost his job. Eventually, the mortgage lender sold her property at foreclosure for less money than she owed on the mortgage. These two disqualifying conditions apply.

The Financial Considerations guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 20(a) through 20(f), and the following 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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's delinquent debts are "a continuing course of conduct" under the Appeal Board's jurisprudence because she had a large delinquent debt from June 2009 until June 2011. 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 does not receive credit under AG ¶ 20(a) even though she established that her financial problems "occurred under such circumstances that [they are] unlikely to recur." Applicant has resolved her delinquent SOR debt, and is unlikely to have delinquent debt in the future.

AG ¶ 20(b) partially applies. Applicant's husband lost his job in 2009, which caused a 36% drop in household income. The loss of his income placed stress on the family budget and resulted in the exhaustion of savings to meet daily living expenses. Initially, Applicant sought a reduction in her mortgage interest rate, hoping to reduce her monthly payment. The bank declined her request because the mortgage on her house was greater than the market value of her house. Applicant then submitted an extensive hardship request for a loan modification, which was ultimately denied. While her hardship request was being considered, she stopped her payments on her mortgage in June 2009, an action necessary for a loan modification. In reviewing her budget, she may have been able to pay her mortgage by cutting back her food and repair expenses, which would have placed her income and expenses on an equal basis each month.

Applicant's mortgage debt on her property is resolved by operation of law. The state anti-deficiency statute prohibits Applicant's mortgage lender from seeking to recover the nearly \$300,000 balance due on her mortgage loan after foreclosure. Under state law, her loan on her primary residence is a non-recourse loan. Federal law requires the mortgage lender to issue a 1099-C, a tax form, which shows that no taxable income arose from the sale of her property.²³ Applicant pays her other bills and her finances are under control. AG ¶ 20(c) applies.

AG 20(d) has some applicability because Applicant initially contacted her mortgage lender in February 2009 and requested to reduce her mortgage interest rate. Her mortgage lender denied her request. She also sought a loan modification, but the mortgage lender eventually denied this request.

²³The Appeal Board held that a 1099-C is one way to show there is clear evidence that the state law has been extinguished the debt. See ISCR Case No. 10-01978. The 1099-C is a tax form which provides information to the Internal Revenue Service on whether taxable income arose from the sale of a property. In this case, state law makes it clear that Applicant does not owe any money on her mortgage loan. State law does not require a 1099-C for this determination.

In summary, Applicant took reasonable efforts to resolve her mortgage debt listed in the SOR. The mortgage lender denied her requests and proceeded with foreclosure. Her house has been sold. Under state law, she has no legal obligation to pay the remaining balance on her mortgage loan, and the lender has no legal right to collect any balance owed. Under federal law, she must report the sale of her house on her 2011 tax return with a 1099-C, which will reflect she owes no money on her property. Even if not mitigated under Guideline F, this case is mitigated separately under the whole-person concept.²⁴

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 an applicant's conduct and all relevant 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful

²⁴In assessing whether an Applicant has established mitigation under Guideline F, the Appeal Board provided the following guidance in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008):

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." See, e.g., ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 200). 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. See, e.g., ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). 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." See, e.g., ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). 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. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). 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.

consideration of the guidelines and the whole-person concept. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

The evidence in support of granting a security clearance to Applicant under the whole-person concept is more substantial than the evidence in support of a denial. Failure to pay or resolve her just debts is not prudent or responsible. Applicant decided not to continue with paying her mortgage debt in 2009 when, with tighter budgeting, she could have made an effort to continue her payments. She chose to give priority to discretionary income expenditures, which raises a question of judgment.

The loss of her husband's job in January 2009 reduced monthly income making it harder to continue a lifestyle, which included charitable giving, eating out, gym membership, and paying for extracurricular school activities for her son. Her biggest expense was her monthly mortgage payment, which she sought to reduce to relieve financial pressures and maintain her other spending levels, particularly her charitable giving and her son's extracurricular activities.

Applicant lived in her house for more than two years without paying her mortgage, which enabled her to continue her substantial charitable giving and paying for her son's extracurricular activities. By staying in the house, she continued to maintain the property, which included completing necessary repairs and most importantly, by living in the house, squatters and animals did not take up residence and cause damage to the property, which, under the Deed of Trust, she would be obligated to repair. Vacant houses are an invitation to unscrupulous individuals to vandalize the property, and over time allow water pipes and electric systems to fail from nonuse. Both Applicant and the mortgage lender benefitted from her continued residence in the house.

Applicant timely paid her mortgage each and every month until June 2009. She initially sought to reduce her interest rate to make her mortgage more affordable. The mortgage lender refused to grant this request. The mortgage lender told her that her house was "under water" when it denied her request. It did not explain why this fact was the basis for denying her request. To obtain a loan modification, she needed to stop her mortgage payments, which she did. After more than 18 months of negotiations over a loan modification, the bank declined to modify her loan and proceeded to foreclose on her house. By this time, her past-due balance had increased to more than \$60,000, which she could not pay.

Applicant's husband built their dream house, which they no longer own. They intended to pay their mortgage so that by the time they retired, they would have sufficient equity to purchase a smaller house. They also saw the house as a way to

provide funds to pay for their son's college education. With a more than 62% decline in the value of their house, Applicant reassessed her ability to save for her retirement, particularly since she was reaching 50 years of age. She realized that she could not rely on the equity in her house as part of her retirement portfolio. More importantly, neither she nor her husband could save money. She spoke with lawyers, realtors, and mortgage brokers about these issues. Based on these discussions and their advice, she decided to stop paying her mortgage. None of these individuals would have considered her security clearance an issue and most likely did not provide her with any advice on the impact her decision and their advice would have on her security clearance. Applicant carefully considered her personal situation and reviewed all the information provided to her in 2009. She made an informed decision, not a careless or haphazard decision, to give up her dream house after the mortgage lender would not modify her mortgage loan.

Applicant owns her cars. She pays her utility bills, credit card bill, cable bill, telephone bill and all other bills every month and always has. She has never violated the rules and procedures for handling classified information in her 22 years of working at her current job. When she decided to stop paying her mortgage, she immediately reported her decision to her facility security officer. Given her overall financial track record and her outstanding work record, Applicant's decision on her mortgage cannot be used to coerce or force her to reveal classified information. Her decision on her mortgage raised a question of judgment, but since she did not hastily make this decision, but gathered information to do so, I find that she would continue to exercise good judgment in handling classified information as she has done in the past. In weighing the all the evidence of record, I find that Applicant has mitigated the Government's security concerns.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from her finances under Guideline F.

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:

FOR APPLICANT

Subparagraph 1.a:

For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

MARY E. HENRY
Administrative Judge