DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
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	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Ray T. Blank, Jr., Esquire, Department Counsel
For Applicant: Michael Vater, Esquire

May 31, 2011

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the security concerns regarding financial considerations and personal conduct. Eligibility for a security clearance and access to classified information is granted.

Statement of the Case

On March 4, 2009, Applicant applied for a security clearance and submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86).[1] On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. He responded to the interrogatories on August 9, 2010.[2] On another unspecified date, DOHA issued him another set of interrogatories. He responded to the interrogatories on September 20, 2010.[3] On November 17, 2010, DOHA issued a Statement of Reasons (SOR) to him,

[1] Government Exhibit 1 (SF 86), dated March 4, 2009.

[2] Government Exhibit 2 (Applicant's Answers to Interrogatories, dated August 9, 2010).

pursuant to 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 and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) for all adjudications and other determinations made under the Directive. The SOR alleged security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) and detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant received the SOR on December 1, 2010. In a written statement, dated December 21, 2010, Applicant's attorney responded to the SOR allegations and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on January 26, 2011, and the case was assigned to Administrative Judge Robert Tuider on February 1, 2011. It was reassigned to me on February 10, 2011. A Notice of Hearing was issued on March 2, 2011, and I convened the hearing, as scheduled, on March 22, 2011.

During the hearing, four Government exhibits (GE 1-4) and seven Applicant exhibits (AE A, and C-H) were admitted into evidence without objection or over objection.[4] Applicant objected to GE 5 for identification, and Department Counsel objected to AE B for identification. I withheld rulings pertaining to the two documents and afforded the parties the opportunity to submit briefs regarding same. Applicant and two other witnesses testified on his behalf. The hearing transcript (Tr.) was received on March 30, 2011. The record was kept open until April 5, 2011, to enable the parties to furnish the briefs, and kept open until April 15, 2011, to enable them to submit written closing arguments.

Rulings on Procedure

As noted above, Applicant objected to GE 5 for identification (GE 5/ID)[5] because no foundation had been presented.[6] During a discussion on the objection, Department Counsel acknowledged GE 5/ID had not been developed during the investigation and was not a component of the Office of Personnel Management (OPM) report of investigation. Instead, GE 5/ID was obtained by a DOHA security specialist – an

[3] Government Exhibit 3 (Applicant's Answers to Interrogatories, dated September 2, 2010).

[4] Applicant's objection to Government Exhibit 4 (Combined Experian, TransUnion, and Equifax Credit Report, dated October 21, 2009), was overruled. Likewise, Department Counsel's objection to Applicant Exhibit C (Initial Forensic Mortgage Audit, dated February 22, 2011), was overruled.

[5] Equifax Credit Report, dated May 21, 2010.

[6] Tr. at 22-23.

adjudicator – in preparation for the drafting of the SOR.[7] He also urged that I reconsider because GE 5/ID is a relevant and material document.[8] In his brief in support of admission, Department Counsel claimed the admission of GE 5/ID was justified and commented on the general rules of admissibility in DOHA cases; the admissibility of credit reports as business records; and the rules for authentication of documents. Department Counsel went further by stating:[9]

> In this instance, the Credit Bureau Report was collected and furnished by the DOHA personnel under the authority of the Directive and E.O. 10865 (enclosure 1 to the Directive), and Paragraph E3.1.2 of the Additional Procedural Guidance of the Directive. The latter empowers DOHA to take interim actions necessary to determining whether to grant or continue a security clearance. The list of Actions provided in Paragraph E3.1.2 of the Additional Procedural Guidance of the Directive is not exclusive.

In his brief against the admission, Applicant's attorney claimed admission of GE 5/ID was not justified, and noted that Paragraph E3.1.20 of the Directive states that official records or evidence compiled or created in the regular course of business are admissible so long as they have been furnished by an investigative agency pursuant to its responsibilities in connection with assisting the Secretary of Defense.

While the Directive may empower DOHA to take various interim actions, including the issuance of interrogatories, necessary to determining whether to grant or continue a security clearance, contrary to Department Counsel's assertion that there is no specific limitation on such actions, there are such limitations. Paragraph E3.1.20 sets one of those limitations.[10] In general, an investigator investigates and an adjudicator adjudicates. In this instance, the adjudicator crossed the line and functioned as an investigator in order to perfect evidence in support of allegations in an SOR against Applicant.[11] GE 5/ID was not furnished by an investigative agency pursuant to its responsibilities under E.O. 10865. Accordingly, Applicant's objection to GE 5/ID is sustained.

Also as noted above, Department Counsel objected to AE B for identification (AE B/ID) because it was merely an answer to a complaint, and as such, it was not the best

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[7] *Id.* at 23.

[8] *Id.* at 29.

[9] Government Brief on the Admissibility of GE 5, dated April 5, 2011, at fn. 18, at 6.

[10] The following limitation applies:

> Official records or evidence compiled or created in the regular course of business, other than DoD personnel background reports of investigation (ROI), may be received and considered by the Administrative Judge without authenticating witnesses, provided that such information has been furnished by an investigative agency pursuant to its responsibilities in connection with assisting the Secretary of Defense, or the Department or Agency head concerned. . . .

[11] During his presentation, Department Counsel acknowledged that the adjudicator was acting in an investigative capacity. *See* Tr. at 28.

evidence available.[12] He also noted that the document merely refers to allegations that had not yet been decided by the court.[13] Along with his brief on the issue, Applicant subsequently submitted the original complaint to merge with AE B/ID. Department Counsel did not submit a brief. Based on the issues presented in the SOR, I find that AE B/ID as supplemented is relevant and material. Accordingly, Department Counsel's objection to AE B/ID is overruled and AE B is admitted.

Findings of Fact

In his Answer to the SOR, Applicant admitted two of the factual allegations (¶¶ 1.b. and 1.d.) of the SOR. Applicant's admissions are incorporated herein as findings of fact. He denied the remaining factual allegations (¶¶ 1.a., 1.c., and 2.a.) of the SOR. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 35-year-old employee of a defense contractor, currently serving as a parts inspection specialist.[14] He is seeking to obtain a secret security clearance. A 1994 high school graduate, Applicant has a May 1998 bachelor of science degree in chemistry, a 2007 master of science degree in quality management systems, and a May 2009 master of science degree in industrial systems engineering.[15] Over the years, Applicant has held several different positions with various employers. He was a production and analytical chemist from February 1999 until August 1999;[16] a research and development chemist from September 1999 until May 2003;[17] a newspaper "deliverer" from June 2003 until April 2004;[18] and a quality control inspector at two different companies from April 2004 until January 2005, and from February 2005 until May 2005.[19] He joined his current employer as a parts inspector in April 2005.[20] Applicant has never served with the U.S. military.[21]

Applicant was never married,[22] but he and his fiancée have two children, a son (born in 2004) and a daughter (born in 2006).[23]

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[12] *Id.* at 38.

[13] *Id.* at 39.

[14] *Id.* at 33.

[15] *Id.* at 34, 92; Government Exhibit 1, *supra* note 1, at 11-12.

[16] Government Exhibit 1, at 17-18.

[17] *Id.* at 16-17.

[18] *Id.* at 16.

[19] *Id.* at 14-15.

[20] *Id.* at 13.

[21] *Id.* at 22-23.

Financial Considerations

There was nothing unusual about Applicant's finances until about August 2008 when, because of the downturn in the economy, his employer eliminated overtime and he was put on furlough with mandatory days off without pay.[24] The absence of overtime continued through March 2009.[25] Unforeseen expenses occurred, especially when the air conditioning unit at his residence failed.[26] During a three-month period of no overtime, during which Applicant needed funds to enable him to pay his mortgage, he borrowed about $1,700 from his father each month.[27] Applicant repaid his father $5,076.68 in March 2009.[28] At some unspecified point thereafter, Applicant started to again be delinquent on his monthly accounts.

The SOR identified three purportedly continuing delinquencies, as reflected by credit reports from 2009,[29] and 2010,[30] totaling approximately $37,111, in charged-off or past due accounts. Some accounts reflected in the credit reports have been transferred, reassigned, or sold to other creditors or collection agents. Other accounts are referenced repeatedly, in many instances duplicating other accounts listed, either under the same creditor name or under a different creditor name. Some accounts are identified by complete account numbers, while others are identified by partial account numbers, in some instances eliminating the last four digits and in others eliminating other digits. The information reflected is not necessarily accurate or up to date.

(SOR ¶ 1.a.): On November 13, 2007, Applicant financed the purchase of a planned unit with a mortgage of $209,000 from a local bank.[31] His monthly payments were $1,303.89.[32] Applicant fell behind in his mortgage payments, and on August 26,

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[22] *Id.* at 20.

[23] *Id.* at 22; Tr. at 92.

[24] Government Exhibit 2 (Personal Subject Interview, dated January 13, 2010), at 1, attached to Applicant's Answers to the Interrogatories; Tr. at 56.

[25] Government Exhibit 2, at 4.

[26] *Id.* at 1.

[27] *Id.* at 4; Government Exhibit 2 (Statement, dated August 3, 2010), attached to Applicant's Answers to the Interrogatories.

[28] Government Exhibit 2 (Statement of father, dated August 4, 2010), attached to Applicant's Answers to the Interrogatories.

[29] Government Exhibit 4 (Combined Experian, TransUnion, and Equifax Credit Report, dated October 21, 2009).

[30] Government Exhibit 3 (Experian Credit Report, dated July 17, 2010), attached to Applicant's Answers to the Interrogatories; Applicant Exhibit G (Experian Credit Report, dated December 8, 2010).

[31] Applicant Exhibit B (Note, dated November 13, 2007), at 1, attached to Fannie Mae/Freddie Mac Uniform Instrument (Form 3010).

2009, Freddie Mac Default Asset Management (Freddie Mac) informed Applicant that he might be eligible for the Home Affordable Modification Program (HAMP), "which is a part of the federal Making Home Affordable Program to help homeowners avoid foreclosure whenever possible."[33] He was advised that there were no costs associated with the program.[34] Applicant was also told:[35]

> First, Home Retention Services will determine if you are eligible, based on your financial situation. If you are, Home Retention Services will look at your monthly income and housing costs, including any past due payments, and then determine an affordable mortgage payment. At first, you will make the new monthly mortgage payment during a Trial Period. If you make those payments successfully and fulfill all Trial Period conditions, [the mortgage lender] will permanently modify your mortgage loan.
>
> The modification may involve one or more of the following changes: 1) bringing your account current; 2) reducing the interest rate on your loan; 3) extending the term of the loan, and/or 4) delaying your repayment of a portion of the mortgage principal until the end of the loan term.

Applicant submitted a hardship affidavit to Freddie Mac.[36] On October 6, 2009, Freddie Mac informed Applicant that he was deemed eligible for a loan modification under the HAMP.[37] He was advised that if his income documentation did not support the income amount discussed, two things could happen: his monthly payment under a trial period plan could change, or he might not qualify for the loan modification program.[38] If he did not qualify, Freddie Mac "will work with you to explore other options available to help you keep your home or ease your transition to a new home."[39] The trial period established under the plan commenced with a monthly payment of $1,246.86 due on or before November 1, 2009, and was to continue for three months.[40] Applicant contends that at some point in the loan modification process he was advised

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[32] *Id.*

[33] Government Exhibit 3 (Freddie Mac letter, dated August 26, 2009), at 1, attached to Applicant's Answers to the Interrogatories.

[34] *Id.*

[35] *Id.*

[36] Government Exhibit 3 (Home Affordable Modification Program Hardship Affidavit, dated October 9, 2009), at 1, attached to Applicant's Answers to the Interrogatories.

[37] Government Exhibit 3 (Freddie Mac letter, dated October 6, 2009), at 1, attached to Applicant's Answers to the Interrogatories.

[38] *Id.*

[39] *Id.*

[40] Government Exhibit 3 (Home Affordable Modification Program Loan Workout Plan, undated), at 2, attached to Applicant's Answers to the Interrogatories. Applicant's monthly mortgage payments were, under his mortgage, originally $1,672. *See* Government Exhibit 4, *supra* note 29, at 5.

by the mortgage lender that in order to be eligible for a loan modification he must be behind in his payments.[41] Nevertheless, Applicant made his timely payments under the trial period plan.[42] At some point, the mortgage lender persuaded Applicant to continue making his monthly payments beyond the trial period while the modification process was underway so as to make it more affordable for Applicant and to avoid foreclosure.[43] Believing that the modification was imminent, Applicant continued making his payments for an additional two months.[44]

On March 11, 2010, Applicant received written notice from the mortgage lender that his application for loan modification had been rejected and that his initial qualification for the program had been a mistake.[45] The mortgage lender demanded all delinquent payments.[46] On an unspecified date, the mortgage lender filed an action to foreclose Applicant's mortgage, claiming $204,495.12 in principal on the mortgage, together with interest from October 1, 2009, late charges, and costs.[47] In April 2010, Applicant engaged an attorney to represent him in the foreclosure action.[48] Applicant's attorney secured the services of a licensed mortgage broker to perform a forensic audit of the paperwork associated with Applicant's foreclosure action. The initial report was issued in February 2011, and it found substantial irregularities on the part of the mortgage lender.[49]

In his Answer to the foreclosure complaint, Applicant asserted a number of affirmative defenses, including the following:[50] (1) there is a lack of standing because the plaintiff in the action is not the original mortgage lender; (2) the plaintiff has unclean hands because it engaged in a pattern of criminal activity involving falsifying information on the loan application; falsifying mortgage documents; violating the Financial Institutions Reform Recovery and Enforcement Act of 1989 (FIRREA);[51] and violating the Truth in Lending Act and the Real Estate Settlement Procedures Act (RESPA)[52] by

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[41] Applicant Exhibit B (Answer and Affirmative Defenses, dated March 14, 2011), at 10.

[42] Tr. at 46.

[43] Applicant Exhibit B (Answer and Affirmative Defenses), *supra* note 41, at 10.

[44] Government Exhibit 2 (Statement, dated August 3, 2010), *supra* note 27; *Id.* at 7, 9, 11.

[45] *Id.* Government Exhibit 2.

[46] *Id.*

[47] Applicant Exhibit B (Complaint to Foreclose Mortgage, undated).

[48] Government Exhibit 3 (Letter from attorney, dated April 15, 2010), attached to Applicant's Answers to the Interrogatories.

[49] Applicant Exhibit C, *supra* note 4.

[50] Applicant Exhibit B (Answer and Affirmative Defenses), *supra* note 41, at 2-12.

[51] 12 U.S.C. § 3336; 12 C.F.R. § 323.5.

[52] 12 U.S. C. § 2601, et seq.

concealing important facts from Applicant; (3) failing to properly post Applicant's payments to his account; (4) failing to fulfill all conditions precedent to the acceleration of the Note and Mortgage; (5) maintaining a pattern of waiver; and (6) equitable estoppel. No decision regarding the foreclosure action has yet been rendered.

The October 2009 credit report indicates the mortgage account had a balance of $205,140, with a past due balance of $3,343, that was 60 days past due.[53] The July 2010 credit report indicates the mortgage account had a balance of $204,495, with a past due balance of $14,834, that was 180 days past due.[54] It reflects no mortgage payments having been made by Applicant during or after the HAMP trial period plan, although Applicant made five such payments. The December 2010 credit report indicates the mortgage account had a balance of $204,495, with a past due balance of $22,982, and indicated there was a foreclosure proceeding pending.[55] It too reflects no mortgage payments having been made by Applicant during or after the HAMP trial period plan.

(SOR ¶ 1.b.): Applicant had a bank credit card which he opened in 2007 to pay for utilities and gifts. When his employer eliminated overtime and he was put on furlough with mandatory days off without pay, and Applicant encountered unexpected expenses, his monthly accounts started to become delinquent. Applicant routinely made payments of the minimum amount due, and the interest rate on the card started to climb.[56] At some point in early 2009, the account became delinquent and was placed for collection. The October 2009 credit report indicates the account had a balance of $12,652, with a past due balance of $2,346.[57] The July 2010 and December 2010 credit reports reflect the same figures, but indicate the account was charged off.[58] On January 21, 2009, over a year before the SOR was issued, Applicant signed a debt settlement agreement with a debt management company to obtain debt settlement services including financial guidance, budgeting, debt settlement, and creditor's rights.[59] Since he started the program, Applicant has received eight hours of financial counseling per month.[60] The agreement called for the company to negotiate with two particular creditors (those listed in SOR ¶¶ 1.b. and 1.c.) the reduction of unsecured debt and settle accounts enrolled in

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[53] Government Exhibit 4, *supra* note 29, at 5.

[54] Government Exhibit 3 (Experian Credit Report), *supra* note 30, at 8.

[55] Applicant Exhibit G, *supra* note 30, at 2.

[56] Government Exhibit 2 (Statement), *supra* note 27, at 1.

[57] Government Exhibit 4, *supra* note 29, at 5.

[58] Government Exhibit 3 (Experian Credit Report), *supra* note 30, at 8; Applicant Exhibit G, *supra* note 30, at 2.

[59] Government Exhibit 3 (Debt Management File – Debt Settlement Agreement, dated January 21, 2009), attached to Applicant's Answers to the Interrogatories; Tr. at 89.

[60] Tr. at 89.

the 38 month program.[61] Commencing in March 2009, Applicant made at least 20 monthly payments of $381.51 to the company.[62] That monthly amount included service fees and maintenance fees. The debt management company has already started settlement negotiations with the creditor,[63] and once Applicant builds a sufficient reserve, the account will be resolved.

(SOR ¶ 1.c.): Applicant had another bank credit card opened in 1999 to pay for routine bills, maintenance for his boat, and offshore gambling.[64] When Applicant encountered his diminished income and unexpected expenses, this account started to become delinquent. Applicant routinely made payments of the minimum amount due, and at some point in early 2009, the account became delinquent and was charged off. The October 2009 credit report indicates the account had a balance of $9,666, with a past due balance of $9,663.[65] The July 2010 and December 2010 credit reports reflect nearly identical figures.[66] On December 7, 2010, with the assistance of his debt management company, Applicant and the creditor settled the account.[67] The creditor agreed to accept a lump-sum payment in the amount of $5,010 as full and complete satisfaction of the debt.[68] On or before February 1, 2011, Applicant paid the agreed amount, and the account was resolved as paid.[69]

(SOR ¶ 1.d.): Over the years, Applicant had a hobby of gambling online playing Texas Hold'em and card games.[70] He generally played two times per week, spending $100 - $200 each time.[71] Applicant acknowledged using his credit card, the one referred to in SOR ¶ 1.c., above, for his online gambling and estimated he charged $5,000 for such use.[72] He has not gambled for at least two years.[73]

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[61] Government Exhibit 3 (Debt Management File – Debt Settlement Agreement), *supra* note 59.

[62] Government Exhibit 3 (Debt Management File – Account Status, various dates), attached to Applicant's Answers to the Interrogatories; Applicant Exhibit D (Account Overview, dated March 21, 2011).

[63] Tr. at 71.

[64] Government Exhibit 2 (Personal Subject Interview), *supra* note 24, at 1.

[65] Government Exhibit 4, *supra* note 29, at 5.

[66] Government Exhibit 3 (Experian Credit Report), *supra* note 30, at 9; Applicant Exhibit G, *supra* note 30, at 1.

[67] Applicant Exhibit E (Stipulation for Settlement, dated December 7, 2010).

[68] *Id.*

[69] Applicant Exhibit F (Notice of Voluntary Dismissal with Prejudice, dated February 1, 2011).

[70] Government Exhibit 2 (Personal Subject Interview), *supra* note 24, at 2.

[71] *Id.*

[72] Government Exhibit 3 (Applicant's Answers to Interrogatories), *supra* note 3, at 3.

[73] Tr. at 56.

During the hearing, Applicant submitted a personal financial statement reflecting a net monthly income of $5,196.44; monthly expenses of $4,416.78; and debt repayments of $964.51.[74] He estimated he had a monthly remainder of $815.15 available for discretionary spending.[75] Applicant contends, that with the exception of the one credit card for which there are current settlement negotiations, he is current on all other accounts and has not incurred any new debts.[76]

Personal Conduct

On March 4, 2009, when Applicant completed and submitted his SF 86, he responded to a question set forth in the SF 86. The SOR alleges Applicant deliberately failed to disclose complete information in response to the following financial question: § 28b - (*Are you currently over 90 days delinquent on any debt(s)?)*. Appellant answered "no" to the question.[77] He did not list either of his two delinquent accounts which came within the scope of the question (SOR ¶¶ 1.b. and 1.c.). Applicant denied intending to convey a false impression and contended his response was based upon information he obtained in a credit report.[78] The July 2010 and December 2010 credit reports both reflect that the accounts identified in SOR ¶¶ 1.b. and 1.c. were 90 days past due as of April 2009, not March 2009.[79] Under those circumstances, Applicant answered the question truthfully, and did not deliberately falsify his response.

Character References and Work Performance

The president of Applicant's union local, who is also a coworker, is highly supportive of Applicant's application for a security clearance. He believes Applicant has displayed a positive attitude and excellent work ethic, and is a "shining example of patriotism."[80] Applicant's father and fiancée consider him trustworthy and faithful, and have never seen him demonstrate poor judgment.[81]

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security

[74] Applicant Exhibit A (Personal Financial Statement, undated).

[75] *Id.*

[76] Tr. at 37.

[77] SF 86, *supra* note 1, at 40-41.

[78] Applicant's Answer to the SOR, dated December 21, 2010), at 2.

[79] Government Exhibit 3 (Experian Credit Report), *supra* note 30, at 8-9; Applicant Exhibit G, *supra* note 30, at 1-2.

[80] Applicant Exhibit H (Character reference, dated March 11, 2011).

[81] Tr. at 105,109.

emphasizing, "no one has a 'right' to a security clearance."[82] 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."[83]

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

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."[84] The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.[85]

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the

[82] *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

[83] Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

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

[85] *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

possible risk the applicant may deliberately or inadvertently fail to 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. Furthermore, "security clearance determinations should err, if they must, on the side of denials."[86]

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."[87] Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

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. . . .

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly, under AG ¶ 19(c), "a history of not meeting financial obligations" may raise security concerns. Also, if there are "financial problems that are linked to . . . gambling problems . . . ," AG ¶ 19(f) is potentially disqualifying. As noted above, there was nothing unusual about Applicant's finances until about August 2008 when, due to the downturn in the economy, his employer eliminated overtime and he was put on furlough with mandatory days off without pay. Although Applicant borrowed money to enable him to pay his mortgage, some accounts, including the one with which he gambled online, became delinquent and were either placed for collection or charged off. AG ¶¶ 19(a), 19(c), and 19(f) apply.

[86] *Egan*, 484 U.S. at 531

[87] *See* Exec. Or. 10865 § 7.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where "the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." Also, under AG ¶ 20(b), financial security concerns may be mitigated where "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." Evidence that "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control" is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."[88] Also, AG ¶ 20(e) may apply where "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."

There was nothing unusual about Applicant's finances until about August 2008 when, because of the downturn in the economy, his employer eliminated overtime and he was put on furlough with mandatory days off without pay. The absence of overtime continued through March 2009. When Applicant needed funds to enable him to pay his mortgage, he borrowed it from his father. Applicant repaid his father in March 2009. Applicant fell behind in his mortgage payments, and in August 2009, Freddie Mac informed Applicant that he might be eligible for HAMP, and was advised that he had to make the new monthly mortgage payment during a trial period. Once he fulfilled all trial period conditions, Applicant's mortgage loan would be permanently modified. In October 2009, Freddie Mac informed Applicant that he was deemed eligible for a loan modification under the HAMP. Applicant made his timely payments under the trial period plan, and continued making them for another two months to comply with the wishes of the mortgage lender. In March 2010, Applicant was notified that his application for loan modification had been rejected and that his initial qualification for the program had been a mistake. The mortgage lender demanded all delinquent payments, and when they were not forthcoming, the mortgage lender filed an action to foreclose Applicant's mortgage. In his Answer to the foreclosure complaint, Applicant asserted a number of

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

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

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

affirmative defenses, including many of those found to have existed by the conclusions of a regulatory review conducted by the various federal banking agencies and subsequent consent orders by and between those agencies and certain national banks, including the mortgage lender herein, designed to remedy the numerous matters requiring attention, including unsafe or unsound practices that were identified. No decision regarding the foreclosure action has yet been rendered.

Of the two credit cards, one was placed for collection and the other was charged off. In January 2009, over a year before the SOR was issued, Applicant signed a debt settlement agreement with a debt management company to obtain debt settlement services including financial guidance, budgeting, debt settlement, and creditor's rights. Since he started the program, Applicant received eight hours of financial counseling per month. The agreement called for the company to negotiate with two particular creditors (those credit cards listed in SOR ¶¶ 1.b. and 1.c.) the reduction of unsecured debt and settle accounts enrolled in the 38 month program. Commencing in March 2009, Applicant made at least 20 monthly payments to the company, and one delinquent credit card account was settled and paid off, and the debt management company has already started settlement negotiations with the remaining creditor. Once Applicant builds a sufficient reserve, the account will be resolved. Applicant is current on all other accounts and has not incurred any new debts.

Much of what occurred was largely beyond Applicant's control and took place under such circumstances that it is unlikely to recur. Applicant received counseling for his financial problems, and there are clear indications that the problems are now being resolved. The issues with the mortgage lender are not unlike similar issues found during the regulatory review conducted by the various federal banking agencies. Applicant acted responsibly under the circumstances, and his current reliability, trustworthiness, or good judgment, are not in question. AG ¶¶ 20(a), 20(b), 20(c), 20(d), and 20(e), apply.

Guideline E, Personal Conduct

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

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The guideline notes a condition that could raise security concerns. Under AG ¶ 16(a), a "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status,

determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities," is potentially disqualifying.

Applicant's omission in his response to the one inquiry in the e-QIP of critical information pertaining to financial delinquencies, provides sufficient evidence to examine if his submission was a deliberate falsification, as alleged in the SOR, or was the result of reliance on information appearing in a credit report, as he contends. As to the question pertaining to 90 day delinquencies, Applicant answered "no." As noted above, a review of the July 2010 and December 2010 credit reports both reflect that the accounts identified in SOR ¶¶ 1.b. and 1.c. were 90 days past due as of April 2009, not March 2009. Under those circumstances, Applicant answered the question truthfully, and did not deliberately falsify his response. I had ample opportunity to evaluate the demeanor of Applicant, observe his manner and deportment, appraise the way in which he responded to questions, assess his candor or evasiveness, read his statements, and listen to his testimony. It is my impression that his reliance on the information appearing in the credit reports was real and his explanations are consistent. Considering the quality of the other evidence before me, they have the solid resonance of truth. I find Applicant's explanations are credible in his denial of deliberate falsification. AG ¶¶ 16(a) has not been established.

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.

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 consideration of the guidelines and the whole-person concept. I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.[89]

There is some evidence against mitigating Applicant's conduct. Applicant has a history of financial delinquencies commencing in 2008, when he permitted accounts to

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

become delinquent and placed for collection or charged off. He gambled and sustained approximately $5,000 in losses over the years. One account - his home mortgage - was moved into a foreclosure status. Two of his three accounts remain delinquent.

The mitigating evidence under the whole-person concept is more substantial. Applicant's initial financial delinquencies arose because of the downturn in the economy. His employer eliminated overtime and he was put on furlough with mandatory days off without pay. The absence of overtime continued through March 2009. Applicant borrowed needed funds to enable him to pay his mortgage, and eventually repaid the loan. He engaged the services of a debt management company to help him resolve two delinquent credit card accounts, and hired an attorney to dispute and defend a foreclosure action which he contends was filled with fraud. He settled one credit card debt, and is now working on the other credit card debt. The foreclosure action is in the state court, along with other such actions, and Applicant's attorney believes Applicant can establish that the mortgage lender violated HAMP, FIRREA, and RESPA, among other laws. Applicant is current on all other accounts and has not incurred any new debts. Applicant did not turn his back on his creditors. Instead, he followed legal and financial advice. His substantial good-faith efforts are sufficient to mitigate continuing security concerns. *See* AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:[90]

> 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 [or she] has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he [or she] has " . . . established a plan to resolve his [or her] 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 [or her] 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.

Overall, the record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I

[90] ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted).

conclude Applicant has mitigated the security concerns arising from his financial considerations and personal conduct.

Formal Findings

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

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

ROBERT ROBINSON GALES
Administrative Judge