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

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| In the matter of: | ) | |
| | ) | |
| ---------- | ) | ISCR Case No. 10-04339 |
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| | ) | |
| Applicant for Security Clearance | ) | |

## Appearances

For Government: Ray T. Blank, Jr., Esquire, Department Counsel
For Applicant: John G. Pierce, Esquire

June 30, 2011

## Decision

GALES, Robert Robinson, Administrative Judge:

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

## Statement of the Case

On January 6, 2010, 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 19, 2010.[2] On another unspecified date, DOHA issued him another set of interrogatories. He responded to the interrogatories on September 11, 2010.[3] On December 9, 2010, DOHA issued a Statement of Reasons (SOR) to him,

[1] Government Exhibit 1 (SF 86), dated January 6, 2010.

[2] Government Exhibit 3 (Applicant's Answers to Interrogatories, dated August 19, 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 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 16, 2010. In a sworn undated statement, received by DOHA on January 10, 2011, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on February 3, 2011, and the case was assigned to me on February 10, 2011. A Notice of Hearing was issued on March 4, 2011, and I convened the hearing, as scheduled, on March 24, 2011.

During the hearing, six Government exhibits (GE 1-6) and one Applicant exhibit (AE A) were admitted into evidence without objection or over objection.[4] Applicant and one other witness testified. The hearing transcript (Tr.) was received on April 7, 2011. The record was kept open until April 7, 2011, to enable Applicant to supplement it. It also remained open until April 21, 2011, to enable the parties to submit written closing arguments. Upon Applicant's motion, it remained open until June 29, 2011, to enable Applicant to supplement the record. Prior to the April 7th deadline, Applicant submitted 11 additional documents. That submission is discussed below. Prior to the June 29th deadline, he submitted two additional documents and his closing argument. Those documents were admitted, over Department Counsel's previous objection, as AE M-N.

## Rulings on Procedure

Applicant submitted six documents, to which Department Counsel objected. They were duplicates of GE 1-6, annotated with comments and corrections as to the information previously placed in some of the documents by Applicant when he completed them. For example, he made alterations to entries on his SF 86 and to his answers to the interrogatories. On the three credit reports, he corrected the account numbers of some of the accounts appearing therein. Applicant also submitted three documents that can best be described as one email, one letter of transmittal, and a "summary of evidence of discrepancies, errors and conflicts" pertaining to GE 1-6." Department Counsel also objected to them. One document was Department Counsel's letter to Applicant describing the hearing and transmitting the proposed GE 1-6. It is

[3] Government Exhibit 2 (Applicant's Answers to Interrogatories, dated September 11, 2010).

[4] Applicant objected to three credit reports, not based on admissibility, but rather on accuracy. I overruled the objection, and admitted the documents as GE 4 through 6, respectively. *See* Tr. at 181-182.

unclear what Applicant's purpose was in offering the document. Department Counsel objected to it as well. The bases for Department Counsel's objections were as follows:

> The documents are unresponsive to the Administrative Judge's offer to allow Applicant to supplement the record. (Tr. at 121-27). . . . Many of the documents submitted duplicate Government exhibits, and the SOR, and others are irrelevant. Many of the comments added now seek to contest account numbers. The documents do not disprove the accounts are Applicant's merely because the account numbers on credit reports are partial numbers. The comments do not rebut his indebtedness and, therefore, are irrelevant. In addition, Applicant had the opportunity at hearing to provide evidence concerning any alleged inaccuracies in documents, including information that he provided himself and failed to take advantage of that opportunity. To allow Applicant at this point to attempt to impeach the evidence he had the opportunity to contest at the hearing, including information he previously provided, would wrongly deny the Government the opportunity for cross-examination.

While I disagree with Department Counsel's characterization that some of the proffered evidence is irrelevant, I find that it is immaterial and not responsive to my initial order. Before completing the SF 86 or his answers to the interrogatories, Applicant had the opportunity to insure that his responses were complete and accurate. Upon receiving the proposed GE 1-6 before the hearing, he had other opportunities to make corrections, and he did make some. At the hearing, he had an additional opportunity to note corrections. He did not do so. Accordingly, as to AE B-K for identification, the objection is sustained and those documents will be set aside. As to AE L for identification, Department Counsel made an objection to portions of the proffered exhibit. The objection is overruled and AE L is admitted in its entirety.

On April 14, 2011, one day before the scheduled deadline for the submission of the Government's written closing argument, citing heavy workload responsibilities, Department Counsel moved for a continuance of one week, until the close of business on April 22, 2011, in which to submit closing argument. Applicant did not submit any comment to the motion. Due to the press of other business, I did not rule, in writing, on the motion of Department Counsel, but did so orally. The motion was granted.

On May 5, 2011, citing new developments related to several of the SOR allegations, Applicant moved for a continuance to submit closing argument and supplemental documentation. Department Counsel did not object to "some additional period to submit argument (such as an additional week)," however, he did object to the submission of additional documents because the record had been closed for the submission of documents several weeks earlier. Applicant proffered the nature of the documents and urged that his motion be granted. On May 9, 2011, Applicant moved for a rehearing, citing new developments related to issues set forth in the SOR.

On May 26, 2011, Department Counsel submitted the Government's brief in opposition to Applicant's motion "for rehearing or to re-open the hearing" and "to

submission of proposed post-hearing evidence." I denied Applicant's motion for a rehearing, but granted his motion for a continuance to submit closing argument and supplemental documents, limited to documentation related to the current status of the five properties and/or mortgages identified in the SOR and referred to by Applicant in his motion. As noted above, two submissions were timely made.

## Findings of Fact

In his Answer to the SOR, Applicant admitted one of the factual allegations (¶ 1.f.) of the SOR. Applicant's admission is incorporated herein as a finding of fact. He denied the remaining factual allegations (¶¶ 1.a. 1.e., and 1.g. through 1.i.) 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 51-year-old employee of a defense contractor, currently serving as a product manager.[5] He is seeking to retain a secret security clearance that was initially granted to him in 1983.[6] A 1977 high school graduate, Applicant has a 1983 bachelor's degree in electrical engineering technology, a 2000 master's degree in business administration, and a 2001 master's degree in computer resource information systems.[7] Over the years, Applicant has held several different positions with various employers. He was a design engineer and a production test engineer.[8] He joined his current employer as a senior staff test engineer in February 1986.[9] Since that time, there is no evidence of Applicant being unemployed. Applicant has never served with the U.S. military.[10]

Applicant was married in November 1983.[11] He and his wife have two sons, born in 1985 and 1987, respectively.[12]

### Financial Considerations

At some unspecified point before 2002, Applicant decided to invest in real estate. He obtained professional financial counseling to determine how to pursue his goal in a conservative, stable manner, and hired tax attorneys for assistance in setting up an

[5] Tr. at 35.

[6] Government Exhibit 1, supra note 1, at 36.

[7] Tr. at 34-35, 81.

[8] *Id.* at 35.

[9] Government Exhibit 1, *supra* note 1, at 13.

[10] *Id.* at 16.

[11] *Id.* at 19.

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

investment plan.[13] In 2002, he approached a realtor to assist him with the development of some vacant real estate that he already owned.[14] They subsequently decided to create a real estate investment partnership.[15] The realtor-partner believed their subsequent acquisitions were low-risk investments.[16] Applicant and his wife planned to establish a number of business entities to collect rental income, operate diagnostics test facilities, operate as a radon mitigation specialist, and manage properties.[17] His investments since his 2002 plan to sell a portion of his split real estate property (S-1), were as follows: In 2003, he acquired property S-3; in 2004, he sold the split portion of property S-1 for $90,000, he acquired a medical diagnostic center with the profits from his sale of the portion of property S-1, and he became a certified radon mitigation specialist; in 2005, he split and sold both the lot and the house of the S-3 property, and executed a tax-deferred exchange of property held for productive use or investment (1031 exchange) by relinquishing his interest in property S-3 and acquiring two 4-plex townhouses;[18] in 2006, he initiated a split of a 4-plex (HC-4) into four separate townhouses; in 2007, he initiated a split of another 4-plex (TC-4), he acquired a second medical diagnostic center, and he refinanced the TC-4 4-plex townhouse.[19] While Applicant and his partners operate under a limited liability company name, all of the investment properties are actually titled in the names of Applicant and his partners.[20]

There was nothing unusual about Applicant's finances until 2008 when, because of the downturn in the economy and what his realtor-partner called the "horrific" local housing market,[21] Applicant started to lose renters in his investment properties. Tenants lost their jobs and were unable to pay the monthly rent. Applicant's financial difficulties commenced in 2008 when his tenants started losing their jobs and he experienced difficulties in finding replacement tenants.[22] Because Applicant's rent fee was $950 – above the market value – tenant vacancy accelerated.[23] He surveyed the surrounding

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[13] Tr. at 37-39.

[14] *Id.* at 41-42, 129-130.

[15] *Id.* at 45-46, 167-169.

[16] *Id.* at 170.

[17] Applicant Exhibit A (Tax Plan Structure February 2004, undated).

[18] A 1031 exchange is a method for selling one qualified property and acquiring another qualified property within a specific time frame. The entire transaction is treated as an *exchange* and not as a simple *sale*, and enables the participants to qualify for a deferred gain treatment. Sales are taxable with the IRS and 1031 exchanges are not. *See*, US CODE: Title 26 U.S.C. §1031, Exchange of Property Held for Productive Use or Investment; Tr. at 43.

[19] Applicant Exhibit A (Investment Plan, undated), at 1-3; Tr. at 42-44.

[20] Tr. at 179-181.

[21] *Id.* at 173.

[22] Applicant Exhibit A (Investment Plan, undated), at 3.

[23] *Id.*

properties and determined they were also having problems, so he reduced his rental rates.[24]

With rapidly emptying properties, Applicant decided to intentionally stop making the monthly payments, supposedly to qualify for mortgage modifications,[25] and foreclosure proceedings were commenced by the mortgage lenders in 2009.[26] Applicant engaged the professional services of two different real estate law firms to assist him in obtaining mortgage modifications with his mortgage lenders.[27] In April 2010, Applicant and his partners attended a foreclosure and loss mitigation conciliation conference to seek mortgage modifications.[28] While the modifications were supposedly approved, no documentation was ever issued by the mortgage lender.[29] Applicant never placed the remaining investment properties on the real estate market for sale and had not considered any short sales.[30] It is Applicant's intention to hold on to the investment properties so that they appreciate in value and start generating a positive cash flow.[31] At the hearing, Applicant, for the first time, said that if the mortgage modifications fall through, he might have to consider short sales "if we have to."[32]

In September 2010, Applicant submitted a personal financial statement reflecting a monthly income of $8,335, and monthly expenses of $8,501, including purported mortgage payments.[33] He failed to estimate a monthly remainder, if any, available for discretionary spending.[34] At that time, he reflected $2,000 in savings and $125,566.28 in stocks and bonds.[35] In February 2010, Applicant estimated he had a monthly

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[24] Tr. at 47-48.

[25] *Id.* at 63, 70; Government Exhibit 3 (Personal Subject Interview, dated February 9, 2010), at 2-5, attached to Applicant's Answers to Interrogatories.

[26] Government Exhibit 4 (Combined Experian, TransUnion, and Equifax Credit Report, dated January 16, 2010), at 9, 11, 17; Government Exhibit 5 (Equifax Credit Report, dated July 1, 2010), at 2; Government Exhibit 6 (Equifax Credit Report, dated September 2, 2010), at 2.

[27] Tr. at 48.

[28] *Id.* at 49-50.

[29] *Id.* at 51.

[30] *Id.* at 80.

[31] *Id.* at 81.

[32] *Id.* at 116-117.

[33] Government Exhibit 2 (Personal Financial Statement, undated), attached to Applicant's Answers to Interrogatories. Applicant contended he was making "actual" payments of $10,120.25 to three identified mortgage lenders, but in reality, at that time no such payments were being made.

[34] *Id.*

[35] *Id.* In February 2010, Applicant disclosed that he had a 401(k) with $30,000 available to use. It is unclear if that 401(k) is included in his stock and bond portfolio.

discretionary income of $1,500, exclusive of income derived from his rental properties.[36] In March 2011, Applicant acknowledged having $24,000 in rent receipts on hand.[37]

Applicant failed to timely file his 2008 Federal income tax return, and eventually entered into a repayment schedule with the Internal Revenue Service (IRS) requiring that he pay $500 per month until the tax obligation of between $25,000 and $30,000 is resolved.[38] He also failed to make the required payments on some non-investment accounts. As a result, several accounts fell into arrears and became delinquent. In addition, the student loan for which he co-signed for his son became delinquent.

The SOR identified nine purportedly continuing delinquencies, including seven mortgages in a foreclosure status, as reflected by three credit reports from 2010,[39] totaling approximately $1,312,152, of which $157,375 is past due. 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 in the credit reports is not necessarily accurate or up to date.

**(SOR ¶¶ 1.a. through 1.e.):** Applicant is indebted to one mortgage lender for five mortgages on different properties (HC-4 and TC-4). All five mortgages went into a foreclosure status in 2009 when Applicant intentionally stopped making the monthly payments, supposedly to qualify for mortgage modifications. As a result, the unpaid balances on each mortgage grew. Despite negotiations with the mortgage lender, no mortgage modification for any of the mortgages has been agreed to by the mortgage lender. Applicant has not made any recent mortgage payments for any of the mortgages.

**(SOR ¶ 1.f.):** Applicant is indebted to one mortgage lender for one investment property (S-1). The mortgage went into a foreclosure status in 2009 when Applicant intentionally stopped making the monthly payments, supposedly to qualify for a mortgage modification. As a result, the unpaid balance on the mortgage grew. Negotiations with the mortgage lender apparently collapsed and the mortgage lender sued Applicant and his partners seeking foreclosure.[40] The matter is currently in litigation. Applicant has not made any relatively recent mortgage payments for the mortgage.

[36] Government Exhibit 3 (Personal Subject Interview), *supra* note 25, at 2.

[37] Tr. at 64.

[38] Government Exhibit 3 (Personal Subject Interview), *supra* note 25, at 1-2.

[39] Government Exhibits 4-6, *supra* note 26.

[40] Government Exhibit 2 (Motion to Dismiss Complaint, dated July 31, 2009), attached to Applicant's Answers to Interrogatories.

**(SOR ¶ 1.g.):** Applicant cosigned a student loan for his son. The account went into a deferred status, but Applicant failed to make the required monthly payments. In May 2010, the unpaid balance, including late fees, had increased to $1,907.31.[41] Applicant made a $25 payment in February 2011.[42] Although Applicant contended the account had been paid off,[43] during the hearing he acknowledged he is still paying on the account.[44] There is no evidence of additional payments made by Applicant or receipts from the creditor to confirm either that the account is being paid or that it has been paid off.

**(SOR ¶ 1.h.):** Applicant is indebted to one mortgage lender for his primary residence. The mortgage went into a foreclosure status in 2009 when Applicant intentionally stopped making the monthly payments, supposedly to qualify for a mortgage modification. As a result, the unpaid balance on the mortgage grew. Negotiations with the mortgage lender apparently collapsed and the mortgage lender sued Applicant seeking foreclosure.[45] The matter is currently in litigation. Applicant has not made any relatively recent mortgage payments for the mortgage.

**(SOR ¶ 1.i.):** Applicant took out a line of credit in the amount of $7,967 for one of his business enterprises.[46] At some point he fell behind 90 days in his monthly payments and the account was charged off in the amount of $6,806.[47] In March 2011, the unpaid balance was reflected as $5,935.91, and Applicant made a payment of $300.[48] During the hearing, Applicant contended the account was current.[49] There is no evidence of additional payments made by Applicant or receipts from the creditor to confirm either that the account is being paid or that it is considered current.

## Policies

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

[41] Applicant Exhibit L, at AA-1 (Letter from Creditor, dated May 10, 2010).

[42] Applicant Exhibit L, at AA-4 (Cancelled Check, dated February 11, 2011).

[43] Applicant Exhibit L, at AA-19 (Notation on Payment Confirmation, dated March 25, 2011).

[44] Tr. at 76, 93.

[45] Government Exhibit 2 (Answer and Affirmative Defenses to Complaint, dated March 30, 2010), attached to Applicant's Answers to Interrogatories.

[46] Tr. at 77; Government Exhibit 4, *supra* note 26, at 13.

[47] Government Exhibit 4, at 13,

[48] Applicant Exhibit L, at AA-14 (Account Summary, dated March 6, 2011).

[49] Tr. at 77, 94.

emphasizing, "no one has a 'right' to a security clearance."[50] 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."[51]

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."[52] 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.[53]

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

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

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

[52] "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).

[53] *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."[54]

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."[55] 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. As noted above, there was nothing unusual about Applicant's finances until 2008 when, because of the downturn in the economy and the local housing market, Applicant's investment properties started to lose renters. With rapidly emptying properties, Applicant decided to intentionally stop making the monthly payments on all of his investment properties, as well as on his personal residence, supposedly to qualify for mortgage modifications. Mortgages and other accounts became delinquent, and his mortgages went into a foreclosure status. AG ¶¶ 19(a) and 19(c) apply.

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

[55] *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."[56]

There was nothing unusual about Applicant's finances until 2008 when, because of the downturn in the economy and what his realtor-partner called the "horrific" local housing market, Applicant's investment properties started to lose renters. Tenants lost their jobs and were unable to pay the monthly rent. Those economic conditions were unexpected and beyond Applicant's control. However, the degree to which those factors had an impact on Applicant's ability to overcome them has not been explained. Applicant was confronted with two issues. One was a financial issue and the other was a business issue. With rapidly emptying properties, Applicant decided to intentionally stop making the monthly payments, supposedly to qualify for mortgage modifications, and foreclosure proceedings were commenced by the mortgage lenders in 2009. Applicant engaged the professional services of two different real estate law firms to assist him in obtaining mortgage modifications with his mortgage lenders. Applicant never placed his investment properties on the real estate market for sale and had not considered any short sales. Instead, Applicant intends to hold on to the investment properties so that they appreciate in value and start generating a positive cash flow. Until then, his apparent goal is to ignore his creditors or force them to agree to loan modifications.

Applicant continued to accrue revenue from the rents generated by his rental properties, and income from his other business enterprises, and was seemingly capable

[56] 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)).

of meeting most of his personal and family financial obligations. He simply decided not to pay his mortgages in an effort to force the mortgage lenders to comply with his wishes to lower his monthly payments and otherwise modify all of the mortgages. As a result, he permitted seven mortgages to fall into arrears and become delinquent. While three mortgage lenders attempted to foreclose on the seven properties, Applicant was only concerned with litigation to retain his properties without making the required monthly payments. In September 2010, Applicant had a monthly net income of $8,335. He claimed monthly expenses of $8,501, including purported mortgage payments, but in reality, he was not making those mortgage payments. He had $2,000 in savings and $125,566.28 in stocks and bonds. Applicant took the tax benefits of his various business enterprises, but refused to comply with his agreed monthly mortgage payments.

Applicant has a degree in business administration. Hoping to build his financial empire, he joined in a partnership with a realtor and sought guidance of attorneys to assist him in the growth of his business portfolio. He engaged the services of litigation attorneys to assist him initially in seeking mortgage modifications and subsequently to fight off foreclosure suits. Other than some generic guidance, there is no evidence of financial counseling, debt management, or debt repayment.

Some of what occurred was beyond Applicant's control and took place under such circumstances that it is unlikely to recur. Applicant received counseling related to his business, but not related to his financial problems. There is little indication that the problems associated with his mortgages are now being resolved. By making cold business decisions related to his mortgages, Applicant acted irresponsibly under the circumstances, and his current reliability, trustworthiness, or good judgment, are in question. AG ¶¶ 20(a), 20(c), and 20(d) do not apply. AG ¶ 20(b) partially applies.

**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.[57]

There is some evidence in favor of mitigating Applicant's conduct. In 2002, he decided to start building wealth and accumulate investment properties. He did so and was very successful in purchasing them at reasonable prices, rehabilitating them, and renting them. Unfortunately, because of the unexpected downturn in the economy and the housing market crash, he lost renters when they lost their jobs and were unable to pay the monthly rent. He reduced his rental asking price. He sought mortgage modifications from his three mortgage lenders.

The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:[58]

> 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.

There are some questionable actions by Applicant in handling his delinquent accounts. At some point in 2009, Applicant made a business decision to stop paying his monthly mortgage payments for both his investment properties and his primary residence. He continued to accrue revenue from the rents generated by his rental properties, and income from his other business enterprises, and was seemingly capable of meeting most of his personal and family financial obligations. He simply decided not to pay his mortgages in an effort to force the mortgage lenders to comply with his wishes to lower his monthly payments and otherwise modify all of the mortgages. As a result, he permitted seven mortgages to fall into arrears and become delinquent. While three mortgage lenders attempted to foreclose on the seven properties, Applicant was

[57] *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).

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

only concerned with litigation to retain his properties without making the required monthly payments. He had $2,000 in savings and $125,566.28 in stocks and bonds. Applicant took the tax benefits of his various business enterprises, but refused to comply with his agreed monthly mortgage payments. I conclude that Applicant has failed to establish a meaningful track record. *See* AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

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

## Formal Findings

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

| | |
|---|---|
| Paragraph 1, Guideline F: | AGAINST APPLICANT |
| Subparagraph 1.a: | Against Applicant |
| Subparagraph 1.b: | Against Applicant |
| Subparagraph 1.c: | Against Applicant |
| Subparagraph 1.d: | Against Applicant |
| Subparagraph 1.e: | Against Applicant |
| Subparagraph 1.f: | Against Applicant |
| Subparagraph 1.g: | For Applicant |
| Subparagraph 1.h: | Against Applicant |
| Subparagraph 1.i: | For Applicant |

## Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ROBERT ROBINSON GALES
Administrative Judge