DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

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

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: Julian Roberts, Esq., Daniela Jansen, Esq.

08/27/2012

Remand Decision

LEONARD, Michael H., Administrative Judge:

This is a security clearance case in which the Appeal Board remanded consistent with its opinion.[1] On July 12, 2011, DOHA issued a statement of reasons (SOR) to Applicant citing Guideline F for financial considerations based on a history of financial problems. A hearing was held in November 2011. I issued a decision in Applicant's favor on February 16, 2012, which Department Counsel appealed.

[1] This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, because the SOR was issued after September 1, 2006, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

In its June 12, 2012 decision, the Appeal Board concluded that my mitigation analysis was flawed due to a misplaced reliance on an antideficiency statute that is the law in Applicant's state of residence.[2] On June 25, 2012, I exercised my discretion to more fully develop the record by giving each party an opportunity to submit documentary evidence on the status (e.g., paid, settled, in a repayment agreement, forgiven, unenforceable, unresolved, etc.) of the two mortgage loans in SOR ¶¶ 1.d and 1.e.[3] Department Counsel or Applicant did not object to this procedure.

Neither Department Counsel nor Applicant filed anything by the August 1, 2012 deadline. Applicant filed a brief on August 7.[4] Thereafter, Department Counsel sought permission to respond, which I granted on August 13, and Department Counsel then filed a four-page response on August 15. The next day Applicant sought permission to respond to some of the points raised by Department Counsel. I granted that request on August 17, and set a deadline for August 24. I also indicated that the record would then close and no additional responses would be allowed. Applicant did not file anything by the August 24 deadline, and the record closed the same day.

Applicant contends that the mortgage lender has no recourse on the two mortgage loans under the state's antideficiency statute.[5] In making that argument, Applicant notes that the mortgage lender has not responded to inquiries concerning disposition of the property, and speculates why the mortgage lender has not issued documentation showing the loans were forgiven. In reply, Department Counsel argues that the antideficiency statute does not apply based on the plain language of the statute. Even if it did apply, Department Counsel argues that Applicant has not established, by means of post-foreclosure documentation, that the statute has in fact been applied to the mortgage loans.

Whether Applicant is still liable or responsible for the two mortgage loans is a difficult question and is governed by state law. The only way to know for certain that a

[2] ISCR Case No. 10-07393 (App. Bd. Jun. 12, 2012).

[3] *See* ISCR Case No. 99-0018 (App. Bd. Apr. 11, 2000) (an administrative judge may consider a brief on remand so long as there is notice to the opposing party and an opportunity to respond).

[4] Applicant's submission consists of: (1) a three-page brief; (2) a two-page document called Response of Applicant to SOR; (3) a two-page document called Applicant's Statement of Mitigating Circumstances; (4) a one-page document called Declaration of Tax Preparer; (5) a two-page document called Declaration of Applicant in Response to Request for Additional Information; and (6) a one-page document showing proof of service. Items (2) and (3) are already part of the record as they are included in Applicant's answer to the SOR. Item (4) is already part of the record as Applicant Exhibit E. And Item (5) is already part of the record as part of Government Exhibit 4.

[5] Applicant's Brief at 2 (setting forth the full text of the antideficiency statute).

debt has been forgiven is if a debtor is issued a Form 1099-C, Cancellation of Debt,[6] or receives a letter or other document from a creditor stating that the account has been resolved in their favor. Neither event has occurred here.

Resolving this question requires application of a state statute (and, no doubt, a body of state caselaw) to a set of facts. A security clearance case is not an ideal forum to decide this question because (1) it is a nonjudicial proceeding that lacks subpoena power for witnesses or documents held by a creditor, and (2) it asks a federal administrative judge—whose authority is limited to deciding security clearance cases—to address a question of debtor-creditor law controlled by state law. In light of these circumstances, the better approach is to rely on what is known and not engage in speculation or conjecture on applicability of the antideficiency statute.[7] Accordingly, the case will be decided based on the facts as found below, which do not include any documentary evidence showing that the antideficiency statute was acquiesced to or applied by the mortgage lender.

Findings of Fact

The SOR alleged five delinquent debts consisting of the following: (1) a medical collection account for $55; (2) a charged-off consumer account for $1,408; (3) a past-due consumer account for $3,824; (4) a charged-off home-equity loan for $51,084;[8] and (5) a mortgage loan in foreclosure for $209,458. In her answer to the SOR, Applicant admitted the five debts with explanations. Her admissions and explanations are accepted and adopted and incorporated as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 51-year-old employee of a federal contractor. She works as a senior analyst in the fields of configuration management and data management. She has been employed by the same large company engaged in defense contracting since 1980. She has a good employment record as verified by written performance assessments from 2006–2009 and performance awards from 2009–2010.[9] Her current annual salary is about $84,000. She is seeking to retain a security clearance at the secret level, which she has held for many years.

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[6] It's possible that a Form 1099-C would not be issued for a mortgage loan default due to *The Mortgage Forgiveness Debt Relief Act of 2007*. In general, the Act provides tax relief for cancelled or forgiven mortgage debt, between 2007 and 2012, that was used to buy, build, or substantially improve a principal residence, or to refinance debt incurred for those purposes, and the debt must have been secured by the home. Whether the Act applies to Applicant's situation is a question beyond the scope of this proceeding, and it is not decided herein.

[7] *See* ISCR Case No. 10-01978 at n. 5 (App. Bd. Aug. 24, 2011).

[8] Exhibits 2, 3, and 6, three credit reports, describe this loan as a second mortgage. According, it is found to be a second mortgage loan as opposed to a home-equity loan.

[9] Exhibits L and M.

Applicant is not married and has no children, but she has a longtime boyfriend with whom she cohabits. Under joint tenancy or tenancy in common, she and her longtime boyfriend bought a home in 2003, and they divide the mortgage loan payment and the household bills equally.

In about 2007, Applicant, in her individual capacity, bought a small two-bedroom, one-bathroom house in a community about 55 miles from her residence in the same state. The home is located near her elderly father. She made no down payment and financed the purchase with a mortgage loan of $205,176 and a second mortgage loan of $51,294.[10] Both loans were with the same mortgage lender (a large national bank).

Applicant moved into the house and lived there until deciding that her commute to work was too onerous.[11] She returned to her previous residence and kept the second house with the idea of returning there in the future.

The house required a considerable amount of work and repairs. In addition, as a landlord, Applicant had problematic tenants and the rental property never produced a positive cash flow. She had no tenants at times, requiring her to cover both mortgage loans.

A May 2010 credit report described both loans as more than 120 days late with past-due balances.[12] She attempted to work with the mortgage lender to modify or refinance the loans, a process she described as "a nightmare."[13] Having no success with the mortgage lender, she hired a lawyer to assist her, but that was unsuccessful as well. In 2010, the mortgage lender placed her on a trial period with increased monthly payments and she made payments for a few months. But by about July 2010, she was no longer able to make the payments and the property fell into foreclosure. A March 2011 credit report described the second mortgage loan as past due and the first mortgage loan as in foreclosure.[14] A June 2011 credit report described the second mortgage loan as a charged-off account and the first mortgage loan as in foreclosure.[15]

The house was sold in May 2011 for $66,298,[16] a sale price substantially less than the purchase price. The steep drop in market value is generally consistent with the

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[10] Exhibit 2.

[11] Exhibit 4 (Declaration of Applicant in Response to Request for Additional Information).

[12] Exhibit 2.

[13] Tr. 58.

[14] Exhibit 3.

[15] Exhibit 6.

[16] Exhibit K.

fact that the rental property is in one of the states hardest hit by the bursting of the real-estate bubble.[17]

Applicant had medical problems during roughly the same period when the issues with the second house were occurring.[18] In March 2010 she had surgery on her left breast to remove a mass. In July 2010 she had a biopsy on her right breast. In October 2010 she had a hysterectomy. This series of medical problems interfered with her ability to devote her full attention to financial matters.

Applicant presented documentary information for the three other delinquent debts. She paid the $55 medical collection account.[19] She settled the $1,408 charged-off consumer account for $880.[20] And the $3,824 past-due consumer account is enrolled in a repayment plan with the creditor and is in good standing.[21]

Applicant's current financial situation appears to be stable. She has two other credit card accounts, both of which are in good standing.[22] Her tax preparer since 2004 examined the history of returns prepared for Applicant, and there was no indication of extraordinary financial problems or income.[23] Of note, Applicant files as head of household claiming her father as a qualifying person under the law that allows a taxpayer to claim that status when the taxpayer provides a home for a parent who does not live with her.

In addition to assisting her father, Applicant provides financial assistance to a disabled adult nephew who is living in an assisted-care facility. Her nephew is the son of her brother, who passed away suddenly in 2008. Her brother's death placed a financial strain on Applicant as she was the family member who paid funeral expenses.

[17] Without objection, I took administrative notice of this well-known fact. Tr. 103.

[18] Answer to SOR (Applicant's Statement of Mitigating Circumstances); Exhibit C (health history report).

[19] Exhibit A.

[20] Exhibit G.

[21] Exhibit B and H.

[22] Exhibits I and J.

[23] Exhibit E.

Law and Policies

It is well-established law that no one has a right to a security clearance.[24] As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[25] Under *Egan,* Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[26] An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[27]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[28] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[29] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[30] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[31] In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.[32] The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[33]

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense

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[24] *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

[25] 484 U.S. at 531.

[26] Directive, ¶ 3.2.

[27] Directive, ¶ 3.2.

[28] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[29] Directive, Enclosure 3, ¶ E3.1.14.

[30] Directive, Enclosure 3, ¶ E3.1.15.

[31] Directive, Enclosure 3, ¶ E3.1.15.

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

[33] ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.[34] Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Discussion

Under Guideline F for financial considerations,[35] the suitability of an applicant may be questioned or put into doubt when that applicant has a history of excessive indebtedness or financial problems or difficulties.[36] The overall concern under Guideline F is:

> 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.[37]

Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information within the defense industry.

The evidence supports a conclusion that Applicant has a history of financial problems or difficulties. The evidence also raises security concerns because it indicates an inability to satisfy debts[38] and a history of not meeting financial obligations[39] within the meaning of Guideline F. The facts are sufficient to establish these two disqualifying conditions. In this regard, I specifically considered that Applicant (1) bought the second

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[34] Executive Order 10865, § 7.

[35] AG ¶¶ 18, 19, and 20 (setting forth the security concern and the disqualifying and mitigating conditions).

[36] ISCR Case No. 95-0611 (App. Bd. May 2, 1996) (It is well settled that "the security suitability of an applicant is placed into question when that applicant is shown to have a history of excessive indebtedness or recurring financial difficulties.") (citation omitted); and *see* ISCR Case No. 07-09966 (App. Bd. Jun. 25, 2008) (In security clearance cases, "the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner.") (citation omitted).

[37] AG ¶ 18.

[38] AG ¶ 19(a).

[39] AG ¶ 19(c).

house with 100% financing, (2) was unprepared to make payments on both mortgage loans when the house went without paying tenants, and (3) defaulted on both mortgage loans. The result was a foreclosure and sale of the house for an amount much less than the amount of the first mortgage loan and the charging off of the second mortgage loan. These circumstances do not reflect well on Applicant's reliability, trustworthiness, and good judgment.

There are six mitigating conditions to consider under Guideline F. Any of the following may mitigate security concerns:

> AG ¶ 20(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;
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> AG ¶ 20(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;
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> AG ¶ 20(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;
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> AG ¶ 20(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;[40]
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> AG ¶ 20(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; or
>
> AG ¶ 20(f) the affluence resulted from a legal source of income.

Applicant receives some credit in mitigation under AG ¶ 20(a), because the two defaulted mortgage loans occurred under such circumstances that are unlikely recur. She purchased the second house with 100% financing. Although most people now understand that such financing has greater risk (for both the lender and borrower), Applicant's transaction in 2007 was not unusual or atypical. Having gone through the

[40] ISCR Case No. 99-0201 (App. Bd. Oct. 12, 1999) ("[T]he 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. Such standards are consistent with the level of conduct that must be expected of persons granted a security clearance.") (citations omitted); ISCR Case No. 02-30304 (App. Bd. Apr. 20, 2004) (relying on a legally available option, such as Chapter 7 bankruptcy, is not a good-faith effort) (citations omitted); ISCR Case No. 99-9020 (App. Bd. Jun. 4, 2001) (relying on the running of a statute of limitations to avoid paying a debt is not a good-faith effort).

difficult process of trying to save the second house and then losing it to foreclosure, Applicant is unlikely to enter into a similar transaction anytime soon.

Applicant receives some credit in mitigation under AG ¶ 20(b) due to conditions largely beyond her control. Although not conclusive, the following conditions were factors that contributed to or were an influence on her financial problems: (1) the death of her brother in 2008, which resulted in her paying the funeral expenses; (2) providing financial assistance to her disabled adult nephew; (3) her series of medical problems in 2010; (4) the considerable amount of work and repairs to the second house; and (5) the problematic tenants and lack of tenants. Moreover, she did not act unreasonably under the circumstances she was facing. She initially retained an attorney to assist her, but that was unsuccessful. She then entered into a trial period with the mortgage lender to rehabilitate the loans. That ended unsuccessfully when she could not afford the higher monthly payments. Her actions were not that of a dishonest, frivolous, or irresponsible debtor.

Applicant receives some credit in mitigation under AG ¶ 20(c), because there are clear indications that her financial problems are resolved or under control. This applies to her three other delinquent accounts, which were delinquent due to inability to pay, and are now resolved, with one account paid, another settled, and the third in a repayment plan. Under the same rationale, she receives credit in mitigation under AG ¶ 20(d) for her good-faith efforts to resolve those three debts.

I have also considered Applicant's case under the nine-factor whole-person concept.[41] I have incorporated my discussion above into my whole-person analysis, but some matters justify additional discussion.

First, I considered the nature, extent, and seriousness of Applicant's financial problems, and the facts and circumstances surrounding her conduct in incurring and failing to satisfy her financial obligations in a timely manner.[42] Taken together, these matters persuade me that this was not a case where Applicant set out with a dishonest purpose or intent to avoid her financial obligations. Nor is this a case where Applicant was obviously taking on excessive risk as a real-estate investor or speculator who bought a high-end house or multiple houses. And this is not a case where Applicant could afford the mortgage loan payments, but decided to engage in a strategic default for financial reasons.[43] Instead, this is a case where Applicant bought a relatively modest house (two bedroom, one bath) in order to live near her elderly father, and the purchase resulted in financial problems she did not anticipate or expect. In my view, Applicant is an example of an honest but unfortunate debtor.

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[41] AG ¶ 2(a)(1)–(9).

[42] AG ¶ 2(a)(1) and (2).

[43] *E.g.*, ISCR Case No. 10-10627 (Jan. 20, 2012) (deciding case against an applicant who decided to default strategically on two home loans he had the means to pay).

Second, I considered the potential for pressure, coercion, exploitation, or duress due to Applicant's financial problems.[44] Granted, Applicant did not present any post-foreclosure documentation for the two mortgage loans. What is known is that the mortgage lender foreclosed on the first loan and charged off[45] the second loan. On the other hand, there is no indication that the mortgage lender is attempting to collect on the mortgage loans. And Applicant has been truthful and complete in answering questions about the mortgage loans and other delinquent debts during this process.[46] In light of these circumstances, I assess the risk of pressure, coercion, exploitation, or duress as low to remote.

Third, I considered the likelihood of continuation or recurrence of similar financial problems.[47] As noted above, having gone through the difficult process of trying to save the second house and then losing it to foreclosure, Applicant is unlikely to enter into a similar transaction anytime soon. Based on the record evidence as a whole, I am persuaded that similar financial problems will not recur.

The purpose of a security clearance case is not to assign guilt or blame and then punish or sanction a person for their past actions. Likewise, a security clearance case is not aimed at collecting debts.[48] Rather, the purpose is to make "an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk."[49] Here, the evidence establishes that Applicant has worked in the defense industry for more than 30 years, she has a good employment record, and she has held a security clearance for many years. She certainly made mistakes and exercised less than good judgment in handling her financial affairs, with the chief concern being the defaulted mortgage loans. Nevertheless, in light of my discussion of the various mitigating conditions and whole-person factors, those matters when taken together persuade me that she remains an acceptable security risk.

Under *Egan* and the clearly-consistent standard, I have no doubts or concerns about Applicant's continued fitness or suitability for a security clearance. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa.* Having done so, I conclude that

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[44] AG ¶ 2(a)(8).

[45] The term charge off means a declaration by a creditor "[t]o treat (an account receivable) as a loss or expense because payment is unlikely; to treat as a bad debt." *Black's Law Dictionary* 266 (Bryan A. Garner ed., 9th ed., West 2009). The charge off, though, does not extinguish or cancel the debt, and a charge off is an adverse factor that can be listed on a credit report.

[46] AG ¶ 2(e)(2).

[47] AG ¶ 2(a)(9).

[48] ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010).

[49] AG ¶ 2(a).

Applicant met her ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided for Applicant.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline F:	For Applicant
Subparagraphs 1.a–1.e:	For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Michael H. Leonard
Administrative Judge