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: *Pro se*

January 20, 2012

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for a security clearance to work in the defense industry. The evidence shows that in 2005 Applicant and his wife obtained two home loans to purchase a primary residence for about $905,000. Over the next five years, the market value of the home fell to about $500,000 due to a steep decline in the residential real estate market. He paid on the loans until July 2010, when he defaulted after deciding it was in his financial interest to do so. The house was sold in a foreclosure sale in March 2011 for about $500,000; the first mortgage loan is paid in full; the second mortgage loan (a home-equity line of credit) was charged off; and there is no indication that a deficiency balance is being pursued by a creditor. His decision to default strategically on two home loans raises unresolved doubts about his judgment, reliability, trustworthiness, and ability to protect classified information. For the reasons discussed below, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,[1] on or about June 15, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) explaining it was unable to find that it was clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the reasons for the action under the security guidelines known as Guideline F for financial considerations and Guideline E for personal conduct.

Applicant timely answered the SOR and requested a decision without a hearing. Subsequently, he changed his mind and requested a hearing on July 26, 2011. The case was assigned to another judge on September 15, 2011, before it was assigned to me on October 14, 2011. The hearing took place November 1, 2011. The hearing transcript (Tr.) was received November 10, 2011.

Findings of Fact

The SOR alleged four delinquent accounts as follows: (1) two past-due credit card accounts with the same creditor for $1,320 and $1,655, respectively; (2) a mortgage loan in foreclosure with a balance of about $666,000; and (3) a home-equity line of credit that was charged off with a balance of about $138,000. Applicant admitted responsibility for the accounts in his reply to the SOR, but he explained that he had resolved the credit card accounts and was no longer responsible for the home loans. He presented reliable proof that the credit card accounts were current and in good standing as of May 28, 2011, and those matters will not be discussed further.[2] His admissions are accepted and adopted and incorporated herein as findings of fact. In addition, the following findings of fact are supported by substantial evidence.

Applicant is a 57-year-old employee of a federal contractor. He has been employed as a senior manager for subcontracts for a large company engaged in defense contracting since May 2010. He is seeking to obtain a security clearance for that job.[3] He held a security clearance during 1979–1981 and 1988–1999, when employed by the same company. His educational background includes a bachelor's degree in business management. He is married, and he and his wife have adult children and minor grandchildren. His annual salary is about $185,000, while his wife earns

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[1] This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, 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.

[2] Exhibits A and B; Tr. 29–34. Based on this evidence, SOR ¶¶ 1.a and 1.b are decided for Applicant.

[3] Exhibit 1.

about $105,000 working as a senior manager for a company involved in the wine industry.

The two home loans stem from Applicant and his wife's purchase of a primary residence in about September or October 2005. They bought the home for a price of $905,000, which was financed by a combination of a first mortgage of about $724,000 and a second mortgage (a home-equity line of credit) of about $136,000 for a total of $860,000. The first mortgage was at a fixed rate and the second was an interest-only loan. The balance due, about $45,000, or 5 percent of the purchase price, was presumably paid by Applicant as a down payment. Over the next five years, the market value of the home fell to about $500,000 (a 44 percent decrease) due to a steep decline in the residential real estate market. Indeed, he lives in one of the states hardest hit by the bursting of the housing bubble.[4]

Applicant and his wife considered their options in light of the steep decline in the market value of their home. They had to rule out refinancing the loans because the property would not appraise at an amount sufficient to qualify. They obtained advice from an attorney, with expertise in working with mortgages, who told them they had three options: (1) remain in the home while continuing to make payments and hope that the market rebounds; (2) walk away from the home, as they live in a nonrecourse state;[5] or (3) attempt a short sale of the property. They also consulted their CPA, who is also a tax attorney, for any potential tax issues. They then contacted the mortgage lender, which held both loans, and attempted to renegotiate the loans, but the mortgage lender declined to renegotiate.

Facing these circumstances, Applicant and his wife struggled with how to proceed. They made market projections on when the local real estate market might recover, and they factored in an anticipated retirement at age 62. After doing so, they decided to walk away from the home and stopped making payments in July 2010. As a result, the property went into foreclosure and it was sold in March 2011 for about $500,000; the first mortgage loan is paid in full;[6] the second mortgage loan (a home-

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[4] I took administrative notice of this well-known fact. Tr. 74–79.

[5] I took administrative notice that Applicant's state of residence has an antideficiency statute. Tr. 74–79. This means that the mortgage lender is not permitted to come after a borrower's other assets and income if the borrower defaults. As I understand the law, this restriction applies only to original loans used to purchase property, not to home-equity lines of credit or mortgage loans obtained after purchase. I am certain the statute applies to Applicant's first mortgage loan. I am less certain about the second, because it is described as a home-equity line of credit. It may well apply, however, because the loan was originated at the time of purchase and used to buy the property. Applicant believes it applies, but the most recent credit report, Applicant's Exhibit G, describes the home-equity line of credit as a charged-off account.

[6] Exhibit F at 2. The first mortgage was paid in full from the sale proceeds, and any shortage was probably paid by mortgage insurance, as Applicant testified that the mortgage was insured. Tr. 37. Requiring private mortgage insurance (or PMI) is a common practice in the mortgage industry when a borrower makes a down payment of less than 20 percent.

equity line of credit) was charged off;[7] and there is no indication that a deficiency balance is being pursued by a creditor. Indeed, Applicant attempted over a two-month period in 2011 to get the creditor to provide written confirmation of no deficiency on the home-equity line of credit without success.[8] But an employee of the creditor told them during a telephone conversation that they were not liable or responsible for the debt.[9]

After defaulting in July 2010, Applicant and his wife used the money they would have paid on the home loans to pay other debts. They are following a methodical approach of debt repayment advocated by a nationally-known expert in personal financial. Their goal is to be debt-free by November 2012. The only negative entry in the most recent credit report from October 2011 is the home-equity line of credit, which is described as a charged-off account.[10] There are no judgments, bankruptcies, or collection accounts listed. The credit report also reveals credit scores of 637, 633, and 665 from the three major credit reporting agencies; the scores are described as "fair."

Law and Policies

It is well-established law that no one has a right to a security clearance.[11] 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."[12] 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.[13] An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[14]

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[7] Exhibit G at 10 (or page 1 of 20 of section on credit cards and loans).

[8] Exhibits E and F at 1.

[9] Exhibit E.

[10] Exhibit G at 10.

[11] *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).

[12] 484 U.S. at 531.

[13] Directive, ¶ 3.2.

[14] Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[15] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[16] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[17] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[18] In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.[19] The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[20]

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 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.[21] 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,[22] the suitability of an applicant may be questioned or put into doubt when that applicant has a history of excessive

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

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

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

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

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

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

[21] Executive Order 10865, § 7.

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

indebtedness or financial problems or difficulties.[23] 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.[24]

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 raises security concerns and indicates an unwillingness to satisfy debts[25] and a history of not meeting financial obligations[26] within the meaning of Guideline F. The facts are sufficient to establish these two disqualifying conditions. As established during the hearing, this case does not involve the inability to pay, because Applicant had the financial means to meet his obligations on the two home loans. Instead, this case involves the unwillingness to pay one's just debts.

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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[23] 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).

[24] AG ¶ 18.

[25] AG ¶ 19(a).

[26] AG ¶ 19(c).

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;

AG ¶ 20(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;[27]

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.

I considered all the mitigating conditions and none, individually or in combination, are sufficient to overcome and mitigate the security concerns.

The evidence shows Applicant chose to default strategically on two home loans.[28] As used here, a strategic default means a decision by a borrower who has the financial means to make the monthly mortgage payments, but chooses not to do so and, instead, intentionally defaults (i.e., stops making payments) on the mortgage loan.[29] This is not uncommon in today's economy, and some argue that it is a perfectly rational and sound business or financial decision.[30] Nevertheless, a good business or financial decision does not insulate the underlying conduct from review in a security clearance case. In Applicant's case, he decided to stop making payments on two home loans although he had the financial means to do so. In other words, he was simply no longer willing to abide by the terms previously agreed to even though he had the ability to pay the loans. He defaulted after deciding that it was in his financial interest to do so given the facts and circumstances he was then facing. It is probable that his state's antideficiency statute was a factor in his decision-making process.

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[27] 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).

[28] My research on the DOHA Web site and Westlaw found a single security clearance case using the term strategic default. In ISCR Case No. 10-10045, 2011 WL 6801117 (Oct. 28, 2011), my colleague Judge Harvey decided against an applicant who let loans on three investment properties go into strategic default.

[29] *See generally Wikipedia*, Strategic default, http://en.wikipedia.org/wiki/Strategic_default (accessed Jan. 12, 2012) (contains background information, discussion, references, and links on the subject).

[30] *See id.* (section on ethical issues).

After due consideration, I conclude that Applicant's decision to default strategically reflects poorly on his judgment, reliability, trustworthiness, and ability to protect classified information. It calls into question his willingness to follow the rules for properly handling and safeguarding classified information if doing so might conflict with his financial interest. For example, it is not a stretch or leap in logic to question Applicant's willingness to report a security infraction or violation if doing so might jeopardize his job or his standing with his employer or some other personal interest.

The evidence justifies current doubts about Applicant's suitability for a security clearance. Following *Egan* and the clearly-consistent standard, I resolve these doubts in favor of protecting national security. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa.* I gave due consideration to the whole-person concept[31] and Applicant's favorable evidence.[32] Indeed, I found Applicant to be a mature and serious person who was respectful throughout the hearing. Nevertheless, Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline F:	Against Applicant
Subparagraphs 1.a–1.b:	For Applicant
Subparagraphs 1.c–1.d:	Against Applicant

Conclusion

In light of the record as a whole, 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.

Michael H. Leonard
Administrative Judge

[31] AG ¶ 2(a)(1)–(9).

[32] *E.g.*, Exhibits C and D (favorable letters of recommendation).