DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 11-01971
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: Christopher Graham, Esq.

09/26/2012

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On February 29, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on April 19, 2012, and requested a hearing before an administrative judge. The case was assigned to me on June 22, 2012. DOHA issued a notice of hearing on July 11, 2012, scheduling the hearing for August 9, 2012. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 9 were

admitted without objection. Applicant testified and submitted Applicant Exhibits (AE) A through M, which were admitted without objection. The record was held open for Applicant to submit additional information. Applicant's counsel submitted an e-mail in which he commented on the evidence, but he did not submit any additional documentary evidence. The e-mail is marked Hearing Exhibit (HE) I. Department Counsel's memorandum forwarding the e-mail is marked HE II. DOHA received the hearing transcript (Tr.) on August 20, 2012.

Findings of Fact

Applicant is a 52-year-old engineer for a defense contractor. He has worked for his current employer since 1995, and he has worked in the defense industry since 1982. He seeks to retain his security clearance, which he has held for almost 30 years. He has two master's degrees. He is married with two children.[1]

Applicant and his wife operated a limited liability company (LLC).[2] The LLC opened a retail business. In June 2006, the LLC borrowed $110,000 from a bank to finance the business. The loan was guaranteed by the U.S. Small Business Administration [SBA]. The interest rate for the loan was 10.25%, payable in 120 monthly payments of $1,478. Applicant and his wife signed a promissory note on behalf of the LLC. They also executed a personal commercial guaranty of the loan, making them personally liable for the loan. The business failed after about two years, and the LLC stopped paying the loan.[3]

In October 2008, the bank sued the LLC as well as Applicant and his wife personally. In September 2009, the court issued a default judgment for the principal sum of $94,087, with interest accruing at the rate of 13.25%, plus attorneys' fees of $4,730 and costs of $449, with interest accruing at the rate of 10%. SOR ¶ 1.a alleges the underlying debt to the bank, and SOR ¶ 1.b alleges the judgment owed to the bank.[4]

Applicant submitted his Questionnaire for National Security Positions (SF 86) in October 2010. He reported a $94,087 judgment obtained by the bank. He wrote that it

[1] Tr. at 21-22, 73-74; GE 1, 2.

[2] A limited liability company is a business structure allowed by state statute. LLCs are popular because, similar to a corporation, owners have limited personal liability for the debts and actions of the LLC. Other features of LLCs are more like a partnership, providing management flexibility and the benefit of pass-through taxation. . . .The federal government does not recognize an LLC as a classification for federal tax purposes. An LLC business entity must file as a corporation, partnership or sole proprietorship tax return. *See* www.irs.gov/businesses/small/article/0,,id=98277,00.html.

[3] Tr. at 29, 43-48; Applicant's response to SOR; GE 5, 6, 8, 9; AE A, B.

[4] Tr. at 23-27, 49; Applicant's response to SOR; GE 5, 6, 8, 9; AE A, B.

was "an insured small business loan by the SBA."[5] He reported the status of the judgment as "unknown, however we believe that the SBA has satisfied this debt."[6]

Applicant was interviewed for his background investigation in November 2010. He told the investigator that the loan to the bank was insured by the SBA. He stated that he called the SBA, and he was told the loan was insured by the SBA and would be paid by the SBA. He stated that he received notice of the default judgment, but he believed the SBA was paying the loan, which would cover the judgment. He stated that if he discovers that he is legally responsible for the loan that he will contact the collection company handling the loan and make a monthly payment plan. Applicant responded to DOHA interrogatories in December 2011. He wrote that to his knowledge, the "loan was paid back to [the bank] by the SBA under the terms and conditions of the original loan." He wrote that he had not had any communication with the bank in over two years.[7]

Applicant's testimony was mostly consistent with his interview. He testified that the loan was insured by the SBA and that he thought the SBA would pay the loan. The bank wrote in February 2006 that the loan was approved subject to SBA approval. The bank wrote that Applicant could expect approximate fees of "SBA Guaranty Fee - $1,100 + $750 packaging fee." He testified that he had been working to settle the debt and judgment for almost two years. That statement is inconsistent with his interview and his response to interrogatories. Applicant stated that he sent material to the creditor some time ago, but did not hear anything back from them. He paid $15,000 on July 25, 2012, to settle the underlying debt to the bank and the judgment.[8]

Applicant and his wife invested heavily in real estate. He lived in a state where the real estate market was booming. It was also one of the hardest hit areas when the real estate market collapsed. He had funds from the sale of two properties in another state. Between 2004 and 2007, they bought 19 single-family properties for between $150,000 and $250,000. He used the money from the sale of the properties in the other state to put down payments of about 10% to 20% on the 19 properties. His plan was to use most of the properties as investment rental properties, and sell some of the properties. He had rent-to-own leases on some of the properties and sold several houses before the market collapsed. He estimates that he made about $60,000 on the sale of the properties. After the collapse, he lost most of his tenants. He was unable to sell the properties. He took out a $50,000 loan from his 401(k) retirement account and attempted to pay the mortgages and keep the houses. He was unable to do so, and he lost all but four houses to foreclosure. SOR ¶¶ 1.d and 1.e allege past-due home equity

---

[5] The SBA does not "insure" loans; it guarantees loans. "If a guaranteed loan defaults, the lender may request SBA to purchase the guaranteed portion." *See* http://www.sba.gov/category/lender-navigation/working-with-sba/become-sba-lender.

[6] GE 2.

[7] GE 8.

[8] Tr. at 27, 29, 49-52, 74-75; Applicant's response to SOR; GE 8; AE A, B.

line of credit accounts, and SOR ¶ 1.f alleges a past-due second mortgage loan. SOR ¶¶ 1.g, 1.h, and 1.i allege past-due mortgage loans.[9]

Applicant testified that he never refinanced or took out any second mortgage loans or home equity loans other than those used to purchase the properties. However, he told the investigator in November 2010 that he had a home equity credit card that he used to fix up and repair his rental properties. The credit card in question actually appears to be an unsecured credit card that was charged off for $9,494. Applicant settled that debt in 2011. Nonetheless, the state where Applicant's investment properties are located has strong anti-deficiency statutes. Applicant asserts that the lenders are precluded from obtaining a judgment against him on any deficiencies owed on the secured loans alleged in the SOR.[10]

The company holding the $6,000 past-due second mortgage loan alleged in SOR ¶ 1.f issued a letter on May 22, 2012, stating the company had closed the loan.[11]

The holder of the foreclosed mortgage loans alleged in SOR ¶¶ 1.g and 1.h issued an Internal Revenue Service (IRS) form 1099-A (Acquisition or Abandonment of Secured Property) for tax year 2010 for both loans. The first form indicated that the lender acquired the property alleged in SOR ¶ 1.g on December 29, 2010. The balance of the principal on the mortgage at that time was listed as $178,565, and the fair market value of the property was listed as $139,900. The second form indicated that the lender acquired the property alleged in SOR ¶ 1.h on December 30, 2010. The balance of the principal on the mortgage at that time was listed as $168,011, and the fair market value of the property was listed as $96,050.[12]

The holder of the foreclosed mortgage loan alleged in SOR ¶ 1.i issued an IRS form 1099-A for tax year 2009. The form indicated that the lender acquired the property on July 28, 2009. The balance of the principal on the mortgage at that time was listed as $179,020, and the fair market value of the property was listed as $127,500.[13]

Applicant does not intend to pay any of his secured loans, relying on his state's strong anti-deficiency statute. He stated that at least one of the mortgage holders would not discuss a settlement with him and told him the loan was uncollectable under state law. He stated that he lost his down payments when the houses were foreclosed. He assumed some of the banks also lost money. However, he stated that the loans "were

[9] Tr. at 30-41, 46-48, 52-64, 94; Applicant's response to SOR; GE 5, 6, 8, 9; AE D-I, K, L.

[10] Tr. at 40, 94; Applicant's response to SOR; GE 5, 6, 8, 9; AE M.

[11] Tr. at 38; Applicant's response to SOR; AE F.

[12] Tr. at 38-41; Applicant's response to SOR; AE G, H.

[13] Tr. at 41-42; Applicant's response to SOR; AE I.

investment loans. [He] paid higher interest rates to compensate them for the risk that they took."[14]

Applicant stopped paying his properties' homeowners association (HOA) dues when he stopped paying the mortgages. One HOA obtained a judgment of $817 against Applicant and his wife in October 2008. This judgment is alleged in SOR ¶ 1.c. He listed the $817 judgment on his SF 86 in October 2010. He wrote that the judgment was "paid." He listed another judgment of $3,502 awarded to the same HOA. He wrote that the "property value" was $3,502 and that he and his wife "believed that this debt was satisfied when the bank took over the investment property." He wrote that, "Payment is being made and will be satisfied in 10/2010." When he was interviewed in November 2010, he explained that he was sued by two HOAs who were represented by the same law firm, but he was only sued once by the HOA alleged in SOR ¶ 1.c. The judgment to the second HOA is not alleged in the SOR. He stated that he mistakenly consolidated both judgments on his SF 86. He told the investigator that he settled both judgments with the law firm at the same time. The judgment was listed on the interrogatories sent to Applicant in November 2011. Applicant testified that he did not find out about the judgment until he received the SOR. He testified that he paid a different judgment in 2010 and he must have confused the two judgments. He submitted proof that he satisfied the judgment alleged in SOR ¶ 1.c on March 30, 2012.[15]

Applicant and his wife owed $1,249 to a third HOA, as alleged in SOR ¶ 1.j. Applicant listed this debt on his SF 86 in October 2010. He wrote that the status of the debt was "[u]nknown, investment property was taken back by bank." When he responded to DOHA interrogatories in December 2011, Applicant wrote that "[t]his collection does not show up on our recent credit reports and no known requests for payment has been made since the property was returned to the bank." Applicant submitted proof that he paid the debt in March 2012.[16]

Applicant has not received formal financial counseling, but his real estate purchases were made upon the advice of the real estate investment firm that he worked with on the purchase of his houses. He still owns four investment properties. He has stable tenants in each property. He does not plan to buy any additional properties. He has about $480,000 in his retirement accounts and about $60,000 in stocks, bonds, and savings. He is saving to maintain an emergency fund to be used in case he loses any of his tenants.[17]

[14] Tr. at 69-72, 84-85.

[15] Tr. at 30, 76-83; Applicant's response to SOR; GE 2, 5-8, 9; AE C.

[16] Tr. at 42; Applicant's response to SOR; GE 2, 5, 6, 8, 9; AE J.

[17] Tr. at 58, 66-69, 87.

Policies

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

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security."

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

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern 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. Two are potentially applicable in this case:

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

Applicant accumulated a number of delinquent debts and was unable or unwilling to pay his financial obligations. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate financial considerations security concerns are provided under AG ¶ 20. The following are potentially applicable:

> (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
>
> (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;
>
> (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control; and
>
> (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant lived in a state where the real estate market was booming. He and his wife bought 19 properties within a three-year period. They also opened a retail business

financed through a $110,000 SBA-guaranteed loan. The economy went into a recession, and the housing market collapsed. He lost most of his tenants and his properties to foreclosure, and he closed the business and defaulted on the $110,000 loan. The recession and the collapse of the real estate market were beyond Applicant's control. To be fully applicable, AG ¶ 20(b) also requires that the individual act responsibly under the circumstances.

Applicant has not paid any deficiencies owed on his secured loans, relying on his state's strong anti-deficiency statute. He did not pay the HOAs until March 2012. He did not pay the SBA-guaranteed loan or the judgment awarded the bank until he settled the judgment for $15,000 on July 25, 2012. I am concerned that Applicant overextended himself in his retail business and investments without paying heed to the risks involved, apparently because most of the risks were borne by the lenders. He stated that the loans "were investment loans. [He] paid higher interest rates to compensate [the lenders] for the risk that they took." I am also concerned about the inconsistent statements Applicant made about several of the debts.

Applicant resolved his unsecured debts, and he is protected from enforcement of his secured debts by his state's anti-deficiency statute.[18] However, I find that Applicant has a history of making questionable financial decisions. I am unable to find that he acted responsibly under the circumstances or that he made a good-faith effort to pay all his debts.[19] His financial issues are recent. I am unable to determine that they are unlikely to recur. They continue to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 20(a) is not applicable. AG ¶¶ 20(b), 20(c), and 20(d) are partially applicable. I find that financial concerns remain despite the presence of some mitigation.

[18] *See* ISCR Case No. 10-07393 at 4 (App. Bd. Jun.12, 2012):

> Even if a delinquent debt is unenforceable under state law, a Judge must consider the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner.

[19] 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 [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 an anti-deficiency statute]) in order to claim the benefit of [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. Jun. 4, 2001)).

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in this whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

I considered Applicant's stable work record and his long history working in the defense industry. He is educated and accomplished. He resolved his unsecured debts, and he is protected from enforcement of his secured debts by his state's anti-deficiency statute. However, I remain concerned by his history of questionable financial decisions, his inconsistent statements about his debts, and the timing of the resolution of his unsecured debts.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has not mitigated financial considerations security concerns.

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
Subparagraphs 1.a-1.j:	Against 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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

_____
Edward W. Loughran
Administrative Judge