DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 11-03633
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro se*

08/07/2012

Decision

GALES, Robert Robinson, Administrative Judge:

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

Statement of the Case

On October 4, 2010, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing version of a Security Clearance Application (e-QIP).[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 October 18, 2011.[2] On February 1, 2012, DOHA issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; 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

[1] Item 5 (e-QIP), dated October 4, 2010.

[2] Item 8 (Applicant's Answers to Interrogatories, dated October 18, 2011).

29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guideline F (financial considerations), and detailed reasons why DOHA was unable to find 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 acknowledged receipt of the SOR on February 14, 2012. In a sworn statement, dated March 2, 2012, Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing.[3] A complete copy of the Government's file of relevant material (FORM) was provided to Applicant on June 15, 2012, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the FORM on June 25, 2012, and timely submitted additional documents to which Department Counsel had no objections. The case was assigned to me on July 31, 2012.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the factual allegations pertaining to financial considerations (¶¶ 1.a. through 1.e. of the SOR). Those admissions are incorporated herein as findings of fact.

Applicant is a 41-year-old employee of a defense contractor, currently serving as a non-destructive testing (NDT) inspector. A 1989 high school graduate, he attended a community college part-time for one year, but did not earn a degree. Despite working 40-60 hours per week, he is a "full-time" student at a college where he is on the honor roll seeking an associate's degree in applied science. He served on active duty in an enlisted capacity with the U.S. Navy from 1989 until 1993, when he was discharged with an honorable discharge certificate. While serving on active duty, Applicant was awarded the Navy Achievement Medal, and was presented with a letter of commendation and a letter of appreciation. Applicant was previously employed in various positions by a variety of employers. He was a sales manager with an insurance company from 1999 until 2008;[4] and a chipper operator with a wood chip mill from 2008 until 2009. He joined his present employer in 2009. Applicant's employment history between 1993 and 1999 has not been described, except for his comment that he was laid off in 2000.[5] Applicant was married to his first wife in 1992, and divorced in 1998. They have two daughters, born in 1992 and 1997. He married his current wife in 2001. They have one daughter,

[3] The matter was initially misclassified as a request for a hearing, but soon after being assigned to another administrative judge to schedule the hearing, the error was caught and, after being given an option by that administrative judge, Applicant reaffirmed his desire to have the case decided on the written record. *See*, Item 4 (Memorandum, dated June 13, 2012).

[4] While with the insurance company, Applicant received recognition on several occasions as agent of the month, agent of the year, and leading associate manager of the year.

[5] Applicant's comment pertaining to the date of his layoff has to be in error, because he also indicated he did not join the insurance company until 1999, as a result of his earlier layoff. *See*, Item 3 (Applicant's Answer to the SOR, dated March 2, 2012), at 1.

born in 2002, and one son, born in 2007. In 1989, Applicant was granted a secret security clearance.

Financial Considerations

There was nothing unusual about Applicant's finances until about 2005 when the first accounts became delinquent for various periods. Accounts also became delinquent in 2006, 2007, 2008, and 2010. Applicant denied having spending problems, and attributed his financial problems to several factors: the old farm house that he purchased without a home inspection was in worse condition than he expected, requiring extensive repairs; his 1998 divorce from his first wife and the necessity of paying her the equitable share of the equity in their home; refinancing the home mortgage to do so, resulting in higher monthly payments; being laid off in 1999 or 2000; obtaining a low-wage position with a wood chip company; and working for 100 per cent commissions with an insurance company when success was periodic and commissions, irregular. As a result of a combination of those factors, accounts became delinquent and were placed for collection or charged off. One account went into foreclosure.

When interviewed by an investigator from the U.S. Office of Personnel Management (OPM) in November 2010, Applicant was unaware of certain accounts about which he was questioned. He stated his intention to find out more about each such account and, if it was due, to make arrangements to resolve the account.

The SOR identified five purportedly continuing delinquencies, totaling approximately $168,476, of which $162,000 was the unpaid loan balance on his home mortgage. Each account is described below, reflecting both the original and present status, as follows:

- (SOR ¶ 1.a.): This is a medical account with an unidentified medical provider with an unpaid balance of $302 that was placed for collection in March 2008.

- (SOR ¶ 1.d.): This is another medical account with an unidentified medical provider with an unpaid balance of $370 that was placed for collection with the same collection agent in March 2008.

- (SOR ¶ 1.b.): This is a bank credit card account with a high credit of $3,365 that was charged off and sold to a collection agent in May 2008. The collection agent increased the balance to $4,802.

- (SOR ¶ 1.c.): This is a home mortgage loan with a high credit of $148,750 that was past due in the amount of $13,046, with an unpaid balance of $146,079, as of October 2010. Foreclosure proceedings were initiated, and the account was sold to a credit agent who increased the past-due balance to $32,655, and the unpaid balance to $162,000.

- (SOR ¶ 1.e.): This is a telephone account with a past-due balance of $1,002 that was placed for collection in October 2010. While the account is listed in

an October 2010 credit report,[6] it no longer appears in his September 2011 credit report.[7] Applicant offered no documentary evidence of any payments having been made on any of the above accounts.

The child support obligation for Applicant's daughter from his first marriage was reduced from $440 per month to $50 per month, as she is now 19 years old; he has reduced expenses by discontinuing smoking; cancelling cable television; discontinuing extra curriculum sports for the children; rejecting new credit cards; making dietary changes; and postponing the purchase of a new automobile. In doing so, Applicant has managed to remain current on his remaining accounts. In January 2012 – before the issuance of the SOR – he sought professional guidance on how to deal with his delinquent debt and engaged the professional services of an attorney to enable him do so.[8] It was recommended that Applicant seek the protection of bankruptcy.

On February 18, 2012, Applicant obtained credit counseling on line, but no debt repayment plan was prepared.[9] On March 14, 2012, having satisfied the bankruptcy means test, Applicant filed a voluntary petition for bankruptcy under Chapter 7 of the United States Bankruptcy Code.[10] In it, he listed $14,673 in assets, and $163,645 in liabilities. All the accounts identified in the SOR, along with the creditors, collection agents, and debt purchasers connected to those accounts, were listed in the bankruptcy petition. On June 27, 2012, Applicant's unsecured nonpriority claims, including those listed in the SOR, were discharged.[11] All of the SOR accounts have been resolved.

In March 2012, Applicant's gross monthly income was $4,360,[12] which, if calculated over a period of 12 months, equals an annual salary of approximately $52,320. In calendar year 2011, he earned a gross income, including overtime, of $59,504.[13]

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."[14] As Commander in Chief,

[6] Item 6 (Combined Experian, TransUnion, and Equifax credit report, dated October 16, 2010).

[7] Item 7 (Equifax credit report, dated September 21, 2011).

[8] Letter from attorney, dated February 28, 2012, attached to Item 3, *supra* note 5.

[9] Certificate of Counseling, dated February 18, 2012, attached to Item 3, *supra* note 5.

[10] Item 10 (Voluntary Petition, dated March 14, 2012).

[11] Discharge of Debtor, dated June 27, 2012, attached to Applicant's Response to the FORM.

[12] Item 10, Form 22A (Chapter 7 Statement of Current Monthly Income and Means-Test Calculation, dated March 14, 2012).

[13] Item 10 (Statement of Financial Affairs, dated March 14, 2012).

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

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."[15]

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."[16] 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.[17]

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 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.

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

[16] "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).

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

Furthermore, "security clearance determinations should err, if they must, on the side of denials."[18]

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."[19] 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. Applicant's financial problems commenced in about 2005 when some accounts became delinquent for various periods, and other accounts followed. Some accounts were placed for collection, charged off, or, in one instance, went to foreclosure. AG ¶¶ 19(a) and19(c) apply.

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*

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

[19] *See* Exec. Or. 10865 § 7.

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*."[20]

AG ¶¶ 20(a) and 20(b) partially apply. Applicant's financial problems commenced in 2005 when he began falling behind on some of his payments. He attributed his financial problems to several factors, some of which were beyond his control, and some of which had an indirect impact on his ability to remain current: the old farm house that he purchased without a home inspection was in worse condition than he expected, requiring extensive repairs; his 1998 divorce from his first wife and the necessity of paying her the equitable share of the equity in their home; refinancing the home mortgage to do so, resulting in higher monthly payments; being laid off in 1999 or 2000; obtaining a low-wage position with a wood chip company; and working for 100 per cent commissions with an insurance company when success was periodic and commissions, irregular. Applicant's financial situation began to deteriorate, and although he managed to maintain most of his accounts in a current status, over the next few years, he could not do so with the remaining accounts. There were only five delinquent accounts throughout the years, and all of them have now been discharged in bankruptcy. Applicant's financial problems were thus relatively infrequent, and considering his current clean financial slate, they are unlikely to recur. While he was previously unable to remain current on all his accounts, he was able to do so with the majority of them. Considering his unspecified past positive efforts, the circumstances surrounding his past financial problems, and his current clean financial status, there is no doubt cast on his current reliability, trustworthiness, or good judgment.[21]

AG ¶¶ 20(c) and 20(d) apply. Over the years, Applicant managed to maintain most of his accounts in a current status. However, some of them, through a variety of circumstances, became delinquent. In February 2012, Applicant obtained credit counseling on line, but no debt repayment plan was prepared. There is substantial

[20] 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 she 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)).

[21] *See* ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

mitigating value in the type of financial counseling he received. In March 2012, having satisfied the bankruptcy means test, Applicant filed a voluntary petition for bankruptcy under Chapter 7. All the accounts identified in the SOR, along with the creditors, collection agents, and debt purchasers connected to those accounts, were listed in the bankruptcy petition. In June 2012, Applicant's unsecured nonpriority claims, including those listed in the SOR, were discharged. Accordingly, all of the SOR accounts have been resolved.[22] Circumstances may have been such that Applicant was unable to resolve all of his accounts by bringing them up-to-date or resolving them before the SOR was issued, but he did do so with most of his non-SOR accounts. His failure with respect to his five remaining accounts, all of which have been resolved through bankruptcy discharge, was not for lack of trying.[23]

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.

[22] There is some duplication of debts in Appellant's bankruptcy schedules. In a bankruptcy filing, most debtors list potential creditors, even when the debt may have been resold or transferred to a different collection agent or creditor, to ensure notice, and reduce the risk of subsequent dismissal of the bankruptcy. If Appellant failed to list some debts on his bankruptcy schedules, this failure to list some debts does not affect their discharge. Absent fraud, in a no-asset bankruptcy, all unsecured, nonpriority debts are discharged when the bankruptcy court grants a discharge, even when they are not listed on a bankruptcy schedule. *See Judd v. Wolfe*, 78 F.3d 110, 114 (3d Cir. 1996); *Francis v. Nat'l Revenue Service, Inc.*, 426 B.R. 398 (Bankr. S.D. FL 2010), *but see First Circuit Bucks Majority on Discharge of Unlisted Debt in No-Asset Case*, American Bankruptcy Institute, 28-9 ABIJ 58 (Nov. 2009). There is no requirement to re-open the bankruptcy to discharge the debt. *Collier on Bankruptcy*, Matthey Bender & Company, Inc., 2010, Chapter 4-523, ¶ 523(a)(3)(A).

[23] "Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

There is some evidence against mitigating Applicant's conduct. He allowed five accounts to become delinquent, and they were either placed for collection, charged off, sold, or went to foreclosure. He did not resolve those accounts by paying them off, but by having them discharged under a Chapter 7 bankruptcy.

The mitigating evidence under the whole-person concept is more substantial. Applicant's financial problems commenced in 2005, and periodically occurred again over the period of several years. As noted above, the financial problems were in varying degrees beyond his control, or had an indirect impact on his ability to remain current. Applicant managed to maintain most of his accounts in a current status, but over the next few years, he could not do so with the remaining accounts. There were only five delinquent accounts throughout the years, and all of them have now been discharged in bankruptcy. Now that the remaining five accounts have been discharged, he has been given a new lease on his financial situation. Furthermore, his expenses have been reduced in varying ways, and his has modified his spending habits. The child support obligation for his daughter from his first marriage was reduced from $440 per month to $50 per month as she is now 19 years old; he has reduced expenses by discontinuing smoking; cancelling cable television; discontinuing extra curriculum sports for the children; rejecting new credit cards; making dietary changes; and postponing the purchase of a new automobile. In doing so, Applicant has managed to remain current on his remaining accounts. In January 2012 – before the issuance of the SOR – he sought professional guidance on how to deal with his delinquent debt and engaged the professional services of an attorney to enable him do so. He followed the advice that he received. *See* AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:[24]

> 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

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

requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

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.[25] Applicant has demonstrated a meaningful track record of debt reduction and elimination. Overall, the evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has mitigated 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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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ROBERT ROBINSON GALES
Administrative Judge

[25] *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).