DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[REDACTED]	)	ISCR Case No. 15-02021
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Daniel F. Crowley Esq., Department Counsel
For Applicant: *Pro se*

01/27/2017

Decision

MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline F. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on November 1, 2012. On October 23, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent her a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DOD CAF acted under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant answered the SOR on November 11, 2015,[1] and requested a decision on the record without a hearing. Department Counsel submitted the Government's written case on January 29, 2016. On February 2, 2016, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections

[1] Applicant included nine attachments with her SOR answer, which I have marked as Applicant's Exhibits (AX) 1 through 9.

and submit material to refute, extenuate, or mitigate the Government's evidence. She received the FORM on February 8, 2016, and submitted her response on March 1, 2016, to which the Government did not object.[2] The case was assigned to me on December 12, 2016.

Findings of Fact[3]

Applicant is 35 years old and has been married since 2006. She and her husband have one child, age 4. She received a bachelor's degree in May 2005. She is a senior electrical engineer, employed full time by a federal contractor since June 2005.

Applicant and her husband purchased a home for their primary residence in March 2007 for $299,900. They financed the entire purchase price of the home, with a first-mortgage loan of $239,000 and a second-mortgage loan of $59,900. In August 2011, after they realized that the combined balances of these two mortgage loans were significantly higher than the fair market value of their home (i.e. "underwater") due to the housing market crash, she and her husband decided to stop making payments on their mortgage loans (i.e. "strategically default").[4] Based on information obtained from home-estimate websites, they believed that the value of their home had decreased to approximately $150,000. Applicant and her husband also believed that they would never recover the loss in value before the balloon payment on their second-mortgage loan became due in 2022. In June 2012, she and her husband vacated the home. The first-mortgage lender foreclosed on the home in July 2012, and the trustee sold it at public auction that same month for approximately $189,000.

Applicant further asserts that she and her husband stopped paying their mortgage loans because they feared the possibility that one or both of them could be laid off, and because she was pregnant. Initially, they were concerned about the increased expenses associated with raising a healthy child (including childcare) and her reduced maternity-leave income. However, when tests suggested that their child could be born with special needs, they were also worried about the possibility of extraordinary medical expenses and decreased income due to the need for Applicant to stay home full time. Fortunately, neither Applicant nor or her husband were laid off nor was their child born with special needs. However, she and her husband believed then, and still believe now, that "strategically defaulting" on their mortgage loans was necessary to ensure the well-being of their financial future; and was a better and more proactive approach to the alternative

[2] Applicant included four attachments with her FORM response, which I have marked as AX 10 through 13.

[3] I have extracted these facts from Applicant's FORM response, SOR answer (Item 2), security clearance application (Item 3), and the summary of her background investigation interview (Item 5) unless otherwise indicated by a parenthetical citation to another item in the record. I considered that the summary of the in-person interview conducted during Applicant's background investigation (Item 5) was not authenticated as required by Directive ¶ E3.1.20. However, Department Counsel informed Applicant that she was entitled to make corrections, additions, deletions, and updates to Item 5. Applicant was also informed that she was entitled to object to consideration of Item 5 on the ground that it was not authenticated. Applicant did neither in her response to the FORM.

[4] They did, however, continue to pay their homeowner's association dues through July 2012.

option of waiting for an actual financial crisis to occur. They also reduced expenses by renting a less expensive home and purchasing a less expensive vehicle.

Applicant and her husband did not attempt a loan refinance, in part, because the second-mortgage loan was not eligible and, therefore, the balloon payment issue would remain unresolved; and, in part, because they believed that they could not qualify based on the value of their home and their income. They also did not attempt a loan modification because they believed that they could not qualify. They did attempt to short sell the home, but the lender refused to accept the offers. While Applicant does not provide the basis for the refusal, she explained that it was common practice at the time for lenders not to accept a short sale offer without additional cash from the borrower. Applicant provided copies of three offers, one dated July 14, 2012, and two dated July 15, 2012, but offered no evidence of any prior efforts to short sell the home. At some point,[5] Applicant sought the advice of a real estate attorney. This attorney advised them about tax breaks that could apply to relieve them of the expected large tax burden associated with a foreclosure or short sale of their home, but warned that he expected them to expire at the end of 2012. This attorney also advised them about a "buy and bail" approach that they were not comfortable pursuing. Applicant did not state whether this attorney also advised them about refinancing and modifications. Instead, Applicant explains that she and her husband based those decisions on their "understandings" of the various programs and rules. Beyond the last-minute short sale attempts, Applicant did not present evidence that either she or her husband otherwise had communications with their mortgage lenders at the various stages in the process to attempt to resolve their mortgage loan delinquencies (either before or after they chose to stop making their mortgage loan payments, the foreclosure, or the trustee's sale).

Applicant's first-mortgage loan account was charged off after foreclosure (SOR ¶1.a). The charge-off amount of $226,337 reflected in the credit reports[6] is incorrect in light of the record evidence. The first-mortgage loan balance at the time of foreclosure was $242,936 and the home was sold at the trustee's sale for approximately $189,000. The resulting deficiency balance is $53,936, which is the amount that would have been charged off by the lender. Her second-mortgage loan account was charged off after foreclosure in the approximate amount of $53,464 (SOR ¶1.b).[7] In her SOR answer, Applicant denied owing either amount. Applicant claims that her state's anti-deficiency statute prohibits her lender from collecting any deficiency balance on her first-mortgage loan. (AX 2 and AX 3.) Applicant's first-mortgage lender has never pursued collecting the deficiency balance. Applicant provided contradictory evidence of the status of her second-mortgage loan: a deed of release showing the loan as "paid in full" as of September 2015 (AX 5); and an account statement showing a $53,464 balance due as of March 2016 (AX

[5] Applicant did not state whether she sought this advice before or after they stopped making their mortgage loan payments.

[6] Item 7 at #20. *See also* AX6 at p. 2, AX7 at p. 17, AX 8 at pp. 3-4 and 24-25.

[7] Item 7 at #21. *See also* AX 8 at pp. 25-26 and AX 11. I considered that this debt does not appear in AX 6 and appears in AX 7 at p. 17 as paid. I also considered the Deed of Release that reflects this debt as "paid in full" (AX 5).

11). Applicant was "in the process" of disputing the debts alleged in SOR ¶¶ 1.a and 1.b. in March 2016.

As of March 2016, Applicant and her husband earned a combined annual salary of approximately $180,000, and maintained savings of about $8,400 (AX 13) and retirement assets of about $394,000 (AX 13).[8] There is no information in the record about their income, assets, or expenses from the years 2011 or 2012. Sometime between November 2015 and March 2016, Applicant and her husband purchased a new home with a down payment of $13,000 and paid off the debt related to a vehicle that they had purchased in January 2015 for $29,200.[9]

Applicant has not received financial counseling, but her most recent credit reports reveal no new delinquent debt (AX 6, AX 7, AX 8). Applicant currently lives within her means and manages her current finances responsibly. Applicant's direct supervisor describes her work as "exemplary" and avers that she "conducts herself with dignity, truthfulness and honesty." (AX 9.) Applicant has maintained a security clearance for over 10 years without incident. She contends that the facts of her case are analogous to those set forth in a colleague's December 2014 DOHA security clearance decision and that, therefore, I should find in her favor (AX 10).

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard

[8] Applicant and her husband also have maintained a college fund for their child for an unspecified duration and of an unspecified amount.

[9] I obtained the purchase date and price from AX 6 at pp. 15-16, AX 7 at p. 22, and AX 8 at p. 5.

classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR ¶. *See Egan*, 484 U.S. at 531. "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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline F (Financial Considerations)

The concern under this guideline 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 . . . .

This concern is broader than the possibility that a person might knowingly compromise classified information to raise money. It encompasses concerns about a person's self-control, judgment, and other qualities essential to protecting classified information. A person who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. *See* ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's credit bureau reports establish two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations") based on a first-mortgage debt (SOR ¶1.a) and a second-mortgage debt (SOR ¶ 1.b).

The security concerns raised in the SOR may be mitigated by any of the following potentially applicable factors:

> 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;
>
> 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;
>
> 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; and
>
> AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

AG ¶ 20(a) is not established. While Applicant is no longer liable for her delinquent mortgage loan debts, the circumstances under which the debts occurred cast doubt on Applicant's current reliability, trustworthiness, and good judgment, as more fully discussed below.[10]

AG ¶ 20(b) is not established. There are no facts in the record that Applicant stopped paying her mortgage loans due to circumstances that were largely beyond her control. I considered that the housing market crash caused her mortgage loans to be underwater as of August 2011. However, there is no evidence that Applicant or her husband's actual income or expenses prevented them from paying their mortgage loans

[10] Even if an applicant has actually paid his debts, a Judge may still consider the circumstances underlying the debts for what they may reveal about the applicant's eligibility for a clearance. *See* ISCR Case No. 15-00216 at 4 (App. Bd. Oct. 24, 2016).

after August 2011. Applicant admits that their decision to stop paying the mortgage loans stemmed from fears of potential changes in income and expenses that never actually materialized.

AG ¶ 20(c) is partially established. Applicant has not received financial counseling. Although she never actually paid her delinquent mortgage debt, it has been resolved; and Applicant has otherwise maintained her finances responsibly.

Her state's anti-deficiency statute applies to alleviate Applicant's liability for the deficiency balance of her first-mortgage loan. Furthermore, Applicant's lender filed a deed of release disclosing that her second-mortgage loan was paid in full.[11]

The following are the relevant portions of her state's anti-deficiency statute:[12]

> A. Except as provided in subsections F, G and H of this section, within within ninety days after the date of sale of trust property . . . , an action may be maintained to recover a deficiency judgment against any person directly, indirectly or contingently liable on the contract for which the trust deed was given as security including any guarantor of or surety for the contract and any partner of a trustor or other obligor which is a partnership. In any such action against such a person, the deficiency judgment shall be for an amount equal to the sum of the total amount owed the beneficiary as of the date of the sale, as determined by the court less the fair market value of the trust property on the date of the sale as determined by the court or the sale price at the trustee's sale, whichever is higher. . . .
>
> D. If no action is maintained for a deficiency judgment within the time period prescribed in subsection[] A . . . of this section, the proceeds of the sale, regardless of amount, shall be deemed to be in full satisfaction of the obligation and no right to recover a deficiency in any action shall exist.
>
> G. If trust property of two and one-half acres or less which is limited to and utilized for either a single one-family or a single two-family dwelling is sold pursuant to the trustee's power of sale, no action may be maintained to recover any difference between the amount obtained by sale and the amount of the indebtedness and any interest, costs and expenses."

Given the plain language of this statute, one could arguably find Applicant not liable for the deficiency balance of her first-mortgage loan under two bases. First, pursuant to

[11] I accorded more evidentiary weight to the recorded deed of release than to the account statement.

[12] AX 2

subsection G, she would not be liable if her home is deemed a single one-family dwelling of two and one-half acres or less. Second, pursuant to subsection D, she would not be liable if her lender failed to timely pursue an action for a deficiency judgment. While Applicant's home was a single one-family dwelling, there are no record facts about the acreage of the home so I cannot find that subsection G applies. However, because the lender has not pursued an action for a deficiency judgement since the July 2012 trustee's sale, I find that subsection D applies.

AG ¶ 20(d) is not established. I credit Applicant for continuing to pay her homeowner's association fees until the trustee's sale, for seeking a real estate attorney's advice, and for attempting to short sell her home (*albeit* at the last minute). However, she did not otherwise put forth a good-faith effort to honor the terms of her mortgage loan once she decided that doing so would not be in her family's best financial interest. While Applicant may have contemplated less self-serving reasons than initially reported to justify her "strategic default," at the heart of her decision-making was a choice to protect her self-interest above her legal obligations. Although, legally, she is no longer responsible for the monetary consequences of that decision, there remains a concern with respect to her security worthiness. As an individual seeking to obtain the benefit of a privilege and not a right, she is held to a higher standard for actions that might otherwise be considered innocuous. Applicant's decision to "strategically default" on her mortgage loans demonstrates a willingness to place her own self-interest above her obligations. I am, therefore, left with doubt as to whether she may also act similarly in the context of her security obligations.

Further regarding the issue of good-faith effort, I want to address Applicant's contention that her case is analogous to that of my colleague's December 2014 decision. It is not. Moreover, even if it were, the decision is not a binding precedent that would require me to find in Applicant's favor.[13]

Whole-Person Concept

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. In applying the whole-person concept, an 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. An 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

[13] Although Hearing Office decisions may be cited as persuasive authority, they are not binding legal precedent which must follow in another situation. *See* ISCR Case No. 09-08248 at 2 (App. Bd. Aug. 22, 2011).

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.

I have incorporated my comments under Guideline F in my whole-person analysis, and I have considered the factors listed above. Because Applicant requested a determination on the record without a hearing, I had no opportunity to evaluate her credibility and sincerity based on demeanor. See ISCR Case No. 01-12350 at 3-4 (App. Bd. Jul. 23, 2003). After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns raised by her financial indebtedness. Accordingly, I conclude that she has not carried her burden of showing that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR ¶:

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraph 1.a	Against Applicant
Subparagraph 1.b	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge