DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 09-03773
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Gregg A. Cervi, Esquire, Department Counsel
For Applicant: *Pro Se*

January 29, 2010

Decision

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) listed three delinquent debts, totaling $30,000, and a bankruptcy in 1996. He resolved the three SOR debts. All of his legally enforceable accounts and debts are current. Financial considerations concerns are mitigated, and eligibility for access to classified information is granted.

Statement of the Case

On March 10, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) or Security Clearance Application (SF 86) (GE 1). On August 5, 2009, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified; and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline F (financial considerations) (Hearing Exhibit (HE) 2). The SOR detailed reasons why DOHA could not make the

preliminary affirmative finding under the Directive 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 Applicant's clearance should be granted, continued, denied, or revoked (HE 2).

On September 1, 2009, Applicant responded to the SOR (HE 3). Initially, he waived his right to a hearing (Transcript (Tr.) 13). After Applicant received the file of relevant materials or FORM from Department Counsel, he requested a hearing before an administrative judge (Tr. 13-14). On October 15, 2009, Department Counsel indicated he was ready to proceed on his case. On October 19, 2009, DOHA assigned Applicant's case to me. On November 13, 2009, DOHA issued a hearing notice (HE 1). On December 15, 2009, Applicant's hearing was held. At the hearing, Department Counsel offered seven exhibits (GE 1-7) (Tr. 19), and Applicant offered nine exhibits (Tr. 21-22; AE A-I). There were no objections, and I admitted GE 1-7 (Tr. 19-20), and AE A-I (Tr. 22). Additionally, I admitted the hearing notice, SOR, and response to the SOR (HE 1-3). On December 23, 2009, I received the transcript. On January 7, 2010, I received five exhibits from Applicant (AE J-N). Department Counsel did not object (HE 4), and AE J-N were admitted into evidence that same day. I held the record open until January 14, 2010, to permit Applicant to provide additional documentation (Tr. 65).

Findings of Fact[1]

In his SOR response, Applicant denied the three SOR debts and admitted the chapter 7 bankruptcy discharge of his debts in May 1997 (HE 3). His SOR response did not explain why he denied the debts in SOR ¶¶ 1.a to 1.c (HE 3).

Applicant is a 48-year-old program planner (Tr. 7; GE 1 at 15). From February 2009 to the present, he has been employed by a corporate employer in state A (Tr. 23). Another corporate employer in state A employed him from November 2008 to February 2009 (Tr. 23). Corporate employers in California employed him from February 2001 to October 2008 (Tr. 24). In 1980, Applicant graduated from high school (Tr. 7). In 1991, he earned a bachelors degree in business management (Tr. 7). He has never served in the military (Tr. 7). He has held a security clearance since 2000 (Tr. 8).

Applicant has never been married (GE 1 at 27). His son was born in 1981 (GE 1 at 30). His son and his son's family live in state A (Tr. 50). Applicant took a pay cut from an annual salary of $150,000 to $130,000 to live in the same state as his son (Tr. 50). He wanted employment that was less stressful (Tr. 52). He is currently living in a one bedroom condo (Tr. 51). He was having stress-related medical problems when he lived in California, and his health is better now that he lives in state A (Tr. 52).

[1]Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Financial Considerations

Applicant's SOR listed three delinquent mortgage debts totaling $30,000. The SOR alleged the following delinquent amounts on those three debts: ¶ 1.a ($26,000); ¶ 1.b ($3,000); and ¶ 1.c ($1,000) (HE 2).

A Chapter 7 Bankruptcy court discharged Applicant's debts in May 1997 (SOR ¶ 1.d). At the time of his bankruptcy, he owed a total of about $6,500, which included a vehicle loan, a small amount on a credit card, and $50 owed a store (Tr. 25-26, 59). His failure to repay the vehicle loan resulted in a judgment (Tr. 58). He was having financial difficulty because of the expense of raising his son (Tr. 26). He described his decision to use Chapter 7 of the Bankruptcy Code to discharge this relatively small amount of debt as foolish (Tr. 26).

SOR ¶¶ 1.a (1st mortgage debt—SOR $26,000—actually $647,000) and 1.b (2nd mortgage debt—SOR $3,000—actually $105,000) RESOLVED THROUGH DEED TRANSFER TO LENDER VIA FORECLOSURE.[2] In January 2005, Applicant purchased a home in California (hereinafter home R) for $765,000 (Tr. 31). He had an appraisal, which showed a market value of $785,000, and he thought it was a prudent purchase (Tr. 72). He raised funds for this purchase from four sources. He borrowed $610,000 from the mortgage lender in SOR ¶ 1.a (AE D at 4, 5). He took out a second mortgage with another lender for $100,000 (Tr. 29; AE D at 3). He borrowed $50,000 on a line of credit secured to another home in California that he has owned since 1991 (hereinafter 1991 home) (AE D at 4). He used $5,000 from a personal savings account. He lived in home R from January 2005 to October 2007 (Tr. 32). There was a fire in the close vicinity to home R in 2007, which burned several nearby homes (Tr. 32). In November 2007, Applicant moved back into his 1991 home. From November 2007 to November 2008, Applicant rented home R to a neighbor who lost his home in the fire (Tr. 32). The monthly rent he received for home R from November 2007 to November 2008 was $4,000 (Tr. 33). The monthly mortgage payments and association fees on home R were about $4,700 (Tr. 33-34). Applicant hoped and believed the renters might purchase home R; however, they did not purchase home R and instead chose to rebuild their home (Tr. 34).

After November 2008, home R was vacant, and Applicant stopped making his mortgage payments (Tr. 35). By February 2009, the first mortgage was delinquent $17,708 (AE D at 4). Eventually the first mortgage fell behind approximately $53,901, and home R went into foreclosure on November 30, 2009 (Tr. 67; AE D at 4). While home R was vacant, Applicant paid the utilities, water, maintenance of the yard, and homeowners association fees (Tr. 37). These costs were about $600 per month (Tr. 37-38).[3]

[2] Unless stated otherwise, the source for the facts in this paragraph is Applicant's June 30, 2009, statement (GE 2).

[3] At the hearing, Applicant was not asked about the real estate taxes and insurance on home R. However, I assume he paid these debts, as they do not appear on his credit report. These costs are probably substantial.

After November 2008, the most proposed rent for home R was about $2,200, which was less than half the amount of his monthly mortgage payments and expenses (Tr. 38). He did not rent home R after November 2008. Early in 2009, he listed home R with a realtor (Tr. 39). Early in 2009, the first mortgage company offered to reduce the monthly mortgage payment from $4,600 to $4,000 for six months; however, he did not accept this offer (Tr. 39). He had three offers to purchase home R at a price from $465,000 to $485,000 (Tr. 40). The first mortgage lender accepted a short sale at $486,000 with closing required by November 27, 2009 (Tr. 41). Although the second mortgage lender agreed not to object to the short sale, the second mortgage lender was expressly authorized to pursue a deficiency judgment (Tr. 42). One offer was submitted before the deadline, and then the purchaser withdrew the offer at the last minute because their child broke out in hives after they were at home R (Tr. 42). The first mortgage lender promised to extend the deadline until November 30, 2009 (Tr. 44). Applicant and his realtor submitted another offer for $474,000 on November 30, 2009; however, the employee at the first mortgage lender was gone, and another employee did not accept the offer because it was past the deadline (Tr. 40, 43-44; AE G). The first mortgage lender put home R into foreclosure on or about December 1, 2009 (Tr. 45). Home R sold in foreclosure for $418,123 (Tr. 47; AE K at 2).

After the foreclosure, the first mortgage company informed Applicant he would not be pursued for additional funds (Tr. 48). A January 7, 2010, letter from the first mortgage creditor "confirm[ed] that [the creditor] will not pursue any deficiency balance associated with" Applicant's loan (AE J at 3). The first mortgage creditor explained the "foreclosure has been completed . . . and the account is considered settled" (AE J at 3).

Applicant said if it eventually turned out that he still owed the second mortgage creditor he would pay the debt (Tr. 72). He promised to immediately start a payment plan (Tr. 72). However, a January 6, 2010, letter from the second mortgage creditor stated the creditor will not pursue the deficiency (AE K at 2). The creditor notes a loss to the creditor of $105,188, but also states Applicant's obligations to the creditor are concluded (AE K at 2).

Applicant's attorney discussed Applicant's potential liability on the first and second mortgages on home R.[4] He listed his qualifications, and indicated the first and second mortgages were used to purchase home R. The two loans were secured by deeds of trust. Neither loan was modified or rewritten after the purchase. On December 7, 2009, the first mortgagor conducted a nonjudicial trustee's public sale of the property. After the sale, the first mortgagor took title to the property, and extinguished the interest of the second mortgagor. Citing California Code of Civil Procedure sections 580b and 580d, lenders are forbidden from recovering deficiency judgments on purchase money

[4] AE M, a December 29, 2009, letter from Applicant's attorney, is the source for the facts in this paragraph. A copy of California Code of Civil Procedure, sections 580b and 580d, are attached to his letter.

loans given to consumer borrowers to purchase personal dwellings. Thus, the creditors cannot attempt to collect from Applicant, and if they did so, he could seek damages in a civil action.

SOR ¶ 1.c (mortgage debt—$1,000) PAYMENT PLAN, RESOLVED. Applicant purchased the home D for $150,000 and it is probably worth about $250,000 now (Tr. 27). The home D has been rented since November 2008, when Applicant moved to state A (Tr. 27). His rent is $1,900 monthly (Tr. 27). On August 20, 2009, Applicant's principal balance owed to the creditor in SOR ¶ 1.c was $323,406 (AE C at 4; AE D at 4). His monthly payment to the creditor in SOR ¶ 1.c is $1,640 (AE C at 2). An October 13, 2009, letter from the creditor in SOR ¶ 1.c notes one payment 30 days late in the last 24 months (AE C at 1). The creditor wrote the credit reporting companies and requested removal of the 30-day-late derogatory information from Applicant's credit report (AE C at 1). Applicant also borrowed $50,000 secured by his 1991 home, which he applied as part of the funding used to purchase home R (Tr. 29; GE 5 at 7; AE D at 4). Both of his mortgages on his home D are current, including his $50,000 second mortgage (Tr. 29, 58; GE 5 at 7; AE D at 4). Both mortgages are paid using an automatic payment from his account (Tr. 54; AE C at 2).

Applicant's monthly gross pay is $9,216, and his monthly net pay is $5,784 (Tr. 53, 56; GE 2 at 14). He deposits $920 a month into his 401(k) plan (Tr. 53). His monthly expenses are $3,330, and his monthly debt payments are $854 (Tr. 56). He is making payments on a $2,500 loan, and he took out a signature loan to repay a loan from his 401(k) account (Tr. 55). His remainder is about $1,600 (Tr. 56). He has approximately $185,000 in his 401(k) account (Tr. 57). He does not have any deficiencies or delinquent accounts (Tr. 57). He borrowed $2,500 against his 401(k) and he is not able to borrow any more money using his 401(k) as security (Tr. 57). His vehicle loan with a high balance of $13,000 shows "pays as agreed"(Tr. 63; AE D at 4). A $30,000 line of credit was "paid as agreed" and closed in 2004 (AE D at 5). Other accounts in his credit reports, except the three listed in the SOR, show a history of "paying as agreed" and a zero balance (Tr. 63; AE D).

On December 20, 2009, Applicant completed financial counseling (AE L). He also generated a budget. The information in this budget is similar to the one discussed in the previous paragraph (AE L). His net monthly pay, after deduction of expenses and debt payments, leaves a surplus of $935 (AE L at 5).

Character Evidence

Applicant provided letters from three character references, who have known him collectively for many years (AE E 1-3). They describe him as honest, dedicated, loyal, and responsible. He is a consummate professional. He has solid integrity and ethics.

The record evidence includes three certificates of extraordinary contribution and outstanding performance, which were issued by Applicant's employer (AE E at 4-6). These three certificates are dated December 11, 2009, November 25, 2009, and October 30, 2009.

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." *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 applicant's 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 the applicant may deliberately or inadvertently fail to protect or 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. 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." *See* Exec. Or. 10865 § 7. *See also* Executive Order 12968 (Aug. 2, 1995), Section 3. 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 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

The administrative judge's decision to grant a clearance is not a final decision unless the parties choose not to appeal. *See* Directive ¶¶ E3.1.28 to E3.1.39. The DOHA Appeal Board[5] may reverse the administrative judge's "decision to grant, deny, or revoke a security clearance if it is arbitrary, capricious, or contrary to law." ISCR Case No. 07-16511 at 3 (App. Bd. Dec. 4, 2009) (citing Directive ¶¶ E3.1.32.3 and E3.1.33.3.).[6] The federal courts generally limit appeals to whether or not the agency complied with its own regulations.[7]

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[5]Fact finding and credibility determinations are reserved exclusively for the administrative judge who is in a position to observe the demeanor of the witnesses. *See* See, 36 F.3d at 382 (citations omitted). The Appeal Board has noted that it does not make "de novo findings of fact." ISCR Case No. 08-06058 at 3 n.1 (App. Bd. Sept. 21, 2009). Appeal Boards and federal courts review the administrative judges' factual determinations to ensure they are supported by substantial evidence in the record. *See See,* 36 F.3d at 382 *Id.*; *Dehue Coal Company v. Ballard*, 65 F.3d 1189, 1193-1194 (4th Cir. 1995). Review authorities defer to the administrative judges' credibility determinations and inferences from the evidence. *Id*. The federal courts review Appeal Board decisions without giving deference to the factual findings of the Appeal Board. *See See*, 36 F.3d at 380 (citations omitted). The Appeal Board cannot "substitute its own fact findings and judgment for" those of the administrative judge. *Id*. at 382. In 2005, the Second Circuit cogently articulated how appellate authorities resolve errors Immigration Judges make at the hearing level. In *Lin v. DoJ*, 428 F.3d 391, 395 (2nd Cir. 2005), the court explained that in the resolution of error, an appellate authority is required to:

> (1) defer to the IJ's fact-finding and affirm [the hearing judge's decision] when the fact-finding is based on specific and cogent reasons not infected by legal error; (2) remand where identified errors leave [the appellate authority] in doubt whether the IJ would have reached the same result absent the errors; (3) affirm, despite IJ errors, when the [appellate authority] can confidently predict that the IJ would necessarily reach the same result absent errors; and (4) grant the [appeal of the hearing judge's decision] only in those extremely rare instances where substantial evidence does not exist to support the IJ's decision.

Judge White's dissenting opinion explains why credibility determinations and ultimately the decision whether to grant or deny a clearance should be left to the judge who makes such determinations. *See* ISCR Case No. 05-01820 at 5-7 (App. Bd. Dec. 14, 2006). *See also* ISCR Case No. 04-06386 at 10-11 (App. Bd. Aug. 25, 2006) (Harvey, J., dissenting) (discussing limitations on Appeal Board's authority to reverse hearing-level judicial decisions and recommending remand as a remedy to resolve material, prejudicial error). *See also FCC v. Allentown*, 349 U.S. 358, 364 (1955).

[6]Although the Administrative Procedure Act (APA) does not apply to security clearance determinations, the "arbitrary, capricious, or contrary to law" standard is derived from the APA. *See Webster v. DOE*, 486 U.S. 592, 598 n.5 (1988) (quoting 5 U.S.C. § 706(2)(A)). *See also United States v. Gregory*, 534 U.S. 1, 6-8 (2001) (noting the standard for Merit Systems Protection Board under 5 U.S.C. § 7703 is the same as for the APA and describing the standard as "extremely narrow" and limited to determining whether "minimal standards set forth in statute" are met).

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guideline F (financial considerations).

Financial Considerations

AG ¶ 18 articulates the security concern relating to financial problems:

> 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.

AG ¶ 19 provides two Financial Considerations Disqualifying Conditions that could raise a security concern and may be disqualifying in this case: "(a) inability or unwillingness to satisfy debts;" and "(c) a history of not meeting financial obligations." "It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply." ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010) (internal citation omitted). Applicant's history of delinquent debt is documented in his credit reports, his response to DOHA interrogatories, and his statement at his hearing.

On May 24, 1996, Applicant discharged about $6,500 in delinquent debt using Chapter 7 of the Bankruptcy Code. In November 2008, he stopped making his mortgage payments on home R, generating about $4,600 in delinquent debt every month until the first mortgage holder filed for foreclosure in November 2009. The government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

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[7] *See El-Ganayni v. DOE*, 2010 U.S. App. Lexis 548 (3d Cir. Oct. 28, 2009) (limiting constitutional challenges to a security clearance determination because merits of an agency's security clearance decision are not reviewable); *Makky v. Chertoff*, 541 F.3d 205, 212 (3d Cir. 2008) (citing *Egan* and stating that "there is no judicial review of the merits of a security clearance decision"). However, federal courts will review an agency decision to ensure compliance with agency regulations. *Id*. at 212-213 (citing *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996)). Here the controlling "regulation" is the Directive and Executive Order cited at page 1, *supra*. The controlling standard of review of administrative judicial decisions is "arbitrary, capricious, or contrary to law." Directive ¶¶ E3.1.32.3.

Five Financial Considerations Mitigating Conditions under AG ¶ 20 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;
>
> (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and
>
> (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.

Applicant's delinquent debts are "a continuing course of conduct" under the Appeal Board's jurisprudence because he had two large delinquent debts from November 2008 until December 2009. *See* ISCR Case No. 07-11814 at 3 (App. Bd. Aug. 29, 2008) (citing ISCR Case No. 01-03695 (App. Bd. Oct. 16, 2002)). Applicant does not receive credit under AG ¶ 20(a) even though he established that his financial problems "occurred under such circumstances that [they are] unlikely to recur." Applicant has resolved his delinquent SOR debts, and is unlikely to have delinquent debt in the future.

AG ¶ 20(b) partially applies. Applicant's financial situation was damaged by the severe decline in home values in California from 2007 to 2009, which is akin to a "business downturn." In January 2005, Applicant purchased home R for $765,000. He had an appraisal, which showed a market value of $785,000. As such, it was a reasonable and prudent purchase. He borrowed $710,000 secured by home R. He borrowed $50,000 on his other home, and used $5,000 from a personal savings account. From November 2007 to November 2008, he rented home R for $4,000 a month. However, he had a negative cash flow of about $600 per month of mortgage interest as well as substantial state real estate taxes and home owner's insurance expenses.

In November 2008, Applicant moved to a different state to be closer to his son's family and for a less stressful working environment; however, he was unable to rent

home R for even half of his mortgage payments. In November 2008, he stopped paying the mortgages on home R, and began generating $4,600 per month in delinquent debt. He paid for maintenance, landscaping, utilities, and gardening, and had a negative cash flow of about $600 per month. He continued to be responsible for substantial state real estate taxes and home owner's insurance expenses. He worked on securing short sales for almost a year, and had three written offers. If the first mortgagor had acted reasonably and appropriately, the first mortgagor would have saved $56,000 by accepting the November 30, 2009, offer for $474,000, and Applicant would still owe the second mortgagor $105,000.

Once home R had gone into foreclosure, Applicant had no reasonable options and could only wait for the foreclosure process to be completed. Applicant has provided ample evidence to establish that he acted responsibly under the circumstances with respect to his three SOR debts. He did not have sufficient financial resources to keep home R out of foreclosure because the rent plus his surplus income was insufficient to make the payments on the two mortgages. He has maintained contact with his creditors and attempted to work with them to resolve the mortgages.[8]

AG ¶ 20(c) applies. Applicant received financial counseling. Applicant has established that "the problem is being resolved or is under control." He has resolved all of his SOR debts. All of his payment plans are established, current, and his credit reports have indicated they are in "pays as agreed" status. The two mortgages in SOR ¶¶ 1.a and 1.b are resolved. Although the creditors in SOR ¶¶ 1.a and 1.b have lost $229,000 and $105,000 respectively, they cannot seek payment from Applicant under California law.[9] He has generated a reasonable budget. He also established some

[8]"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.

[9] As Applicant's attorney indicates, under California law, there is a provision called the Anti-Deficiency Statute, Cal. Code Civ. Proc. § 580(b, which states in relevant part:

> No deficiency judgment shall lie in any event after a sale of real property or an estate for years therein for failure of the purchaser to complete his or her contract of sale, or under a deed of trust or mortgage given to the vendor to secure payment of the balance of the purchase price of that real property or estate for years therein, or under a deed of trust or mortgage on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling occupied, entirely or in part, by the purchaser.

Under this section, generally if there is a foreclosure on a dwelling and there is a deficiency, the lender has no recourse regarding "purchase money loans," also called "non-recourse loans," the amounts set forth in both the 1st and the 2nd mortgages used to finance the dwelling purchase. The collateral or dwelling is considered full satisfaction. *See, e.g.,* ISCR Case No. 08-09662 at 9 (AJ Feb. 26, 2009) (quoting same provision to mitigate substantial mortgage debts—it is noted hearing-level decisions are

mitigation under AG ¶ 20(d) because he showed some good faith[10] in the resolution of his SOR debts by admitting responsibility for his SOR debts.

In sum, Applicant showed exceptional diligence and efforts to resolve his delinquent SOR debts. He took every reasonable, responsible action to mitigate the losses of the mortgage lenders in SOR ¶¶ 1.a and 1.b. Those two debts have been resolved through foreclosure, and Applicant has no legal obligation to pay any additional funds to the creditors in SOR ¶¶ 1.a and 1.b. The creditors have confirmed he has no obligation to pay them any more funds, and these two large debts are settled or resolved.

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.

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. AG ¶ 2(c). I have incorporated my comments

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persuasive but non-precedential); ISCR Case No. 08-03024 at 10-12 (AJ Apr. 28, 2009) (same result—different state).

[10]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 he or she relied on a legally available option (such as bankruptcy) 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)).

under Guideline F in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

The whole person factors against reinstatement of Applicant's clearance are insufficient to support revocation of his security clearance; however, they do warrant re-weighing under the whole person concept. Failure to pay or resolve his just debts is not prudent or responsible. Applicant has a history of financial problems. On May 24, 1996, about $6,500 of Applicant's delinquent debt was discharged under Chapter 7 of the Bankruptcy Code. In November 2008, he stopped making his mortgage payments on home R, and began generating $4,600 monthly in delinquent debt. In November 2009, he owed about $752,000 on his two home R mortgages ($647,000 on his 1st mortgage and $105,000 on his 2nd mortgage).

The rationale for reinstating Applicant's clearance is more persuasive. In January 2005, Applicant purchased home R for $765,000. Based on an appraisal, which showed a value of $785,000, his purchase of home R was a reasonable and prudent purchase and investment. He borrowed $710,000 secured by home R, which is an indication the creditors agreed the purchase price was reasonable. In November 2008, he moved to a different state to be closer to his son's family and for less stressful employment. By then, there was a substantial decline in the fair market value of home R. He wanted to retain home R until real estate prices recovered. By November 2008, he had paid the difference between his $4,000 monthly rent and his $4,700 monthly mortgage payments (not including his real estate taxes and insurance) for 12 months. After November 2008, he was unable to rent it for even half of his mortgage payments. He worked on short sales with a realtor for almost a year, and had three written offers. He continued to pay for utilities, taxes, maintenance, gardening, and insurance from November 2008 to 2009, as he attempted to avoid foreclosure.

The first mortgagor on home R did not act reasonably and appropriately. On November 30, 2009, the first mortgagor had an offer for $474,000. The first mortgagor failed to process this offer, which would have saved the first mortgagor $56,000. If this short sale had been approved, Applicant would still owe the second mortgagor $105,000. Applicant aggressively pursued the November 30, 2009, short sale in lieu of the foreclosure because he believed he might lose his security clearance if home R was foreclosed. Once home R had gone into foreclosure, Applicant had no reasonable options and could only wait for the foreclosure process to be completed. Applicant has established that he acted responsibly under the circumstances with respect to his three SOR debts. He did not have sufficient financial resources to keep home R out of foreclosure because the rent plus his surplus income was insufficient to make the payments on the two mortgages. He maintained contact with his creditors and attempted to work with them to resolve the mortgages without using foreclosure to avoid paying the two mortgages.

Applicant is 48 years old and sufficiently mature to understand and comply with his security responsibilities. He deserves substantial credit for supporting the Department of Defense as an employee of a defense contractor. He provided three letters of support and three certificates of commendation issued by his current

employer. There is every indication that he is loyal to the United States, the Department of Defense, and his employer. There is no evidence that he abuses alcohol or uses illegal drugs. He has never been fired from a job or left employment under adverse circumstances. He has no reportable criminal offenses. These factors show substantial responsibility, rehabilitation, and mitigation.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude Applicant has mitigated the financial considerations security concerns. I take this position based on the law, as set forth in *Department of Navy v. Egan,* 484 U.S. 518 (1988), my careful consideration of the whole person factors and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has mitigated or overcome the government's case. For the reasons stated, I conclude he is eligible for access to classified information.

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
Subparagraphs 1.a to 1.d:	For Applicant

Conclusion

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

MARK HARVEY
Administrative Judge