



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
-----) ISCR Case No. 12-04806
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Department Counsel
For Applicant: Joseph Testan, Attorney At Law

April 4, 2014

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (E-QIP) on December 9, 2011. (Government Exhibit 1.) On November 26, 2013, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, (as amended), issued a Statement of Reasons (SOR) to the Applicant, which 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 the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR on December 13, 2013, and he requested an administrative hearing before a DOHA Administrative Judge. This case was assigned to the undersigned Administrative Judge on February 4, 2014. A notice of hearing was issued on February 6, 2014, and the hearing was scheduled for March 3, 2014. At the hearing the Government presented six exhibits, referred to as Government Exhibits 1 through 6, which were admitted without objection. The Applicant called four witnesses and testified on his own behalf. He also presented twenty-one exhibits, referred to as Applicant's Exhibits A through U, which were also admitted into evidence without objection. The record remained open until close of business on March 10,

2014, to allow the Applicant to submit additional documentation. The Applicant submitted one Post-Hearing Exhibit, referred to as Applicant's Post-Hearing Exhibit A, which was admitted without objection. The official transcript (Tr.) was received on March 12, 2014. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

REQUEST FOR ADMINISTRATIVE NOTICE

Applicant's Counsel requested that I take administrative notice of the California Anti-Deficiency Statute, set forth in California Code of Civil Procedure Sections 580(b) and 580(d), and *UM Capital LLC v. Ozeran* 2010 WL 685325 (Cal. App. 2d Dist. Mar. 1, 2010) and *Herrera v. LCS Financial Services Corporation* 274 F.R.D. 666 (N.D. Cal. 2011). Department Counsel had no objection. (Tr. p. 35.) The requested documents were not admitted into evidence but were included in the record. The facts administratively noticed are set out in the Findings of Fact, below.

FINDINGS OF FACT

The Applicant is 59 years old and married. He has two Bachelor's degrees, one in Biology, and the other in Computer Science. He holds the position of Computer Systems Analyst for a defense contractor. He is seeking to obtain a security clearance in connection with this employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline F - Financial Considerations) The Government alleges that the Applicant is ineligible for clearance because he is financially overextended and at risk of having to engage in illegal acts to generate funds.

The Applicant admitted the allegations set forth in the SOR under this guideline. (See Applicant's Answer to SOR.) Credit Reports of the Applicant dated December 15, 2006; January 13, 2012; January 17, 2014; and March 6, 2014, reflect that at one time Applicant was indebted to Bank A as set forth in the SOR, for two mortgage loans involving one property. Applicant owed approximately \$228,994 on the first loan, and \$46,840 on the second loan, totaling over \$275,000. (Government Exhibits 3, 4, 5, and 6.)

Since 1996 Applicant and his wife have been involved in the real estate business. Applicant's wife testified that when her great-grandfather came to the United States as an immigrant, he built homes and sold them for profit. Over the years, the tradition was passed down through the family, and she became involved in real estate investing. In order to diversity their retirement plan, she and her husband began to purchase rental

properties. In 1996 Applicant and his wife purchased their first rental property. She took real estate courses at the local community college to learn more about the business. Since then, and before 2010, they purchased four of five more properties, rented them out, and made a profit when they were sold. (Tr. p. 68.)

In May 2005, Applicant and his wife purchased a house for their personal residence. To purchase the property, they obtained a first and a second mortgage from Bank A. Applicant and his wife lived in the house (L-4) from 2005 to 2008. (Tr. p. 70.) During that period, Applicant spent about \$23,000 in remodeling. (Applicant's Exhibit R.) In 2008, Applicant purchased another property that became his primary residence, and he retained (L-4) as an investment. The loans on L-4 were never refinanced.

In 2009, with the collapse of the real estate market, Applicant's rental properties lost significant value and were up side down. (Applicant's Exhibit O.) Applicant was forced to reduce the amount of the rents on his properties, which were significantly less than the mortgage payments required on the property. He was also suddenly and unexpectedly confronted with other major costly issues. He contends that between 2009 and 2010, he lost about \$50,000 and depleted his reserves. (Applicant's Exhibit O.) In 2009, it took six months to evict a tenant who was not paying rent. (Applicant's Exhibit B, and Tr. p. 74.) In early 2010, one of the properties required an \$8,000 septic tank repair. (Applicant's Exhibit C.)

Confronted with this financial crisis, and the difficulties making the payments on all of his investment properties, Applicant chose the one property with the largest discrepancy between the payment and the rental rate, which was L-4, and tried to obtain a loan modification. He was told that there were no loan modification programs available for rental properties. He followed the financial counseling advice recommended by the bank, in hopes of eventually getting a loan modification, but was not successful. (Applicant's Exhibit N.) At some point, Applicant could no longer afford to make the payments on L-4. To prevent the property from being foreclosed upon, Applicant tried to raise money by trying to sell another property he owned, a vacant property, but was unsuccessful. (Applicant's Exhibit F.) He also tried to borrow from his 401(k) to pay the mortgage on L-4, but was prevented from doing so since there was already a loan on the 401(k). (Applicant's Exhibit K.) In 2010, foreclosure proceedings started on the L-4 property, and it was foreclosed upon in October 2011. (Tr. p. 85.)

Applicant contends that the first mortgage loan on the property was settled by the foreclosure, as the property was collateral for the loan. Applicant's credit report confirms this understanding. (See Applicant's Exhibit P, and Government Exhibit 4, page 6.) Applicant contends that the second loan on the property was also charged off. (See Applicant's Exhibit P, and Government Exhibit 4.) Applicant received two 1099-A's from the lender on both the first and second mortgage. (Tr. p. 112.)

Applicant recently contacted the bank to determine whether he could settle a debt that had been charged off. After numerous conversations with various individuals there, he was advised to send the bank a letter explaining what happened, and that his

intentions are to settle the debt. (Tr. p. 92.) Applicant submitted a copy of the letter he sent to the bank. (Applicant's Exhibit H.) Applicant testified that if he owes anything to the bank for the second loan, he will honor the agreement and settle the loan, as he has the financial means to do so. (Tr. p. 93.) Applicant also testified that if the foreclosure transaction itself is found to have tax consequences, imposing some tax liability on the Applicant, he will resolve it. (Tr. p. 114.)

Since L-4 was foreclosed upon, Applicant and his wife enrolled in and completed an intensive eight week financial counseling course focusing on debt reduction, in order to avoid future problems of this sort. (Applicant's Exhibit Q.) Applicant adopted, internalized, and is currently practicing the seven financial principles he learned at the financial seminar. An example of this is in June 2013, he purchased a property with no mortgage. He paid for it with cash, partially from a 401(k) loan. (Applicant's Exhibit G, and Tr. p. 87.) His debt reduction plan includes his present attempt to sell two of his land parcels. He has a five year plan and the goal is to become debt free. (Applicant's Exhibits I and J, and Tr. p. 98.)

Four witnesses, including a long time church associate, the pastor of Applicant's church, a close friend, and his wife, testified to Applicant's consistent good judgment, trustworthiness, loyalty, and reliability. These individuals have all known the Applicant for over ten years and see him on a regular basis. They recommend him for a security clearance. (Tr. pp. 21-96.)

Applicant's personal financial statement dated February 20, 2014, reflects that after his regular monthly expenses and mortgages on his investments are paid, he has about \$1,100 in discretionary funds left at the end of the month. (Applicant's Exhibit J.) He presently owns five houses, including his personal residence, and two parcels of land. The parcels of land are currently up for sale. (Tr. p. 98.) Applicant also has retirement accounts with his employer. (Applicant's Exhibit L.) Applicant and his wife's current net worth is about \$900,000. (Tr. p. 96.)

Applicant's job performance appraisals for the period from January 2011 through 2012, reflect an overall rating average of "3", which "exceeds expectations." (Applicant's Exhibit T.) Applicant was Employee of the Year in 2003. (Applicant's Exhibits S.)

Letters of recommendation, mainly from coworkers and friends of the Applicant, attest to his high moral character, good judgment and responsible nature. He is considered by all to be a trustworthy individual who is well respected. He is recommended for a security clearance. (Applicant's Exhibit U.)

POLICIES

Enclosure 2 of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline F (Financial Considerations)

18. *The Concern.* 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.

Conditions that could raise a security concern:

19.(a) inability or unwillingness to satisfy debts; and

19.(c) a history of not meeting financial obligation.

Conditions that could mitigate security concerns:

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;

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

20.(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

a. The nature, extent, and seriousness of the conduct and surrounding circumstances;

b. The circumstances surrounding the conduct, to include knowledgeable participation;

c. The frequency and recency of the conduct;

- d. The individual's age and maturity at the time of the conduct;
- e. The extent to which participation is voluntary;
- f. The presence or absence of rehabilitation and other permanent behavior changes;
- g. The motivation for the conduct;
- h. The potential for pressure, coercion, exploitation or duress; and
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct, which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in instances of financial irresponsibility, which demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation,

which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has been financially irresponsible (Guideline F). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

The evidence shows that the Applicant became delinquently indebted beginning in 2009, when the real estate market crashed and property values plummeted to unprecedented lows. Without sufficient financial resources available to meet these unexpected expenses, one of Applicant's investment properties was foreclosed upon. Given this situation, the question now before this court is whether the Applicant acted reasonably and responsibly under the circumstances. I find that he has. Applicant made every attempt to avoid foreclosure and, although he was not successful, he has continued to show good judgment. Other than the property that was foreclosed upon, Applicant had been able to meet all of his financial responsibilities related to his other investments. The Applicant has inquired about the status on the second loan and has offered to settle the loan if it is determined that he owes anything.

The legal question raised in this proceeding concerns whether the Applicant is liable for a deficiency judgment on the L-4 property that was foreclosed upon and returned to the bank. As I see it, the Applicant owes nothing more to the bank. In this case, the Applicant's property falls within the protection of the California Anti-Deficiency Statute. California Civil Procedure Code (CCP) Section 580(b) indicates that a lender is prohibited from seeking a deficiency judgment against a borrower if he incurred the loan for the sole purpose of purchasing the home. There is also a requirement that the subject property be the residence of the debtor (which it was at the time the loan was taken out); a one to four unit property; and the money was used to purchase the property. This is considered a purchase money loan, and are non-recourse loans, which means the lender's only recourse is to sell the home to pay the money owed. CCP Section 580(d) sets forth that if a lender sells a home under a power of sale, contained in the mortgage or deed of trust, (trustee's sale), then he cannot also sue the homeowner in a court of law for the deficiency. In this case, the property foreclosure was the bank's recourse on the loan. Since the debt is a non-recourse debt, its cancellation through foreclosure does not result in cancellation of debt income, for which Applicant owes any income tax. In the event that the bank determines that Applicant must repay something toward the second loan, Applicant has expressed the willingness to settle the debt, and has the financial resources available.

Regarding whether there is any tax liability arising from the foreclosure transaction, Applicant received two 1099-A's (Acquisition or Abandonment of Secured Property) from the lender. Applicant did not provide a 1099-C (Cancellation of Debt), which would indicate that Applicant's debt had been cancelled and that he has no tax

liability. Since Applicant did not submit a 1099-C there is an inference that he may have some tax liability, but even that is not definite. In the event that there are any tax implications, Applicant has expressed a willingness to resolve them and he has the financial resources to do so.

Applicant has now resolved his past due indebtedness. He has acted responsibly and reasonably under the circumstances. Furthermore, there is no evidence in the record to show that the Applicant strategically arranged this loan default for the purpose of improving his financial position.

These humbling, unpredictable, and unfortunate circumstances were isolated incidents that will not recur. Applicant more clearly understands that the real estate business is quite of a gamble, and not a guarantee of any sort. To be involved in the business one must hope for the best and plan for the worst. This means one must have sufficient financial resources available for emergencies that may arise, be it from the economy changes, or property necessities. In the real estate business, one must always be prudent in decision making and be careful not to financially over-extend yourself, even if the deal looks good. One must carefully evaluate whether the benefit of the investment out-weights the risk in getting involved in such a volatile business.

Since the foreclosure, Applicant's financial situation has stabilized. Applicant is able to pay his bills and make the payments on his other mortgages without difficulty. He has learned the hard way that he will no longer purchase property by obtaining a loan. He understands that he must remain fiscally responsible if he is to hold a security clearance.

Under the circumstances he has done the best he could. He has made a good-faith effort to resolve his past due indebtedness, and he has resolved his delinquent debts. He has not incurred any new debt that he cannot afford to pay and in fact has reduced some of his expenses. He has clearly demonstrated that he can properly handle his financial affairs. There is clear evidence of financial rehabilitation. In the event that he becomes excessively indebted again, his security clearance will be in immediate jeopardy. Considering all of the evidence, the Applicant has introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case.

Under Guideline F (Financial Considerations), Disqualifying Conditions 19.(a) *inability or unwillingness to satisfy debts*; and 19.(c) *a history of not meeting financial obligations*, apply. However, Mitigating Conditions 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; 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 20.(d) *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve*

debts also apply. Accordingly, I find for the Applicant under Guideline F (Financial Considerations).

I have also considered the “whole-person concept” in evaluating the Applicant’s eligibility for access to classified information. Under the particular facts of this case, the totality of the conduct set forth above, when viewed under all of the guidelines as a whole, support a whole-person assessment of good judgement, trustworthiness, reliability, candor, and a willingness to comply with rules and regulations, and/or other characteristics indicating that the person may properly safeguard classified information.

I have considered all of the evidence presented, including his favorable witnesses statements, letters of recommendation, and job performance evaluations. It mitigates the negative effects of his financial indebtedness and the effects that it can have on his ability to safeguard classified information. On balance, it is concluded that the Applicant has overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the SOR.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: For the Applicant.

Subpara. 1.a.: For the Applicant.

Subpara. 1.b.: For the Applicant.

DECISION

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 a security clearance for the Applicant.

Darlene Lokey Anderson
Administrative Judge