



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



In the matter of:)	
)	
[NAME REDACTED])	ISCR Case No. 12-07103
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: Ronald C. Sykstus, Esq.

02/02/2015

Decision

MALONE, Matthew E., Administrative Judge:

Applicant’s debts do not indicate poor judgment or a lack of trustworthiness. He has been proactive in trying to resolve his financial problems, which arose from circumstances beyond his control. His current finances are sound and do not present a security concern. His request for continued access to classified information is granted.

Statement of the Case

Applicant has held a security clearance since about 1985. On February 22, 2012, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to renew his eligibility for a security clearance required for his work as a defense contractor. Based on the results of the ensuing background investigation, Department of

Defense (DOD) adjudicators could not determine that it is clearly consistent with the national interest for Applicant to hold a security clearance.¹

On June 5, 2014, DOD adjudicators issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed under the adjudicative guidelines² for financial considerations (Guideline F) and personal conduct (Guideline E). Applicant timely responded to the SOR (Answer) and requested a hearing.

The case was assigned to another administrative judge on September 23, 2014, and a hearing was scheduled for October 20, 2014. However, Applicant was granted a continuance and the case was transferred to me on November 18, 2014. I convened a hearing on December 18, 2014. Department Counsel for the Defense Office of Hearings and Appeals (DOHA) presented Government Exhibits (Gx.) 1 - 5.³ Applicant testified, presented five witnesses, and proffered Applicant's Exhibits (Ax.) A - W.⁴ All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on January 6, 2015.

Findings of Fact

Under Guideline F, the Government alleged that Applicant owes \$50,980 for two delinquent or past-due debts (SOR 1.a and 1.b). Under Guideline E, the Government alleged Applicant deliberately made a false statement to the Government by omitting from his EQIP the debt alleged at SOR 1.b (SOR 2.a). Applicant admitted, with explanations, the Guideline F allegations. He denied, with explanations, the Guideline E allegation. In addition to the facts established by Applicant's admissions, I make the following findings of fact.

Applicant is 60 years old and has been married since 2009. A previous marriage ended by divorce in 2006. Applicant and his first wife had three children, now ages 24, 30, and 32. His second wife has two children from a previous marriage, ages 26 and 28. (Gx. 1)

Applicant holds bachelor's and master's degrees in chemistry, earned in 1976 and 1979, respectively. He has worked in the defense industry since 1984, when he first received a security clearance. Applicant has an excellent reputation for reliability, honesty, and trustworthiness among his colleagues and in the community. His record of performance in his current job, for which he was hired in October 2003, is superior. In

¹ Required by Executive Order 10865, as amended, and by DOD Directive 5220.6 (Directive), as amended.

² The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

³ A list of the Government's exhibits is included in the record as Hearing Exhibit (Hx.) 1.

⁴ A list of the Applicant's exhibits is included in the record as Hx. 2

addition to documentary evidence presented regarding Applicant's character and work ethic, several witnesses with knowledge of the issues raised in the SOR testified and recommended him for a position of trust. (Gx. 1; Ax. A - N; Tr. 26 - 32, 111 - 134)

Available information supports the allegations under Guideline F. Applicant incurred a delinquent debt (SOR 1.a) for the cost of a cable television box. It was not accounted for as returned because of a mistake over the method of payment when Applicant cancelled his service at a previous residence. When Applicant became aware of the unpaid account, it had grown to \$1,247 from interest and penalties. Applicant contacted the creditor and the debt was reduced to \$247.32, which he paid in July 2014. (Answer; Gx. 1 - 4; Ax. W; Tr. 50 - 55)

The debt alleged at SOR 1.b is for a mortgage on a commercial real estate business Applicant and his current wife started in August 2008. Applicant has been in the landlord-tenant business since he inherited rental properties (duplex houses) from his parents almost 15 years ago. Those properties have steadily produced rental income and have covered their mortgages. Overall, he has enjoyed success in managing those properties. In 2008, he and his wife, an independent stock broker, decided to buy a 60-unit apartment building near a large military installation. The cost of the purchase exceeded one million dollars. They expected that recent decisions by the Defense Base Closure and Realignment Commission (BRAC) would result in an influx of personnel transferring to their area who would become a reliable source of potential tenants. However, the number of incoming personnel projected by the BRAC far exceeded the actual increase realized at the nearby facility. (Gx. 2; Tr. 33 - 35, 42)

Applicant and his wife incorporated their rental business as a limited liability company (LLC). By incorporating, they were protected from personal civil liabilities arising from the business, but they might still be personally liable for debts arising from the business, such as the mortgage they obtained to buy the property. Applicant's wife worked on-site at the apartment building as its leasing agent and, with the assistance of her son and Applicant, tended to the physical maintenance and management of the building. Thanks to frugal business practices, this was a viable business for the first two years. Most of the units were occupied and its operating costs, including a commercial mortgage, were covered. However, there was little money remaining after expenses to make more than minimal upgrades and repairs. (Ax. O; Tr. 36 - 41)

In 2009 and 2010, as a result of the national economic downturn, several tenants lost their jobs and were unable to pay as required by their leases. Applicant lost rent revenues through unoccupied apartments, and he found it increasingly difficult to meet his expenses. They decided to take out a second mortgage on their personal residence to get money for operating expenses, such as repairs of damage caused by tenants. (Ax. P; Tr. 40 - 41)

In April 2011, an EF-5 (the most powerful category) tornado struck the area where Applicant's apartment building was located. There was significant widespread damage, including to Applicant's property. Insurance covered most of the repairs;

however, a rumor spread among their tenants that the Federal Emergency Management Agency (FEMA) was paying Applicant and his wife emergency funds that would more than cover their operating costs. Several tenants stopped paying rent, further exacerbating the effects of their dwindling rental revenues. (Tr. 41, 43 - 48)

Also in 2011, the original lender on the apartment building mortgage went into receivership, and Applicant's mortgage was sold to the creditor referred to in SOR 1.b. Applicant had never missed a monthly payment and continued to make payments as required after the mortgage changed hands. The mortgage in question was a commercial loan subject to renewal by the lender every three years. Despite Applicant's satisfactory performance, the new lender decided not to renew the mortgage and called the loan due. Applicant averred that the original lender sold the mortgage for 25 percent of the loan amount, and that the new lender wanted to take advantage of a Government program that would pay 75 to 80 percent of the value of the property subject to a foreclosed mortgage. Although Applicant owed more than one million dollars on his mortgage, his attempts to sell the property resulted in offers of \$750,000 or less. Despite Applicant's attempts to work with the lender to renew the loan or to negotiate some other resolution that would allow Applicant to retain the building, the mortgage was foreclosed in June 2012. (Gx. 1; Gx. 2; Tr. 48 - 60)

Applicant continued to pay the apartment mortgage through the end of 2011. Thereafter, because of the continued loss of tenants and existing tenants' refusal to pay rent consistently, Applicant fell behind on his mortgage. As alleged in SOR 1.b, he accrued almost \$50,000 in past-due payments. In 2012, Applicant hired an attorney to represent him in negotiations with the new mortgage lender. Applicant's attorney recommended Applicant and his wife file Chapter 7 bankruptcy to resolve his financial obligation regarding the apartment building. Applicant resisted the idea of filing for bankruptcy and continued his attempts to resolve the apartment mortgage. He even offered to use funds from his retirement account, but the lender continued to demand lump-sum payments Applicant could not afford. (Tr. Gx. 2; Gx. 3; Ax. V; Tr. 60 - 61)

In 2013, the mortgage lender sued Applicant for the value of the apartment mortgage, as well as for two other of Applicant's mortgage accounts it held. He has not missed any payments on mortgages other than the apartment building note. In March 2014, having obtained a judgment lien against Applicant for one million dollars, the creditor garnished Applicant's pay at a monthly rate of \$942. In November 2014, Applicant filed a Chapter 7 bankruptcy petition. The only debts he is seeking to be discharged of are the apartment building mortgage and a building supply store credit card used for maintenance and repairs of that building. Applicant is reaffirming his other mortgages, his two car loans, and other personal credit obligations. As of this hearing, Applicant's Chapter 7 was still pending approval, but his attorney expressed confidence that this matter would be resolved and that Applicant would be able to legally rid himself of the obligations related to SOR 1.a. (Gx. 5; Ax. Q; Ax. T; Ax. U; Tr. 64 - 72, 82, 89)

When Applicant submitted his EQIP in February 2012, he disclosed the debt at SOR 1.a, but omitted the debt alleged at SOR 1.b. All available information indicates that Applicant was less than 120 days past-due on the debt at SOR 1.b when he filled

out the questionnaire. He had made payments on that account through the end of 2011, and although he was aware he was behind in his mortgage payments for the apartment building, he reasonably believed he did not yet have to disclose the debt. As to the judgment lien obtained against him, the record shows the creditor filed suit for the debt after Applicant submitted his EQIP. Applicant did not intend to conceal his financial problems from the Government. (Gx. 1; Gx. 4; Ax. V; 87 - 89)

Aside from the debt related to his apartment building investment, Applicant's finances are sound. As already noted, he has continued to meet all of his other real estate obligations, and he has not incurred new debt that he cannot pay. A personal financial statement (PFS) he submitted in January 2014 reflected joint monthly income and expenses, including his real estate mortgage payments, that resulted in a net remainder of about \$275. Since then, his wife has started receiving monthly Social Security benefits of about \$920. This extra income has offset the garnishment that began in March 2014, but which will end when Applicant's bankruptcy is finalized. (Gx. 4; Tr. 89 - 93)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁵ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the guidelines. Commonly referred to as the "whole-person" concept, those factors are:

- (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 presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁶ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of

⁵ See Directive. 6.3.

⁶ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁷

A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁸

Analysis

Financial Considerations

Available information is sufficient to support all of the SOR allegations. The facts established raise a security concern about Applicant's finances that is addressed at AG ¶ 18, as follows:

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. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

More specifically, available information requires application of the disqualifying conditions at AG ¶¶ 19(a) (*inability or unwillingness to satisfy debts*); and 19(c) (*a history of not meeting financial obligations*). These factors apply because Applicant still owes the debt at SOR 1.b. As to AG ¶ 19(a), the emphasis is more properly placed on Applicant's inability to meet the lump-sum demands of his creditor. As to AG ¶ 19(c), this factor has limited application because one past-due debt does not equate to a protracted period of failing to meet one's financial obligations.

I also conclude that the record supports application of the following AG ¶ 20 mitigating conditions:

⁷ See *Egan*, 484 U.S. at 528, 531.

⁸ See *Egan*; AG ¶ 2(b).

(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; and

(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.

Applicant paid the debt at SOR 1.a when he became aware of it. Aside from the debt at SOR 1.b, he has incurred no other past-due debts and the causes of the SOR 1.b debt were largely beyond Applicant's control. Applicant approached the apartment building venture in a reasonable manner. He and his wife incorporated, and they directly managed the business in a frugal manner. They could not reasonably foresee the economic downturn or the damage inflicted by a tornado. They also had a reasonable expectation that the BRAC decisions regarding the nearby military installation would result in an increased source of tenants. However, when that also failed to materialize, Applicant continued to struggle to maintain a sufficient occupancy. Finally, Applicant could not have foreseen that the mortgage lender would decide not to renew the apartment building mortgage. He tried in good faith to resolve his obligation, including unsuccessful attempts to sell, and offering to use funds from his retirement account to satisfy his past-due payments. However, the lender demanded payments Applicant could not afford, and Applicant has now resorted to Chapter 7 bankruptcy, a reasonable action under these circumstances.

Applicant's current finances are sound. His financial problems are limited to his apartment building venture, and it is likely that debt will be discharged through bankruptcy. He has had no such difficulties with his other rental properties, and he is meeting all of his regular financial obligations as required. Applicant's failure to pay his outstanding debts is not an accurate reflection of his judgment and reliability, and there is little likelihood he would resort to improper or illegal conduct to resolve his debts. I conclude Applicant has mitigated the Government's security concerns about his finances.

Personal Conduct

The Government alleged Applicant intentionally did not disclose in his most recent security clearance application relevant and material information about his finances. If established, such conduct would raise a security concern about Applicant's personal conduct that is articulated at AG ¶ 15, as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

More specifically, it may be disqualifying if available information supports application of AG ¶ 16(a):

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

However, information presented at hearing shows that Applicant was not yet 120 days or more past-due on his apartment building debt when he submitted his EQIP, and the lawsuit that resulted in a judgment lien against Applicant was not filed until after Applicant submitted his application. On balance, available information does not support a conclusion that Applicant intended to conceal, or mislead the Government about, his financial problems. The security concerns under this guideline are resolved for Applicant.

In addition to evaluating the facts presented, and having applied the appropriate adjudicative factors under Guidelines E and F, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant has been candid about his debts, which arose from circumstances beyond his control. He has dealt with his financial difficulties in a way that reflects positively on his judgment and reliability. The information about his work performance and his reputation in the community also supports a conclusion that Applicant is a mature, responsible individual who can be trusted with sensitive information. On balance, he has mitigated the security concerns raised by the Government's information.

Formal Findings

Formal findings 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 - 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a:	For Applicant

Conclusion

It is clearly consistent with the national interest for Applicant to have access to classified information. Applicant's request for a security clearance is granted.

MATTHEW E. MALONE
Administrative Judge