



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



In the matter of:)
)
-----) ISCR Case No. 14-00401
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Department Counsel
For Applicant: Cathryn E. Young, Attorney At Law

August 8, 2014

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (E-QIP) on September 16, 2013. (Government Exhibit 1.) On March 13, 2014, the Department of Defense (DoD), 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 DoD 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 April 7, 2014, and he requested an administrative hearing before a Defense Office of Hearings and Appeals Administrative Judge. This case was assigned to the undersigned Administrative Judge on May 2, 2014. A notice of hearing was issued on May 8, 2014, and the hearing was scheduled for June 12, 2014. At the hearing the Government presented five exhibits, referred to as Government Exhibits 1 through 5, which were admitted without objection. The Applicant presented twenty exhibits, referred to as Applicant's Exhibits A through T, which were also admitted into evidence without objection. He also testified on his own behalf. The record remained open until close of business on June 27, 2014, to allow

the Applicant to submit additional documentation. The Applicant submitted six Post-Hearing Exhibits, referred to as Applicant's Post-Hearing Exhibits U through Z, which were admitted without objection. The official transcript (Tr.) was received on June 25, 2014. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

FINDINGS OF FACT

The Applicant is 43 years old and married. He holds the position of Site Manager 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 each of the allegations set forth in the SOR under this guideline. (See Applicant's Answer to SOR.) Credit Reports of the Applicant dated April 30, 2008; October 10, 2013; and April 29, 2014, reflect that at one time Applicant was indebted to each of the two mortgage lenders set forth in the SOR, in an amount totaling approximately \$300,000. (Government Exhibits 2, 3 and 4.)

Applicant served honorably on active duty in the United States Navy from November 1989 to November 1995. During his military career he underwent numerous deployments and received awards and commendations for his service. He also held a security clearance without issue.

In 2006, at the peak of the housing bubble, Applicant purchased his first property, a condominium. Prior to this purchase, he and his wife had been renting a small apartment. After saving financial resources to do so, they enlisted the help of a real-estate agent and a loan officer, recommended by a family friend, who helped them through the purchase. With no background in this area, they trusted these professionals. They purchased the property for \$305,000, they put \$15,000 down, and were offered two loans. (Tr.p. 34.) The first loan, was an interest only loan, and the second loan had a balloon payment due in December 2013. The loan officer assured the Applicant that the balloon payment was negligible and of no consequence, since Applicant could easily refinance and pay it off. Unfortunately, the housing market crashed, and this became impossible. When the economy took a downturn, Applicant's property lost 30% of its resale value and he was underwater with his mortgages.

From 2006 to 2011, Applicant faithfully made the mortgage payments on the property. Between 2008 and 2011, Applicant made various attempts to refinance the property. Each time, the bank informed him that he did not qualify for a refinance program because he was not behind on his payments. Since Applicant was not in a worse financial situation than he was when he originally entered into the loan agreement, the bank refused to assist him with a loan restructuring. Although Applicant did not want to lose the condo, he knew that a balloon payment was due on the loan in 2013 that he could not afford to pay. Through the advice of a friend, Applicant obtained an attorney who advised him to try to short sale the property. When his attorney contacted the bank and informed them of Applicant's intention to short sale the property, the bank foreclosed and auctioned the property, declining multiple legitimate offers from buyers for the short sale. (Applicant's Answer to SOR.)

Applicant contends that he has no liability for the first loan in the amount of \$269,564.95, since it was his primary residence, he did not refinance the property, and it was foreclosed upon by the lender. To support his argument he referred to the governing law, state anti-deficiency statute 580(b) that protects him from any liability in this situation. The statute precludes purchase money lenders from obtaining a deficiency judgment against the borrower after foreclosure on a purchase money mortgage on a dwelling, when the dwelling is occupied, entirely or in part by the purchaser. (Applicant's Post-Hearing Exhibits X, Y and Z.) In this case, Applicant did not waive the statute's protection because he did not obtain the second mortgage through a refinance. Both loans were obtained concurrently and used for the original purchase of the condominium, which was later foreclosed upon by and sold at Trustee's sale in August 2012. To confirm this understanding, Applicant also provided a copy of a Form 1099-A that he received from the lender. (Applicant's Post-Hearing Exhibit U.)

In regards to the second loan, Applicant testified that he did not receive a 1099-A or 1099-B from the lender, but is of the opinion that he has no liability here either. After some confusion from the lender about the matter, on June 16, 2014, Applicant's attorney sent a letter to the holder of the loan requesting written confirmation of whether Applicant is responsible for the debt on the second loan or not, and if not, that the derogatory information be removed from his credit report. (Applicant's Post-Hearing Exhibit V.) Applicant received a response indicating that the lender is currently willing to accept a single payment of \$16,711.60 as settlement on the balance owed that is now \$55,705.35 with no future liability. The offer is good until end of business on June 30, 2014. (Applicant's Post-Hearing Exhibit V.) Applicant testified that he is willing and able to satisfy any liability that may be determined he owes on the second loan. (Tr. pp. 78-81.) He has about \$20,000 in his 401(k) and is also willing to make payments if that is required.

Applicant is current on all of his other debts. He has a history of paying his bills on time and living within his means. His personal financial statement indicates that he earns \$64,000 annually, not counting bonuses. After paying his monthly expenses, he has about \$1,600 left in discretionary funds at the end of the month. (Applicant's Exhibit E.) Applicant lives very modestly. He indicates that he has learned from his mistakes

and has become much more knowledgeable about the real estate business from this experience. He will never get into this kind of situation again.

Numerous letters of recommendation from friends and colleagues attest to Applicant's honesty, good judgment, reliability and trustworthiness. (Applicant's Exhibits J, K, L, M, N, O, P, Q, S and T.)

Applicant has received various Certificates of Completion for training related to his work. (Applicant's Exhibit R.)

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 obligations.

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.

It can be argued that on the surface it appears that the Applicant strategically defaulted on his mortgage loans in bad faith because he realized that he made a bad deal and wanted out. A careful look at the evidence, however, indicates that this is not the case. The evidence shows that Applicant made every effort to rectify the situation without having to default, but was ignored. Applicant got caught up in a bad mortgage that many lenders offered to naive and inexperienced first-time purchasers during the housing bubble. Being ignorant of the process, Applicant detrimentally relied on his real-estate agent and loan broker and was led into a bad mortgage arrangement. As Applicant became more familiar with his situation, he vigilantly tried to restructure his loans in order to keep the property, but was ignored. Clearly he wanted to keep the property, since he was diligent about paying the mortgage and the Homeowners Association fees for five years before he defaulted. He hired an attorney for help, who recommended that he short sale the property, but this was unsuccessful. After the property was foreclosed upon, Applicant has been in constant contact with the lenders in order to resolve any outstanding issues that may remain. Applicant has received no inherent benefit from the default.

Applicant received a 1009-A from the lender concerning the first loan on the property which confirms that he has no liability. In regard to the second loan, the collection agency for the lender has offered to settle the matter, and the Applicant has indicated that he is willing to do whatever is necessary at this point to resolve it. Applicant understands that he must remain fiscally responsible if he is to hold a security clearance. He has made a good-faith effort to resolve his past due indebtedness. He

has not incurred any new debt that he cannot afford to pay. He has learned from his mistakes, and demonstrated that he can properly manage his financial affairs. There is clear evidence of financial rehabilitation. In the event that Applicant does not fulfill his financial obligations as promised, 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 accomplishments in the military, current employment certificates and awards, and favorable letters of recommendation. 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