



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



In the matter of:)	
)	
[NAME REDACTED])	ISCR Case No. 14-00750
)	
Applicant for Security Clearance)	

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

12/03/2014

Decision

MALONE, Matthew E., Administrative Judge:

The security concerns about Applicant’s 2009 letter of reprimand are mitigated by the passage of time, and because the underlying conduct was isolated and unlikely to recur. The security concerns about Applicant’s financial problems are mitigated because they arose from circumstances beyond his control and he has acted responsibly in his attempts to resolve his delinquent debts. His request for continued access to classified information is granted.

Statement of the Case

On July 16, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to renew his eligibility for a security clearance he first received while on active duty in the U.S. Army. After the ensuing background investigation, Department of Defense (DOD) adjudicators could not determine that it is clearly consistent with the national interest to continue Applicant’s security clearance.

On April 28, 2014, DOD issued a Statement of Reasons (SOR) alleging facts which raised security concerns addressed in the adjudicative guidelines¹ for personal conduct (Guideline E) and financial considerations (Guideline F).

Applicant timely responded to the SOR (Answer) and requested a hearing. The case was assigned to me on August 5, 2014, and I convened a hearing on September 11, 2014. Department Counsel presented Government Exhibits (Gx.) 1 - 4. Applicant testified and offered Applicant's Exhibits (Ax.) A - D. All exhibits were admitted without objection. I held the record open after the hearing to receive from Applicant additional relevant information. Applicant's timely post-hearing submission has been included in the record, without objection, as Ax. E. DOHA received the transcript of hearing (Tr.) on September 26, 2014. The record closed on September 29, 2014.

Findings of Fact

Under Guideline F, the Government alleged that Applicant owes \$585,106 for eight delinquent or past-due mortgage or mortgage-related debts (SOR 1.a - 1.g) Under Guideline E, the Government alleged that in February 2009, while he was on active duty in the Army Reserve, Applicant was issued a Letter of Reprimand for misusing Government resources and conducting personal business during military duty hours. He was cited for violating DOD Joint Ethics Regulations, for displaying poor judgment, and for disregarding guidance of his superiors (SOR 2.a).

In response to the SOR (Answer), Applicant denied with explanations the SOR 1.a and 1.b allegations. He admitted the remaining allegations, albeit with explanations. In addition to his admissions, I make the following findings of fact.

Applicant is 41 years old and works as an unpaid consultant to a defense contractor. He requires a top secret clearance with eligibility for access to sensitive compartmented information (SCI). Applicant graduated from the United States Military Academy in 1998 with a bachelor's degree in engineering management. In 2012, he enrolled at both a state university and an online college to study for post-graduate business degrees. He is financing his studies through the Post-9/11 GI Bill. In addition to paying his tuition, the GI Bill pays him a monthly stipend of about \$700. (Answer; Gx. 1; Ax. C; Tr. 6 - 17, 53 - 62)

After completing his active duty obligation in 2003, Applicant continued in military service by affiliating with the Army Reserve. He was recalled to active duty between 2003 and 2009. In that capacity, Applicant received the same pay and benefits as if he were a member of the regular active duty Army. In 2009, as alleged in SOR 2.a, Applicant was given a letter of reprimand for misusing Government resources by conducting personal business during duty hours. Thereafter, Applicant's Reserve orders

¹ 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).

were cancelled and he was returned to an inactive duty status as a selected drilling reservist (SELRES). Currently, he is part of a civil affairs unit where he drills one weekend each month and performs at least two weeks of active duty for training annually. Unlike his recalls to active duty, for which he was paid on a full-time basis, he now is paid only when he is participating in his weekend and annual training activities. Since receiving the letter of reprimand, Applicant has received two satisfactory performance evaluations. (Answer; Gx. 1; Gx. 2; Ax. B; Tr. 36 - 39, 49 - 53)

While Applicant was on active duty between 1998 and 2009, he was eligible for protection under the Servicemembers Civil Relief Act (SCRA).² The SCRA extends to active duty military members, including Reservists recalled to active duty, certain protections against civil actions pertaining to mortgage foreclosure, credit card debt, and mortgage interest rates. In 2002, he started investing in real estate and relied on those protections to avoid immediate foreclosure on the mortgages for those properties, and to delay penalties for delinquent or past-due mortgage payments. In 2010, after he was removed from active duty within the meaning of the SCRA, he had little income aside from his monthly drill pay with which to meet his mortgage obligations. The banks holding his mortgages moved quickly to foreclose. His efforts to avoid foreclosures were not successful because of the sharp decline in property values after 2007. He was unable to refinance any of his loans and short sales were not feasible. (Answer; Gx. 1; Gx. 2; Ax. C; Tr. 39, 72)

All of Applicant's financial problems are the result of his real estate investment activities, which he conducted through an incorporated small business. In 2002, he bought a property near the large military installation in State A, at which he was assigned. He was initially able to lease the property steadily and for a profit, due mainly to the large number of military members looking for off-base housing. However, when Operation Iraqi Freedom commenced in 2003, the customer base was sharply reduced as a result of large-scale deployments. Applicant was able to endure revenue losses and avoid foreclosure due to the SCRA. However, when he left active duty in 2009, the bank quickly foreclosed and the loan was forgiven as a business loss. This debt is addressed in SOR 1.a, and was resolved in 2011 when Applicant declared the forgiven debt as income on his federal and state tax returns. (Answer; Gx. 1 - 4; Ax. A; Ax. D; Tr. 37, 72)

In 2004, Applicant was transferred to his current location in State B, where he saw additional real estate investment opportunities. He eventually tried to start a real estate development business with a person who turned out to be a scam artist. At that person's behest, Applicant bought three properties to either lease out or raze and reconstruct for sale. But his partner's promises of a ready labor force did not materialize. Further, Applicant's partner took advantage of his access to Applicant's credit and ran up large balances that Applicant was not able to repay. Applicant later filed suit against the partner, but was unable to get relief from those credit card debts. In

² 50 U.S.C. App. §§ 501 et. seq.

2011, a credit card company charged off a \$13,371 debt. That amount was subsequently declared as income on Applicant's taxes. (Answer; Gx. 1; Gx. 2; Ax. C; Tr. 37, 40 - 41)

The first mortgages for two of the State B properties are addressed in SOR 1.b and 1.c. Each of the three State B properties also had a second mortgage equity loan for 20% of the purchase price. This enabled Applicant to obtain the properties with no money down. Those debts are alleged at 1.d, 1.e, and 1.f. As to the first mortgages, the debt at SOR 1.b was foreclosed and the remaining obligation forgiven. Applicant declared the amount as income based on a Form 1099-A filed with his 2013 income tax return. The mortgage debt at SOR 1.c has been foreclosed and Applicant anticipates he will receive a Form 1099 from the IRS that will require him to declare any debt forgiven as income on his next tax return. Applicant has not yet acted on the 20% equity loans alleged in SOR 1.d, 1.e, or 1.f. (Answer; Gx. 1; Gx. 2; Ax. A; Ax. D; Ax. E; Tr. 40 - 46)

After his real estate investment efforts failed, Applicant formed his own small business. Since about 2010, he has been in the property management business, and has been soliciting contracts as a disadvantaged small business to provide long-term temporary housing near military facilities. His intended customer base consists of military and defense contractor personnel who work on temporary orders at a base or other facility away from their home. To date, Applicant has had little success in his marketing efforts; however, his property management business provides him sufficient income, along with his monthly Army Reserve pay, to cover his current expenses each month. (Answer; Gx. 1; Ax. C; Ax. E; Tr. 17, 70 - 72)

With the professional help of a certified accountant, Applicant has been "setting aside" \$1,000 each month. As shown in employee payroll reports for his property management company, Applicant pays himself just over \$1,000 each month. That money, in turn, is withheld for federal taxes and have been more than sufficient to meet the increases in his reportable income as his mortgages are forgiven after foreclosure. Corresponding tax returns and IRS transcripts show that his income tax withholdings each year exceed his liabilities, and that he is current on all of his federal income tax obligations. (Answer; Ax. A; Ax. E; Tr. 47, 53)

The debt alleged at SOR 1.g is for a home equity line of credit (HELOC) on his principal residence in State B. When he bought the house in 2004, this loan was initially an interest-only loan for the first few years but now requires him to pay principal as well as interest. Applicant is repaying the loan as required but the access to credit has been suspended because the house is no longer worth what it was when the loan was obtained. (Answer; Gx. 1 - 4; Ax. A; Ax. D; Ax. E; Tr. 48)

As to Applicant's current finances, he receives less than \$1,000 income from his Army Reserve participation. As noted above, he is diverting most of his monthly small business income to taxes. Applicant has taken roommates to help with his mortgage expenses, but he acknowledged that he has little remaining each month after expenses. In addition to trying to build his small business, Applicant is trying to become better

qualified, through higher education and small business certifications, at obtaining a well-paying job in the defense industry. He is studying for a master's degree, and he attends several small business conferences as a means of networking and generating job opportunities. (Answer; Gx. 2; Ax. C; Tr. 53 - 62)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,³ 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 new 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 interest⁴ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of 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.⁵

³ See Directive. 6.3.

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ See *Egan*, 484 U.S. at 528, 531.

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.⁶

Analysis

Personal Conduct

In 2009, Applicant misused Government resources by conducting personal business affairs during working hours while serving on active duty. This information raises a security concern about personal conduct, which is addressed 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.

Of the specific disqualifying conditions listed under this guideline, only AG ¶ 16(d)(4) is pertinent to these facts and circumstances:

credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: . . . evidence of significant misuse of Government or other employer's time or resources.

It is uncontroverted that Applicant used office email for matters relating to his property management business while serving as a general's aide. The letter of reprimand was not produced for the record, so the extent to which his misuse of Government resources was “significant” cannot be determined. To his credit, Applicant disclosed this event in his EQIP and in his subject interview with a Government investigator. Further, this was an isolated event and Applicant has received two

⁶ See *Egan*; AG ¶ 2(b).

satisfactory performance evaluations since the letter was issued. This information supports application of the mitigating condition at AG ¶ 17(c):

the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

Available information supports a conclusion that Applicant's letter of reprimand does not reflect adversely on his current judgment and reliability. Also, it is not likely to recur as his military circumstances have changed in that he has ample time outside his active duty obligations to conduct his business. On balance, he has mitigated the security concerns raised by his 2009 misconduct.

Financial Considerations

In Applicant's 2013 EQIP, he disclosed several significant delinquencies related to his failed real estate investment activities. Subsequent credit reports and a subject interview with a Government investigator attributed to Applicant more than \$585,000 in delinquent mortgage debt. Available information is sufficient to raise a security concern about Applicant's finances. That concern is expressed, in relevant part, 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.

More specifically, available information requires application of the disqualifying conditions at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*) and AG ¶ 19(c) (*a history of not meeting financial obligations*).

In response to the SOR and at his hearing, Applicant established that his debts arose from failed real estate ventures between 2002 and 2007. In State A, those ventures failed because the population of available tenants evaporated when a large military deployment occurred as part of Operation Iraqi Freedom. In State B, those ventures failed because his partner was a scam artist who convinced Applicant to obtain properties on the strength of the partner's promise of enough labor to rehabilitate or rebuild those houses. The timing of Applicant's real estate investments in State B also coincided with the collapse of home values there. Applicant was left without any funds with which to meet his mortgage obligations and the homes were foreclosed. The best Applicant could do under the circumstances has been to satisfy his forgiven or abandoned debts as taxable income based on the amount remaining on his mortgage obligations after foreclosure and resale. He has been able to resolve most of his total

debt this way. He continues to pay enough estimated income taxes to satisfy the anticipated tax obligations.

The foregoing requires application of the following AG ¶ 20 mitigating conditions:

(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; and

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

Although he still has several debts to repay, the presence of unpaid debts is not necessarily disqualifying. Equally as important is an individual's judgment and initiative in responding to adverse financial conditions. Applicant has demonstrated that he will continue to resolve his debts while improving his current and future financial prospects. On balance, he showed that he is acting in good faith and that his finances are under control. Applicant has mitigated the security concerns about his financial problems.

Whole-Person Concept

I have evaluated the facts and have applied the appropriate adjudicative factors under Guidelines E and F. I also have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is 41 years old and presumed to be a mature, responsible adult. The letter of reprimand is the only known blemish in his military record, and it does not appear to be an accurate indicator of his current judgment and reliability. His financial problems arose from circumstances largely beyond his control. But he has acted responsibly under the circumstances, and given available resources, to resolve his debts. A fair and commonsense assessment of all available information shows that Applicant is unlikely to experience such financial problems in the future and that those problems do not reflect adversely on his judgment and reliability.

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.g: For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

Conclusion

In light of all of the foregoing, 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