



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



In the matter of:)
)
) ISCR Case No. 14-01515
)
Applicant for Security Clearance)

Appearances

For Government: Caroline E. Heintzelman, Esq., Department Counsel
For Applicant: Don Awerkamp, Esq.

12/17/2014

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense's (DOD) intent to deny her eligibility for a security clearance to work in the defense industry. Applicant mitigated the security concerns raised by her decision to strategically default on a mortgage loan. For two years, Applicant made a good-faith effort to honor the terms of her mortgage obligation. She made the decision to strategically default on a mortgage loan after consulting her financial planner and at least two real estate attorneys. She acted responsibly in light of her circumstances. Clearance is granted.

Statement of the Case

On June 25, 2014, the DOD issued a Statement of Reasons (SOR) detailing security concerns under the financial considerations guideline.¹ DOD adjudicators were

¹ This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

unable to find that it is clearly consistent with the national interest to grant or continue Applicant's security clearance and recommended that the case be submitted to an administrative judge for a determination whether to revoke or deny Applicant's security clearance.

Applicant timely answered the SOR and requested a hearing. At the hearing convened on November 18, 2014, I admitted Government's Exhibits (GE) 1 through 5 and Applicant's Exhibit (AE) A, without objection. After the hearing, Applicant timely submitted AEs B through H, which I admitted without objection.² I received the transcript (Tr.) on November 26, 2014.

Administrative Notice Documents

Applicant offered documents regarding State 1's anti-deficiency statute and case law interpreting the statute. These documents are appended to the record as HE I through IV, without objection.

Findings of Fact

Applicant, 33, has worked as an employee of a federal contractor since 2005. She has held a security clearance since approximately July 2008, without incident. In August 2013, Applicant reported the foreclosure of her rental property to her employer's facility security officer (FSO). The resulting adverse information report triggered the current reinvestigation and adjudication. The SOR contains a single allegation that Applicant is indebted to a mortgage lender for approximately \$118,300 on a foreclosed property.³

Applicant purchased her first home, a 950 square foot townhome, in 2006. She purchased the property for \$159,900 using 80/20 financing. Under this structure, the mortgage is secured by two loans, the first for 80% of the purchase price and a second loan for the remaining 20%. Applicant testified that she did not fully understand the terms of the mortgage loans. After purchasing the property, Applicant invested \$15,000 of her savings into improving the property. Applicant and her husband continued to live in the home after their marriage in 2009. When they were ready to start a family, the couple decided to buy a larger home in a better neighborhood. By the time they were ready to sell the townhouse in 2010, the value of the property had fallen by 50 percent. Comparable home sales in the area showed a similar decline in property values as well as an increasing number of short sales and home foreclosures. Unable to sell the home, Applicant decided to convert it into a rental property when she and her husband moved into their new home in July 2010.⁴

² The correspondence related to the Applicant's post-hearing submissions are appended to the record as Hearing Exhibit (HE) V.

³ Tr. 24-25; GE 1-2.

⁴ Tr. 16-18; GE 3.

While Applicant was pregnant with her first child, she took a hard look at her finances. At the time, the mortgage loans were Applicant's only debts. Although she priced the townhome at the high end of the rental market, the property operated at a loss. On average, Applicant paid \$500 each month to cover the expenses related to the property. Although she did not have any other consumer debt, Applicant knew that her expenses would increase with the birth of her child. The couple needed new vehicles and would have to incur costs for daycare. Applicant consulted her financial planner who advised her that the second loan on the property has a term of 15 years and required a balloon payment at the end of the term to satisfy the mortgage. The financial planner informed Applicant that it was unlikely that she would ever recuperate her investment in the property and warned her that she was at risk of depleting her savings or becoming reliant on credit cards to meet her obligations under the terms of the mortgage loans. The financial planner advised Applicant to strategically default on the mortgage and referred her to a real estate attorney.⁵

The real estate attorney advised Applicant of the state's anti-deficiency law and suggested that she execute a strategic default on the property if she was unable to modify the terms of the mortgage loan with the lender. Because Applicant did not feel comfortable with the idea of defaulting on a financial obligation, she consulted another real estate attorney, whose advice echoed the first attorney's recommendation. As she consulted attorneys, Applicant also sought the advice of a friend who worked in her employer's security department about the impact of a strategic default on her security clearance. Applicant's friend advised her to make the best decision she could, to keep written records, and to report the foreclosure when it occurred. Applicant decided to continue paying the mortgage on the property and seek a mortgage modification. She did not qualify for a loan modification with her lender, nor did she qualify for any relief programs available at the time. The lender did not give Applicant the option to short sale the property.⁶

Applicant made her last mortgage payment on the townhome in April 2012. Six months after she stopped paying the mortgage, the lender offered her a trial modification. Applicant participated in the trial modification for two months in November and December 2012, but decided to abandon it after the lender informed her that successful completion of the trial program did not guarantee a permanent modification arrangement. Pregnant with her second child, Applicant and her husband reevaluated their decision to keep the townhouse. Although they had been able to rent the townhome for 22 of the 30 months they held the property as a rental unit, they had paid approximately \$16,500 out of pocket to cover the deficiency between the rental income and the expenses on the property. Applicant was also concerned that the looming balloon payment on the second mortgage would cause her family a significant financial hardship. Applicant testified that she and her husband lamented over the decision and sought advice from family members and close friends. Ultimately, Applicant and her husband decided that maintaining the property was not in the best interest of their

⁵ Tr. 18-20. AE H.

⁶ Tr. 21-23, 31-32, 35.

growing family. Although Applicant defaulted on the mortgage, she continued to pay the monthly home owner's association fee until the housing records showed that she no longer owned the property.⁷

In September 2012, the lender gave Applicant notice that the home would be sold pursuant to the deed of trust on the property. The home was offered for sale at auction in December 2012, during the time Applicant was participating in the trial modification program. The lenders report both mortgages as having no outstanding balance. The property sold in May 2013. Applicant has since worked with her financial planner and tax preparer to ensure that she treated the disposition of the property appropriately on her federal tax return.⁸

Applicant and her husband have a household income of approximately \$160,000. They live within their means and use consumer credit sparingly. Together they have amassed liquid savings totaling approximately \$10,000, and have retirement savings of about \$300,000. Aside from the strategic default on the townhome, Applicant has a positive credit history and a credit score in the high 700s.⁹

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

⁷ Tr. 23-24, 32-33; AE H.

⁸ Tr. 37, 44-45; GE 4; AEs A, D.

⁹ Tr. 37-39; Answer.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

Unresolved delinquent debt is a serious security concern because failure to “satisfy debts [or] 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.”¹⁰ Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information within the defense industry.

The SOR alleges that Applicant is indebted to one creditor, a mortgage lender, for approximately \$118,000 on a foreclosed mortgage. Applicant admits that she strategically defaulted on the mortgage to avail herself of the protection offered under her state’s anti-deficiency law. Applicant’s admission is sufficient evidence of her unwillingness to repay her debts and her history, albeit a limited one, of not paying her debts.¹¹

However, the record contains evidence that mitigates these concerns. Citing her state’s anti-deficiency law, Applicant argues that she is not legally responsible for the debt alleged in the SOR. In relevant part, the statute reads:

¹⁰ AG ¶ 18.

¹¹ AG ¶¶ 19(a), (c).

If a trust property of two and one-half acres or less which is limited to and utilized for either a single one-family or a single two-family dwelling is sold pursuant to the trustee's power of sale, no action may be maintained to recover any difference in the amount obtained by the sale and the amount of the indebtedness and any interest, costs, and expenses.¹²

In enacting the statute, the State's legislature intended to protect certain homeowners from the financial disasters of losing their homes to foreclosure plus all of their other non-exempt property on the execution of a judgment for the balance of the purchase price.¹³ As long as the subject property fits the description in the statute, the protection applies to primary residences and investment properties.¹⁴ While resolving issues of state law is not ideal in the context of security clearance cases, in cases such as this one where the statutory language is clear on its face, and the case law interpreting the statute is also clear, the speculation or conjecture regarding the applicability of the statute is absent. Applicant's property falls within the requirement outlined in the statute; as a result, the lender cannot recover the deficiency balances on the loan from her. Accordingly, Applicant is not responsible for the debt as alleged in SOR ¶ 1.a.

A finding that the SOR debts are legally uncollectible does not end the inquiry into Applicant's security worthiness; the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner must also be examined.¹⁵ Applicant acted responsibly, with every intention to comply with the terms of her mortgage loan. Circumstances beyond Applicant's control, the severe devaluation of her home caused by the nation-wide crash of the real estate market, put her in a financial bind she could not have foreseen or prevented. Applicant's decision to strategically default on the mortgage loan came after she made a good-faith effort over two years, at a cost of \$16,500, to fulfill her legal obligations to her creditor. She acted responsibly in light of her circumstances by seeking advice from her financial planner and three real estate attorneys. Only after her attempts to obtain a loan modification failed and her advisors warned her that her financial health was in jeopardy did she finally take advantage of her state's anti-deficiency law. Her decision to strategically default on the townhome does not cast doubt on her continued security worthiness. She also self-reported the issue to her FSO as required, showing her willingness to comply with security regulations and eliminating the issue as potential source of vulnerability or exploitation. Furthermore, Applicant does not have a history of financial problems or a habit of being fiscally irresponsible. Her finances are otherwise under control.¹⁶

¹² HE II; See also HE I.

¹³ HE IV.

¹⁴ See *Nothorn Arizona Properties v. Pinetop Properties Group*, 804 P.2d 501 (App. 1986).

¹⁵ See, e.g., ISCR Case No. 01-09691 at 3 (App. Bd. Mar. 27, 2003).

¹⁶ See AG ¶¶ 20 (a)-(e).

I have no doubts or reservations about Applicant's current reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(a). The purpose of a security clearance case is not to assign guilt or blame and then punish or sanction a person for their past actions. Likewise a security clearance case is not aimed at collecting debts. Nor is an applicant required to commit acts of financial martyrdom to maintain a security clearance. Rather the purpose is to make "an examination of a sufficient period of a person's life to make an affirmative determination that the personal is an acceptable security risk."¹⁷ Applicant found herself stuck between her desire to honor the legal obligation to her creditor and maintaining her otherwise-stable finances. In finding an appropriate solution to the problem, Applicant has handled her obligations as a clearance holder appropriately. In doing so, she has proven that she takes the duties attendant to her fiduciary relationship with the Government seriously and that she continues to be worthy of the Government's trust and confidence. Clearance is granted.

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

Subparagraph 1.a: For Applicant

Conclusion

In light of all of the circumstances presented, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

Nichole L. Noel
Administrative Judge

¹⁷ AG ¶ 2(a).