



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



In the matter of: )  
 )  
 [Redacted] ) ISCR Case No. 14-02526  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Fahryn Hoffman, Esq., Department Counsel  
For Applicant: *Pro se*

01/20/2015

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application on December 9, 2013. On July 22, 2014, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DOD acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by DOD on September 1, 2006.

Applicant answered the SOR on August 13, 2014, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on October 29, 2014, and the case was assigned to me on October 31, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 3, 2014, scheduling the hearing for November 19, 2014. I convened the hearing as scheduled.

Government Exhibits (GX) 1 through 3 were admitted in evidence without objection. Department Counsel's letter to Applicant transmitting copies of GX 1 through 3 is attached to the record as Hearing Exhibit (HX) I. Applicant testified and submitted Applicant's Exhibits (AX) A through I, which were admitted without objection. I kept the record open until December 5, 2014, to enable Applicant to submit additional documentary evidence. He timely submitted AX J through O, which were admitted without objection. Department Counsel's comments regarding AX J through O are attached to the record as HX II. At my request and without objection from Applicant, Department Counsel submitted information about the law applicable to limited liability companies (LLC) in the jurisdiction where the debts alleged in SOR ¶¶ 1.a-1.i and 1.k were incurred. Her submission is attached to the record as HX III. DOHA received the transcript (Tr.) on December 3, 2014.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted all the allegations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 66-year-old electrical engineer employed by a defense contractor since July 1998. He graduated from college with a bachelor's degree in engineering in 1989, and he began working for defense contractors shortly after graduation. He has held a security clearance during his entire period of employment by defense contractors. (Tr. 7.)

Applicant married in January 1977. He and his wife have two daughters, ages 28 and 26, who live with them. Applicant's nephew, his sister's son, is a mortgage broker. (Tr. 70, 72.) In 2006, his nephew convinced him to join three others who had formed an LLC in 2005 to buy and operate a hotel. (Answer to SOR; AX G.) The LLC originally was organized under the law of the state where the original owners resided. (AX H.) Applicant was reluctant to join the venture, but his nephew convinced his wife, who persuaded Applicant to participate. He invested \$100,000 in the LLC, using a home equity line of credit. (Tr. 36-38, 66.) Only the original owners had authority to transact business on behalf of the company. The other owners, including Applicant, were allowed only to review the records of the company. (AX H.)

The LLC decided to purchase a motel located in another state. In March 2006, the LLC was reorganized as an LLC in the jurisdiction where the motel was located, with four owners, including Applicant, each having a 25% interest. (AX J.) Two original owners moved to the location of the motel and managed its daily operation.

The two original owners mismanaged the business, lost money, and failed to pay the required state fees and taxes. Schedule E of Applicant's federal income tax returns reflected losses of \$5,295 in 2006; \$9,854 in 2007; \$27,904 in 2008; \$6,863 in 2009; \$7,258 in 2010; \$17,713 in 2011; \$15,992 in 2012; and \$16,531 in 2013. (AX M.)

Around 2008, Applicant gave half of his 25% ownership share to his nephew. (Tr. 121; AX L at 2.) In 2009, after the city filed complaints against the motel for prostitution,

drug-dealing, and selling alcohol to minors, a majority of the owners voted to replace the motel management, and Applicant's nephew began managing the motel. The owners discovered that the previous managers had not paid the federal and state income taxes, sales taxes, and guest taxes.

After two years, Applicant's nephew was unable to turn the motel into a profitable venture. Applicant personally paid about \$33,000 on the mortgage loan. (Tr. 120.) The owners decided to surrender the property to the mortgage lender. (Tr. 39-42.) The mortgage was foreclosed, and the motel was sold for about \$700,000. After delinquent taxes were deducted, the LLC received only \$500,000 (Tr. 55-56.) The lender obtained a judgment against Applicant for about \$975,000, and he received notice of the judgment in October 2013. (GX 2; AX O; Tr. 57.)

The various state tax liens alleged in SOR ¶¶ 1.a-1.i, totaling about \$175,122, were filed in 2010, 2011, and 2012 for unpaid state taxes and fees attributable to the motel owned by the LLC. As of the date of the hearing, Applicant was considering a lawsuit to require all owners to share equally in settling the tax liens and the defaulted mortgage loan, but he had not retained an attorney or taken any action to resolve them. (Tr. 45, 57.) The liens and the judgment are unresolved.

I have taken administrative notice of the laws under which the LLC was organized and doing business as a motel, including the following provisions:

**Statute 17-7688: *Liability to third parties.*** (a) Except as otherwise provided by this act, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company, and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.

(b) Notwithstanding the provisions of subsection (a) of this section, under an operating agreement or under another agreement, a member or manager may agree to be obligated personally for any or all debts, obligations and liabilities of the limited liability company.

(c) A member or manager of a limited liability company is not a proper party to proceedings by or against a limited liability company, except when the object is to enforce a member's or manager's right against, or liability to, the limited liability company.

**Statute 17-76138: *Taxation of limited liability companies.*** For the purposes of any tax imposed by the state of [jurisdiction] or any instrumentality, agency or political subdivision of the state of [jurisdiction], a limited liability company formed under this act or qualified to do business

in the state of [jurisdiction] as a foreign limited liability company shall be classified as a partnership unless classified otherwise for federal income tax purposes, in which case the limited liability company shall be classified in the same manner as it is classified for federal income tax purposes. . . .

The LLC organizational documents do not obligate the owners to be personally liable for LLC debts. The record contains no evidence of any other agreement obligating Applicant to be personally liable for LLC debts. The LLC filed its federal income tax returns as a partnership. (AX L). Thus, it is treated as a partnership for the purposes of the state taxes levied on the motel operations.

In late 2006, Applicant's nephew asked Applicant to help out a friend by buying the friend's house, with the understanding that the friend would make the mortgage payments, and the friend would buy back the house after six months. The nephew told Applicant that the friend could not afford the payments and needed help. (Tr. 71-72.) The house was a duplex with two rental units, each renting for \$250 per month. Both units were occupied, but only one occupant was paying rent. Applicant did not examine the house, did not meet with the friend before closing the sale, and did not know why his nephew's friend was in financial distress. He did not have the house appraised, although his nephew's friend showed him an appraisal for \$130,000 (Tr. 73-74.) Applicant thought the proposal was not a good idea, but his wife persuaded him to accept it. He bought the house for \$130,000. (Tr. 73-75.) The buy-back agreement was never reduced to writing. (Tr. 129.)

After two months, Applicant started receiving notices that the mortgage loan payments were not being made. Applicant made the loan payments of \$987 for two months. He was able to negotiate a loan modification, which reduced the monthly payments to about \$579. (GX 3 at 7; Tr. 87.) Applicant started receiving notices of building code violations. When Applicant received an offer from a third party to buy the house, he found out that the appraised value of the house was only \$32,000. (Tr. 54; AX F.) He stopped making payments on the house. In December 2013, Applicant was notified that the lender was initiating foreclosure action. (AX I; Tr. 91-92.) Applicant has offered a deed in lieu of foreclosure, but has not received a response. (Tr. 50-54, 93.) Other than offering the deed in lieu of foreclosure, he has had no communication with the lender. (Tr. 94.) The debt is not resolved.

Applicant's federal income tax return reflects that he and his wife received \$158,018 in wages and salaries in 2013. (AX D.) He has paid off the mortgage on his home, which is worth about \$400,000. He has borrowed about \$230,000 on a home-equity line of credit, secured by his home. He used \$100,000 from the line of credit for his investment in the LLC, and the rest was for the education of his daughters. His payments on the line of credit are only \$650 per month, because it is an interest-only loan. In addition to his interest in the LLC and the ill-fated purchase of the rental property which is in foreclosure, he owns two other rental properties. (Tr. 65-67, 98-103.) He testified that he would be able to pay his share of the LLC-related debts if he could pay them in installments. (Tr. 69-71.)

Applicant aspires to lead a quiet life. He testified at the hearing, “I just wanted to do my job. Because, after eight hours, I don't want to take any kind of trouble, I want to go to sleep, that is it.” (Tr. 36.) He is active in his religious community, and was recognized for community service in April 2013. (AX E; Tr. 59.)

## **Policies**

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the

criteria listed therein and an applicant's security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## Analysis

### Guideline F, Financial Considerations

The SOR alleges nine state tax liens totaling about \$175,122 (SOR ¶¶ 1.a-1.i); a delinquent mortgage loan for \$108,448 (SOR ¶ 1.j); and an unsatisfied judgment for \$975,182 (SOR ¶ 1.k). The concern under this guideline is set out in AG ¶ 18:

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.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns about an individual's self-control, judgment, and other qualities essential to protecting classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

The evidence establishes that Applicant is liable for his proportionate share (12.5%) of the state tax liens, alleged in SOR ¶¶ 1.a-1.i, because an LLC is treated under state law as a partnership for tax purposes. However, the judgment for the deficiency after foreclosure on the motel property, alleged in SOR ¶ 1.k, is an obligation of the LLC and not an individual obligation. The delinquent mortgage loan in SOR ¶ 1.j, unrelated to the LLC, is Applicant's individual responsibility. Applicant's admissions, the documentary evidence presented at and after the hearing, and Applicant's testimony establish two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or

unwillingness to satisfy debts”) and AG ¶ 19(c) (“a history of not meeting financial obligations”).

The following mitigating conditions are potentially applicable:

AG ¶ 20(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;

AG ¶ 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;

AG ¶ 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;

AG ¶ 20(d): the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

AG ¶ 20(e): the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

AG ¶ 20(a) is not fully established. Applicant’s delinquent debts are numerous and recent. Although the evidence indicates that Applicant is easily influenced by family members, I am satisfied that business ventures similar to the two ill-advised ventures in this case are unlikely to recur.

AG ¶ 20(b) is not fully established. Generally, financial losses resulting from speculative real-estate investment are not “beyond a person’s control” within the meaning of this mitigating condition. See ISCR Case No. 09-03764 (App. Bd. Apr. 1, 2010) (sustaining judge’s finding that debts from a failed business venture entered voluntarily by an applicant were not the result of conditions largely beyond the applicant’s control) and ISCR Case No. 08-08435 (App. Bd. Jul. 16, 2009) (overturning judge’s application of AG ¶ 20(b) where an applicant did not exercise due diligence before entering into risky real estate venture). Thus, Applicant’s financial problems caused by his lack of due diligence before purchasing a rental property, sight unseen, from his nephew’s friend was not a condition beyond his control. However, the fraudulent and illegal acts and omissions of the LLC owners who managed the motel were conditions largely beyond Applicant’s control. Nevertheless, Applicant has not acted responsibly. Except for consulting with a lawyer, he has done virtually nothing to resolve the debts.

AG ¶ 20(c) is not established. Although Applicant has discussed his financial situation with a lawyer, he has not received the type of financial counseling contemplated under this mitigating condition, and his financial problems are not under control.

AG ¶ 20(d) is not established. Applicant has taken no affirmative steps to pay his share of the state tax liens or resolve the delinquent mortgage loan in SOR ¶ 1.j.

AG ¶ 20(e) is established for the judgment in SOR ¶ 1.k. Although Applicant has not asserted it, he has a reasonable basis for disputing the judgment against him arising from the foreclosure on the LCC-owned motel. Under the applicable state law, he is not liable for the LLC debt and was not a proper party to the legal action against him.

### **Whole-Person Concept**

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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.

I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant was sincere and candid at the hearing. He has been a contractor employee and held a security clearance for virtually all his professional life. On the other hand, his poor judgment, lack of due diligence in his business ventures, and vulnerability to influence and exploitation by family members raise serious doubts about his trustworthiness and reliability.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns about his finances. Accordingly, I conclude he has



not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

**Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): AGAINST APPLICANT

Subparagraphs 1.a-1.j:	Against Applicant
Subparagraph 1.k:	For Applicant

**Conclusion**

It is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman  
Administrative Judge