



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



In the matter of:)
)
) ISCR Case No. 14-04871
)
Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: C. Lowell Crews, Esq.

05/21/2015

Decision

CURRY, Marc E., Administrative Judge:

The deficiency that Applicant owes to a junior mortgagor, stemming from a 2009 home foreclosure, is non-collectible. This is not the controlling factor when assessing the financial considerations security concern under the Adjudicative Guidelines (AG); however, when considered in tandem with the circumstances surrounding the foreclosure, Applicant's efforts through his realtor to avoid foreclosure, and later, with his attorney, to ascertain whether he remained responsible for any deficiency, together with Applicant's current financial stability, I conclude that he has mitigated the security concern. Clearance is granted.

Statement of the Case

On November 24, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a statement of reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense*

Industrial Personnel Security Clearance Review Program (January 2, 1992), as amended (Directive); and the AGs implemented by the DOD on September 1, 2006.

On December 30, 2014, Applicant answered the SOR, denying the sole allegation. He requested a hearing whereupon the case was assigned to me on March 10, 2015. DOHA issued a notice of hearing on March 19, 2015, scheduling the hearing for April 15, 2015. On March 23, 2015, Applicant's attorney entered his appearance and requested a continuance. I granted the continuance and rescheduled the hearing for May 13, 2015. On May 4, 2015, Applicant's counsel moved for another continuance. On May 6, 2015, I denied his motion, but extended the record, giving Applicant's counsel until June 1, 2015 to submit any document that he was unable to obtain before the May 13, 2015 hearing date, and giving Department Counsel through June 5, 2015 to file objections to any post-hearing submissions.

The hearing was held on May 13, 2015, as scheduled. At the hearing, I took administrative notice of one document, a discovery letter written from Department Counsel to Applicant, dated March 2, 2015 (Hearing Exhibit (HE) I), and received two Government exhibits (GE 1 and GE 2) together with the testimony of Applicant and a character witness. Also, I received 11 exhibits marked as Applicant's Exhibits (AE) A through L. On June 1, 2015, Applicant's counsel submitted an additional document that I marked and received as AE M. Department Counsel did not file any objection, whereupon I closed the record. The transcript was received on May 21, 2015.

Findings of Fact

Applicant is a 58-year-old single man. He graduated from high school in 1975 and joined the U.S. Marine Corps in the early 1980s. (Tr. 65) After being honorably discharged in 1985, he began working for a defense contractor as an aviation systems analyst. (Tr. 64) He has been working with the same Government client for multiple employers since then. (Tr. 64) He has continuously held a security clearance for 30 years. (Tr. 65)

In May 2005, Applicant purchased a home with his fiancée and her son. Under their agreement, the fiancée's son was to pay the principal mortgage, totalling \$480,000, and Applicant and his fiancée were to pay the junior mortgage, totalling \$112,000. (Tr. 46) The payment of the principal mortgage was financed with an adjustable rate mortgage (ARM). (Tr. 21) Legally, the mortgages were only in Applicant's name. (Tr. 47) The plan was for Applicant and his fiancée to delegate responsibility for both mortgages to her son after two years, then move out of the house. (Tr. 47) The mortgage company reassured them that if his fiancée's son made consistent payments in that time, improving his poor creditworthiness, that it would allow the delegation to occur. (Tr. 47)

In June 2005, Applicant began making the mortgage payments on the junior mortgage, totalling \$960 monthly, as agreed. (AE A; Tr. 18) In November 2005, Applicant's fiancée died. (Tr. 20) In approximately January 2006, her son, unbeknownst

to Applicant, stopped making mortgage payments. (Tr. 20) Applicant did not discover this until April 2006. By then, the principal mortgage was delinquent in the amount of \$4,979. Applicant paid the delinquency. (AE A at 37)

Applicant's late fiancée's son never made any more mortgage payments. Unable to afford both mortgages, Applicant tried to refinance them. (Tr. 21) These efforts were unsuccessful. Applicant then tried to negotiate a freeze on the interest rate on the ARM, which was scheduled to increase significantly. (Tr. 21) After this failed, Applicant attempted to sell the property. (Tr. 22) By then, the real estate market was beginning to collapse, and the home value was less than what Applicant owed on the mortgages. (Tr. 23)

Applicant then attempted to short sell the home, consulting with his realtor on a weekly basis. These efforts also proved unsuccessful. Although Applicant never made any payments on the principal mortgage after April 2006, he continued to make the payments on the second mortgage through June 2007.¹ By then, payments had become unsustainable. (Tr. 49)

In September 2007, the bank initiated the foreclosure process. (AE B) In October 2008, the home was sold through the court. (AE B at 3) Per the auditor's account, the sale price covered the primary mortgage. (AE B at 2)

The auditor's report did not account for the money that Applicant owed the junior mortgagor. The court auditor served the junior mortgagor with a copy of the auditor's account. The junior mortgagor did not file any exceptions to the omission. In November 2009, the court ratified the auditor's account. (AE F)

Applicant contacted the junior mortgagor both before and after the foreclosure about the status of his debt. (Tr. 56-58) He was told to "stand by" while the junior mortgagor negotiated a division of the sale proceeds with the principal mortgagor. (Tr. 57) Before the foreclosure, Applicant waited for the junior mortgagor to enter the foreclosure proceedings and file a deficiency judgment. It did not. (Tr. 56)

On April 8, 2015, Applicant formally disputed the debt. He contends that the debt is invalid because the junior mortgagor neither filed a foreclosure judgment after receiving notification of the foreclosure action, nor took exceptions to the final court order. (AE E - AE G) On April 20, 2015, the account was deleted from his credit report. (AE L)

Applicant earns \$84,000 annually. He has approximately \$2,500 of discretionary monthly income and about \$120,000 invested in a 401(k) account. (Tr. 66-67)

¹Applicant's late fiancée's son and his family moved out of the home in July 2006, at Applicant's request. (Tr. 53) Applicant had moved out shortly after he discovered that his late fiancée's son had not been making the payments on the principal mortgage.

Policies

The adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied together with the factors listed in the adjudicative process. 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.”

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 applicant or proven by department counsel. . . .” The applicant has the ultimate burden of persuasion for obtaining a favorable security decision.

Analysis

Guideline F, Financial Considerations

Under this guideline, “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.” (AG ¶ 18) Applicant’s inability to keep up with his mortgage payments led to the foreclosure of his home in 2008. AG ¶ 19(a), “inability or unwillingness to satisfy debts,” applies.

Applicant never had any financial problems before buying the home. He did not begin to struggle with the mortgage payments until his late fiancée’s son reneged on his agreement to make monthly payments on the principal mortgage. Applicant tried to maintain these mortgage payments, making a payment of nearly \$5,000, covering the four months of payments that his late fiancée’s son had missed. Also, recognizing that he could not sustain payments on both mortgages, Applicant made efforts to either refinance or modify the home. When these efforts were unsuccessful, he attempted to sell the home, but was stymied by the beginning of the real estate market collapse which caused the value to decrease to an amount less than what he owed on the mortgages. Under these circumstances, 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,” and

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

Applicant’s home was sold through the foreclosure process. His first mortgage was satisfied through the sale, leaving a \$112,000 deficiency, the amount remaining on the second mortgage. He disputes responsibility for this deficiency, contending that the failure of the junior mortgagor to enter the foreclosure action and file a deficiency judgment within the time period prescribed under state law rendered the debt invalid. Further, he argued that the statutory invalidity of the debt is analogous to a discharged debt in bankruptcy, and as such, is more significant in weighing mitigation than a debt that is uncollectible because of the expiration of a statute of limitations.

Applicant provided all of the documents supporting his dispute, which he submitted to the credit reporting agencies, including a copy of the state law, and all of the court documents establishing that the junior mortgagor received notice of foreclosure. As of the hearing date, one of the credit reporting agencies had responded to his dispute by deleting the deficiency from the credit report.

Department Counsel contends that a security clearance issue exists notwithstanding whether the deficiency is statutorily invalid or non-collectible under state law, because Applicant incurred the mortgage debt and did not satisfy it. Department Counsel is correct. Nevertheless, the legal basis of Applicant’s argument and the steps that he took to get the debt removed from his credit report are sufficient to trigger the application of 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.”

Applicant earns \$84,000 annually, has \$120,000 invested in a 401(k) plan, and has \$2,500 of discretionary monthly income. There is no record evidence that he may be struggling financially. AG ¶ 20(c), “. . . there are clear indications that the problem is being resolved or is under control,” applies.

Whole-Person Concept

Under the whole-person concept, the administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). They are as follows:

(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.

Defaulting on a mortgage is a significant indicator of financial instability. Conversely, Applicant's failure to pay his mortgage was neither part of a historical pattern of debt default, nor the result of any irresponsible money management or foolish real estate speculation. Instead, it was an isolated episode caused by an unusual combination of circumstances - the death of Applicant's fiancée, her son's subsequent breach of their agreement to help make mortgage payments, and the collapse of the real estate market.

Applicant has successfully disputed the debt, arguing that it is statutorily invalid. This alone does not mitigate the security concern. However, the invalidity of this debt renders it highly unlikely that it could render Applicant vulnerable to pressure, coercion, exploitation, or duress in the future.

In the unlikely event that the mortgagor was to successfully pursue this debt, six years after receiving notice of foreclosure, Applicant has ample discretionary income, and investment income that he could liquidate in order to make payment arrangements.

Considering this case in the context of the whole-person concept, I conclude Applicant has mitigated the security concern. In reaching this decision, I also considered Applicant's strong character reference and the length of time that he has held a security clearance.

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 by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

MARC E. CURRY
Administrative Judge