



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



In the matter of:)	
)	
)	ISCR Case No. 14-05150
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

04/26/2016

Remand Decision

LYNCH, Noreen A., Administrative Judge:

On April 22, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant listing security concerns arising 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 adjudicative guidelines (AG), implemented in September 2006.

Applicant timely answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on October 28, 2015. A notice of hearing was issued on November 5, 2015, scheduling the hearing for December 3, 2015. Government Exhibits (GX) 1-2 were admitted into evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant Exhibits (AX) A-I at the hearing. I kept the record open until January 6, 2016 for additional documentation, which was timely received. AX J-O were entered into the record without objection. The transcript was received on December 11, 2015. I issued

my decision on February 23, 2016, denying Applicant's eligibility for access to classified information.

Applicant appealed the decision and raised the following issues on appeal: whether the Judge failed to consider all of the evidence; whether the Judge's application of the mitigating conditions was erroneous; and whether the Judge's whole-person analysis was erroneous.

On April 20, 2016, the Appeal Board remanded my decision to address AX O because "specifically the documents, including a HUD 1, in Exhibit O pertaining to the scheduled short sale of the property was not discussed." The Board noted that not all the documents were signed, but the cumulative significance of the documents contained in the exhibit is sufficient such that I should have discussed the exhibit.¹

Findings of Fact

In his answer to the SOR, Applicant denied the SOR allegations under Guideline F. He provided explanations for each alleged debt.

Applicant is 33 years old. He graduated from high school and received his undergraduate degree in 2006. Applicant is married and has no children. He has been with his current employer since 2001, where he serves as an accounting clerk. He completed a security clearance application in 2014. (GX 1) Applicant has held a security clearance since 2005.

The SOR alleges approximately \$260,000 in delinquent debt for one mortgage loan, two state tax liens, and a charged-off account. (GX 2) The charged-off account in SOR 1.d for \$13,771 has been settled in the amount of \$8,955. (AX K)

Applicant purchased a rental property in 2007. He paid about \$238,000. At the time he earned approximately \$90,000 annually. He could afford his own mortgage and the rental property with the rental income, and he made mortgage loan payments in a timely manner. When the tenant stopped paying and Applicant's income was reduced by half, he could no longer afford to make the monthly payments. (Tr. 25) Applicant attempted to file suit against the tenant for the rent and he tried to obtain a loan modification. He was not successful. He claims the home went to foreclosure in 2011. In 2014, he obtained the services of a law firm to help to sell the property. (AX B) At some point, the property was vandalized and Applicant filed a claim with his insurer.

As to SOR allegations 1.a and 1.b, Applicant's indebtedness to the state for a 2011 tax liens in the amount of \$849 and \$2,372 relates to the tax associated with the rental property that he purchased in 2007. (AX C) As of the close of the record, they were not resolved.

¹One member of the Appeal Board issued a Dissenting Opinion.

As to SOR allegation 1.c, Applicant has a past-due amount of \$243,378.00 on a mortgage loan to the bank for the rental property. The balance of the loan is about \$283,000. As of the close of the record, Applicant has not sold the property and the balance was unresolved at this point. He stopped making payments on the mortgage loan in 2008. He has attempted several short sales over the years.

Applicant emphasized that the debts are not the result of an inability to live within his means or poor self-control. His wife works and earns approximately \$100,000 a year. When Applicant's work hours were reduced to about 24 hours a week, he looked for a second job. (AX J) Applicant learned a lesson about real estate investment. He does not intend to invest in real estate in the future (Tr. 32)

Applicant's realtor testified that he has worked with him since 2008. (AX A) The realtor explained the property that serves the basis of allegation 1.c is listed with his company. The property was under signed contract for sale. (AX N) The transaction would be a short sale if the bank approves. The tax liens that are listed in SOR 1.a and 1.b would be resolved by the short sale of the property according to Applicant. (Tr. 15) He further explained the difficulties that Applicant has experienced with the rental property. Initially, the tenants living in the home did not move out after they stopped paying rent. After about a year the tenants left the home. No rent was paid during that time. The realtor also explained that he advised Applicant about selling the property. He communicated with the lender on a consistent basis to resolve the matter. The realtor acknowledged that other short sales have been rejected by the bank. (AX D) Part of the reason may be that the property was vandalized. A claim was made to Applicant's insurer (AX L) and a check sent to the loan company. (AX G) He believed there was a strong chance that it will be accepted this time as a cash buyer is involved. (Tr. 20)

As a post-hearing submission, Applicant submitted AX O, which reflected a Final HUD Approval memorandum for a gross sale price of \$120,000. It stated that the closing must take place by December 28, 2015. The Bank's typical forms, reflected an approved property sale, short sale affidavit, and unsigned settlement sheet. (AX O) This document does not change or provide sufficient evidence that the sale was in fact completed. I found nothing in the record to show a completed short sale of the property. Applicant's signature appeared on some forms. However, there was no signed settlement sheet to show a completed sale. (AX O)

Applicant earns about \$45,000 a year. He is current with his other bills. There are no credit reports in the record. He acknowledged that he has obtained financial counseling. (AX J)

Applicant submitted a letter of recommendation from a colleague who has known him for 20 years. He describes Applicant as a trustworthy person who has demonstrated a high degree of professionalism. He can be entrusted to protect the privacy of client information. (AX I)

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, 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 in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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.

The U.S. Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." ² The burden of proof is something less than a preponderance of evidence. ³ The ultimate burden of persuasion is on the applicant. ⁴

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 protect 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 Executive Order 10865 provides that 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." ⁵ "The clearly consistent standard indicates that security clearance

² See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

³ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁴ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁵ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

determinations should err, if they must, on the side of denials.”⁶ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁷ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

Analysis

Guideline F, Financial Considerations

The security concern for Financial Considerations is set out in AG ¶ 18:

Failure or an 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. It also states that An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Applicant admitted that he incurred delinquent debt when one property that he bought in 2007 went to default. The outstanding debt is about \$243,000. He also has two tax liens that are not resolved as of the close of the record. Consequently, Financial Considerations Disqualifying Conditions (FC DC) AG ¶ 19(a) (inability or unwillingness to satisfy debts), and FC DC AG ¶ 19(c) (a history of not meeting financial obligations) apply. With such conditions raised, it is left to Applicant to overcome the case against him and mitigate security concerns.

The nature, frequency, and relative recency of Applicant’s financial difficulties make it difficult to conclude that it occurred “so long ago.” Applicant still has unresolved financial issues concerning the one home loan mortgage, and two state tax liens. The property was under contract for a short sale, but other short sales have been rejected by the bank. The post-hearing submission does not show a completed sale, but shows an approval by the bank. Consequently, Financial Considerations Mitigating Condition (FC MC) 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) does not apply.

FC MC AG ¶ 20(b) (the conditions that resulted in the behavior 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

⁶ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁷ *Id.*

responsibly under the circumstances) partially applies. Applicant purchased a rental property and was earning ample income to maintain a mortgage as long as tenants remained in the home. The tenants did not pay the rent for about one year. Applicant tried to have them removed. When they left, he worked with a realtor to rent or sell the property. He also tried to get a loan modification. At the same time his income was reduced by half. He made the last payment in 2008. The property was vandalized and several short sales were rejected by the bank. Applicant has pending a signed contract for another short sale. His realtor believes this will be accepted as it is a cash buyer. However, it has been eight years and the issue has not been resolved, and the balance is outstanding. There is nothing in the record to show a completed short sale of the property despite the HUD approval.

FC MC AG ¶ 20(d), (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) has some application. Applicant as noted above made efforts to resolve the issue by renting the home or doing a short sale. He communicated with the lender. He did not pay on the mortgage for a period of eight years. His realtor and a law firm were advising him. He paid one charged-off account. He believes the tax liens will be resolved through a short sale. FC MC AG ¶ 20(c) (the person has received or is receiving counseling for the problem, but there are not clear indications that the problem is being resolved, or is under control.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the circumstances. The 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.

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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant is 33 years old. He has been with his current employer since 2001. He is married and has no children. He is a mature and educated man. He has held a security clearance without incident since 2005. He bought an investment property in 2007 which

resulted in financial problems. He provided information that he has tried to resolve the issue over the years. His realtor testified and confirmed his efforts. He has a possible short sale. He settled another account that was listed on the SOR. He believes that the two tax liens will be resolved when the house is sold through a short sale. He had financial counseling. He has made some good-faith efforts over the years. He realizes that investing is a difficult venture and has no plans to invest in real estate in the future. Applicant has not incurred new delinquent debt and has not had any other difficulties. However, as of the close of the record over \$240,000 in delinquent debt, to include tax liens, remain unresolved. Notwithstanding his efforts, Applicant's delinquent debts have been outstanding for a long period of time and continue to raise concerns.

Applicant has not presented sufficient information to carry his burden of proof in this case. He has not mitigated the financial considerations security concern.

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 :	AGAINST APPLICANT
Subparagraphs 1.a-1c:	Against Applicant
Subparagraph 1.d:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant a security clearance. Clearance is denied.

NOREEN A. LYNCH.
Administrative Judge