



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 08-08435

**Appearances**

For Government: Julie R. Mendez, Esq., Department Counsel

For Applicant: *Pro Se*

March 31, 2009

**Decision**

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant completed a security clearance application (SF-86) on May 7, 2008. On November 12, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) stating 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 Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised Adjudicative Guidelines (AG) promulgated by the President on December 29, 2005, and effective for SORs issued after September 1, 2006.

In a response dated November 19, 2008, Applicant admitted to the two delinquent debts alleged in the SOR and explained why she believed the debts were incurred through fraud. She declined a hearing on the record. Department Counsel submitted a File of Relevant Materials (FORM), dated March 2, 2009. Applicant received a copy of the FORM on March 5, 2009, and responded to it by letter dated

assignment to an administrative judge for administrative determination. I was assigned the case the following day. Based upon a review of the case file, submissions, and exhibits, security clearance is granted.

### Findings of Fact

Applicant is a 58-year-old executive assistant. She has worked for the same defense contractor since January 2003. Currently, Applicant earns approximately \$96,000 in salary and retirement payments. She received a degree from an accredited university in June 2000. Married in September 1983, Applicant was divorced in June 2005. She has two adult children. There is no evidence of any financial issues other than those raised in the SOR.

There are few extraneous facts in this case. Applicant admits the two allegations raised in the SOR. Specifically, she admits she is indebted to one mortgagor on an account that has been past due in the approximate amount of \$18,799 and which is in foreclosure with an approximate balance of \$63,750. She also admits she is indebted to another entity with a past due amount of approximately \$45,399 owed on a foreclosed account with an approximate balance of \$380,000. As of November 2008, neither debt had been paid. In her March 2009 response regarding the SOR, no evidence of subsequent payment was introduced.

At some point at the end of 2005 or early 2006, Applicant answered an advertisement in the newspaper she thought might lead to a career in real estate. "At that time, everyone was getting in on making money by flipping real estate."<sup>1</sup> She met with a man who wanted to "use her credit for six months to purchase houses," and that for each house she purchased she would make \$10,000.<sup>2</sup> Profit would be made by fixing up the properties for quick resale at a competitive price.

On May 1, 2006, Applicant entered into a joint venture agreement with the man and his limited liability corporation (LLC). Their agreement states that it was to be in effect for one year, with the intention of selling the property within that one year. In the event that the property did not sell in one year, the agreement was to expire.<sup>3</sup> The agreement stated that Applicant would receive \$5,000 up-front and \$10,000 after purchasing the property.<sup>4</sup> The property was to be transferred to the LLC after six months. If that transfer did not occur, the LLC would pay Applicant an additional \$5,000.<sup>5</sup> The contract also said the LLC would be responsible for the timely payment for

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<sup>1</sup> Rebuttal to FORM, at 1.

<sup>2</sup> FORM, Item 3, at 21.

<sup>3</sup> FORM, Item 3, at 14, paragraph 1.02.

<sup>4</sup> FORM, Item 3, at 14, paragraph 4.1a.

<sup>5</sup> *Id.*

the mortgage for one year.<sup>6</sup> It was agreed that the LLC also would lease the properties from Applicant. The agreement stipulated the LLC would be named on the deed(s) while Applicant would be named on the mortgage(s).

Two houses were purchased in Applicant's name. The first month's rent checks from LLC were no good. Moreover, the LLC only made two mortgage payments and both were late. The dates of last activity on the mortgage accounts are noted as November 2006 and December 2006, respectively. At that point, Applicant decided to investigate and went to view the properties. Both needed considerable work. One had extensive water damage and a tenant; the other house had a flooded basement and the garage was pulling away from the house. A contractor working across the street told her that her partner had a bad reputation and that he would not deal with him.

After seeing the properties, Applicant was convinced the appraiser submitted a false report concerning the properties. "When we contacted the appraiser, he was willing to drop a dime on [her partner] so he would not get tied to [the partner's] messy business practices."<sup>7</sup> Then she could no longer make contact with her partner. Applicant started investigating the man with whom she went into partnership. She discovered he had been fired from a realty company for shady dealings.<sup>8</sup> The more she dug, the more she realized she had been duped. She has since filed charges against the man for bad checks. She is helping her mortgage company investigate the matter as fraudulent and is helping another victim in her legal suit against the man.<sup>9</sup>

Applicant takes responsibility for the mortgages and acknowledges that they are financially too much for her to handle by herself. "I thought about filing bankruptcy but that is the coward's way out and I did not want that on my record. I had to decide between a bankruptcy and a foreclosure. I believed that foreclosure was the only option I had left."<sup>10</sup> She concludes by stating: "I am so ashamed for allowing this man to use me as he has. This experience will be like a thorn in my side for the rest of my life. At this very moment [this man] is still scamming and swindling people of their livelihood."<sup>11</sup> To underscore her point, she offered a recent newspaper article regarding the partner in which it is reported the partner is being sought by police in an unrelated real estate

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<sup>6</sup> FORM, Item 3, at 18, paragraph 11.1.

<sup>7</sup> FORM, Item 3, at 21-22.

<sup>8</sup> *Id.*

<sup>9</sup> Rebuttal to FORM, at 1.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

scam and on felony theft warrants.<sup>12</sup> She also submitted an email noting a link to state court records involving cases against the man.<sup>13</sup>

### Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. Under AG ¶ 2(c), this 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The 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. . . ." <sup>14</sup> The burden of proof is something less than a preponderance of evidence. <sup>15</sup> The ultimate burden of persuasion is on the applicant. <sup>16</sup>

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 protect or safeguard classified information. Such decisions entail a certain degree of legally

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<sup>12</sup> Rebuttal to FORM, at 3.

<sup>13</sup> Rebuttal to FORM, at 4.

<sup>14</sup> See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

<sup>15</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

<sup>16</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

permissible extrapolation as to 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.” See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>17</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>18</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>19</sup> It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find Guideline F (Financial Considerations) to be the most pertinent to the case. Conditions pertaining to this adjudicative guideline that could raise a security concern and may be disqualifying, as well as those which would mitigate such concerns, are set forth and discussed below.

## Analysis

### Guideline F – Financial Considerations

Under Guideline F, 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. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.<sup>20</sup> The Directive sets out several potentially disqualifying conditions under this guideline.

Applicant permitted her name and credit to be used within a joint venture to buy two houses. Although she was duped into the arrangement, she is now responsible for approximately \$62,000 in past due mortgage payments on a combined balance of about \$444,000. This debt was initially identified as being owed in October 2008 and remains unpaid to date. Such facts are sufficient to give rise to Financial Considerations Disqualifying Condition (FC DC) AG ¶ 19(c) (“a history of not meeting financial obligations”) and FC DC AG ¶ 19(a) (“inability or unwillingness to satisfy debts”) apply.

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Executive Order 10865 § 7.

<sup>20</sup> Revised Adjudicative Guideline (AG) ¶ 18.

With such conditions raised, the burden shifts to Appellant to overcome the case against her and mitigate security concerns.

The evidence is persuasive that Applicant was the victim of a particularly slick con that offered an unbelievably high return, yet a return that was not totally unrealistic given the real estate market and machinations of the day. From the time she made the telephone call through the time she acquired the mortgages, the arrangement seemed genuine and their agreement legal. It was not until it was time for her partner to perform his part of the bargain that irregularities first appeared. Two late payments and returned rent checks led her to investigate the properties. She found damaged homes and a tenant. By that point, however, her partner had disappeared. Since that time, he has performed at least two other real-estate scams, one of which resulted in newspaper coverage noting that the police were looking for the man.

Financial Considerations Mitigating Condition (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 responsibly under the circumstances”) requires not only a circumstance beyond an applicant’s control, but also that evidence that an applicant contemporaneously behaved responsibly. At the time, Applicant had no indication she was being set up, nor did she have reason to suspect anything was awry. True, the potential return expected in exchange for her investment was particularly handsome. Given then-contemporaneous tales of the high profits that could be gleaned from “flipping” homes, however, it was not so extraordinary as to seem unbelievable. Applicant made her investment and entered into a valid legal agreement in good faith. The fact that her partner failed to do the same when it became his time to act does not demonstrate Applicant has poor self-control, lacks judgment, or is unwilling to abide by rules and regulations; it only demonstrates that she was duped by a criminal.<sup>21</sup>

The joint venture was entered into less than three years ago. The mortgages first became delinquent a little over two years ago. Consequently, the behavior is recent. However, the unique circumstances are such that they have taught Applicant that what sounds too good to be true, probably is too good to be true. They have also taught her the basic investment axiom: “Before you invest – Investigate.” It is highly unlikely Applicant will again find herself engaged in any but the most conservative and solid business ventures. Moreover, now that she understands how she was duped, she has been diligently aiding efforts to expose her former partner. Applicant takes full responsibility for her actions and for the mortgages. She has expressed both her embarrassment and her contrition. Recognizing she is unable to financially honor these mortgages on her own, she willingly let them go to foreclosure, preferring not to seek bankruptcy protection. FC MC AG ¶ 20(a) (“the behavior happened so long ago, was so

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<sup>21</sup> It is notable that DOHA chose to pursue this case solely under Guideline F (Financial Considerations), rather than under Guideline E (Personal Conduct), which contemplates conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, or dishonesty which could indicate that the person may not properly safeguard classified information. AG ¶ 15.

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") partially applies because her debts are not fully resolved. No other mitigating conditions apply.

### **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 the 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 public trust position must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

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 a mature woman who attended college after raising her children. Divorced from her husband of over 20 years, she was impressed by what seemed to be easy money to be made in the mid-2000s real estate market. Answering a blind ad in the paper, she soon became a pawn in a con man's scheme that appeared to be a simple house "flipping" venture. Although her partner was supposed to make the mortgage payments and had technically leased the properties she bought at his behest, he dropped out of the picture and left her to deal with the mortgages assumed in her name. Left with a combined mortgage balance of nearly \$444,000, of which nearly \$65,000 was noted as past due in October 2008, Applicant knew she could not make up the overdue payments and bring the mortgages current on her present income of less than \$100,000. Thinking bankruptcy to be too stigmatizing, she opted to go ahead with the foreclosure process. With the exception of these two mortgages, there is no evidence Applicant has or has had any other financial issues.

This case arises under Guideline F (Financial Considerations). Related security concerns arise when there is evidence of a failure or inability to live within one's means, satisfy debts, or meet financial obligations because of poor self-control, lack of judgment, or an unwillingness to abide to rules and regulations. Here, Applicant is

unable to meet her financial obligations with regard to the two mortgages she assumed as the initial part of her joint venture. This was not because of poor self-control, poor judgment, or an unwillingness to abide by rules and regulations, especially since at that stage, there was no reason for her to suspect deception. At worst, she failed to meet her financial obligations because the business opportunity she pursued was the creation of a con man. It was not the straight-forward "house flip" she had seen repeatedly reported in the media, but a scam defrauding investors and inducing them into investments that they might not otherwise make.

The joint venture was sufficiently simple as to make sense. The scheme, however, was sufficiently complex in its execution as to obfuscate a less than experienced real estate investor. The fraud acted to interrupt the usual sequence from initial investment to ultimate gain or loss by having all remaining elements tipped against Applicant's favor from the beginning. In further mitigation, she has since learned the marketplace has more than its share of dirty hands and that diligence must be taken not just with regard to one's investments, but also with in regard with whom one invests. She is contrite and embarrassed for being duped. Guideline F considerations are sufficiently mitigated. She has not failed to meet her financial obligations because of personal failings, but because of fraud. Further mitigation is found in this case's highly unique circumstances, "whole person" considerations, evidence that such conduct will not recur, and evidence that her predator's con does not cast doubt on her current reliability, trustworthiness, or good judgment. With security concerns regarding her finances thus mitigated, I conclude it is clearly consistent with national security to grant Applicant a security clearance. Clearance is granted.

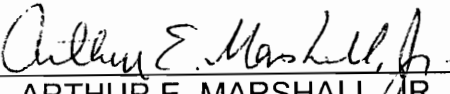
### Formal Findings

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
Subparagraph 1.b:	For Applicant

### Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility a security clearance. Clearance is granted.

  
ARTHUR E. MARSHALL, JR.  
Administrative Judge