



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-09662
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

February 26, 2009

Decision

GALES, Robert Robinson, Chief Administrative Judge:

Applicant mitigated the security concerns regarding financial considerations. Eligibility for a security clearance and access to classified information is granted.

Statement of the Case

On May 28, 2008, Applicant applied for a security clearance and submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a Security Clearance Application. On December 15, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to her, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive). The SOR alleged security concerns under Guideline F (Financial Considerations), and detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

It should be noted that on December 29, 2005, the President promulgated revised *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information*, and on August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing implementation of those revised Adjudicative Guidelines (hereinafter AG) for all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (January 1987), as amended and modified (Regulation), in which the SOR was issued on or after September 1, 2006. The AG are applicable to Applicant's case because his SOR was issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on December 17, 2008. In a sworn, written statement, dated December 19, 2008, Applicant responded to the SOR allegations and requested a hearing before an Administrative Judge. Department Counsel indicated the Government was prepared to proceed on January 15, 2009, and the case was assigned to Administrative Judge Wilford H. Ross on January 22, 2009. It was reassigned to me on January 23, 2009, due to caseload considerations. A Notice of Hearing was issued on January 28, 2009, and I convened the hearing, as scheduled, on February 10, 2009.

During the hearing, seven Government exhibits and one Applicant exhibit were admitted into evidence without objection. Applicant testified. The transcript of the hearing (Tr.) was received on February 13, 2009.

Findings of Fact

In her Answers to the SOR, Applicant admitted all the factual allegations in ¶¶ 1.a. through 1.c. of the SOR.

Applicant is a 41-year-old employee of a defense contractor, and she is seeking to obtain a security clearance, the level of which has not been divulged. She previously held a SECRET security clearance from about 1991 until 2002, while employed by another defense contractor.¹ With the exception of a period from February 2002 until April 2005, when she was a stay-at-home homemaker, and a one month period in 2008, when she was laid off,² Applicant has been gainfully employed since 1991. She has been employed by the same defense contractor, or a successor corporation, since May 2008, and currently serves as an administrative assistant.³

Applicant was married in 2001, and divorced in 2005.⁴ She has one child, born in 2001.⁵

¹ Government Exhibit 1 (e-QIP, dated May 28, 2008), at 15, 27.

² *Id.* at 12-13, 15.

³ *Id.* at 12.

⁴ *Id.* at 18.

In 1997, Applicant's debts, consisting primarily of credit card debt, were discharged in bankruptcy under Chapter 7.⁶ Over subsequent years, Applicant, either individually or jointly, has financed and purchased a number of family residences without difficulties. In July 2003, she received a \$201,622 home mortgage from Chase. That mortgage was paid until July 2004, when the account was closed as paid.⁷

In November 2004, she applied for mortgage financing from Wachovia on a new residence. Applicant and her boyfriend jointly applied because they were living together. He was apparently not eligible, so the mortgage lender simply put the mortgage in her name, but using their combined salaries. She was advised by the lender that she could afford the type of mortgage they were offering her, provided it was broken down into a basic adjustable rate 1st mortgage and a 2nd mortgage or home equity line of credit.⁸ She put \$50,000 down⁹ and secured a mortgage in the amount of \$311,250 with an accompanying home equity or 2nd mortgage in the amount of \$62,250, for a total of \$373,500.¹⁰

Applicant dutifully paid her monthly mortgage without any difficulty for an unspecified period of time.¹¹ At some point, that mortgage adjusted and her monthly payment increased. In an effort to hold her expenses down, Applicant refinanced her residence with Countrywide in the amount of \$356,000.¹² The Wachovia mortgage was satisfactorily paid off and the account was closed.¹³

In January 2007, she refinanced her residence again, this time with Homecomings Financial, a subsidiary of GMAC, and received a fixed rate 1st mortgage in the amount of \$360,000,¹⁴ and a 2nd mortgage in the amount of \$67,500, with an interest rate of 10.25 per cent.¹⁵ The Countrywide mortgage was satisfactorily paid off

⁵ *Id.* at 21.

⁶ Government Exhibit 4 (Equifax Credit Report, dated September 19, 2005), at 2.

⁷ Government Exhibit 3 (Combined Credit Report, dated July 1, 2008), at 5.

⁸ Tr. at 27-28.

⁹ *Id.* at 29.

¹⁰ *Id.* Applicant seemed to recall the purchase price of the home as \$400,000, but the credit report indicates the combined total of the two mortgages was actually \$373,500. Government Exhibit 3, *supra* note 7, at 14.

¹¹ Tr. at 30.

¹² Government Exhibit 3, *supra* note 7, at 7.

¹³ *Id.* at 14.

¹⁴ *Id.* at 4; Tr. at 30.

¹⁵ Government Exhibit 2 (Account Statement, dated June 13, 2008), attached to Interrogatories, dated October 30, 2008.

and the account was closed.¹⁶ At the time she refinanced the residence with Homecomings Financial, she was told the provisions of the instrument were identical to those in the Countrywide mortgage, and her monthly payments would be lower.¹⁷ Applicant first learned that there was a problem when she received her first tax bill. The taxes were supposed to be included in the escrow to be paid monthly, but because of an oversight on the part of the mortgage lender, the provision was not originally included.¹⁸ As a result of her complaint, the matter was “straightened out” by the mortgage lender, but the result was a higher monthly payment for Applicant.¹⁹ The monthly payment was increased from nearly \$1,518 to nearly \$3,076.²⁰

At some point, not otherwise specified, Applicant and her boyfriend split up and he moved out of the residence.²¹ The loss of his rent contribution and the unanticipated higher monthly payment made it more difficult for Applicant to maintain her payments current. To do so, she withdrew money from her retirement account to make up the deficit.²² She started to come up short, and distraught over the situation, discussed her alternatives with the mortgage lender.²³ Aurora Loan, the new holder of the 1st mortgage, advised her to either sell the property at a pre-foreclosure or “short sale,” or let it go into foreclosure.²⁴ After struggling with the increased payments for about two or three months, she moved out of the house.²⁵

In mid-2008, Aurora Loan commenced the foreclosure process on the 1st mortgage, now totaling \$363,000.²⁶ At about the same time, Homecomings Financial placed the 2nd mortgage, with a principal balance of \$67,500 and an outstanding balance of principal, interest, and late charges totaling nearly \$6,393, into collection.²⁷ The residence has been vacant since she left.²⁸

¹⁶ Government Exhibit 7 (Equifax Credit Report, dated February 7, 2009), at 2.

¹⁷ Tr. at 47-49.

¹⁸ *Id.* at 48-49.

¹⁹ *Id.* at 49-50.

²⁰ Government Exhibit 2 (Escrow Account Statement, dated July 1, 2008), *supra* note 15.

²¹ Tr. at 32.

²² *Id.*

²³ *Id.* at 33.

²⁴ *Id.* at 36.

²⁵ *Id.* at 32.

²⁶ Government Exhibit 7, *supra* note 16, at 3.

²⁷ Government Exhibit 2 (Account Statement, dated June 13, 2008), *supra* note 20.

²⁸ Tr. at 36-37.

Applicant and her son now reside in a rental apartment.²⁹ Her monthly net salary is \$2,245, and after severely curtailing her monthly expenses down from \$2,362 to \$1,509, she has a net remainder of \$1,821 for discretionary spending.³⁰ With the exception of the purported mortgage deficiencies, all their other accounts and expenses are now current.³¹

The SOR identified the two purportedly continuing mortgage deficiencies and an allegation that Applicant had a negative monthly net remainder. Those three allegations listed in the SOR, and their respective purported current status, according to the credit reports, financial records and correspondence, as well as Applicant’s comments regarding same, are described below:

SOR ¶	TYPE DEBT OR ALLEGATION	AMOUNT	STATUS
1.a.	1 st mortgage	\$363,000	Foreclosure process
1.b.	2 nd mortgage	\$72,131	Foreclosure process
1.c.	Minus monthly net remainder	-\$629	Improvement to +\$1,821

Applicant has been characterized by current and former colleagues and supervisors in extraordinarily favorable terms: organized, efficient, extremely competent, responsible, reliable, dedicated, high integrity, trustworthy, well liked, self-motivated, great asset, “can do” attitude, organized, and exhibits the highest standards of ethics and conduct.³²

Policies

When evaluating an Applicant’s suitability for a security clearance, the 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, which are useful in evaluating an Applicant’s eligibility for access to classified information.

An Administrative Judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of

²⁹ *Id.* at 35.

³⁰ Personal Financial Statement, dated December 19, 2008, attached to Response to SOR. In an effort to reduce her expenses, Applicant tightened her belt, ceased taking one medication, cancelled her house telephone, reduced cable television and utility expenses, reduced car expenses, and generally lowered her lifestyle to where she is “surviving.”

³¹ Tr. at 41.

³² Applicant Exhibit A (Character references and assorted Performance Review and Planning Forms, various dates).

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 meaningful decision.

Since 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.

In the decision-making process, facts must be established by “substantial evidence.”³³ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the Applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 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.” Accordingly, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism.

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

³³ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1).

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. . . .

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly, under AG ¶ 19(c), "a history of not meeting financial obligations" may raise security concerns as well. The evidence is sufficient to establish AG ¶¶ 19(a) and 19(c).

As noted above, with the exception of a period from February 2002 until April 2005, when she was a stay-at-home homemaker, and a one month period in 2008, when she was laid off, Applicant has been gainfully employed since 1991. In 2004, she obtained financing for her residence, and subsequently refinanced it several more times, each time, hoping to lower her monthly mortgage payments. Each time she applied for a mortgage, Applicant presented her financial background as part of her application for the mortgage loan. Unfortunately, a combination of circumstances subsequently served her poorly, and she found her most recent 1st mortgage provisions in error (caused by the mortgage lender). When they were corrected, her monthly payments skyrocketed from nearly \$1,518 to nearly \$3,076. She was soon unable to continue to pay her monthly mortgage payments. Unable to generate a pre-foreclosure or "short sale" in the non-existent real estate market, she followed the mortgage lender's advice and abandoned the residence to possible foreclosure.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial considerations. Under AG ¶ 20(a), the disqualifying condition may be mitigated where "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." When "the conditions that resulted in the financial problem were largely beyond the person's control (e.g., the loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances" is also potentially mitigating under AG ¶ 20(b). Evidence that "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" is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."³⁴ Also, AG ¶ 20(e), "the individual has a reasonable basis to

³⁴ The Appeal Board has previously explained what constitutes a "good faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person

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” may apply.

As noted above, the normal overriding concern pertaining to financial considerations in the security clearance context is that “[f]ailure 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. . . .” (emphasis supplied). But these are not “normal” times, for the world in general, and the United States in particular, is faced with economic chaos, plummeting real estate values, tightened credit, corporate layoffs and bankruptcies, diminished savings and retirement accounts, financial institution failures and takeovers, and soaring unemployment.

We no longer think in terms of millions or even billions of dollars when describing deficits, for in this new world order, trillions of dollars have become the new standard. We are in economic turmoil, with posturing and corporate greed running rampant; where credit is unavailable; where thousands, if not hundreds of thousands, of otherwise innocent bystanders have become victims by losing their homes to foreclosure and their jobs to these uncertain times; and where the popular responses are to point the fingers of blame and throw unprecedented amounts of money, characterized as stimulus funds, into the abyss with the hope of success.

This economic catastrophe appears to be the “perfect storm” where the confluence of greed, irresponsible risk-taking, regulatory failure and inadequate oversight, malfeasance, misfeasance, and nonfeasance on the part of some segments of corporate America, our financial institutions, and political institutions, has resulted in unintentional consequences or “collateral damage” to the innocents. In the past, these unconscionable actions were overlooked in the race for enrichment.

To determine if an applicant is such an unintentional victim or a willing participant and complicit, in an otherwise unwise or irresponsible monetary scheme, or a person with poor self-control or lack of judgment, an analysis of the individual’s original intentions and actions is essential. In this instance, since her 1997 bankruptcy, Applicant’s financial history and actions reveals no evidence of poor self-control, lack of judgment, or a willingness to abide by rules and regulations. To the contrary, her sole goal was to obtain a mortgage with an affordable monthly payment, and when the mortgage payments adjusted upward, she refinanced to again obtain a lower monthly

acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.’ Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy [or statute of limitations]) in order to claim the benefit of [the “good faith” mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

payment. Her efforts were responsible and disciplined. Applicant's current situation was caused by other factors, including an error by an apparently knowledgeable but careless, and possibly unscrupulous, mortgage lender.

In January 2007, aware of Applicant's inability to pay the monthly mortgage payments to Homecomings Financial without the contributions of her boyfriend, that institution, nevertheless, appraised her residence and found she qualified for a \$360,000 1st mortgage and a \$67,000 2nd mortgage, although the real estate value of her home had already started to plummet. Rather than ignoring the facts, it should have anticipated the result. It was evident that she could not afford the new mortgage, for she did not lie or represent her financial status in her application for the mortgage. It was seemingly another example of a disregard of lending guidelines.

While the foreclosures are in the process, they are apparently on hold and have not actually taken place, despite the residence being unoccupied for about one year. This situation presents an interesting conundrum, for if the foreclosures do occur, under state law, Applicant may not be liable for either the unpaid mortgages or the deficiencies, and the lien holders would be limited to the property. Under California law, there is a provision called the Anti-Deficiency Statute,³⁵ which states in relevant part:

No deficiency judgment shall lie in any event after a sale of real property or an estate for years therein for failure of the purchaser to complete his or her contract of sale, or under a deed of trust or mortgage given to the vendor to secure payment of the balance of the purchase price of that real property or estate for years therein, or under a deed of trust or mortgage on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling occupied, entirely or in part, by the purchaser.

Under this section, generally if there is a foreclosure on a dwelling and there is a deficiency, the lender has no recourse regarding "purchase money loans," also called "non-recourse loans," the amounts set forth in both the 1st and the 2nd mortgages used to finance the dwelling purchase. The collateral or dwelling is considered full satisfaction. In addition, there is another pertinent law, called the One Form of Action Rule,³⁶ which states in relevant part:

There can be but one form of action for the recovery of any debt, or the performance of any right secured by mortgage upon real property.

Considering the unusual circumstances of today's economy in general, and the series of events involving Applicant's mortgage loans in particular, Applicant's actions and her otherwise good financial status, there are clear indications that Applicant's

³⁵ Cal. Code Civ. Proc. § 580(b).

³⁶ Cal. Code Civ. Proc. § 726(a).

financial issue has been resolved and is now largely under control. The evidence establishes AG ¶¶ 20(a), 20(c), 20(d), and 20(e), and partially 20(b)³⁷ because the circumstances are unusual and unlikely to recur, and do not cast doubt on her reliability, trustworthiness, and good judgment.

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) 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 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. Applicant met with a mortgage lender at Homecomings Financial where she presented her financial background as part of her application for the mortgage loan. She, alone, was qualified for a particular loan, even though her boyfriend's salary was considered, and it was granted to her. She was told the provisions of the instrument were identical to those in the Countrywide mortgage, and her monthly payments would be lower. However, she discovered there was a problem when she received her first tax bill because the taxes were supposed to be included in the escrow to be paid monthly, but because of an oversight on the part of the mortgage lender, the provision was not included in this mortgage. The mortgage lender "straightened out" the error, but the result was a higher monthly payment for Applicant, with the monthly payment increasing from nearly \$1,518 to nearly \$3,076.

The loss of her boyfriend's rent contribution and the unanticipated higher monthly payment made it more difficult for Applicant to maintain her payments so she withdrew money from her retirement account in an effort to make up the deficit. The new holder of the 1st mortgage, advised her to either sell the property at a pre-foreclosure or "short sale" or let it go into foreclosure. After struggling with the increased payments for about

³⁷ For the purposes of my analysis, in this instance, I have considered both the tax escrow error of the lending institution, Applicant's split from her boyfriend and intended co-purchaser, and the general global economic problems, to be such conditions which justify, at least, partial recognition.

two or three months, she moved out of the house. (See AG ¶¶ 2(a)(1), 2(a)(2), 2(a)(5), and 2(a)(7).)

Of course, the issue is not simply whether Applicant's mortgage debts are resolved; it is whether her financial circumstances raise concerns about her fitness to hold a security clearance. I am mindful that while any one factor, considered in isolation, might put Applicant's credit history in a sympathetic light, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.³⁸ Considering the circumstances behind the mortgage loans given to her by the mortgage lenders, her employment history, her otherwise outstanding reputation, the decline in real estate values, and her continuing good-faith efforts, the security concerns are mitigated. (See AG ¶¶ 2(a)(1), 2(a)(8), and 2(a)(9).)

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from her financial considerations.

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
Subparagraph 1.c:	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 for a security clearance. Eligibility for access to classified information is granted.

ROBERT ROBINSON GALES
Chief Administrative Judge

³⁸ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006)