



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



In the matter of:)	
)	
)	ISCR Case No. 08-10209
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: James F. Duffy, Esq., Department Counsel
For Applicant: *Pro Se*

July 29, 2009

Decision

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

Applicant completed a security clearance application (SF-86) dated December 5, 2007. On March 17, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) enumerating 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 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, effective for SORs issued after September 1, 2006.

In an undated response, Applicant admitted all three of the allegations set forth in the SOR and requested a hearing. The matter was referred to DOHA on June 1, 2009, and the case was assigned to me that same day. Department Counsel and Applicant agreed to a hearing date of June 24, 2009. A notice of hearing was issued to that effect on June 4, 2009. I convened the hearing as scheduled. Applicant was accompanied by a friend, gave testimony, offered no documents, and was given through July 8, 2009, to submit any evidence for consideration. Department Counsel

offered four documents admitted as exhibits (Exs.) 1-4 without objection. The transcript (Tr.) of the proceeding was received on July 6, 2009. On July 7, 2009, Applicant transmitted three documents by facsimile transmission to Department Counsel. They were forwarded to me on July 8, 2009, and accepted into the record as Exs. A-C without objection. The record was then closed. Based upon a review of the testimony, submissions, and exhibits, I find Applicant failed to meet her burden regarding the security concerns raised. Security clearance is denied.

Findings of Fact

Applicant is a 48-year-old janitorial grounds supervisor who has worked for the same defense contractor for over 25 years. A former janitor, she was promoted to a supervisory position three years ago. She regularly receives high ratings on her evaluations and recently received a notable raise.¹ Applicant earned a high school diploma. Currently single, she became guardian of five nieces and nephews 12 years ago after the death of her sister. She remained their legal guardian until the two youngest children, who are twins, turned 18 this past year. One of the twins has special needs and will remain with Applicant for the rest of Applicant's life.²

In 2006, an adult nephew of Applicant wanted to go into business with Applicant, whose credit was better than his.³ Their plan was to purchase, renovate, and resell or "flip" residential properties. That summer, they bought two houses and repaired them for sale. The economy, however, was unfavorable and there was little interest in the properties. Then, in November 2006, one of the homes was vandalized. Items such as the hot water heater and appliances were stolen. The house exterior and lawn were defaced and littered. Applicant feared the investment had been a mistake, realizing they did not have the funds to make all the repairs and keep current on the mortgages. She repeatedly asked the bank for permission to sell the homes short, but permission was denied. Consequently, they continued paying the mortgages on the two houses until their capital was depleted. With the lenders unwilling to work with her on an alternative, the properties went into foreclosure in January 2007 and April 2007, respectively.

Applicant believes that the banks have thus far neglected the properties. One house is currently inhabited, but it is unclear whether it is a legal rental or a squatter situation. The other house is vacant. Applicant has no knowledge of the mortgage holders' intention with regard to the sale of the properties.⁴ At issue in the SOR at ¶¶ 1.a through 1.c are home mortgages foreclosed upon for non-payment in the amounts

¹ Tr. 26.

² Tr. 24-25.

³ Ex. C (Nephew's undated letter).

⁴ Tr. 34, 37.

of \$40,000, \$131,000, and \$32,966, respectively.⁵ Aside from issues regarding mortgages, the homes and properties each have intrinsic values.⁶ Not having yet been resold by the lenders, there is no way to calculate Applicant's ultimate liability, if any.⁷

These obligations were noted on Applicant's security clearance application. Applicant has been forthright regarding these properties and her foreclosures from the beginning of the security clearance process. She has repeatedly approached the lenders to permit her to sell the houses short or to otherwise devise a plan to dispose of the properties, but the lenders have been uncooperative. The mortgage foreclosures at issue are Applicant's "only financial problems that are within the past seven years or so. . . ."⁸ Otherwise, she lives within her means and continues to support the twins. Applicant regrets making these investments. She has found the whole experience, as well as being held in limbo by the lenders with regard to how the matter will be resolved, to be an extremely emotional experience.

Policies

When evaluating an applicant's suitability for a security clearance, an 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. 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 commonsense 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

⁵ Tr. 31. Although not at issue in the SOR and not clearly established at the hearing, Ex. 3 (Credit report, dated Oct. 30, 2009) indicates an additional \$160,000 may also be at issue. Tr. 30-33.

⁶ Tr. 34.

⁷ See, e.g., Tr 34, 37.

⁸ Tr. 29.

Department Counsel. . . .⁹ The burden of proof is something less than a preponderance of evidence.¹⁰ The ultimate burden of persuasion is on the applicant.¹¹

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 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.”¹² Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.¹³ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.¹⁴ 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 this 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 an

⁹ See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

¹⁰ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

¹¹ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

¹² *Id.*

¹³ *Id.*

¹⁴ Executive Order 10865 § 7.

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.¹⁵ The Directive sets out several potentially disqualifying conditions under this guideline.

Applicant and her nephew invested in two properties, planning on re-selling the houses for a profit. The properties did not sell, the banks foreclosed on the mortgaged properties, and Applicant is now deemed liable for approximately \$203,000. While it is foreseeable that this amount will be reduced when or if the properties are sold, these facts are sufficient to raise financial considerations disqualifying condition (FC DC) AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and FC DC AG ¶ 9(c) ("a history of not meeting financial obligations"). With such conditions raised, the burden shifts to Applicant to overcome the case against her and mitigate security concerns.

Applicant freely and willingly accepted her nephew's business proposal. While the media of the day may have celebrated the profits to be made by "flipping" houses, and while Applicant had no control over national or regional real estate market conditions, she surely understood that any such venture has its risks. Regardless, Applicant has had no control over the fact the lenders have yet to sell or otherwise dispose of the properties in nearly a year and a half. Such a sale should offset or reduce Applicant's liability significantly. Moreover, a business downturn is a legitimate basis for mitigation under 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").¹⁶ There is no evidence, however, Applicant received financial counseling or otherwise retained a liaison to work with the lenders on her behalf. Similarly, there is no evidence the lenders will soon decide what they will do with the properties. Consequently, FC MC ¶ 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") does not apply.

At work and with regard to the guardianship of her nieces and nephews, Applicant has demonstrated reliability, dedication, and trustworthiness. With regard to her investments, she has expressed regret. She describes the entire unpleasant experience as an emotional one. She is unlikely to make such an investment again. 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") applies. Moreover, she has tried to work with the banks to either sell the properties short or otherwise dispose of the properties. While unsuccessful, she has exerted genuine effort and demonstrated persistence in her attempts. FC MC ¶ 20(d) ("the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts") applies. No other mitigating conditions apply.

¹⁵ Revised Adjudicative Guideline (AG) ¶ 18.

¹⁶ Tr. 42.

Whole Person Concept

Under the whole person concept, an 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. 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense 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. Speaking in Applicant's favor, she is a highly credible woman who, in her mid-30s, undertook the tremendous responsibility of assuming guardianship of five children, including one with special needs. She has devoted herself to their upbringing and well-being. She worked herself up from janitor to supervisor and, in the process, earned the trust and praise of her employer. The downturn in real estate markets and the inability to sell the investment properties at issue were beyond Applicant's control. When her real estate investments soured, she diligently worked toward negotiating a compromise with her lenders, but to no avail. Other than her unresolved situation with regard to the mortgages, she is financially fit and has had no financial issues in close to a decade.

Speaking against Applicant, with regard to her mitigation of financial considerations security concerns, is the sheer enormity of the sum for which Applicant is potentially liable.¹⁷ While the sale or auction of the properties probably would not offset Applicant's obligation on the mortgages, it should reduce her liability. Ownership of the homes, however, is now in the hands of the lenders and their plans regarding the properties are unknown. As a result, there is no definite indication of what the total sum of Applicant's delinquent debt might be. Consequently, in carrying her burden in this proceeding, Applicant is presently left, through no fault of her own, in limbo as the lenders dawdle. Moreover, there is no evidence as to how she might address a debt as unwieldy as that which might emerge once the lenders have disposed of the property.

¹⁷ Tr. 42-43.

Applicant is a mature woman of admirable achievement whose investment, unfortunately, was dashed by recent downturns in the economy. Any doubts about an Applicant must be resolved in favor of national security. At least until a finite sum is determined regarding her liability, security concerns remain unmitigated. As previously noted, the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. It is merely an indication that an applicant has not met the strict guidelines established for issuing a clearance. With security concerns regarding her finances unmitigated and the extent of her liability thus far unresolved, however, I conclude it is not clearly consistent with national security to grant Applicant a security clearance. Clearance is denied.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant

Conclusion

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

ARTHUR E. MARSHALL, JR.
Administrative Judge