



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



In the matter of: )  
)  
)  
----- ) ISCR Case No. 08-10264  
SSN:----- )  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Jennifer Goldstein, Esquire, Department Counsel  
For Applicant: *Pro Se*

July 15, 2009

**Decision**

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WESLEY, Roger C., Administrative Judge:

**Statement of Case**

On March 10, 2009, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, and Department of Defense (DoD) Regulation 5200.2-R, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on March 30, 2009, and requested a hearing. The case was assigned to me on April 15, 2009. The case was scheduled for hearing on May 18, 2009. A hearing was held as scheduled, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, or deny, Applicant's application for a security clearance. At hearing, the Government's case consisted of seven exhibits (1-7); Applicant relied on two witnesses (including

himself) and four exhibits (A through D) The transcript (R.T.) was received May 27, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Procedural Rulings and Evidentiary Issues**

Before the close of the hearing, Applicant requested leave to supplement the record with documentation of (a) court filings covering creditor 1.a's instituted foreclosure proceedings in State 2, (b) foreclosure initiation by creditor 1.b and/or the creditor's approval of a short sale or acceptance of a deed in lieu of foreclosure, and (c) character references. For good cause shown, Applicant was granted 14 days, to June 1, 2009, to supplement the record. The Government was granted three days, to June 4, 2009, to respond. Within the time permitted, Applicant provided copies of a cover letter to Department Counsel, declarations from his mother and a member of his church, the State 2 court docket sheet, and letters explaining construction delays. Department Counsel offered no objection to the admission of any of Applicant's proffered exhibits. The submissions were admitted as exhibits E through H.

### **Summary of Pleadings**

Under Guideline F, Applicant is alleged to have accumulated two delinquent debts exceeding \$258,000.00. They are listed as creditors 1.a and 1.b. and will be referred to in this way in the findings and conclusions.

For his answer to the SOR, Applicant denied each of the debt allegations. He provided no explanations.

### **Findings of Fact**

Applicant is a 50-year-old information technology coordinator for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Applicant married his first spouse in May 1983, and divorced her in August 1985 (see ex. 1). He has no children from this marriage. He remarried his second wife in September 1997 (ex. 1; R.T., at 50-51). He has two young boys from this marriage, and resides in State 1 (R.T., at 51). He received computer training from a local computer academy, and has completed most of the credits necessary to earn an Associate of Arts degree (R.T., at 49).

In October 2005, Applicant purchased an undeveloped lot in State 2 for investment purposes (his first such experience) with the intention of placing a residential building on the property (R.T., at 70, 80-83). He financed his purchase with a construction loan with creditor 1.a for \$240,435.00 secured by a first mortgage on the property (see exs. 3 through 5 and A; R.T., at 68, 83). A very destructive hurricane

struck the area of his property in 2007. This storm created supply shortages and delayed construction for almost two years (see ex. H; R.T., at 35, 43-44, 79). Unable to develop the property, Applicant suspended all work in November 2007. At the time, creditor 1.a had disbursed only \$64,000.00 of its approved \$240,435.00 loan proceeds to Applicant. This \$64,000.00 disbursement represented the amount of loan funds allocated by creditor 1.a for Applicant's purchase of the property (R.T., at 82).

In November 2007, Applicant replaced the construction loan made to him by creditor 1.a with a lot loan for \$64,615.87 and executed a substitute first mortgage on the property to secure the loan (R.T., at 45, 68-69, 84-86). Monthly payments on this revised mortgage were \$360.00. Evidently, the mortgage lender's loan disbursements were just for the purchase of the lot, and did not include any disbursed loan proceeds for construction. When Applicant converted his construction loan to a reduced loan to cover just the \$64,000.00 expended for the lot purchase, the lender was able to simply release Applicant from any responsibility over the approximately \$180,000.00 in loan proceeds the lender had not disbursed (R.T., at 86-89).

Just after executing a modified loan and mortgage with creditor 1.a, Applicant purchased an adjacent lot in the same real estate complex (see exs. 3 through 5 and C). He obtained \$260,000.00 in financing to cover the purchase of the lot and the construction of the duplex he planned to erect on the property. Both the lot purchase and the proposed construction were appraised at \$305,000.00, and were covered ) and financed his purchase with a loan secured by a first mortgage. Monthly payments on this loan were \$1,720.00 (R.T., at 71).

Faced with a weakening economy, inability to find renters for his properties, and the lack of money (see ex. 7; R.T., at 79), Applicant ceased making mortgage payments on both of his State 2 properties in April 2008 (R.T., at 70-71, 78). Creditor 1.a initiated judicial foreclosure proceedings in State 2's circuit court in June 2008 (see ex. G; R.T., at 70). Court records document that creditor 1.a obtained a final judgment of foreclosure in October 2008 after Applicant defaulted on the creditor's filed complaint (see ex. G). The property was noticed for sale in November 2008 (ex. G).

Applicant understands that creditor 1.a could obtain a deficiency from the court and seek personal liability against him for any entered deficiency following sale of the property (R.T., at 73, 75-76, 91). To date, though, he has not been able to find out whether a sale was ever consummated (R.T., at 73, 88). Creditor 1.a has since been seized by the Federal Deposit Insurance Corporation (FDIC). Whether or not this bank has returned to business, either in its name or as a spun-off bank from the FDIC, is not known to Applicant (R.T., at 73-74, 91-94). Applicant believes that creditor 1.a has up to a year (from the date of sale) to seek a deficiency (R.T., at 92). That time has not yet expired.

Applicant's most recent credit reports document that creditor 1.b initiated foreclosure proceedings in 2008 (see ex. 4). Applicant assures that he still owns this property. He has placed the property for sale and entered into negotiations with the

creditor to enlist the creditor's agreement to accept either a short sale or a deed-in-lieu of foreclosure on the property (see ex. 7; R.T., at 74-75). Applicant currently owes creditor 1.b approximately \$256,000.00 on his mortgage debt (R.T., at 74). He reports that the creditor is agreeable in principle to accepting a short sale at a negotiated floor price or a deed-in-lieu of foreclosure (ex. C). However, he provides no documentation from the creditor showing acceptance of either of his proposals.

Current market conditions in the development where Applicant's completed duplex (financed by his first mortgage with creditor 1.b) is located are severely depressed. Applicant reports that comparable properties in the development are selling in the \$35,000.00 to \$40,000 range (R.T., at 73-75). While his broker did receive a recent preliminary offer of \$55,000.00 for the duplex, Applicant did not express much confidence in completing a sale with this buyer (R.T., at 74, 76). Lack of domestic demand for real estate in this region is generally attributable to depressed real estate and employment conditions in the area (R.T., at 79-80). Applicant assures that about 70 per cent of the investment properties in the State 2 development are currently empty (R.T., at 80).

To date, Applicant has heard nothing back from creditor 1.b regarding its foreclosure position, its willingness to accept a short sale with an agreed floor price, or whether it is amenable to accepting a deed-in-lieu of foreclosure (R.T., at 76-78). So, at this time there is no formal offer or agreement in place between creditor 1.b and Applicant covering either a short sale or a deed-in-lieu of foreclosure. Based on current market conditions in State 2, prospects for creditor 1.b's agreeing to either option are not good. For the lender to accept either option would require it to agree with Applicant to accept either exceptionally low sale proceeds on a pre-approved short sale or agree to a deed-in-lieu of foreclosure and waive any deficiency entitlement it might otherwise have to recover its losses (R.T., at 74-75). Creditor 1.b has provided no tangible indications that it is willing to pursue either option with Applicant.

Should creditor 1.b decline both the short sale and deed-in-lieu of foreclosure offers currently in discussion, Applicant's only other option would be to raise the cash necessary to pay off his \$250,000.00 mortgage loan (R.T., at 77). He does not find this latter option very appealing, or very plausible in his current circumstances.

Applicant's credit reports show him to be current with his other debts (see exs. 4, 5 and 6). Based on his personal financial statement, Applicant has a current adjusted monthly gross income of around \$4,240.00 (compare ex. 7 with R.T., at 52-53). At the moment, Applicant has \$19,000.00 in his 401(k) account and around \$10,000.00 in a savings account (R.T., at 65-66). Recently, he increased his 401(k) retirement deductions to 10 per cent (R.T., at 53). His wife nets around \$1,400.00 a month and has no 401(k) account (R.T., at 54-55).

Applicant's monthly expenses total around \$4,805.00. His expenses encompass rent, groceries, utilities, car bills, life insurance and medical expenses (see ex. 7; R.T., at 55-63). He owes approximately \$7,000.00 on his vehicle and has monthly car

expenses of \$200.00 (ex. 7). This leaves him with a typical net monthly remainder of approximately \$962.41 (see ex. 7).

Applicant is well regarded by friends of many years who (like Applicant) are regular members of Applicant's church (see ex. D; R.T., at 34-36). These friends have always found Applicant to be calm, determined, and loyal to the membership in church affairs (ex. D; R.T., at 34-35). These church members hold Applicant in high regard in financial matters. His pastor, too, finds Applicant to possess outstanding leadership and interpersonal skills (see ex. D). He credits Applicant with being diligent, organized and a self-starter, and recommends him for a position of trust.

### **Policies**

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E 2(a) of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

### **Financial Considerations**

*The Concern:* "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. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts." Adjudication Guidelines, ¶ 18.

### **Burden of Proof**

By virtue of the precepts framed by the revised Adjudicative Guidelines, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because

the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted facts alleged in the Statement of Reasons, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

### **Analysis**

Applicant is a well-regarded information technology coordinator for a defense contractor who financed two investment properties in another state, and subsequently, due to unforeseen construction delays and a major real estate downturn in the state, simultaneously defaulted on his two loans. By defaulting, he exposed himself to judicial foreclosure of both properties, and ensuing deficiency claims by the respective creditors. Without resolution, these two major debts have the potential to expose Applicant to deficiency liability and raise security concerns over the potential of future Applicant defaults.

Security concerns are raised under the financial considerations guideline of the revised Adjudicative Guidelines where the individual applicant is so financially overextended as to indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, which can raise questions about the individual's reliability, trustworthiness and ability to protect classified information, and place the person at risk of having to engage in illegal acts to generate funds. Applicant's accumulation of delinquent debts and his past inability to pay these debts warrant the application of two of the disqualifying conditions (DC) of the Guidelines¶ DC 19(a), "inability or unwillingness to satisfy debts," and ¶19(c) "a history of not meeting financial obligations."

Applicant's debts are attributable in part to construction delays and an ensuing major downturn in real estate market conditions in his region. Together, these problems prevented him from completing construction on one of the properties (creditor 1.a) and reselling both of them without incurring major losses. When rental and resale prospects

in the relevant development area collapsed in 2008, Applicant ceased paying on both properties.

Records show that creditor 1.a initiated and completed judicial foreclosure proceedings in State 2 without any appearance from Applicant. Creditor 1.a obtained a final judgment by default in October 2008. Whether this judgment includes a deficiency entitlement or not is unknown. While Applicant expressed an opinion that he believed the creditor could pursue a deficiency in one year, he did not provide a copy of the judgment or any court orders to that effect. Exploration of State 2 law confirms the availability of a deficiency in foreclosure cases initiated in the state.

State 2 makes judicial foreclosure the sole remedy for a lender seeking to foreclose on a defaulted mortgage. Unlike some states (mostly in the West), State 1 does not provide for alternative non-judicial foreclosures. By virtue of Chapter 702.06 of State 2's statutes, all mortgages are governed by the state's judicial foreclosure law. Its long arm procedures permit joinder of out of state residents by substituted service and progression to judgment by default.

Once the foreclosed property at issue in a particular case is sold at public auction for less than the value of the mortgage, the creditor may seek a deficiency claim in two ways. Where the creditor includes a deficiency claim in its complaint, and the entered foreclosure judgment includes a right to a deficiency, the foreclosing creditor may move the court retaining jurisdiction over the case for a personal deficiency within one year of the foreclosure sale. See Chapter 702.06 and *Chrestensen v. Eurogest*, 906 So. 2d 343, 345n.2 (App. 2005). Where, however, neither the complaint nor the final judgment include a deficiency claim or entitlement, the foreclosing creditor who is not made whole by the ensuing foreclosure sale may seek a deficiency by a separate lawsuit. The creditor in this instance has five years to seek an independent deficiency judgment. § 95.01 of State 2 Stat.; see *Chrestensen v. Eurogest, supra*. The five year time limit for such complaints runs from the date of the foreclosure sale, and not from when the complaint was filed, or the judgment of foreclosure was entered. See Chapter 702.06 of State 1's statutes and *Chrestensen v. Eurogest* (citing *Singleton v. Greymar Assocs.*, 882 So. 2d 1004 (App. 2004), *supra*).

Whether creditor 1.a preserved a deficiency entitlement in its foreclosure judgment can not be discerned without examination of the judgment itself. Even if an entitlement was preserved, it is not known whether creditor 1.a's sale of its foreclosed first trust deed produced sufficient sale proceeds to cover its \$64,000 mortgage on the property. Given the depressed state of real estate conditions in this particular region of State 2, it seems very unlikely that creditor 1.a was made whole from the sale. If this is the case, creditor 1.a has legal options for pursuing a deficiency, depending on what its final foreclosure judgment provides for.

Creditor 1.b's \$256,000.00 first mortgage on Applicant's completed duplex presents equally significant deficiency risks for Applicant. At the present, Applicant is still in possession of this former property and continues to negotiate with the creditor over a

short sale and/or acceptance of a deed-in-lieu of foreclosure. Creditor 1.b's acceptance of either option from Applicant would require a settlement agreement with Applicant and forgiveness of any deficiency claim should the property fail to produce enough in sale to satisfy its mortgage-backed loan on the property. See J. Murray, *Deeds in Lieu of Foreclosure: Practical and Legal Consequences*, 26 Real Prop. Prob. &Tr. J., 459, 516 (1991).

Considering the depressed state of prices in the development complex of Applicant's properties in State 2 and the significant price differential extant between what the creditor 1.b property can realistically bring on the open market and the mortgage balance, existing conditions are not very promising for achieving any positive outcome for Applicant from his current negotiations with creditor 1.b. Whether creditor 1.b has already initiated judicial foreclosure proceedings in State 2 is not known. Applicant remains at high risk, though, to this creditor's initiating foreclosure proceedings, obtaining a judgment of foreclosure, and then seeking a deficiency (either as an ancillary claim in its foreclosure suit or through an independent action) against Applicant for the balance owing after the public sale of the property under the court's supervision.

After judgment and sale of the property covered by the final foreclosure judgment, State 2 permits the foreclosing creditor to seek a deficiency judgment *in personam*, and enables the creditor to then register its judgment in the respondent's state of residence and pursue enforcement action there. Both the stakes and risks associated with creditor 1.b's securing a deficiency judgment against Applicant are considerable and cannot be discounted under current market conditions in State 2. To be sure, these risk assessments are not made on the basis of perfect foresight. They are best estimates based on the past history in the region of Applicant's properties, current market conditions in the region, and some evaluation of Applicant's risk exposure under real estate conditions that are likely to persist for the foreseeable future.

Based on his evidentiary showing, extenuating circumstances certainly contributed to Applicant's inability to resolve his two mortgage obligations in State 2. A confluence of construction delays, falling prices, and a poor rental market hampered his ability to service either of his two real estate mortgages in State 2. Available to Applicant is ¶ MC 20(b) of the financial considerations guideline, "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." While judgment problems persist over Applicant's lack of corroborated due diligence efforts preceding his investment purchases in a still underdeveloped area of State 2, they are extenuated somewhat by unforeseen post-purchase construction delays and deteriorating market conditions in the region.

In recognition of the modest constructive efforts Applicant has made to resolve his creditor 1.b mortgage with a negotiated short sale and/or deed-in-lieu of foreclosure in the wake of depressing real estate conditions in State 2, some mitigation credit is available to him. Age of the two still unresolved debts (creditors 1.a and 1.b) is covered by two of the mitigating conditions for financial considerations: ¶ MC 20(a), "the behavior



happened so long ago, was so infrequent, or occurred under circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment," and ¶ MC 20(d), "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." Although neither mitigating condition is dispositive, they do have some limited application to Applicant's situation.

Holding a security clearance involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor. Financial stability in a person cleared to access classified information is required precisely to inspire trust and confidence in the holder of the clearance. While the principal concern of a clearance holder's demonstrated financial difficulties is vulnerability to coercion and influence, judgment and trust concerns are implicit in financial cases (as here).

Whole person assessment permits extenuation and some mitigation of Applicant's accumulated delinquent mortgage debts. Extenuating circumstances associated with construction delays on his creditor 1.a mortgage and overall depressed market conditions associated with both State 2 properties temporarily impaired his ability to meet his financial obligations with his creditor 1.a and 1.b lenders.

While it would be unfair to impose 20/20 hindsight on Applicant in this case, judgment lapses do play some role in Applicant's situation. Considering the location of these properties and his failure to move more aggressively to resell the properties and avert foreclosures and potentially major deficiency liabilities relative to the properties, Applicant can be faulted some on his failure to use more due diligence before proceeding with his investments in State 2. Where real estate investment decisions are involved, the Appeal Board has always stressed due diligence and aggressive debt resolution efforts in appraising the adequacy of an applicant's mitigation steps in extricating himself from poor real estate investment decisions. See ISCR Case No. 07-16841, at 5 (App. Bd. Dec. 19, 2008).

Manifestly, there are considerable questions about (a) the adequacy of Applicant's inquiries into the viability of his investment properties in a state far from his place of residence and (b) the strength of his efforts to avert the loss of his State 2 properties in a deteriorating real estate market. Compounding Applicant's judgment questions are the major security risks that pertain to his continued high exposure to major deficiency obligations with both creditors. These risks are simply too high to be safely mitigated at this time.

Taking into account all of the extenuating facts and circumstances surrounding Applicant's two mortgage debt accumulations and the risks of deficiency liability that is still extant, he fails to mitigate judgment, reliability and trustworthiness concerns related to his debts. Unfavorable conclusions warrant with respect to the allegations covered by the financial considerations guideline.

In reaching my decision, I have considered the evidence as a whole, including each of the E 2(a) factors enumerated in the Adjudicative Guidelines of the Directive.

### **Formal Findings**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE F: (FINANCIAL CONSIDERATIONS):      AGAINST APPLICANT

Sub-paras. 1.a and 1.b:                                      Against Applicant

### **Conclusions**

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

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Roger C. Wesley  
Administrative Judge