



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



In the matter of:)	
)	
)	ISCR Case No. 08-11614
)	
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: *Pro se*

April 7, 2010

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated the Financial Considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

The Defense Office of Hearings and Appeals (DOHA) issued an undated Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, Financial Considerations. The action was taken under Executive Order (EO) 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 adjudicative guidelines (AG).

Applicant answered the SOR on July 17, 2009, and requested a hearing before an administrative judge. The case was assigned to another administrative judge on August 7, 2009, and reassigned to me on October 13, 2009. DOHA issued a notice of

hearing on November 9, 2009, and the hearing was convened as scheduled on December 8, 2009. After an amendment to the SOR, as discussed below, I granted a continuance of the case until January 28, 2010. That hearing was conducted by video teleconference (VTC). DOHA received the transcript of the first hearing (Tr.1) on December 15, 2009, and the transcript of the second hearing (Tr.2) on February 3, 2010.

Procedural and Evidentiary Rulings

Evidence

At the first hearing on December 8, 2009, the Government offered Exhibits (GE) 1 through 10, which were received without objection. Applicant testified on his own behalf and submitted Exhibits (AE) A through F, which were admitted without objection.

At the second hearing on January 28, 2010, the Government offered GE 11, which was received without objection. Applicant testified on his own behalf, called a witness,¹ and submitted AE G through R, which were admitted without objection.

The record was held open for Applicant to submit additional information. Applicant submitted AE S through SS, which were admitted without objection. Department Counsel's memorandum is marked Hearing Exhibit (HE) I.

Motion to Amend SOR

Department Counsel moved to amend the SOR by adding two allegations under Guideline F, as follows:

1.f. As of December 8, 2009, you had not filed your federal income tax return for tax year 2007.

1.g. As of December 8, 2009, you had not filed your federal income tax return for tax year 2008.

Applicant did not object to the amendment, and it was granted. A continuance was granted to permit Applicant to respond to the amendment.

Findings of Fact

Applicant is a 42-year-old employee of a defense contractor. He is seeking to retain his security clearance. He has worked for his current employer since May 2006.

¹ Applicant's witness was driving from another state and was not present when the hearing started. She was still a substantial distance away when it was time for her to testify. She pulled over to the side of the road, and her testimony was taken telephonically.

He has a Master's degree, awarded in 1993. He is married with two children, ages eight and seven.²

Before he accepted his current job, Applicant was self-employed, working in the areas of property management and software development. He also worked as a software developer for two corporations between 1993 and 2001, and 2004 to 2005. Applicant and his wife purchased their home in state A for about \$190,000 in 1995. He later took out a second mortgage/home equity loan on the property for about \$50,000, which he used for his business. It appears he may have also refinanced his first mortgage at some point. Applicant accepted his current job in state B in May 2006. At that point, the balances on his primary and secondary mortgages were about \$169,000 and \$42,600. Applicant placed the house on the market, asking about \$200,000, but the house did not sell. After several months without a buyer, the house was rented in November 2006. The tenant paid the rent for about a year and then stopped paying. Applicant stopped paying the mortgages in October 2008. Applicant placed the house back on the market but was unable to sell it. He made the decision that it was not financially wise to keep paying the mortgages, and he permitted the house to go to foreclosure. The tenant was finally evicted in March 2009.³

Applicant and the mortgagor worked out a "short sale" of the house. His documents indicated the house sale was scheduled to close on March 10, 2010. The purchase price of the house was \$150,000. The first and second mortgages were held by the same financial institution. After closing costs, the mortgagor was scheduled to receive \$136,953 from the sale. That would leave a deficiency of about \$25,000 on the first mortgage. Under the terms of a short sale, the mortgagor agrees to accept a sale price less than the amount of the mortgage and release the homeowner from liability for the deficiency. Applicant testified that he believed the short sale covered both the first and second mortgage. The short sale documents do not specifically state that both mortgages are covered. However, the sale could not proceed without the approval of the lienholder of the second mortgage. The mortgagor had apparently given up hope of collecting the second mortgage because a credit report obtained on January 21, 2010, showed the second mortgage as "charged off." The balance of the second mortgage is listed at \$43,000.⁴

Applicant's wife also has a Master's degree. She works and their combined income is substantial. They rented a home in state B for several months after they moved there. They then purchased a new home in July 2006. Applicant obtained a first mortgage on the property for \$200,000 and a second mortgage for \$50,000. There is no indication of any payment issues on these mortgages.⁵

² Tr.1 at 42, 69-70; GE 1; AE S.

³ Tr.1 at 20-27, 41-45; Applicant's response to SOR; GE 1, 2; AE S.

⁴ Tr.1 at 27-28; Tr.2 at 18-22; Applicant's response to SOR; GE 11; AE B, G, H, S, PP.

⁵ Tr.1 at 29, 40-43; AE S, EE.

Applicant bought an investment property from a builder in state B for \$600,000 in June 2007. The sale was financed with a 30-year \$600,000 mortgage, with monthly payments of \$5,713. The house was appraised at \$700,000, and Applicant thought he could sell or “flip” the house in a short period for \$650,000 to \$700,000. Throughout the hearing, Applicant stated that he believed he had \$100,000 in equity in the property because they purchased it at less than the appraised value. The housing market quickly collapsed. He lowered the asking price to about \$590,000, but was unable to sell the house. He stopped paying the mortgage in about November 2007, and let the home go into foreclosure.⁶

Applicant stated that the decisions to stop paying his mortgages were difficult ones. He stated “[t]hey were simply losing too much value to attempt to salvage at their current loan rate.” Regarding the house in state A, he testified that “it really didn’t make financial sense to work with the property any more because of the large amount that we needed up front and the fact that the property was under the value that was required.”⁷ When he responded to DOHA interrogatories in March 2009, he wrote:

I am still in the process of deciding if this property is worth retaining. With this current economy it is not prudent to invest money into a property that is losing value.⁸

Applicant’s mortgagor issued an Internal Revenue Service (IRS) form 1099-A (Acquisition or Abandonment of Secured Property) for tax year 2008. The form indicated that the lender acquired the property on May 1, 2008. The balance of the principal on the mortgage at that time was listed as \$600,899, and the fair market value of the property was listed at \$293,894. Applicant testified that the house was actually sold and \$293,894 was the sales price. Applicant was asked at the first hearing about the tax consequences of the 1099-A form. He stated that he had not yet filed his 2007 and 2008 tax returns.⁹

Applicant’s accountant testified at the second hearing. She stated the 2007 and 2008 tax returns had been prepared and were in the process of being submitted. Applicant submitted proof after the hearing that the returns had been filed. The returns indicate that Applicant can expect refunds of about \$26,000 for tax year 2007, and \$13,000 for tax year 2008. The accountant testified about the 1099-A form. She indicated that form did not impose any tax consequences, as it merely notifies the taxpayer and the IRS of the fair market value of the property. There are no tax consequences because it does not affect the underlying debt, which the taxpayer/Applicant still owes. If, as Applicant testified, the property sold for \$293,894, his indebtedness on the mortgage is about \$307,000. The mortgagor can attempt to

⁶ Tr.1 at 28-36, 46-48; Applicant’s response to SOR; GE 5, 6; AE S.

⁷ Tr.1 at 27, 38-39; Applicant’s response to SOR; GE 5, 6; AE S, EE.

⁸ GE 5.

⁹ Tr.1 at 36-37, 50-57; AE C, S.

collect the debt, or it can issue an IRS form 1099-C (Cancellation of Debt). If the mortgagor forgives the debt and issues a 1099-C, then there are potential tax consequences. Tax liability depends upon whether the taxpayer is insolvent, as determined by an IRS formula. Applicant's accountant prepared an insolvency worksheet. The worksheet is not yet applicable, as the mortgagor has not issued a 1099-C. Applicant stated that the worksheet indicates that there will be no tax liability if a 1099-C is issued.¹⁰

Applicant bought another investment property in state B in October 2007. That was four months after he put the first investment property on the market, and a month before he stopped paying the mortgage on the first property. The property was a four-unit building that he bought for \$400,000. He intended to sell the property at a profit. He was unable to sell the property and started leasing the units in April 2008. He stated that his property manager stole the tenants' rent and did not forward the rent payments. Applicant stopped paying the mortgage in February 2009, and it went into foreclosure in May 2009.¹¹

In addition to the delinquent mortgages, the SOR alleged two other delinquent debts. The \$44 debt alleged in SOR ¶ 1.a was an association fee on the property in state A, which was supposed to be paid by Applicant's tenant. Applicant paid that debt in July 2009. Applicant's tenant in state A made improvements to the property without Applicant's permission, and then did not pay the contractor. A \$1,300 mechanic's lien was placed on the property. That debt was alleged in SOR ¶ 1.e. Applicant settled this debt in January 2009, and the lien was released.¹²

In May 2008, Applicant self-reported the foreclosure of his first investment property and the mechanic's lien on his house in state A to his security manager. Applicant has not received financial counseling. Other than his unpaid mortgages, Applicant's finances are sound. His 2007 tax return showed he and his wife earned \$170,598. They reported \$177,571 in income on their 2008 tax return. Applicant stated they currently both earn "six-figure" salaries. His insolvency worksheet reported \$150,000 in retirement accounts and \$25,309 in cash and bank accounts. He has about \$2,000 per month in discretionary income. He has loans against his retirement accounts. He indicated that he planned on using his income tax refunds to pay off his retirement account loans, which would increase his monthly discretionary income to about \$4,000. He stated that the mortgagors have taken no steps to attempt to collect the deficiencies owed on his foreclosed properties. If the mortgagors attempt to enforce their debts, he will retain an attorney and negotiate a settlement or otherwise resolve the debts. He has the resources to address the debts if that occurs. He and his wife

¹⁰ Tr.2 at 14-16, 22-23, 27-45; AE K, L-R, W, X, Y, FF-HH, QQ, RR.

¹¹ Tr.1 at 61-67; AE S. The foreclosure of the second investment property was not alleged in the SOR. It will not be used for disqualification purposes. It will be considered in assessing Applicant's overall financial situation; in the application of mitigating conditions; and in evaluating the "whole person."

¹² Tr.1 at 20, 25, 38, 48-50; Applicant's response to SOR; GE 5, 6, 8, 9; AE A, D-F.

have ended their investments in real estate and do not plan on entering that market again. Applicant submitted information establishing that he is a valued employee.¹³

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 to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

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 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.

¹³ Tr.1 at 37-39, 48, 70; Tr.2 at 23-24, 46, 64-65; Applicant's response to SOR; GE 3; AE T, U, W, X, EE, GG, II, JJ.

Section 7 of EO 10865 provides that adverse 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* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

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

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. Three are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same.

Applicant accumulated a number of delinquent debts and was unable or unwilling to pay his obligations for a period. He did not timely file his 2007 and 2008 federal income tax returns. The evidence is sufficient to raise all the above disqualifying conditions.

Four Financial Considerations mitigating conditions under AG ¶ 20 are potentially applicable:

- (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;
- (b) the conditions that resulted in the financial problem 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;

(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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant filed his 2007 and 2008 federal income tax returns. AG ¶ 20(a) is applicable to SOR ¶¶ 1.f and 1.g.

Applicant still owes more than \$300,000 for deficiencies on foreclosed mortgages. His financial issues are recent and ongoing. AG ¶ 20(a) is not applicable to his unpaid debts.

Applicant attributed his financial problems to the downturn in the real estate market. He also had a tenant who did not pay the rent and a property manager that stole from him. Those events were outside Applicant's control. His decision to invest in the real estate market was completely within his control. AG ¶ 20(b) also requires that the individual act responsibly under the circumstances. Applicant and his wife have good jobs and earn substantial salaries. He has about \$25,000 in cash and bank accounts and \$150,000 in retirement accounts. He could have afforded to pay the mortgages on the state A house if he chose to do so. He decided not to, stating it was "not prudent to invest money into a property that is losing value." His ability to pay the mortgages on the state A home was further hampered by the poor business decision to invest in real estate properties. He bought the investment property in July 2007, knowing that he had recently been forced to rent the state A house because he was unable to sell it. He thought he could "flip" the house and make a quick profit. That house was on the market four months when he bought another investment property in October 2007. That was just one month before he stopped paying the mortgage on the first investment property. I do not find that Applicant acted responsibly by buying investment properties while he was unable to sell his first house. AG ¶ 20(b) is partially applicable.

Applicant has not received financial counseling. His mortgagor agreed to a short sale of the state A house. That ends his legal liability for the primary mortgage. His legal liability for the second mortgage/home equity loan is less clear, although it appears the mortgagor agreed to the sale and listed the loan as "charged off." There are indications that the state A mortgages are resolved. AG ¶ 20(c) is applicable to the primary mortgage on the state A house, and that debt is mitigated. The secondary mortgage is more problematic, even if the debt is no longer legally enforceable because of the short sale. Applicant did not benefit financially from the primary mortgage and the mortgage on the investment property. However, he received \$50,000 from the second mortgage/home equity loan, which he used for his own purposes. He has the financial means to pay that debt, but chose not to because it would not be "prudent." AG ¶ 20(c) is partially applicable to the secondary mortgage.

Applicant owes about \$307,000 on the deficiency for the investment property's mortgage. Applicant states it is unlikely the mortgagor will proceed against him. That may be so, but it does not constitute a resolution of that problem. AG ¶ 20(c) is not applicable to the deficiency owed on the investment property's mortgage. Applicant's actions do not qualify as a good-faith effort to repay or otherwise resolve his mortgages.¹⁴ AG ¶ 20(d) is not applicable to his unpaid mortgages.

Applicant paid the debts alleged in SOR ¶¶ 1.a and 1.e. AG ¶ 20(d) is applicable to those debts.

In sum, I conclude that financial concerns are still present despite some mitigation.

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 security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

¹⁴ 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 Financial Considerations Mitigating Condition 6, 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 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) in order to claim the benefit of Financial Considerations Mitigating Condition 6.

(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. Jun. 4, 2001)).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment. I considered Applicant's positive work record and his overall financial situation. Applicant's finances would be in great shape if he did not have real estate issues. He and his wife have large salaries, and he has substantial savings and retirement accounts. However, he made risky investments and incurred large losses. In reality, the mortgagors incurred large losses, because Applicant has not paid them. He took \$50,000 in equity out of his home in state A and used that money for his business. Despite the ability to pay that debt, he chose not to pay it. He currently owes more than \$300,000 on the mortgage for his foreclosed investment property. He has taken no action on that debt, other than to assume the mortgagor will not attempt to enforce it. Applicant's finances continue to raise doubts about his judgment, reliability, and trustworthiness.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated Financial Considerations security concerns.

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:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraphs 1.e-1.g:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge