



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 08-11786 |
| SSN: |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Michael Lyles, Esquire, Department Counsel
For Applicant: *Pro Se*

March 19, 2010

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I deny Applicant's eligibility for access to classified information.

Applicant signed his Electronics Questionnaire for Investigations Processing (e-QIP) on May 8, 2008. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines F and E on July 10, 2009. DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant received the SOR, and answered it in writing on August 24, 2009. He requested a hearing before an administrative judge. DOHA received the request on

August 27, 2009. Department Counsel was prepared to proceed on September 14, 2009, and I received the case assignment on November 9, 2009. DOHA issued a notice of hearing on November 16, 2009, and I convened the hearing as scheduled on December 10, 2009. The government offered six exhibits (GE) 1 through 6, which were admitted into evidence without objection. Applicant testified on his own behalf. He submitted 15 exhibits (AE) A through O, which were admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on December 18, 2009. I held the record open until January 10, 2010, for Applicant to submit additional documentation. Applicant timely submitted two exhibits, AE P and AE Q, without objection. The record closed on January 10, 2010.

Procedural and Evidentiary Rulings

Notice

At the hearing, I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived his right to 15 days notice. (Tr. 9.)

Post-hearing Submissions

The record closed January 10, 2010. Thereafter, Applicant submitted additional documentation on two separate occasions. Applicant did not file a motion requesting that the record be reopened. The Government objected to the admission of this additional evidence on the grounds that the submissions are not timely. The Government has not argued that it would be prejudiced by the submission of Applicant's additional evidence.

I have considered the Government's argument and the failure of Applicant, a non-lawyer, to file a motion. I find that the Government is not prejudiced by the admission of Applicant's submissions. These documents are admitted as AE R through AE U.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.c and 1.d of the SOR, with explanations. He denied the factual allegations in ¶¶ 1.a, 1.b, 2.a, and 2.b of the SOR.¹

¹When SOR allegations are controverted, the government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted).

Applicant, who is 50 years old, was hired by a Department of Defense contractor in 2008 to work as a law enforcement professional with the troops in Iraq. He deployed to Iraq to work on the improvised explosive device (IED) problems. At the end of his one year tour of duty, he learned that his security clearance was rescinded. As of the date of the hearing, Applicant was not working.²

Applicant graduated from college in 1985 with a Bachelor of Science degree. He joined a major city police department in July 1985. He worked in narcotics and gang units during his 16 years as a police officer. He retired in September 2001 on disability. Applicant married in 2005 and has a daughter, who is 35 months old.³

Applicant purchased two properties in 1988 or 1989 (AE F - house B and house C). In 2002, he purchased a property, where he lived, for \$700,000 (AE F - house A). He rented the other two properties. Applicant began purchasing fix-up properties around 2002. After he repaired each property, he sold it for a profit. He retained ownership of these properties for a short period of time. He indicated that he sold each property for between \$20,000 and \$50,000. He used the profits to purchase another property and to pay any bills related to the sold property. Applicant received tax notices on his investment properties which he either paid in April or December of the year when due. He assumed his business agent also received the tax bills.⁴

Applicant purchased a house in the early summer of 2005, which he sold in August 2005. He owned this property for 63 days. Applicant believed that all expenses related to this property, including property taxes, were contained in the settlement documents and paid from the sale proceeds. When he was in Iraq, he learned that he owed additional property taxes on this property. He did not receive the notices on the past due taxes, as the notices were mailed to the wrong address. When he learned about the unpaid taxes in 2009, he paid them. Although the State tax office issued a release of lien for its lien filed in January 2006, Applicant stated he did not realize a lien had been filed on this property. He did not own the property when the lien was filed.⁵

In the fall 2005, a real estate agent suggested Applicant purchase a property, then tear down the house and rebuild. Applicant indicated that the destruction and rebuilding process took about 18 months, and because of this time period, his financial problems developed. Applicant purchased three homes for investment (House D, house E, house F). Applicant purchased these properties by refinancing his two rental properties and his home with a first mortgage. He also obtained a second loan, which was a home equity loan, with the two rental properties as collateral. Before he could complete the rebuilding of even one of the three houses of his investment properties,

²GE 1; Tr. 30-31.

³GE 1; Tr. 29-30.

⁴AE F; AE J; AE K; AE L; AE M; AE N; AE O; Tr. 33-34, 47-48.

⁵AE E; Tr. 42-43.

the real estate market changed and property values began to decline. Applicant sold the three investment properties between February 2007 and March 2008. He does not owe any money on these properties, as the property sold for an amount equal to the debt owed the primary mortgagor.⁶

By early 2008 Applicant did not have sufficient income to pay the three mortgages and two equity loans on his home and the two unoccupied rental homes purchased in 1988 or 1989. He tried to sell these homes, including by short sale, but he was unsuccessful. The mortgage holder foreclosed on all three properties (house A, house B, house C) and sold all three homes in August 2008. Applicant does not owe the primary lender any money on its loans.⁷

As previously stated, Applicant obtained two equity loans to finance his investment properties in October 2005. He paid his monthly payment on each loan until February 2008. When his properties sold at foreclosure, the sale proceeds covered the mortgage loans on these properties, but were insufficient to pay the equity loans. Applicant obtained a letter from the loan officer who arranged the four loans, including these two equity lines of credit (junior liens), on Applicant's rental properties. The loan officer opined that 1) upon a foreclosure sale, the proceeds from the foreclosure sale are applied to the first mortgage and if there are any remaining funds after all taxes and costs are paid, the proceeds are applied to junior liens; and 2) all junior liens are either satisfied with the sale proceeds or eliminated at the trustee's sale. Based on this knowledge, the loan officer stated that Applicant's two properties (house B and house C) went to a trustee sale and the liens were extinguished. No documentation showing what occurred at the trustee sale has been provided.⁸

The company holding the equity line of credit on house B and house C and listed as a creditor on the credit reports of record is no longer in business. Applicant traced the loans to a banking institution, which purchased the company owning the lines of equity. Applicant spoke with this creditor. The creditor initially agreed to provide a letter on the status of his accounts, but later withdrew its offer. It also refused to issue a 1099 for tax purposes. Instead, the creditor verbally advised Applicant that these two debts are charged-off and have a zero balance. The creditor did not provide any information on what it intends to do about the collection of the charged-off debts, if anything.⁹

Subsequent to the hearing, Applicant challenged the validity of the two equity lines of credit with the credit reporting companies. As a result, the three credit reporting companies deleted these two debts from his credit report. The two credit reports of record do not show a debt owed to the current creditor and purchaser of these two

⁶AE F; AE H; AE I; Tr. 33-35.

⁷GE 2, p. 10; AE G; Tr. 35-39.

⁸GE 3; AE P; Tr. 62-66.

⁹AE P; AE R; AE S.

debts. Applicant did not submit a full credit report with his post-hearing submissions. Thus, the record lacks information as to whether the current creditor has listed these debts on his credit report.¹⁰

Applicant moved his family across the country in July 2009. He purchased a house for \$575,000 and has a mortgage of \$275,000.¹¹ His monthly mortgage payment is \$3,200. His current monthly income totals \$3,700. Applicant has applied for unemployment benefits and has some money in his checking account to pay normal monthly living expenses. He does not have a car payment and limits his credit expenses.¹²

Applicant received a job offer on April 21, 2008, which he immediately accepted. His new employer acknowledged Applicant's acceptance of the job offer by e-mail, dated April 22, 2008. As a condition of employment, his new employer required him to complete a security clearance questionnaire (e-QIP) before May 5, 2008. The e-QIP was attached to the e-mail along with instructions. Applicant completed the e-QIP in late April 2008 and submitted it to his facility security officer (FSO) for processing. At this time, he was not 90 days late in his mortgage payments on his three properties nor had the foreclosure process begun on his properties. He discussed this fact with his FSO who advised that since he was not yet 90 days past due, he should answer "no" to question 28 (b): "Are you currently over 90 day delinquent on any debts?"¹³

Applicant met with the security clearance investigator on July 21, 2008. He discussed his housing investment enterprise with the investigator. He told the investigator that the mortgagor had foreclosed on his three properties in May 2008, and that he had requested the mortgagor to initiate a short-sale of the property. He also advised the investigator that the two debts at issue in this case were more than 90 days past due and that he was waiting to hear from the mortgagor about the short sale before taking care of these accounts. Applicant argued at the hearing that he made a good faith effort to reveal his mortgage debt problems at the interview. The summary of the personal interview contains no statement which indicated that the investigator confronted Applicant with negative information about his mortgage debts before he acknowledged the problem. Inferences warrant a finding that Applicant disclosed his debt problems to the investigator without confrontation.¹⁴

¹⁰GE 3, GE 4; AE R; AE T; AE U.

¹¹Applicant used his cash assets to purchase his current house. Tr. 68-69.

¹²Tr. 32, 68-71.

¹³GE 1; AE A; AE B; AE C; Tr. 54.

¹⁴GE 2; Tr. 55-57.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are 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, these guidelines are applied 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, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for obtaining 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 an 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).

Analysis

Guideline F, Financial Considerations

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

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. Applicant accumulated two delinquent debts from his real estate investment enterprise, which are not paid. The evidence is sufficient to raise these potentially disqualifying conditions.

In assessing whether an Applicant has established mitigation under Guideline F, the Appeal Board provided the following guidance in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008):

In evaluating Guideline F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts." See, e.g., ISCR Case No. 05-01920 at 5 (App. BD. Mar. 1, 200). However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. See, e.g., ISCR Case No. 02-25499 at 2 (App. BD. Jun. 5, 2006). All that is required is that an applicant demonstrate that he has ". . . established a plan to resolve his financial problems and taken significant actions to implement that plan." See, e.g., ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) ("Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.") There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), mitigation may occur when “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.” Applicant’s current financial problems occurred when the real estate market collapsed in 2007. Until the collapse of the real estate market, he paid his personal and investment bills. He is not involved in real estate investment for profit at this time. This mitigating condition has some applicability as he exercised reasonable judgment when he invested in his properties. This mitigating condition has only partial applicability since the question of whether Applicant will invest in property for resale in the future is unknown.

Under AG ¶ 20(b), security concern may be mitigating where “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.” As noted above, Applicant’s financial problems arose when the real estate market collapsed in 2007. He sold three investment properties, but allowed three other properties to go to foreclosure. Even though he had significant debt from his investments, he was able to pay most of the debt by selling his properties. However, he has two unpaid equity lines of credit, totaling \$70,000. Although he acted responsibly by selling his property, he has not resolved the two debts at issue in this case. I find this mitigating condition is partially applicable.

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.” Applicant has not received counseling nor has he resolved the delinquent debts, either by payment or settlement. I conclude that these mitigating conditions are not applicable.¹⁵

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

¹⁵AG ¶¶ 20(e) and 20(f) are not raised in this case.

AG ¶ 16(a) describes conditions that could raise a security concern and may be disqualifying:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and (e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

For AG ¶ 16(a) to apply, Applicant's omission, concealment or falsification in his answer must be deliberate. Applicant completed his e-QIP a few days before his debts became 90 days past due, and denied any overdue debts. He also denied having any liens placed against his property in the prior seven years for failing to pay taxes or other debts. He signed the E-QIP at the time his debts became 90 days past due. Thus, at the time he executed the e-QIP, he omitted material facts about his debts. This information is material to the evaluation of Applicant's trustworthiness to hold a security clearance and to his honesty. In his response, he denies, however, that he had an intent to hide this information from the government. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.¹⁶

When he completed his e-QIP in April 2008, Applicant followed the advice of his FSO and answered "no" to existence of any debts 90 days past due. Under these circumstances, his answer is technically correct. He voluntarily provided the security clearance investigator information about his foreclosed property and past due mortgage debts in July 2008. His actions in July 2008 show that he had no intent to falsify his answer to Question 28b or to hide his debt problems from the government.

Regarding the property lien filed in January 2006, Applicant credibly testified that he did not know about the lien until he was in Iraq. His testimony is supported by the fact that the State tax office mailed the delinquent tax notice to the property address in late 2005 or early 2006, even though its records indicated that Applicant sold the

¹⁶See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

property in August 2005 and by the fact that the State government placed the lien against the property Applicant had already sold. Overall, I find the evidence of record failed to show that Applicant intentionally falsified his answers to the e-QIP. The government has not established intentional falsification.

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 an applicant's conduct and all relevant 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant worked for a large city police department for 16 years, retiring in 2001 on disability. After he retired, he began purchasing houses in need of repair. He made the necessary repairs and sold the houses a few months later for a profit. In the fall 2005, he followed the advice of a real estate agent and purchased three properties where he would tear down the existing house and rebuild. He purchased his new investment properties by refinancing his personal home and two other long-held properties. Shortly after he began this investment process, the real estate market declined significantly, impacting his ability to resell his property. He eventually sold the three properties he had purchased in 2005.

Applicant could not sell his personal home or the remaining two rental properties. He defaulted on his mortgages and the mortgagee foreclosed on his properties. These

three properties sold at foreclosure and his primary mortgage debt on his home was satisfied. The two home equity loans on his investment properties were not paid from the sale proceeds as there were no funds to pay these loans. His loan officer correctly indicated that under state law, the foreclosure sale extinguished the junior liens on the house created by the equity loans.¹⁷ However, under State law, a sold out junior lien holder, such as the equity loan holder in this case, generally has a right to sue Applicant for the unpaid debt.¹⁸ The original creditor for the two equity loans did not sue Applicant and is no longer in business. However, Applicant determined that the debts are held by another mortgage lender with an assigned account number. The lender carries the debts on its books as a charge-off with a zero balance. Applicant provided no information that he paid these debts. He denied owing the debts based on his understanding that the foreclosure sale eliminated the debts and the elimination of the original creditor from his credit report.

Applicant's problem is not resolved because he has not provided evidence that he paid these debts; that the current creditor has forgiven the debts; that the current creditor will not pursue legal action to obtain a judgment for the debts; or that he has otherwise resolved these debts. The fact that the current creditor shows a zero balance on the debts is not enough to show he does not owe these debts. Applicant acknowledged that the two debts are listed on the creditor's records as a charge-off which, under security clearance law, is not considered resolution of the debts. While Applicant has shown that he timely pays his other bills, he has not provided sufficient evidence to show that the equity lines of credit are resolved in his favor, or discharged.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his finances under Guideline F. The government did not establish its case under Guideline E.

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: | For Applicant |
| Subparagraph 1.d: | For Applicant |

¹⁷207 C. A.3d 1018 (1989); 2003 WL 23025437 (2003).

¹⁸Bank of America National Trust and Savings Association v. Graves, E015010 (2009).

Paragraph 2, Guideline E:

FOR APPLICANT

Subparagraph 2.a:

For Applicant

Subparagraph 2.b:

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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

MARY E. HENRY
Administrative Judge