



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



In the matter of: )  
)  
) ISCR Case No. 09-00395  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: John Bayard Glendon, Esquire, Department Counsel

For Applicant: John F. Mardulla, Esquire

March 18, 2010

**Decision**

O'BRIEN, Rita C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised under the guideline for financial considerations. Accordingly, his request for a security clearance is denied.

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on June 17, 2008. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding<sup>1</sup> that it is clearly consistent with the national interest to grant Applicant's request.

On July 9, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) that specified the basis for its decision: security concerns addressed in the Directive under

<sup>1</sup> Required by Executive Order 10865 and by DoD Directive 5220.6 (Directive), as amended.

Guideline F (Financial Considerations) of the revised Adjudicative Guidelines (AG).<sup>2</sup> Applicant signed his notarized Answer on August 20, 2009. Of the nine allegations in the SOR, he admitted to six. He denied allegation 1.c. As to allegation 1.g., he admitted in part and denied in part. He also requested a hearing before an administrative judge. Department Counsel was prepared to proceed on September 16, 2009, and the case was assigned to me on September 21, 2009. DOHA issued a Notice of Hearing on October 27, 2009, and I convened the hearing as scheduled on November 17, 2009.

During the hearing, the government offered five exhibits, which I admitted as Government Exhibits (GE) 1 through 5. Applicant testified, presented one witness, and offered 14 exhibits, admitted as Applicant's Exhibits (AE) A through N. DOHA received the transcript (Tr.) on November 23, 2010.

### **Evidentiary Ruling**

I held the record open to allow Applicant to submit additional documentation showing his contacts with his creditors before he filed a bankruptcy petition in July 2009. Applicant timely submitted 35 documents, which I admit, over Department Counsel's objection, as AE O through WW.

### **Findings of Fact**

Applicant's admissions in his answer to the SOR are incorporated herein as findings of fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the record evidence, I make the following additional findings of fact.

Applicant is 37 years old. He married in 1995, and divorced in 2002. He re-married in November 2005, and has four children. From 1995 to 1999, he was an enlisted member of the U.S. Navy. He received his first security clearance while in the Navy. He earned a bachelor's degree in criminal justice in 1995, and a master's degree in public administration in 1999. He worked for a federal agency as a police officer from 1999 to 2001, holding a Top Secret/Sensitive Compartmented Information (SCI) security clearance. He began working for federal contractors in 2001, in information systems security. In May 2008, he began his current position as senior associate with a defense contractor. His job involves ensuring that security rules and regulations are followed. He has been continuously employed for at least the past ten years. (GE 1; Tr. 27-32)

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<sup>2</sup> Adjudication of this case is controlled by the revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. The revised Adjudicative Guidelines supersede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

Applicant started investing in real estate in 2005. (Tr. 35) He testified that he had a “fairly extensive history of buying real estate.”<sup>3</sup> In January 2005, he purchased an 11-acre undeveloped lot (Lot A) for \$186,000 (allegation 1.a.), financing 100 percent of the loan. Later that year, in August 2005, he bought his primary residence for \$660,000. He financed 100 percent of the loan, with a first mortgage of \$528,000 and a second mortgage of approximately \$164,000, with the additional amount covering closing costs and points (allegations 1.b. and 1.c.). (Tr. 58-59, 61, 70-71)

When Applicant bought Lot A in January 2005, he paid \$186,000, but its appraised value was between \$228,000 (Tr. 35) and \$256,000 (Answer). Applicant testified that his “...goal was to hang on to it as long as I could for--just like I said--for my kids' education and mine and my wife's retirement.” (Tr. 33, 35) He also testified that Lot A was a long-term investment and that he planned to build a house on it to live in during the week, and then stay at his other property on weekends. (AE F; Tr. 71-72) However, he put Lot A up for sale in 2005, the year he bought it, for \$256,000 (Answer).

Department Counsel asked Applicant if he had considered the cost of his real estate investments:

Q: Had you ever done a calculation as to what the mortgage costs, the carrying costs on these properties would be, before you bought the third and fourth properties?

A: Yes; yes. My--the--at this--when I--after I bought the properties, I did--I did do that. But I thought that I could, with the market the way it was at the time, I could flip those and make, actually make some money off of them and then buy down the house in [city]. And obviously that didn't happen.

Q: So your strategy changed from being a long-term investor to a speculator, basically?

A: Yes.

Q: To try to make a quick profit on that—

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<sup>3</sup> Applicant bought a house during his first marriage. He then owned a condominium from 2003 to 2005. (Tr. 57-58) He bought Lot A as well as his primary residence in 2005. In the fall of 2006, he bought an undeveloped lot (Lot B) for \$273,000, which appraised for \$320,000. (Tr. 36) He obtained 100% financing. (Tr. 72) He began trying to sell it in 2006 or 2007, but was unsuccessful. It was foreclosed, and is included in the bankruptcy. (AE E) In 2006, Applicant purchased a lot, and had a house built on it (Lot/house C) (Tr. 74-75). He lived in this house from 2007 to 2008. (GE 1) He obtained 100% financing for this purchase: a first mortgage of \$468,000 and a second mortgage of \$116,000, for total indebtedness of \$584,000. This property was foreclosed and sold for \$300,000. (Tr. 63-64, 68) The debts related to Lot B and Lot/house C, are not alleged in the SOR. They are listed here to facilitate consideration under the whole person analysis.

A: Yes. (Tr. 78)

Although the assessed value of Lot A continued to rise through 2008, Applicant received no offers. (Answer; AE F; Tr. 35) He persistently tried to sell the land for several years through advertisements, realtors, and builders. He was unsuccessful. (Tr. 36-37) In 2007, Applicant's wife had twins. This unexpected event resulted in additional expenses and reduced income. Eventually, Applicant was unable to carry the payments on his mortgages. About 6 months to 12 months before he reached this point, he contacted his lenders. However, none would work with him on alternate loan arrangements (Tr. 41). When he started to miss payments (Tr. 40), they did respond. The lender who held his mortgage on Lot A (allegation 1.a.) agreed to a loan modification that lowered his payments (AE S). The lender also accepted a "short sale," in which the lot would be sold for less than the mortgage loan balance. Applicant also was able to negotiate a loan modification from the lender who held the first mortgage on his residence (allegation 1.b.). This change reduced his monthly payment on that mortgage by half for a period of six months. (Tr. 82) However, the holder of the second mortgage on his residence (allegation 1.c.) would not agree to a loan modification. (Tr. 40-41) Applicant had arrears on his residence mortgage, but kept up the payments, and the primary residence mortgage was not foreclosed. (GE 2; AE S, MM – SS; Tr. 49, 55, 82)

Applicant obtained a personal loan of \$40,813 to help with his mortgage payments (allegation 1.d). He also used credit cards for the same purpose. These credit card accounts, listed at allegations 1.e. through 1.i., total approximately \$71,000. In July 2008, Applicant signed a contract with a consumer credit agency to represent him in negotiations to settle his delinquent credit card accounts. Applicant agreed to pay \$745 per month into an account to be used to pay the settlements. In spring 2009, the agency settled one account of \$2,641 (allegation 1.i.). The remaining four credit card accounts alleged in the SOR were not paid or settled. Applicant does not currently use credit cards. He has also retained a credit monitoring service to keep abreast of his debts. His October 2009 credit bureau report shows no delinquent credit card or installment accounts. (GE 2, 3, 4, 5; AE D, M; Tr. 42-43, 46, 50, 52)

In July 2008, at about the same time as he worked with the consumer credit agency, he contacted an attorney for advice. The attorney proposed that he file a bankruptcy petition. Applicant preferred not to file for bankruptcy because he feared it would jeopardize his security clearance. However, in July 2009, Applicant and his wife filed a Chapter 7 bankruptcy petition. The petition includes the unpaid SOR debts listed at allegations 1.a through 1.h. Applicant surrendered his primary residence in the bankruptcy petition. He decided not to reaffirm this debt because the house was "too far underwater" that is, he owed about \$660,000 but the market value was approximately \$450,000. He and his family moved to a rental property. The bankruptcy discharged his debts in November 2009. (AE N; Tr. 37-39, 82)

As to financial counseling, Applicant considered learning about financial planning and budgeting, but decided that it was too costly. In June and August 2009, he

completed the two-part online credit counseling that is required as part of the bankruptcy process. As of the date of the hearing, he had enrolled in a course sponsored by his church that teaches family financial planning. He expected to begin the course in 2010. (AE B, C, E, N; Tr. 44, 48-49, 88)

Applicant's 2007 gross annual salary was \$206,103. In 2008, Applicant earned \$193,770. His 2009 gross income was approximately \$175,000. His wife earned approximately \$17,000, in both 2007 and in 2008. In 2009, she worked in sales, and earned an income that fluctuated between \$48,000 and \$60,000. Applicant testified that, currently, he has a positive cash flow and his only debts are his wife's school loans and a car loan of \$8,000. (AE H, I; Tr. 48-49)

Applicant's witness is his subordinate at their current employment. He has known Applicant for four years and is aware of Applicant's financial problems. He testified that Applicant is goal-oriented, methodical, and trustworthy, and has never ignored rules or regulations. (AE L; Tr. 23- 25) Another subordinate, who is also a friend, submitted a reference letter. He has known Applicant for two years, and stated that Applicant mentioned his financial problems, but did not let it interfere with his work ethic. He believes Applicant to have integrity, and to be trustworthy and loyal. Applicant's current supervisor provided a letter that attests to Applicant's honesty and integrity. He notes that Applicant has consistently followed the rules relating to classified information. Applicant has kept his supervisor aware of his financial situation. Another co-worker stated that Applicant has developed cost-saving projects for federal agencies and improved security standards. His co-worker is aware of Applicant's financial situation and believes Applicant would never allow himself to be blackmailed. (AE J, K, L)

### **Policies**

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the revised AG.<sup>4</sup> Decisions must also reflect consideration of the "whole person" factors listed in ¶ 2(a) of the AG.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline F (Financial Considerations).

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<sup>4</sup> Directive. 6.3.

A security clearance decision is intended only to resolve the questions of whether it is clearly consistent with the national interest<sup>5</sup> for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an Applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, an Applicant bears a heavy burden of persuasion.<sup>6</sup> A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.<sup>7</sup>

## Analysis

### Guideline F (Financial Considerations)

AG ¶18 expresses the security concern pertaining to financial considerations:

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 over-extended 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.

Applicant began investing in real estate when the market was booming in the mid-2000s. In 2005, he bought a house as a primary residence for \$660,000, as well as an undeveloped 11-acre lot for \$186,000. The mortgage loans, totalling \$846,000, were 100 percent financed. He put the lot up for sale the year he bought it. He had no offers and was unable to keep up with the loan payments. He also could not manage the payments on his house, and eventually put his primary residence up for sale as

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<sup>5</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>6</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>7</sup> See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

well. When he could no longer meet his mortgage payments on his income, he obtained a personal loan of almost \$41,000. He also used credit cards to make mortgage payments, which resulted in approximately \$70,000 in delinquent credit card accounts. The following disqualifying conditions under AG ¶19 apply:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (e) consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis.

The Financial Considerations guideline also contains conditions that can mitigate security concerns. The following conditions under AG ¶ 20 are relevant:

- (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.

AG ¶ 20(a) does not apply. Applicant's delinquencies are not distant in time, as they were discharged in bankruptcy in November 2009, only four months ago. His financial speculating raises questions about his reliability and judgment.

The real estate market was booming when Applicant bought Lot A and his primary residence in 2005. The market crash only had a negative effect on his financial situation from approximately 2007-2008. Applicant's wife's pregnancy with twins in 2007 did result in twice the expected expenses, as well as the loss of his wife's income. Applicant had no way to foresee the crash, or the advent of twins. Therefore, starting in 2007, he was affected by events beyond his control. However, his financial problems began in 2005, when his own disregard for a sound and reasonable approach to investing initiated his financial problems. When Applicant purchased

properties that were beyond his ability to afford, even with his substantial salary, he was not acting reasonably. AG ¶ 20(b) cannot be applied.

Applicant receives credit in mitigation under AG ¶ 20(c), which requires financial counseling or indications that the problem is resolved. Applicant hired a credit repair agency in 2008, through which he paid one SOR debt; he also contacted an attorney for advice on how he should proceed; and he completed the financial planning course that is required of those who file bankruptcy.

Mitigation under AG ¶ 20(d) requires a good-faith effort to repay debts. The Appeal Board has defined “good faith” as acting in a way that shows “reasonableness, prudence, honesty, and adherence to duty or obligation.” In the same decision, the Board held that, “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 [this mitigating condition].<sup>8</sup> Although Applicant made efforts to sell the properties, his imprudent assumption of excessive debt led him to a situation where, ultimately, his only recourse was bankruptcy. Although it is a legitimate option to resolve overwhelming debt, it does not qualify under the Appeal Board’s jurisprudence as a good-faith effort. AG ¶ 20(d) does not apply.

### **Whole Person Analysis**

Under the whole person concept, an administrative judge must evaluate the Applicant’s security eligibility by considering the totality of the Applicant’s conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

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.

AG ¶ 2(c) requires that 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 under the applicable guideline in light of all the facts and circumstances surrounding this case.

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<sup>8</sup> ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004), quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001).



When Applicant began investing in real estate, he was a mature adult, a husband, and the father of four children. He purchased numerous properties between approximately 2001 and 2007 and admits that he had an extensive history of buying real estate. When the real estate market was experiencing a boom, Applicant was able to buy properties with 100 percent financing. At one point, in 2007, he carried the following debt: Lot A (\$186,000); Lot B (\$273,000); Lot C/house (\$584,000); and his primary residence (\$660,000). It was financially irresponsible to carry such a burden, even with a substantial income.

During his testimony, Applicant offered contradictory reasons for his investment choices. He first characterized his purchases as long-term investments to fund his children's education, and to have land on which to build homes for his family. He bought Lot A in 2005, and began trying to sell it the same year at a substantially higher price. He began trying to sell Lot B after holding it for approximately one year. When questioned by Department Counsel, he admitted that he thought he could "flip" the properties to "make some money." His speculating was neither prudent nor successful. It led to bankruptcy and the loss of his family's home. Applicant's past risky conduct, and his contradictory testimony, indicate a lack of credibility, reliability, and good judgment.

Overall, doubts remain as to Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative guideline.

### **Formal Findings**

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|----------------------------|-------------------|
| Paragraph 1, Guideline F   | AGAINST Applicant |
| Subparagraphs 1.a. – 1.h.: | Against Applicant |
| Subparagraph 1.i.:         | For Applicant     |

### **Conclusion**

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

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RITA C. O'BRIEN  
Administrative Judge