



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



In the matter of:)	
)	
)	ISCR Case No. 09-03725
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: *Pro se*

July 12, 2010

Decision

HENRY, Mary E., Administrative Judge:

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

Applicant signed his Electronic Questionnaire for Investigations Processing (e-QIP) on January 9, 2009. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F on November 23, 2009. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR on November 30, 2009. He immediately answered the SOR in writing and requested a hearing before an administrative judge. DOHA received the request on December 3, 2009 and

Department Counsel was prepared to proceed on December 17, 2009. DOHA assigned the case to another judge on March 15, 2010, and, for work load reasons, reassigned the case to me on March 22, 2010. DOHA issued a notice of hearing on April 5, 2010, and I convened the hearing as scheduled on April 28, 2010. The Government offered five exhibits (GE) 1 through 5, which were received and admitted into evidence without objection. Applicant testified on his own behalf. He submitted nine exhibits (AE) A through I, which were received and admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on May 6, 2010. I held the record open until May 28, 2010, for Applicant to submit additional matters. Applicant timely submitted 15 additional documents, AE J through AE X, which are admitted without objection. The record closed on May 28, 2010.

Findings of Fact

In his Answer to the SOR, Applicant denied all the factual allegations in the SOR.¹ After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 53 years old, works as an information technology (IT) storage engineer for a Department of Defense contractor. He began this job in January 2009. Prior to his current employment, Applicant operated his own IT consulting business full-time from November 2001 until September 2004, and then on a part-time basis from September 2004 until he closed the business in 2009. From September 2004 until accepting his present employment, he also performed IT work for companies on a part-time basis or on a temporary contract.²

Applicant has two adult children. His daughter is 32 years old and his son is 19 years old. He is engaged and will marry in August 2010. He graduated from high school and attended college for a year. He worked in the automotive industry until 1996, when he started working in the IT industry after developing his computer skills.³

For many years, Applicant cared for his elderly and disabled mother. In 2005, Applicant purchased a house in which he and his mother lived. He financed the house

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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

²GE 1; Tr. 18-20.

³GE 1; GE 2; Tr. 20-22.

with a 100% interest only mortgage. His mother paid \$600 to \$700 a month towards the house expenses until she died in December 2006.⁴

In early 2007, Applicant decided to invest in out-of-state real estate.⁵ With the help of a real estate investor who was a customer and became his partner, he purchased two properties to rent in a state many hundreds of miles from his home. He purchased the first property for \$80,000 from his partner. He financed this purchase with a 100% interest only mortgage. Although he rented this property, the monthly rent did not pay the mortgage on this property. He paid an additional \$100-\$150 each month towards the mortgage. The tenants moved out of the property in January 2008.⁶

Applicant purchased the second property for \$154,000, which he financed with a 100% interest only mortgage. He received rent from the tenants in this property, which paid the mortgage on this property. The tenants moved from this property in 2008.⁷

Around the time Applicant purchased the two investment homes, his financial stability changed. He found it difficult to pay his home mortgage and his other bills, including the expenses needed to operate his IT business. He called the mortgagor on his personal residence to discuss modifying his mortgage, because he understood there were programs to help people in financial distress. The mortgagor never responded to his call. He made his last mortgage payment in April 2007, intending at that time to refinance the house.⁸

On November 15, 2007, Applicant severely fractured his right elbow in an automobile accident. His injury required surgery and followup physical therapy, and kept him from working for several months. When he returned to work, he worked limited hours, as directed by his physician. This injury adversely impacted his business and his income for a year. About the time of the injury, his business partner filed for bankruptcy.⁹

By the end of 2007, Applicant found it difficult to pay his bills because the worker's compensation income did not cover his expenses. During his real estate partnership, his partner collected the rents from his tenants and forwarded the money to Applicant, but not always timely. His business partner also managed Applicant's

⁴GE 2; Tr. 22, 52.

⁵Applicant testified that he purchased these properties in 2006. His tax returns for 2006 do not reflect his ownership of these properties in 2006. His 2007 tax return shows that he owned these properties in 2007. AE Q; AE T; Tr. 23.

⁶GE 2; Tr. 23-28, 30.

⁷GE 2; Tr. 23, 27, 31, 45.

⁸Tr. 57-58.

⁹*Id.* 22, 27-28; AE A through AE I.

properties. When his business partner filed bankruptcy, he no longer collected the rent from Applicant's properties, and, for awhile, Applicant could not locate him. Given the problem with his business partner, the loss of rent on one property, his decreased income, and the long distance from his rental property, Applicant made a business decision to let the two real estate investment properties go to foreclosure. He notified his remaining tenant of this decision and the tenant moved from the house. He paid his last mortgage payment on the rental properties in February 2008.¹⁰

Applicant explained his decision to default on the rental properties as a business decision. He did not want to be an out-of-state property owner, and the two rental properties became a drain on him both physically and monetarily. He could not find a property manager for his rental properties, and he did not want to manage the properties long-distance. Applicant unsuccessfully tried to find a real estate agent to sell these properties. His income had declined and his work was uncertain after his injury. Thus, he decided that he would let the two rental properties go to foreclosure.¹¹

He moved out of his personal residence in December 2007, when the mortgagor foreclosed on the property located in a western state. The mortgagor has never demanded payment for any deficiency on the mortgage. Under the law in his state of residence, the mortgagor cannot recover any deficiency in the mortgage debt on a personal residence sold at a non-judicial foreclosure.¹²

Concerning the mortgage debts on the two rental properties, the credit reports of record reflect that Applicant stopped both his mortgage payments and that the properties were reclaimed by the mortgagor to settle defaulted mortgages, which under state law resolves any indebtedness.¹³ The credit reports also show a zero balance on these debts. The mortgagor has not demanded payment for any deficiency on the mortgage. Applicant does not know what happened with these properties. After the hearing, he wrote to the mortgagor, requesting a copy of his account. He has not received a response.¹⁴

¹⁰*Id.* 22, 26, 29-30, 32-33,

¹¹*Id.* 30-31.

¹²See *G.E. Capital Mortgage v. Maldonado*, 2003 WL 23025437, p. 7 (N.D. Cal); *Moeller v. Lien*, 30 Cal. Rptr. 2d 777 (1994); *FPCI RE-HAB 01 v. E & G Investments, LTD.* 207 Cal. App. 3d 1018 (1989).

¹³Under state law, a mortgagor can request a mortgagee to execute a Deed in Lieu of Foreclosure. Through this action, the mortgagee transfers the property and title to the property to the mortgagor and the mortgagor extinguishes the mortgagee's debt. See *Kincaid v. Southtrust Bank*, 221 S.W. 3d 32 (Tennessee).

¹⁴GE 3; GE 5; AE L. Under state law, a mortgagor can request a mortgagee to execute a Deed in Lieu of Foreclosure. Through this action, the mortgagee transfers the property and title to the property to the mortgagor and the mortgagor extinguishes the mortgagee's debt. See *Kincaid v. Southtrust Bank*, 221 S.W. 3d 32 (Tennessee).

Applicant provided copies of his federal and state income tax returns prepared by an accountant, which include his business income and expense sheets for the years 2006, 2007, and 2008. His rental income and expenses are included with the 2007 and 2008 tax returns. In 2006, Applicant's personal gross income totaled \$46,637, his gross business receipts or sales totaled \$86,000, and his gross business profit totaled \$25,119 with a total net loss on income. He received a tax refund on his 2006 taxes in late 2007.¹⁵

Applicant's 2007 federal income tax return showed his personal income at \$37,373, and his gross business receipts or sales totaled \$110,357. His business gross profit in 2007 totaled \$21,387, with a net business loss of \$28,341. He received \$9,275 in rent on the two properties he owned. His mortgage and tax expense on both properties totaled \$9,399, resulting in an overall net loss of \$124 on his rental properties before depreciation was calculated. Because of Applicant's business and rental income losses, he received a tax refund in 2007.¹⁶

Applicant's 2008 federal income tax return showed his personal income at \$35,741 and his gross business receipts or sales totaled \$28,435. His gross business profit totaled \$9,160, with a net business loss of \$5,003. He received no rental income from his investment properties. His insurance, taxes, and mortgage interest on both properties totaled \$5,679 before depreciation. Including depreciation, he had a net loss on these properties in the amount of \$14,463. His tax return reflects that the rental properties were sold in June and July 2008. His tax deductions for 2008 do not include a personal deduction for property interest on his personal residence.¹⁷

Applicant currently earns \$5,400 a month in gross income and \$3,864 a month in net income. He also receives reimbursements, which are not explained, in varying amounts most months. His monthly living expenses total \$3,393, leaving approximately \$471 a month in remaining income. Applicant's reimbursement income has not been calculated in these income and expenses totals.¹⁸

Prior to purchasing the two rental properties, Applicant paid all his monthly bills, and the credit reports support his statement. He continues to pay his monthly bills. In addition to the mortgages, the February 13, 2009 credit report lists two small unpaid medical bills, one for \$181 and another \$316. The August 1, 2009 credit report lists only the \$316 unpaid medical bill. Applicant disputes the \$316 medical debt, which relates to his elbow injury. The medical provider charged him for a sling he did not receive. He

¹⁵AE Q; AE R; AE S.

¹⁶AE T; AE U; AE V. Applicant's tax returns support his statement that the rental income in one house paid the mortgage on the property and that the rental income on the other house was insufficient to pay the mortgage. *Id.*

¹⁷AE W; AE X.

¹⁸AE M; AE P.

disputed this bill with medical provider after he received it, but did not keep a copy of his dispute, and again in January 2010, with the credit reporting companies. The results of the dispute are not known. After the hearing, he wrote the creditor, again disputing this bill. He has not received a response. He did not keep copies of his prior disputes. The record does not contain a recent credit report showing the results of his January 2010 disputes.¹⁹

Applicant provided a somewhat confusing sequence of the events, to describe his financial problems. His memory about the dates is poor; however, the evidence of record supports his statements about what actually occurred. In his words, he paid his bills on time until “I tried to be a real estate conglomerate.” From this experience, he learned that real estate investment was not something he wanted to do in the future. He considered his decision to end his venture into real estate investment “the best way that I felt that I could get out of it and, and put an end to that chapter, per se of my life, and move on and get past that, and start fresh again. . . .”²⁰

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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

¹⁹GE 3; GE 5; AE J; AE N; Tr. 36-39, 53-54.

²⁰Tr. 59-60.

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. The mortgagors foreclosed on three properties owned by Applicant as he was unable to pay his monthly mortgage payments. The evidence is sufficient to raise these potentially disqualifying conditions.

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 financial worries arose when he decided to invest in real estate, a decision he regrets. As a result, he decided

to avoid real estate investments in the future. Because of this decision, there is little likelihood financial problems of this type will occur in the future, and it does not raise concerns about his current reliability, trustworthiness, or good judgment. This mitigating condition applies.

Under AG ¶ 20(b), mitigation may occur 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.” Applicant’s financial problems started after his mother’s death, and were compounded by his severe elbow injury and loss of work immediately after his injury. About this time, business downturns began when the economy significantly slowed down and his real estate investment partner filed for bankruptcy. Tenants moved out of one rental property, leaving him without a source of income to pay the mortgage. The combination of all these circumstances contributed to his financial problems. Applicant made a decision to pay all his bills, except the mortgages. He weighed the consequences of not paying the mortgages against the consequences of not paying his other bills and decided to allow his properties to go to foreclosure. Faced with a tough decision, he made a reasonable decision under the circumstances in which he found himself. This mitigating condition partially applies in this case.

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). Applicant has not received financial counseling. His monthly bills are paid each month. The credit reports show that he does not owe any money to the creditors who hold the mortgages on his investment (rental) property, and the SOR does not allege that he owes these creditors any money. Likewise, the creditor who holds the mortgages on his personal residence is prohibited by state law from collecting any remaining balance owed on his mortgage, if any. This mitigating conditions applies as Applicant’s finances are under control.

AG ¶ 20(d) applies where the evidence shows “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” The record contains no evidence which indicates that Applicant made “a good faith effort” to resolve the debts listed in the SOR as that term is defined in appeal board decisions. This mitigating conditions does not apply.

Applicant may mitigate security concerns under AG ¶ 20(e) if “the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute and provides evidence of actions to resolve the issue.” Applicant disputed debt the \$316 medical bill with the credit reporting agencies in January 2010. The record does not contain any information on the results. Applicant denies owing the listed medical bills and has challenged one of these bills again. He credibly testified about the reasons he disagreed with this bill and about challenging the medicals bills. This mitigating condition applies to SOR allegations 1.a and 1.d only.

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.

The evidence in support of granting a security clearance to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant decided to invest in real estate at the same time he experienced difficulty with paying his mortgage on his personal residence, his IT business expenses, and living expenses. He did not explain why he made the decision to move forward with his property investments; however, he acknowledged that this decision created additional financial problems for him. His tax returns show that his over all rental income paid all but \$124 on the costs of operating these properties in 2007; thus, his decision in 2007 to purchase these properties was not unreasonable and did not impact his personal living expenses.

His mother's death in December 2006 effected his ability to pay his living expenses. Because his mother paid \$600 to \$700 a month towards the personal residence expenses, her death resulted in lost household income, which required additional money from him each month to cover the costs of the personal residence. At the same time, he worked part-time for a real estate property management company and for his personal business. Neither job provided sufficient income to pay all his

expenses. By April 2007, he could not pay all the expenses related to the house and to his IT business. He contacted his mortgagor about renegotiating his loans, but the mortgagor did not respond. He then stopped making his mortgage payments. Seven months later, he severely injured his right elbow in an automobile accident. As a result, he did not work for a time and then only part-time upon his return, leaving him unsure about his employment. About this time, his real estate partner filed for bankruptcy and stopped collecting the rents on his rental property. Although he received sufficient rental income from one property to pay its mortgage, he found management of the property long distance difficult. Applicant could not find a new property manager, nor could he sell his rental properties. By early 2008, his tenants had moved from the properties, one as a result of a letter he sent after deciding to allow the property to go to foreclosure.

Faced with all the above problems, Applicant had to make difficult decisions in 2007 and in early 2008. He weighed all the above factors and decided to allow the mortgage companies to foreclose on his residence and investment properties and to pay his other bills, as he lacked income to do both. His only other choice was to pay the mortgages and not to pay his other bills. Either decision carried negative consequences for his finances and overall financial stability. He made what he considered the best decision to return to financial stability. He relocated to another part of the country and works steadily at his new job. This job provides a steady income and enables him to pay his bills.

The record evidence shows that he does not owe any money on the rental properties as the mortgagor reclaimed the property to settle the defaulted mortgagor. The mortgagor attained title to the rental properties through an executed a deed-in-lieu of foreclosure, which transferred the rental properties to the mortgagor and released Applicant from any indebtedness. Regarding his personal residence, the mortgagor cannot collect any deficiency owed on his personal residence mortgage under state law. This mortgagor has not demanded payment of any unpaid debt from Applicant. The two medical bills total less than \$500. Applicant disputes owing the largest debt and the smaller debt has been removed from his August 2009 credit report. His past financial problems cannot be a source of improper pressure or duress. Of course, the issue is not simply whether all his debts are paid: it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. In hindsight, Applicant realized that his decision to purchase rental property was not a good decision. He has no intent to enter the real estate investment market in the future. He manages his finances and remains out of debt. He is not over extended financially and does not intend to do so in the future.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his finances.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

MARY E. HENRY
Administrative Judge