



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



In the matter of:)
)
) ISCR Case No. 09-04133
)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esq., Department Counsel
For Applicant: *Pro se*

April 17, 2012

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant has not mitigated Financial Considerations security concerns raise by his questionable real estate investments. Eligibility for access to classified information is denied.

Statement of the Case

On September 16, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a 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) effective for cases after September 1, 2006.

Applicant answered the SOR on October 11, 2011, and requested a hearing before an administrative judge. The case was assigned to me on January 30, 2012. DOHA issued a notice of hearing on February 1, 2012, and the hearing was convened

as scheduled on February 17, 2012. The Government offered Exhibit (GE) 1 through 8, which were admitted without objection. The Applicant offered Exhibit (AE) A through D, which were admitted without objection, and testified on his own behalf. He also submitted one post-hearing exhibit marked and admitted without objection as AE E. DOHA received the transcript of the hearing (Tr.) on February 29, 2012.

Findings of Fact

Applicant is a 52-year-old employee of a defense contractor. He is married, but considers himself separated from his wife, although he has not yet filed for divorce. He has three children, ages 21, 17, and 14. He possesses an associate's degree in electronics. He served on active duty in the Navy from 1978 to 1982. (GE 1; Tr. 34-36.)

The SOR alleges applicant is indebted to eight creditors in the total approximate amount of \$1,390,200. In his Answer, Applicant admitted each debt. Each debt can also be found listed in credit reports dated September 15, 2007; July 15, 2010; August 4, 2011; and February 10, 2012. In his Answers to Interrogatories, Applicant acknowledged the accounts but indicated that he never made any payments to any of these accounts. He noted that the majority of the debts have now been charged off by the creditors. At hearing, he indicated that the debts were incurred as a result of fraud, and will be removed from his credit report after his state statute of limitations expires in October 2012. (Answer; GE 2 through GE 8; Tr. 72.)

Each of the debts listed in the SOR were incurred in approximately October 2006, when he purchased five residential properties through an investment company (IC). He learned of the investment opportunity through a friend and co-worker who was investing in properties in another state through IC. Applicant watched a PowerPoint presentation on IC and decided he wanted to participate with IC too. Applicant did not conduct any other research on the risks of investment or research into IC. (AE E; Tr. 36-37, 48-49, 59-61.)

Applicant agreed to purchase five properties located in another state, in his name. He was the sole person listed on both the mortgages and the titles. IC was then going to manage the properties for Applicant. IC was to collect the rent, pay the mortgage and other bills associated with the properties, and would eventually help the owners sell the properties to the people who were renting the homes. Applicant expected a return on a "couple of thousand dollars" for lending his name and credit to IC for the purchases of the properties. (Tr. 41, 47-49, 56-58.)

Through the help on IC, Applicant secured two loans on each property. The first mortgage for each property ranged between \$400,000 to \$425,000 and the second mortgages on each property ranged between \$76,000 to \$83,000. Applicant did not put any money down in any of the transactions. He testified that altogether, he financed approximately \$2,000,000. (Tr. 43-44.)

Applicant indicated that he was curious how he could qualify for all of the mortgages. He was told that the requirements for investors were different. However, in

order for Applicant to qualify, he followed the suggestion on IC and temporarily added his name to his friend's bank account in order to qualify for the loan. Once the loan had been approved, Applicant's name was removed from the friend's account. (Tr. 56-58, 75.)

Applicant testified he thought it seemed odd to add his name to the friend's bank account, but he was told it was normal for these transactions. He indicated he had never purchased real estate before and knew "nothing about real estate." Applicant admitted that he did not use good judgment in these transactions. Applicant's statements, which plead ignorance with real estate transactions, are discrepant with Applicant's Answers to Interrogatories, which indicate that he owns a condo purchased approximately in 2006. (GE 5; Tr. 56-58, 75.)

Approximately three weeks after the real estate purchases closed, Applicant began receiving bills for the new properties, including mortgage statements. He testified that he forwarded the statements to IC and changed the address for the bills to reflect IC's address, per his agreement with IC. The bills went unpaid. However, when late notices were sent out, the notices only went to IC. Applicant never knew that the accounts were delinquent until foreclosure proceedings had already started. (Tr. 59-61.)

In January 2007, Applicant attended a meeting with several of his friends that had also invested in properties along with IC. They were informed that IC had decided to "close its doors." He learned that IC had been unable to pay the mortgages, although some of the properties were rented. In fact, only three of Applicant's properties were rented and the rental income was substantially less than the monthly mortgage payments due on each property. (AE B; Tr. 50, 59-61.)

Applicant joined his fellow investors in contacting a real estate agent to attempt to do short sales or deeds in lieu of foreclosure. The real estate agent suggested that the investors hire an attorney. The group collectively hired an attorney, to whom they paid a retainer of \$15,000. The attorney contacted the FBI on their behalf. The FBI conducted an investigation into the practices of the officers and underwriters of IC, and eventually several individuals associated with the real estate transactions were charged and convicted of Conspiracy to Commit Mail, Wire and Bank Fraud. (AE B; AE C; Tr. 42, 50, 65-66, 73.)

All five of Applicant's real estate investment purchases have been foreclosed upon and have since been sold. Applicant testified that he has sent letters to each of the creditors listed in the SOR telling the lenders that the mortgages were fraudulent. He does not intend to pay any of the remaining delinquent accounts. He did not produce copies of any correspondence between himself and the creditors listed on the SOR. He believes that the accounts will no longer appear on his credit report after October 2012. He testified that in the past, he has always paid his bills on time and "never borrowed any money" except from his 401K. Again, this testimony is discrepant with his Answer to Interrogatories, on which he identified a mortgage for his condo. (AE D; Tr. 64, 72.)

Applicant is well respected by the director of human resources at his company, another co-worker, and his supervisor. His human resource director noted that Applicant has a strong work ethic and a “clean employment record.” His co-worker indicated Applicant is “honest, reliable and hard working.” All recommended Applicant for a security clearance. His performance evaluations reflect he is “fully successful” and a “high contributor” in all of his assessment categories. (AE A.)

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.

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 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 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* EO 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 concern 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
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust.

Applicant voluntarily entered into five real estate transactions and accumulated significant mortgage debt that he is now unable or unwilling to pay. He hoped that by lending his name and credit to IC, he would gain financially. While he contests the debts as fraudulent transactions, he is at least partially responsible for the fraud. He participated in filing deceptive loan statements (showing his friend’s bank account as his jointly held asset) in order to acquire the loans for the five properties which are the subject of the SOR. The evidence is sufficient to raise the above disqualifying conditions.

Five 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;

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

(e) 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 or provides evidence of actions to resolve the issue.

Applicant disputes the validity of his indebtedness to the creditors listed in SOR, but he does not deny that he has the underlying mortgage debt that is not being paid. Instead, he indicated that the debts have been charged-off and that they will be removed from his credit report in October 2012. Even if delinquent debt is legally unenforceable under a state law, the Government can still consider Applicant's judgment in acquiring the debt and whether he handled the debt responsibly after its acquisition. This forum is not the proper place to litigate the validity of any potential civil claims. Overall, his dispute over the legitimacy of his debt does not mitigate his poor judgment in fraudulently acquiring the mortgages or his poor judgment in signing his name to financial responsibilities, which he could not realistically afford. Applicant's involvement in these real estate transactions casts doubt onto his current reliability, trustworthiness, or good judgment. He has not acted responsibly under the circumstances. There are no indications that the problem is resolved or under control, nor has there been a good faith effort to resolve his debts. The concern remains unmitigated.

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 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.

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.

Applicant is well respected by his director of human resources, his co-worker, and his supervisor. He also has excellent performance reviews. Yet, he has made several questionable financial choices that do not demonstrate the judgment, reliability, or trustworthiness needed to hold a security clearance. There are significant unresolved concerns about Applicant's finances and judgment.

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 the 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.~1.h.:	Against 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.

Jennifer I. Goldstein
Administrative Judge