



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-04727
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace L. Garcia, Esquire, Department Counsel
For Applicant: *Pro se*

October 29, 2010

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant was unable to make his monthly payments on his mortgage loans in 2008, when he was unemployed. He resolved the debts through a short sale of his previous residence in April 2010. Clearance granted.

Statement of the Case

On February 26, 2010, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a statement of reasons (SOR) detailing the security concerns under Guideline F, Financial Considerations, that provided the basis for its preliminary decision to deny him eligibility for a security clearance and to refer the matter to an administrative judge. 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); Department of Defense Regulation 5200.2-R, *Personnel Security Program* (January 1987) as amended; and the

adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

On March 2, 2010, Applicant answered the SOR allegations and requested a hearing. The case was assigned to me on April 30, 2010, to conduct a hearing and to determine whether it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. With the agreement of the parties, on April 27, 2010, I scheduled a hearing for May 26, 2010.

I convened the hearing as scheduled. Seven Government exhibits (Ex. 1-7) and nine Applicant exhibits (Ex. A-I) were admitted into evidence without objection, and Applicant testified, as reflected in a transcript (Tr.) received on June 4, 2010.

At Applicant's request, I held the record open until June 9, 2010, for him to submit additional documents. On June 8, 2010, Applicant submitted three exhibits (Ex. J-L), which were entered without any objection from the Government.

Findings of Fact

The SOR alleged under Guideline F, Financial Considerations, that Applicant was past due \$27,966 on a mortgage in foreclosure with a \$319,960 balance (SOR 1.a), and that he owed \$30,490 on a charged-off second mortgage (SOR 1.b). Applicant admitted that his primary mortgage was in foreclosure and that his second mortgage had been charged off. However, both lenders had approved a short sale with a closing date in April 2010, and the holder of the second mortgage agreed to accept \$5,000 to release the lien and the debt. After considering the pleadings, exhibits, and transcript, I make the following factual findings.

Applicant is a 35-year-old technical writer, who has worked for his current employer, a defense contractor, since December 2008. (Ex. 1.) He seeks a secret-level security clearance, never having previously held a security clearance.

Applicant and his spouse married in August 1998, when he was still in college. After earning his bachelor's degree, Applicant went to work in medical device sales and marketing in his spouse's home state in September 2000. (Ex. 1.)

In July 2004, Applicant and his spouse purchased a home, taking on a primary mortgage of \$233,600 and a second mortgage of \$58,400. (Ex. 5; Tr. 37.) They paid their mortgage loans on time. In June 2006, Applicant was laid off. In August 2006, he began working as a national product specialist for a medical device manufacturer. In September 2006, Applicant and his spouse's home loans were transferred to new lenders with balances of \$320,000 (SOR 1.a) on the first mortgage and \$29,000 (SOR 1.b) on the second mortgage. (Ex. 2, 5.)

After the birth of their son in February 2007, Applicant's spouse was placed on medical disability. (Ex. 2.) They managed to make their monthly payments on several

credit card accounts on Applicant's income, and on her disability pay, which was comparable to her previous employment income. (Tr. 43.) They relied on consumer credit for his travel expenses, which were mostly reimbursed, but also for living expenses and car repairs. (Tr. 66-67.) In August 2007, Applicant financed a car through a \$25,643 loan, to be repaid at \$475 per month. (Ex. 5, 6.) In December 2007, Applicant switched employers to a start-up medical device manufacturer closer to their home. (Ex. 1.) He had been commuting 200 miles round trip to his previous job. (Tr. 37.)

Applicant and his spouse began to fall behind on some consumer credit card accounts in 2008. (Ex. 5.) They also failed to pay their primary mortgage in March 2008, but paid extra in April and May 2008 to bring their loan current. (Ex. 2; Tr. 41-42.) Then in July 2008, Applicant resigned from his job with no immediate employment prospects. He had been spending 70 to 80 hours a week at work and wanted more time with his family. (Tr. 37-38, 46.) Applicant applied for work as well as to graduate schools to pursue an MBA degree. He did not anticipate that he would have problems finding a job, but he contacted his mortgage lenders immediately out of concern that he would have difficulty paying the mortgage loans. He and his spouse were paying on several credit card accounts and on a vehicle, and they had no significant savings. (Tr. 50-51, 54-55.) In August 2008, his spouse began working for a local school system, having accepted an offer of employment that May. (Tr. 42.) Yet with Applicant still out of work, they took the advice of their mortgage lenders to pursue a short sale of their home.¹ They stopped paying on their mortgage loans that summer, and in September 2008, they listed their home with a realtor who specialized in short sales. (Ex. 2, F; Tr. 36, 39-41.)

In late December 2008, Applicant and his family relocated across the country for his job with his current employer. Applicant's spouse worked until the day they left, and she was paid unemployment compensation until March 2009. (Tr. 69.)

By early January 2009, Applicant and his spouse were \$14,931 past due on their primary mortgage and \$1,605 past due on their second mortgage on their previous residence. (Ex. 5.) In January 2009, foreclosure proceedings were initiated on the primary mortgage (Ex. 5, D.), although the lender suspended the process pending a successful short sale. (Ex. 2.) Over the next year, Applicant and his spouse had four offers for purchase that fell through on the property. (Tr. 36, 40.)

On March 9, 2009, Applicant applied for a security clearance for his employment. He disclosed that the mortgages on his previous residence were delinquent, but that he and his spouse had recently accepted an offer from a buyer and they were moving forward with both mortgage companies to finalize the sale. (Ex. 1.) As of an April 14, 2009 interview with a government investigator, they had an offer of \$150,000 for the property (Ex. 2.), but the short sale was subsequently not approved by the primary mortgagor. (Tr. 40.)

¹ Applicant explained that they had savings, but that after going through all of their bills with their primary lender to determine whether they could avoid foreclosure or a short sale, they could afford to send the lender only a couple of hundred. In the mortgagor's opinion, "it was more important that they use that to continue to live and continue to successfully look for a job. . . ." (Tr. 50.)

In July 2009, Applicant and his spouse's second mortgage, which had a \$28,592.46 balance, was transferred for collection to a company that specialized in the recovery and rehabilitation of debt. (Ex. E.) In late February 2010, the current loan servicer for their primary mortgage agreed to accept \$158,000 for the property in a short sale contingent on a closing date no later than April 11, 2010. Under the terms of an "AS IS" short sale, the lender was to receive no less than \$141,603.20. Applicant and his spouse were informed that the note holder could pursue a deficiency judgment for the difference between the payment received and the total balance due on the loan. (Ex. A.)

On March 8, 2010, Applicant and his spouse paid the loan servicer of the second mortgage \$2,000 in partial settlement of the delinquent loan (SOR 1.b). (Ex. L; Tr. 44.) The debt would be settled and a lien released provided they paid an additional \$3,000 in the next three weeks. (Ex. B.) On April 6, 2010, the house sold for \$158,679.91. The primary mortgagor took \$141,603.20 in settlement of its loan (SOR 1.a) and \$3,000 was paid in settlement of the second mortgage (SOR 1.b). (Ex. C, F; Tr. 45.)

As of September 2009, Applicant and his spouse were paying some of their credit card accounts under modified terms that they could afford. (Ex. 4, 6; Tr. 55.) They were paying \$1,120 per month in debt payments, primarily credit cards. (Ex. 4.) As of November 2009, Applicant's credit report showed outstanding credit card balances totaling about \$27,493, which included a couple of accounts on which he was an authorized user. (Ex. 6.) Applicant was 30 days past due in his car payment in December 2009 and January 2010 because his spouse had no income over the holidays. (Ex. F; Tr. 56, 64.)

As of May 2010, Applicant was not behind in his credit card payments or their rent of \$1,800 per month. (Ex. 4; Tr. 44.) He owed about \$12,969 in credit card balances in his name. (Ex. 6, 7, F; Tr. 65-66.) Applicant and his spouse plan to pay off their credit card balances to where they have only or two open credit card accounts each for emergencies. (Tr. 66.) Available credit reports indicate Applicant last opened a credit card account in March 2007. (Ex. 5-7, F.) They had about \$2,500 in savings as of May 2010. (Tr. 72.)

Since August 2009, Applicant has been enrolled in a part-time MBA program. (Ex. I; Tr. 34.) He owes about \$20,126 in deferred federal student loan debt for his master's program and \$32,790 in deferred student loan debt for his undergraduate degree. (Ex. 5, 6, F; Tr. 57-59.) Applicant's graduate tuition is subject to reimbursement by his employer provided he earns passing grades. (Tr. 58.)

In March 2010, Applicant was given an individual achievement award by his employer for his outstanding job performance. (Ex. H.) As of May 2010, his annual salary was \$68,140.80. (Ex. G.) Applicant's spouse has been employed as a certified occupational therapy assistant since March 2009. (Ex. 2; Tr. 52.) She earns around \$2,800 per month on a contract basis providing part-time rehabilitation services for local schools. (Tr. 43-44, 51.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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 overall arching 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 reasonable, logical, and based on the evidence of 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 applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to safeguard sensitive 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 (EO) 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 about finances 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.

Due in part to accumulated credit card debt, Applicant and his spouse were financially overextended to where they could not make their mortgage payments when he resigned from his job in July 2008. On the advice of their primary lender, they elected to pursue a short sale of their home. They stopped paying on their mortgage loans in the summer of 2008, and in January 2009 their primary lender initiated foreclosure. Potentially disqualifying conditions AG ¶ 19(a) ("inability or unwillingness to satisfy debts"), AG 19(c) ("a history of not meeting financial obligations"), and AG ¶ 19(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") apply.

AG ¶ 20(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," cannot reasonably apply, given the recent mortgage defaults. It is also difficult to apply AG ¶ 20(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." Applicant lacked control over the job prospects in his area, and he may not have anticipated difficulty in securing employment. That said, he voluntarily resigned from his job in July 2008 when he and his spouse, who had accepted a job but had not yet returned to work, had several outstanding credit card debts, a \$475 monthly car payment, and no significant savings. Applicant bears primary responsibility for the financial difficulties that he and his spouse faced in 2008.

However, AG ¶ 20(d), "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts," applies. When he left his job in July 2008, Applicant notified his primary mortgagor. Together they reviewed Applicant and his spouse's expenses to see whether they could pay something toward their first mortgage. Advised by the lender to pursue a short sale of their home, Applicant and his spouse then acted fairly expeditiously in listing their property for sale with a realtor experienced in short sales. The delay in selling the home was due to market conditions

and other factors not within Applicant's control. Furthermore, with the April 2010 settlement of the two mortgage loans, albeit for less than their full balances, Applicant also satisfies AG ¶ 20(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," as to the financial concerns alleged in the SOR.

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 conduct and all the relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(a).² Settlement of the two mortgage loans at issue does not fully address the financial judgment concerns in this case. Applicant and his spouse relied heavily on consumer credit cards in the past, as evidenced by the \$27,493 in outstanding balances on Applicant's credit record as of November 2009. Their debt was sizeable enough that his mortgagor told him to pursue a short sale of his home. As of May 2010, Applicant is responsible for \$12,969 in credit card debt in his name, not including the accounts on which he is an authorized user.

However, Applicant need not be debt free before he can be granted access. Applicant and his spouse have been timely in their debt payments since February 2010 except for the mortgages, which have been resolved. He expressed a credible intent to pay down his credit card balances with the goal of eliminating all but one or two accounts for emergencies. His income appears to be sufficient to make those payments. He has acted responsibly in contacting his creditors when finances were tight in the past, and in negotiating affordable repayment terms with some of his creditors. While his rent of \$1,800 per month is fairly high, there is no evidence that he has fallen behind in his rent. His financial situation has improved sufficiently to where it no longer presents an unacceptable security risk.

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

²The factors under AG ¶ 2(a) are:

- (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.

Subparagraph 1.a: For Applicant
Subparagraph 1.b: For Applicant

Conclusion

In light of 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.

Elizabeth M. Matchinski
Administrative Judge