



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



In the matter of:)	
)	
)	ISCR Case No. 09-05554
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esq., Department Counsel
For Applicant: Matthew E. Faler, Esq.

December 29, 2010

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant has not mitigated Financial Considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On June 25, 2010, 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 July 16, 2010, and requested a hearing before an administrative judge. The case was assigned to me on August 17, 2010. DOHA issued a notice of hearing on August 31, 2010, and the hearing was convened as scheduled on October 13, 2010. The Government offered Exhibit (GE) 1 through 10,

which were admitted without objection. The Applicant offered Exhibit (AE) A through O, which were admitted without objection, called one witness, and testified on his own behalf. Applicant's Attorney also provided a trial brief, marked App. Ex. I. The record was left open until close of business October 20, 2010 for receipt of additional documentation. Applicant, through his attorney, submitted eight additional documents, marked P through W, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on October 21, 2010.

Findings of Fact

Applicant admitted the SOR allegations ¶¶ 1.a.(1) through 1.a.(29). He denied SOR ¶¶ 1.b., 1.c., 1.d., 1.e., 1.f., and 1.g. After a thorough and careful review of all of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 45-year-old employee of a defense contractor. He has worked for his employer since 1997. Applicant's gross annual income from his employment ranged from approximately \$108,390 to \$106,150 from 2006 to present. He is married and has four children, ages 11, 9, 7, and 4. (GE 1; AE J; AE K; AE L; AE M; Tr. 42-43, 65.)

Applicant's wife has a real estate license and has attempted to earn money through investing in real estate. Applicant's wife made the decisions on all of their property investments, but Applicant was a co-signer on all of their mortgages and jointly owned the properties. (Tr. 88-89, 95-96, 102, 107.)

In 1996, prior to Applicant's marriage to his wife, he purchased a home (Property One) in state A for approximately \$168,500. He financed the purchase with a down payment of approximately \$28,852 and a loan for \$146,447. This was his primary residence until 2001. In November 2001, Applicant made his first real estate investment purchase with his wife and purchased a 4-plex in state A (Property Two) for the purchase price of \$642,000. It was financed through a \$557,800 loan and \$82,757 down payment obtained by refinancing the mortgage on his primary residence. In October 2002, Applicant sold Property One in state A for approximately \$324,900. He and his family continue to own Property Two and reside in one of the units. (AE F; AE G; Tr. 47-48, 60-70, 93.)

In January 2004, Applicant and his wife purchased a second 4-plex in state A (Property Three) for \$885,000. Applicant put approximately \$229,069 down, which was obtained by refinancing Property Two. He financed \$663,750. Property Three was sold in May 2005 for \$1,192,000. Applicant and his wife made \$350,000 from the sale. (AE F; Tr. 48-50, 66, 110.)

In February 2005, Applicant and his wife purchased a duplex in state A (Property Four) for \$203,000. Applicant put approximately \$48,191 down, which was obtained by again refinancing Property Two. He financed \$162,400. This property was sold in August 2005 for \$280,000. (AE F; Tr. 50-51.)

In April and May of 2005, Applicant and his wife purchased three single family residential condominium properties located in state B. They purchased Property Five for \$230,000; Property Six for \$305,000; and Property Seven for \$190,000. The loans for these three properties were for \$207,000; \$274,447; and \$152,000, respectively. They put a total of \$143,844 down on all three of these properties, which they got from again refinancing Property Two. Applicant's wife was responsible for the investment decisions regarding these properties, although she never traveled to state B to see the properties. (AE F; AE I; Tr. 53-54, 72-73, 76, 126.)

In October 2005, he and his wife purchased three more properties, located in state C. They purchased two residential 4-plexes (Property Eight and Property Nine), and a commercial property (Property Ten). Properties Eight and Nine were purchased for \$350,000, each. They put \$33,437 down on Property Eight and \$36,784 down on Property Nine. The money for the down payment came from the sale of Property Four. He reports he financed \$315,000 on Property Eight and \$315,000 on Property Nine (although these numbers do not appear to add up correctly with his down payments to reach the purchase price). Property Ten was purchased for \$1,430,000. They made a down payment of \$316,050, which was obtained from the sale of Property Three. (AE F; AE H; Tr. 54-55.)

By the end of 2005, Applicant owned one property in state A (Property Two), three properties in state B (Property Five, Property Six, and Property Seven), and three properties in state C (Property Eight, Property Nine and Property Ten). He testified that at that time, he had no credit card debt. (Tr. 55.)

In 2006, Applicant began experiencing financial problems with Properties Five through Ten. When Applicant and his wife purchased the properties, Applicant's wife claims that all of the properties were rented and had rental income that would cover the mortgages. However, due to the loss of tenants and problems with the companies managing the properties for them, they began to have a negative cash flow every month. Applicant was forced to borrow again from his 401K pension plan and began using credit cards to make the monthly payments on these properties. He had previously borrowed from his 401K plan in 2004 and 2006 to help his wife acquire their real estate investments. In 2006, Applicant's total loss was \$229,000. Despite the financial problems Applicant was already experiencing in 2006, Applicant purchased Property Eleven in October 2006 for \$360,000, with \$43,200 down and a loan for \$324,000. This property was purchased from a friend of Applicant's wife. The friend lent Applicant's wife the money for the down payment and Applicant "didn't put a penny into that property." Applicant permitted the purchase despite the large loss on their other properties because his wife insisted that she could "turn them around." (AE F; AE J; AE K; Tr. 56-60, 93, 111-123, 125.)

In 2007, Applicant's losses continued as he borrowed again from his 401K and continued to use credit cards to satisfy his debt. In 2007, he sustained losses of \$215,000. However, he claimed at hearing that he was not late on any of his mortgage payments through 2007. (AE K; Tr. 79-80.)

In 2008, Applicant and his wife realized they could not sustain the investment properties. They decided to attempt the sale of some of their investment properties. Appellant was able to successfully short-sell Property Five. The amount of the deficiency is unclear from the record. The rest of the properties did not sell and were foreclosed upon, with the exception of Property Two, which Appellant still owns. Applicant's 2008 Federal Income Tax Return filing shows a loss of \$12,917 in 2008. (AE L; Tr. 78-88, 124.)

On November 13, 2009, Applicant and his wife filed Chapter 7 bankruptcy. Applicant listed total liabilities of \$2,834,253.31. Of that sum, \$1,592,749 was in unsecured nonpriority claims. As part of their bankruptcy, Applicant and his wife took an on-line class on how to manage their finances. Allegations 1.a.(1) through 1.a.(29) and 1.e. were all included in the liabilities listed in the Chapter 7 and found in Applicant's credit reports. The remaining liability of \$1,241,504 is for the first and second mortgage on Property Two, which Applicant still owns. He reaffirmed his mortgages on Property Two in his bankruptcy. Applicant received a discharge of his liabilities on April 26, 2010. (GE 2; GE 3; GE 4; GE 5; GE 6; GE 7; GE 8; GE 10; AE A; AE C; AE E; Tr. 45, 94, 97.)

Applicant's debts listed in the SOR ¶¶ 1.b., 1.c., 1.f., and 1.g. are for mortgages on the various properties which were foreclosed upon, prior to Applicant's 2010 discharge of his Chapter 7 bankruptcy. Applicant and his attorney contend that Applicant owes nothing further on the foreclosed properties. A credit report completed on July 9, 2010, shows that Applicant has a \$0 balance on all of his mortgage accounts displayed in the report. This report includes zero balances for the debts owed to the creditor alleged in ¶¶ 1.b., 1.f., and 1.g. (AE A; AE B; AE O.)

Allegation ¶ 1.c., a mortgage debt alleged to be past due in the approximate amount of \$17,212, and ¶ 1.d., a credit card debt in the approximate amount of \$1,424, are not easily matched up to any entry in Applicant's Chapter 7 bankruptcy. Never the less, these two debts that existed on the Applicant's 2009 credit reports, were discharged along with the listed debts according to 11 U.S.C. 524(a).¹ Additionally, he has disputed the debts with the creditors. (GE 3; GE 4; GE 6; AE A; AE O.)

As of the date of the hearing, Applicant had personal liability on approximately \$11,197 worth of debt on an account he opened in 2005 that was not discharged in bankruptcy. He is current on this account and making payments of approximately \$238 per month. He also noted credit card debt of \$1,925, \$1,356, and \$272 owed to three additional creditors. (GE 10; AE B; AE D; Tr. 45-46.)

Applicant's schedule J of current expenditures of individual debtors in his Chapter 7 shows that at the time he filed bankruptcy, he had a monthly net income of \$10,936.34. His average monthly expenses were listed at \$12,560. He had a deficit of \$1,623.66. However, he testified he has \$1,000 left over after his monthly expenses are met. His post hearing exhibits reflect that their household current net income is \$10,700 per month and they have \$9,142 worth of living expenses each month. The surplus of

¹ 11 U.S.C. 524(a); see also *In re Beezely*, 944 F.2d 1433, 1437 (9th Cir. 1993).

\$1,548 is allocated to his 401K and 401K loan repayment. He has an average monthly checking account balance of \$3,426 and monthly savings account balance of \$21.23. In addition, his bankruptcy filing lists real property totaling \$1,673,000; including \$900,000, the value of Property Two. The other real property listed in the bankruptcy included 12 undeveloped properties held “free and clear” totaling \$108,000, although Applicant claimed this land was “worthless.” Applicant has not taken a vacation in six or seven years. He contends he has learned his lesson with respect to investments and has pledged to be wiser in future investments. He is currently investing 10% of his income into his 401K. (AE A; AE P; AE Q; AE R; AE S; AE T; AE U; AE V; AE W; Tr. 61-63, 85-88, 103.)

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

- (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.

On a salary of approximately \$108,390 to \$106,150 a year, Applicant contractually obligated himself to pay over \$2,000,000 in mortgages from 2004-2005. Applicant voluntarily entered into these business ventures hoping to make a profit by renting the units. When the rental payments for the properties failed to cover the full amount of the mortgages and maintenance fees in 2006, he found himself relying on his credit to maintain his investments. He then incurred a large amount of credit card debt. Yet, he still went forward with the purchase of Property Eleven in October 2006 for \$360,000. From 2005 to the 2010 discharge of Applicant’s Chapter 7 bankruptcy, he demonstrated a history of not meeting his financial obligations, which he had an inability to satisfy. Further, he consistently spent beyond his means on his investments. 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's debts listed on the SOR were discharged April 26, 2010, through the Chapter 7 bankruptcy. Applicant's questionable financial decisions that led to the bankruptcy occurred over a number of years. Not enough time has passed since Applicant's discharge of debt to ascertain whether he will be more careful in future investments. He continues to maintain ownership of Property Two, which was reaffirmed in bankruptcy. He owes approximately \$1,241,504 on this property. It does not appear that he has the funds to maintain that property and meet his monthly expenses given his current income, should any problems with his current tenants arise. He has an average savings of \$21.23 per month and has been unwilling or unable to use his other assets such as the undeveloped land to get money to pay his mortgage in the past. AG ¶20(a) is not applicable.

Applicant's debt is not the result of a condition beyond his control, but instead resulted from a series of bad business ventures entered into voluntarily by the Applicant. When Applicant began experiencing financial difficulties, instead of mitigating his losses, he relied on credit cards and withdrawals from his 401K. He continued to invest in Property Eleven, despite the difficulties he was experiencing with the other properties. While Applicant contends that his financial problems were due to the failing economy, problems with management companies, and the inability to get tenants in the rental units, Applicant and his wife did not act diligently with respect to the properties. In fact, Applicant's wife, who managed the investments, never even visited the three properties in state B. Their continued operation of the failing properties from 2006 to

2009, while continuing to accumulate delinquent debt was not reasonable. Further, Applicant's decision to utilize his credit cards to support the properties, instead of tapping into other resources like the 12 undeveloped properties held by Applicant's wife, is questionable. Applicant failed to take steps to minimize the debt in a timely or reasonable manner.² AG ¶20(b) is not applicable.

Applicant has discharged the majority of his debt through his Chapter 7 bankruptcy, with the exception of Property Two, which he reaffirmed. As part of the bankruptcy, Applicant completed on-line financial counseling. However, there are no indications that the Applicant's financial problems are resolved or are under control. As previously noted, documentary evidence suggests that each month, Applicant has little liquid assets left over for emergencies or future problems with the rental units he still owns in Property Two. AG ¶20(c) is not applicable.

The Appeal Board has indicated that good-faith "requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation."³ Further, "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 Financial Considerations Mitigating Condition 6."⁴ Applicant's large debts, discharged through Chapter 7, combined with the fact that he is still engaged in a large financial investment in Property Two, the recency of his financial problems, and his questionable financial decisions outlined above, indicate that he has not made a showing of reasonableness, prudence, honesty, and adherence to duty or obligation. AG ¶20(d) is not applicable.

Finally, Applicant has contested the two debts not listed on his Chapter 7 bankruptcy with the creditors under 11 U.S.C 524(a). With respect to these two debts only AG ¶ 20(e) is mitigating, in part. However, the dispute over the debts in no way indicates that he acted responsibly with respect to his finances as a whole or that he demonstrated he will act responsibly in the future.

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

² The Appeal Board has held "Even if an applicant gets into financial difficulties because of circumstances beyond the applicant's control, the Judge must consider whether the Applicant dealt with his or her financial difficulties in a reasonable manner." ISCR Case. No. 99-0012 (App. Bd. December 1, 1999).

³ ISCR Case No. 99-0201 at 4 (App. Bd. October 12, 1999).

⁴ ICSR Case No. 02-30304 at 3 (App. Bd. April 20, 2004).

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 made questionable financial choices that do not demonstrate the judgment, reliability, or trustworthiness needed to hold a security clearance. Not enough time has passed since his discharge of debt in Chapter 7 bankruptcy. Further, Applicant failed to introduce any character evidence to support his trustworthiness. 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.:	Against Applicant
Subparagraph 1.b.:	Against Applicant
Subparagraph 1.c.:	Against Applicant
Subparagraph 1.d.:	Against Applicant
Subparagraph 1.e.:	Against Applicant
Subparagraph 1.f.:	Against Applicant
Subparagraph 1.g.:	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