



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



In the matter of:	)	
	)	
	)	ISCR Case No. 09-05577
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

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

November 22, 2010

**Decision**

HEINY, Claude R., Administrative Judge:

Applicant was more than 120 days past due on a home equity loan and mortgage on investment property. He also owed \$9,000 in delinquent property taxes. The property taxes are now current and the property has gone to a short sale. Applicant has mitigated the security concerns under financial considerations. Clearance is granted.

**Statement of the Case**

Applicant contests the Department of Defense's (DoD) intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> the Defense Office of Hearings and Appeals (DOHA) issued

<sup>1</sup> 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).

a Statement of Reasons (SOR) on April 26, 2010, detailing security concerns under financial considerations.

On May 10, 2010, Applicant answered the SOR and elected to have the matter decided without a hearing. Department Counsel submitted the Government's case in a File of Relevant Material (FORM), dated June 10, 2010. The FORM contained 11 attachments, listed as Government exhibits (Ex.). On June 17, 2010, Applicant received a copy of the FORM, along with notice of his opportunity to file objections and submit material to refute, extenuate, or mitigate the potentially disqualifying condition.

On July 12, 2010, Applicant responded to the FORM. Department Counsel did not object to the material. Applicant's response was admitted into the record as Ex. A and B. On August 6, 2010, I was assigned the case.

### **Findings of Fact**

In Applicant's Answer to the SOR, he admitted owing the SOR debts. I incorporate Applicant's admissions to the SOR allegations. After a thorough review of the record, pleadings, and exhibits, I make the following findings of fact:

Applicant is a 35-year-old mechanical engineer who has worked for a defense contractor since March 2007. He is seeking to obtain a security clearance.

In April 2005, Applicant purchased a \$510,650 second house, with which he intended to generate rental income. (Ex. 3, B) His renter fell behind on his payments and filed for bankruptcy protection. Applicant was more than 120 days past due on his \$63,800 home equity line of credit. He was \$2,414 delinquent on the line of credit and \$21,169 delinquent on his mortgage. He was more than 120 days past due on his \$552,000 mortgage. He also owed \$9,000 in delinquent property tax. He decided to proceed with a short sale<sup>2</sup> on the property. As of May 2010, Applicant had a potential buyer having actively pursued short sale process for approximately a year.

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<sup>2</sup> A short sale is a sale of real estate in which the proceeds from the sale fall short of the balance owed on a loan secured by the property sold. In a short sale, the bank or mortgage lender agrees to discount the loan balance because of an economic or financial hardship on the part of the mortgagor. The home owner/debtor sells the mortgaged property for less than the outstanding balance of the loan, and turns over the proceeds of the sale to the lender, sometimes (but not always) in full satisfaction of the debt. In such instances, the lender would have the right to approve or disapprove of a proposed sale.

A short sale typically is executed to prevent a home foreclosure. The decision to proceed with a short sale is predicated on the most economic way for the bank to recover the amount owed on the property. Often a bank will allow a short sale if they believe that it will result in a smaller financial loss than foreclosing. A short sale is typically faster and less expensive than a foreclosure.

A short sale is nothing more than negotiation with lien holders a payoff for less than what they are owed, or rather a sale of a debt, generally on a piece of real estate, short of the full debt amount. It does not

In May 2009, Applicant entered into a residential listing agreement to sell the home for not less than \$315,000. (Ex. A) On June 17, 2010, a couple offered to buy the property for \$350,000. (Ex. A) The buyers signed the short sale addendum notifying them that the agreement was contingent upon the seller's receipt of written consent from all existing secured lenders and lien holders. (Ex. A) Settlement was to take place on September 22, 2010. (Ex. B) Since the record closed in July 2010, there is no evidence the home went to settlement as planned.

The mortgage company paid \$8,508 to bring the property tax owed on the home current. (Ex. B) As of May 28, 2010, \$552,410 was owed on the property. An escrow amount of \$2,081 was being held to pay additional property tax. At settlement, \$1,738 in county taxes was to be paid representing the taxes due from July 1, 2010 through September 22, 2010.

As of November 2009, Applicant's monthly net income was \$5,200, his monthly expenses were \$1,350, and his monthly debt payment was \$3,800. Leaving a monthly net remainder of \$50. (Ex. 8) He was paying \$3,500 monthly on his home mortgage loan on which he owed \$630,000 and was paying \$300 monthly on his \$10,000 student loan. His June 2009-credit bureau report (CBR) indicates he pays his mortgage as agreed. (Ex. 6)

Provisions under the Anti-Deficiency Statute, Cal. Code Civ. Proc. § 580(b)<sup>3</sup> do not apply to this transaction because the property was purchased as rental property and there is no evidence Applicant occupied the property.

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extinguish the remaining balance unless settlement is clearly indicated on the acceptance of offer. Short sales are common in standard business transactions in recognition that creditors are not doing debtors a favor but, rather, engaging in a business transaction when extending credit.

<sup>3</sup> Under California law, the Anti-Deficiency Statute, Cal. Code Civ. Proc. § 580(b) states in relevant part:

No deficiency judgment shall lie in any event after a sale of real property or an estate for years therein for failure of the purchaser to complete his or her contract of sale, or under a deed of trust or mortgage given to the vendor to secure payment of the balance of the purchase price of that real property or estate for years therein, or under a deed of trust or mortgage on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling occupied, entirely or in part, by the purchaser.

Under this section, generally if there is a foreclosure on a dwelling and there is a deficiency, the lender has no recourse regarding "purchase money loans," also called "non-recourse loans." The amounts set forth in both the 1st and the 2nd mortgages used to finance the dwelling purchase are not enforceable by a deficiency judgment. The collateral or dwelling is considered full satisfaction of the debt, upon foreclosure.

## 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 must 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 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, 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 of 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 of 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

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

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.

An individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behavior in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts as agreed. Absent substantial evidence of extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage his finances so as to meet his financial obligations.

The record evidence supports a conclusion Applicant has a history of financial problems. Applicant had a home equity line of credit and mortgage, which totaled approximately \$616,000 on which he was more than 120 days past due. Additionally, he owed \$9,000 in delinquent property taxes. The evidence supports application of disqualifying conditions AG ¶ 19 (a), "inability or unwillingness to satisfy debts" and AG ¶ 19(c), "a history of not meeting financial obligations."

Four financial considerations mitigating conditions under AG ¶¶ 20(a) – (d) 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; and

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

Applicant purchased the rental/investment property in 2005. At the time of purchase, this was considered a good investment strategy. He fell behind on his payments when his renter defaulted on the lease. For more than a year, he aggressively sought to find a buyer to purchase the property. He has recently found a buyer.

The mitigating conditions of AG ¶ 20(a) have limited application. Even though the property was purchased in 2005, the debts are considered recent because the property has only recently gone to short sale. However, the behavior happened under such circumstances that it is unlikely to recur.

The conditions listed in AG ¶ 20(b) apply. The financial problems were largely beyond his control. The real estate markets nationwide have suffered greatly, which was a factor beyond his control. He could not have anticipated the drastic change in the real estate market when he purchased the property in 2005 for \$510,000. He currently owed \$616,000 on his home equity line of credit and mortgage. The property went to short sale for \$350,000. Once he realized the problem, he acted responsibly under the circumstances. For more than a year he sought a new purchaser for the property and finally found one.

The mitigating conditions of AG ¶ 20(c) have limited application. Although there is no evidence Applicant has received financial counseling, there is some indication his financial problems are being resolved. There is a contract on the property and it was to go to closing on September 2010. Considering how Applicant has pursued the short sale of the property, it can be assumed should the closing not occur he will aggressively seek a new purchaser. Except for the real estate, there has been no showing Applicant has experienced a problem with any other lender or account. None of his other accounts are delinquent. He is current on his home mortgage, utilities, and vehicle loans.

Under AG ¶ 20(d), Applicant has a purchaser for a short sale on the property. A short sale is a standard business transaction in which the creditor is not doing the Applicant a favor, but has engaged in a business transaction to recover some funds on the transaction. Under AG ¶ 20(d) this would constitute, "or otherwise resolve debts." AG ¶ 20(d) applies.

## **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.

The issue is whether Applicant's financial circumstances raise concerns about his fitness to hold a security clearance. (See AG ¶ 2(a) (1).) I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. The debts were not incurred on luxuries. At the time of purchase, buying the rental property was considered a good investment strategy. The dramatic loss in fair market value of the property could not have been foreseen in 2005, when the property was purchased. The downturn of the real estate market nationwide was beyond his control.

The property has gone to short sale and his financial liability as to the house has been addressed. His past conduct in securing a purchaser for the short sale indicates he will be just as aggressive in attempting to find another purchaser should the closing not occur. There is no showing he is unable to address his other financial obligations in a timely manner.

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

## **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, Financial Considerations: FOR APPLICANT

Subparagraphs 1.a – 1.c: 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 security clearance. Eligibility for access to classified information is granted.

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CLAUDE R. HEINY II  
Administrative Judge