



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



In the matter of: )  
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-----, ----- ) ISCR Case No. 09-06091  
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Applicant for Security Clearance )

**Appearances**

For Government: John B. Glendon, Esquire, Department Counsel  
For Applicant: *Pro se*

January 12, 2011  
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**Decision**  
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CURRY, Marc E., Administrative Judge:

Applicant remains delinquent on two home mortgages collectively totalling more than \$800,000, and foreclosure proceedings are ongoing, generating a financial considerations security concern that she failed to mitigate. Clearance is denied.

**Statement of the Case**

On March 24, 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 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 by the Department of Defense on December 1, 2006.

Applicant answered the SOR on April 23, 2010, admitting all of the allegations. She requested a hearing, and the case was assigned to me on July 6, 2010. On July 21, 2010, a notice of hearing was issued scheduling the case for August 12, 2010. The hearing was conducted as scheduled. I received eight Government exhibits, 12 Applicant exhibits, and Applicant's testimony. DOHA received the transcript (Tr.) on August 23, 2010.

### **Findings of Fact**

Applicant is a 45-year-old married woman with four children ranging in age from 9 to 17. She graduated from college in 1986 with a degree in mechanical engineering. Currently, she is pursuing a master's degree in engineering. (Tr. 19)

Applicant has worked as an engineer for her entire career. For the past seven years, she has worked for a defense contractor. Her duties include the integration of avionics equipment on aircraft. (Tr. 19)

In the early 1990s, Applicant and her husband owned two rental properties. In 1995, she experienced a complicated pregnancy that rendered her unable to work. (Answer) About the same time, Applicant and her husband began having problems managing their rental properties, including frequent vacancies, evictions, and repairs. These problems were not unusual.<sup>1</sup> However, with Applicant disabled, they could no longer absorb the rental expenses and manage their personal expenses.

In July 1995, Applicant and her husband filed for Chapter 7 bankruptcy protection. (AE H) The court granted their petition, discharging approximately \$42,000 of debt. Also, Applicant and her husband lost their rental properties through the bankruptcy process. (Tr. 57)

In October 2004, Applicant and her husband sold their home and made a profit of \$40,000. (Tr. 23) They applied approximately \$30,000 of this profit as a down payment on a new home that they had purchased for \$736,000. They financed the remaining \$715,000 of the purchase price with a mortgage.

In March 2005, Applicant's husband quit his job and, using the \$10,000 of profit remaining from sale of the home from which they had sold, started a trucking business. (Tr. 25) The business struggled, compelling Applicant and her husband to increasingly finance it with their credit cards. (Tr. 27)

Later in 2005, Applicant and her husband refinanced their home and invested \$50,000 of its equity in the trucking business. (Tr. 28) Applicant and her husband's business debt continued to increase. In June 2006, they obtained a second mortgage on their home in the amount of approximately \$165,000. The combined monthly

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<sup>1</sup>In 1994, Applicant and her husband reported a loss of \$24,000 on their income tax returns. (AE I)

mortgage payments totalled approximately \$7,300. The principal on the first mortgage and the principal on the second mortgage totalled \$880,000. (Tr. 47)

For the life of Applicant's husband's business, it generated revenue. However, the revenue was always exceeded by the business's operating expenses. (Tr. 46) Applicant's husband ended his trucking business in December 2006. (Tr. 65) He started working for another company immediately and did not experience a lapse in income. (Tr. 65)

Nevertheless, the years spent trying to keep the trucking business afloat by leveraging the equity in their home strained the family's finances. Consequently, although Applicant by June 2006 was earning \$115,000 annually, it was insufficient to pay the family's expenses, prompting her to increasingly turn to credit cards to make ends meet. (Tr. 46, 57)

In December 2006, Applicant stopped making payments on the secondary mortgage. (AE 2) In March 2007, Applicant stopped making payments on the primary mortgage. (AE G) That month, she wrote the mortgagee to request a loan modification.<sup>2</sup> The mortgagee rejected her request. In June 2007, she again wrote the mortgagee requesting a loan modification on the primary mortgage. (AE C at 3; AE F-G ) The mortgagee again denied the request. (*Id.* at 1-2) With each of her last three letters, Applicant included copies of the family's budget. (AE E at 2; F at 3; G at 2)

Applicant has not made any mortgage payments on either mortgage since 2007. (Tr. 48) She contends that she stopped making payments to "force [the mortgage company] to negotiate with [her]." (Answer at 1) At some point during that period, the mortgages were assigned to another bank, unbeknownst to Applicant. (Tr. 49; Answer at 1) In June 2009, the new mortgagee initiated foreclosure proceedings against Applicant and her husband. (AE A)

Before filing the foreclosure proceeding, the mortgagee informed Applicant that it would not address the secondary mortgage until she had resumed paying the primary mortgage. (Tr. 52) Currently, the secondary mortgage is in charge-off status. (Tr. 55)

In response to the mortgagee's foreclosure lawsuit, Applicant, through counsel on June 26, 2009, contended that the bank lacked standing to sue ". . . because it did not own the note and mortgage when it commenced the action." (AE L) The mortgagee filed a motion for judgment as a matter of law. On July 21, 2010, the court denied the mortgagee's motion, concluding Applicant had "demonstrated that plaintiff did not own the note at the time the action was commenced."<sup>3</sup> (AE A)

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<sup>2</sup>The mortgagee held both the primary and the secondary mortgage.

<sup>3</sup>In order to obtain a motion for judgment as a matter of law, the mortgagee must establish existence of the mortgage, ownership of the mortgage, ownership of the mortgage note, and default of the mortgage. (*Miller Planning Corp. V. Wells*, 253 A.D. 2d 859 (1998)).

The issue of ownership of the mortgage note remains in litigation. Applicant intends to resume mortgage payments after the court determines whether the bank that sued Applicant is the current mortgagee. (Tr. 62)

In June 2007, Applicant began focusing on paying her outstanding credit card debts. She had satisfied all of them by February 2009. (Tr. 52-53) She contends that she satisfied approximately \$75,000 of debt unlisted in the SOR. This contention is not corroborated by the record evidence. Applicant realized that paying her credit card debts rather than the mortgages risked her home, but chose this strategy because “the choice was to avoid an immediate second bankruptcy . . . or to risk losing the house . . . much later.” (Answer at 1)

In October 2009, a creditor obtained a judgment against Applicant for \$2,237, as listed in SOR subparagraph 1.d. (Tr. 59) Applicant contends that this was a business debt she overlooked while in the process of satisfying the other debts. The court ordered a garnishment of Applicant’s wages. (AE B at 1) Applicant finished paying the debt through the garnishment in December 2009. (AE B at 2; Tr. 28)

In February 2009, after satisfying her credit card debts, Applicant began setting money aside in her 401k account. (Tr. 53) Applicant contends that the amount she invests each month totals the amount she would otherwise have been paying toward the satisfaction of her mortgage, totalling approximately \$40,000 annually. (Tr. 53, 61-62) She did not provide any corroborating documentary evidence. Applicant’s goal is “to accumulate as much money as possible until [the] legal matter is cleared up, apply whatever funds [she] saves toward a pay down of [the] debt to avoid bankruptcy by going through the legal process with the foreclosure.” (Tr. 66) Applicant and her husband’s combined salary in 2009 was \$159,240. (AE J)

Applicant worked with an accountant from 2005 to 2007 to assist her with filing her income taxes. (Tr. 63) The accountant’s services did not include any financial planning. (Tr. 63) She is not currently working with a financial planner. (Tr. 63)

### **Policies**

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines. In addition to introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions.

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. 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.”

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 for obtaining a favorable security decision.

## **Analysis**

### **Guideline F, Financial Considerations**

Under this guideline, “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 (AG ¶ 18). Applicant satisfied the debt listed in SOR subparagraph 1.d, therefore, I resolve it in her favor. Because she resolved it through a wage garnishment, however, it has minimal probative value as to the issue of her security clearance worthiness.

Applicant’s 1995 bankruptcy and her current mortgage delinquencies trigger the application of AG ¶¶ 19(a), “inability or unwillingness to satisfy debts,” and 19(c), “a history of not meeting financial obligations.” The following mitigating conditions are potentially applicable under 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;

(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.

The financial problems that compelled Applicant to file for bankruptcy in 1995 began when she experienced disabling health problems and became unable to

generate income to support the management of the rental properties she owned with her husband. More recently, her husband's struggling business strained the family's finances to the point where they ultimately could not make ends meet. Under these circumstances, the first prong of AG ¶ 20(b) applies.

When Applicant realized she was unable to pay her mortgages she wrote the mortgagee four times between March 2007 and January 2008 requesting a loan modification. When the mortgagee sued her, she retained an attorney. Although the litigation remains pending, the most recent court ruling established that the mortgagee did not own the note when the foreclosure action was filed.

The court's favorable ruling did not dismiss the mortgagee's claim. It was merely a preliminary ruling, and the litigation is ongoing. The mortgagee may yet prevail. Most important, Applicant remains delinquent on two mortgages totalling \$880,000 regardless of whether the mortgagee has standing to foreclose.

Nevertheless, Applicant is litigating this issue in good faith. I conclude she has acted responsibly under the circumstances triggering the application of the second prong of AG ¶ 20(b).

Applicant is not contesting her accrual of the mortgage delinquencies. Consequently, AG ¶ 20(e) does not apply. However, the good-faith nature of her litigation together with her documented efforts to resolve her problem paying the mortgage note by seeking a loan modification render AG ¶ 20(d) applicable, and AG ¶ 20(c) partially applicable.<sup>4</sup>

Applicant contends that she will be able to satisfy the mortgages once the litigation is resolved. In support of this contention, she testified that over the past two years, she has satisfied approximately \$75,000 of delinquent business-related debt, and then saved more than \$40,000 in her 401k account to be applied to the mortgages once the litigation is resolved. This testimony was uncorroborated. Consequently, her contention that she will begin satisfying the mortgages after the litigation is resolved is merely speculative. Therefore, although Applicant is clearly attempting to resolve the problem by ascertaining the proper mortgagor through litigation, I cannot conclude that her financial situation is clearly under control.

### **Whole-Person Concept**

Under the whole-person concept, 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

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<sup>4</sup> "... there are clear indications that the problem is being resolved . . . ."

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.

Applicant's financial problems were caused by circumstances beyond her control. Conversely, Applicant has not made any mortgage payments on either delinquent mortgage in three years, and they total more than \$880,000. Her testimony that she is saving money in her 401k account in monthly amounts totalling what she would otherwise apply to monthly mortgage payments was uncorroborated. Also, this strategy is perplexing given the substantial penalties and income tax consequences of early withdrawal of income from 401k accounts. Given this questionable strategy, Applicant's testimony that she was not working with a financial planner was particularly relevant in gauging the likelihood of continuation. Upon balancing the cause of Applicant's current financial problems, its ongoing nature, and Applicant's uncorroborated assurances that she will remedy the problem, I conclude that she has not carried the burden. Applicant has failed to mitigate the security concern.

### **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.c:	Against Applicant
Subparagraph 1.d:	For 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 continue Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

MARC E. CURRY  
Administrative Judge