



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



In the matter of:)
)
) ISCR Case No. 09-06992
)
)
Applicant for Security Clearance)

Appearances

For Government: Nichole Noel, Esquire, Department Counsel
For Applicant: *Pro se*

January 31, 2011

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I deny Applicant's eligibility for access to classified information.

Applicant signed an Electronic Questionnaire for Investigations Processing (e-QIP) version of a security clearance application (SF-86) on May 5, 2009. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on June 8, 2010 detailing security concerns under Guideline F, Financial Considerations, and Guideline H, Drug Involvement, that provided the basis for its preliminary decision to deny him a security clearance. 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 on September 1, 2006.

Applicant acknowledged receipt of the SOR on June 14, 2010. He answered the SOR in writing and requested a hearing before an administrative judge. DOHA received the request on July 6, 2010. Department Counsel was prepared to proceed on September 28, 2010, and I received the case assignment on October 4, 2010. DOHA issued a notice of hearing on October 26, 2010, and I convened the hearing as scheduled on November 17, 2010. The Government offered four exhibits (GE) 1 through 4, which were received and admitted into evidence without objection. Applicant testified. DOHA received the transcript of the hearing (Tr.) on December 2, 2010. I held the record open for Applicant to submit additional matters. Applicant timely submitted Exhibits (AE) A through G, which were admitted without objection. The record closed on December 21, 2010.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a and 2.a-2.j of the SOR. His admissions are incorporated herein as findings of fact. He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 47 years old, works as a network administrator for a Department of Defense contractor. He began his current employment in October 2008. After high school, he received training at a technical school.¹

Applicant married his first wife in November 1985, and they divorced in February 1989. He married his second wife in May 1989, and they divorced in July 1995. He and his present wife married in June 2005. They have a four-year-old son. His wife works as a nurse.²

Applicant moved from another state to his current location in 2001. He initially worked as an information technology consultant. At the same time, he started to develop a real estate investment company. In time, his investment company became his sole source of work and income. His business purchased properties, which he would rehabilitate then sell. He established several limited liability corporations (LLC) to purchase and sell the properties. He also established an S Corporation, which operated as the management company for his LLCs.³

Applicant used lines of credit and credit cards to finance his business purchases and operations. He opened bank accounts and credit cards in the names of his LLCs and his own name. His creditors required him to personally guarantee all transactions of

¹GE 1.

²*Id.*; Tr. 13.

³Tr. 13-14, 18-19.

his LLCs in these accounts. Applicant used these accounts for deposits on prospective property purchases, for closing money, and for purchases of materials to repair the property before reselling it. He regularly paid his credit card bills and his lines of credit until 2008.⁴

Applicant successfully operated his business until 2008, when the economic downturn impacted his business operations. He had a number of properties he could not sell, as the real estate market had severely declined. He began to default on his mortgages, credit card payments, and bank loans. In July 2008, he spoke with a bankruptcy attorney, who advised Applicant not to file for bankruptcy at that time, but to wait for the completion of the foreclosure process on his properties, which he has done. In the last two years, Applicant transferred many of his properties by giving a “deed-in-lieu” to the mortgage holder. As a result, he no longer owns the properties, and he does not owe the mortgage holder any money on his loans. The mortgage company owns the properties.⁵

Applicant submitted a personal financial statement. He listed his net monthly income as \$2,970 and his monthly expenses as \$3,617.⁶ He did not list his wife’s income in his statement. He and his wife split monthly expenses, and she pays what he cannot pay each month.⁷

Concerning the debts listed in the SOR, Applicant advises that the debts in allegations 2.a through 2.d, which total \$86,853, are credit cards and lines of credit related to his business and are unpaid. Likewise, the debts in allegation 2.f and 2.g are unpaid credit cards from his business. He lacks the financial resources to pay these debts.⁸

Applicant continues to pay the \$19,700 credit card debt listed in SOR ¶ 2.e.⁹ He estimates that he owes approximately \$17,000 on this debt. He stopped using the credit card in 2008 and pays the creditor \$244 a month. The \$1,140 property tax lien in SOR ¶ 2.h is paid.¹⁰

⁴Tr. 18-20.

⁵*Id.* at 26-27, 37-38; GE 2.

⁶He listed expenses such as auto repairs for \$25, home repairs for \$50, home improvement for \$50, and garden supplies for \$40. These expenses are not incurred every month. Thus, his deficit is lower some months. GE 3.

⁷*Id.*; Tr. 27.

⁸Tr. 19-24.

⁹Applicant’s high balance on this card was \$24,000.

¹⁰GE 3; GE 4; AE B; Tr. 22-24.

SOR ¶ 2.i concerns a homeowners association lien. Applicant provided documentation which shows that this lien attached to the property, not to him personally or his businesses. The property has been sold at foreclosure and includes the lien. I find that this lien is resolved, as Applicant no longer owns the property.¹¹

SOR ¶ 2.j lists three debts related to two property mortgages and an equity line of credit. Both properties have been sold at foreclosure after Applicant transferred title to the properties to the mortgage holder. In both cases, the mortgage company waived the deficiency judgment in the foreclosure documents. As a result of this waiver, Applicant does not owe any additional money on the mortgages in 2.j(2) and 2.j(3). He received a 1099-A for the 2.j(2) mortgage. This form indicates that Applicant has abandoned the property. To his knowledge, he does not owe any income taxes on this property. These allegations are found in favor of Applicant.¹²

The allegation in SOR ¶ 2.j(1) concerns a second mortgage on the 2.j(2) property. Applicant has not received a cancellation of debt notice or a forgiveness of debt letter. He, however, believes that under state law, the creditor's only recourse is to file a lien on the property. Thus, he believes he is not personally liable on the debt. He has not provided information which supports his belief or shown that this debt is resolved.¹³

Applicant contacted a bankruptcy attorney a few months before the hearing. He has not yet filed bankruptcy as he does not have the \$3,000 filing fee. Once he proceeds with bankruptcy, he has been told that he must stop all payments on debts. He expects to make the final loan payment on his truck by May 2011. He then hopes to save the money to file bankruptcy.¹⁴

As a high school student and young man, Applicant smoked marijuana between 1985 and 1990. He did not smoke marijuana again until 2002. He attended parties with friends from a community service group, where marijuana was sometimes smoked. For no particular reason, he occasionally smoked a marijuana cigarette. He never purchased or sold the marijuana. He last smoked marijuana in June 2008. He last attended a party with this group in 2009, as he prefers to spend time with his son. He continues to participate in the group's community service activities where marijuana is not smoked. He signed a statement of intent not to use drugs in the future and agreed to a revocation of his security clearance if he did.¹⁵

¹¹AE C; Tr. 33.

¹²AE D; AE E; AE F; Tr. 33-35.

¹³Tr. 33, 35-37.

¹⁴Tr. 37-38.

¹⁵GE 2; AE G; Tr. 15-18, 39-41.

Policies

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

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for 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 an 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 Executive Order 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 relating to the guideline for Financial Considerations 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.

AG ¶ 19 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and especially the following:

- (a) inability or unwillingness to satisfy debts.
- (c) a history of not meeting financial obligations.

Applicant developed significant financial problems when his real estate investment business failed in 2008. He has been unable to resolve all of the debts from his business failure, as he lacks the financial ability to pay these debts. These two disqualifying conditions apply.

The Financial Considerations guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 20(a) through 20(f), and especially the following:

- (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 started a real estate investment business, which he successfully operated for at least six years. He business failed when the economy declined significantly, particularly in the real estate market. When he realized he had significant financial problems, he contacted a bankruptcy attorney in 2008, who advised him to wait to file bankruptcy until his properties had proceeded through the foreclosure process. For over two years, he has worked with mortgage companies on resolving his mortgage debts in the foreclosure process. Given the advice from the attorney, Applicant has acted reasonably about his mortgage debt as he could not sell the properties. At this time, all of his first mortgage debts have been resolved. A second mortgage debt remains unresolved and he has not paid his credit cards, except one. AG ¶ 20(a) is applicable only to the mortgage debts alleged in SOR ¶¶ 2.j(2) and 2.j(3).

Applicant has not received financial counseling, nor has he contacted a debt solution company about consolidation of his debts. He showed that the tax lien had been paid and that the association lien for fees attached to the property, which means that the lien stayed with the property after it had been sold. He no longer has any interest in this property, thus, he does not owe this money. He has resolved the debts in SOR ¶¶ 2.h and 2.i. AG ¶ 20(c) partially applies since his current finances are under control, but he has not resolved all his past debts.

Applicant pays one credit card debt on a monthly basis and has since 2008. He has reduced his debt by \$7,000. He does not use this credit card for new purchases, as he wants to resolve this debt. AG ¶ 20(d) applies to this debt, which is alleged in SOR ¶ 1.e. The remaining mitigating conditions are not applicable in this case.

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to drug involvement:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and

(2) inhalants and other similar substances;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

The following conditions described in AG ¶ 25 could raise a security concern in this case and may be disqualifying:

- (a) any drug abuse (see above definition); and
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant smoked marijuana occasionally between 2002 and June 2008 at parties for no particular reason. Because he smoked marijuana, he had to possess it. The Government has established its prima facie case under the above disqualifying conditions.

AG ¶ 26 provides conditions that could mitigate security concerns:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) a demonstrated intent not to abuse any drugs in the future, such as:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) an appropriate period of abstinence; and
 - (4) a signed statement of intent with automatic revocation of clearance for any violation;
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and
- (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant has never abused prescription drugs nor has he been in a drug treatment program. Thus, AG ¶¶ 26(c) and 26(d) are not applicable. Applicant stopped his infrequent use of marijuana in June 2008, more than 30 months ago. His last use did not occur a long time in the past. Although he smoked marijuana infrequently each year, he did smoke it for seven years prior to completing his security clearance application. Mitigation is not established under AG ¶ 26(a).

Applicant realized that he needed to stop his marijuana use and did in June 2008. He prefers to spend time with his son, not attending parties where marijuana is smoked. Although he still performs community service with the organization, he does not socialize with individual members who smoke marijuana as he did in the past. To show his commitment to not smoking marijuana in the future, Applicant signed a statement of intent not to do so and agreed to the revocation of his security clearance if he did. He has mitigated the security concerns under AG ¶ 26(b).

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 an 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 decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Prior to the economic downturn, Applicant paid his bills. He successfully built a real estate investment business. However, when the real estate market sharply declined in 2007 and 2008, his business failed when he could not sell his property or pay the mortgages on these properties. Upon the advice of legal counsel, he did not file bankruptcy in 2008, but allowed the mortgage companies to foreclose on his properties. He resolved many of the foreclosure actions by giving the mortgage companies a "deed-in-lieu" which gave the mortgage companies title to and ownership of the property and divested him of any ownership and debt. Through this process, he resolved his primary

mortgages on his business properties, and he does not have any outstanding liabilities on the primary mortgages.

As part of his business model, Applicant developed LLCs to purchase his investment property, to manage his business, to obtain credit cards, and to open bank accounts. He had to personally guarantee these credit cards and bank accounts. As a result, he is liable for the unpaid credit card debts associated with his business. His current financial circumstances do not permit him to pay these debts, and he lacks funds at this time to file bankruptcy. With his wife's income, he can pay his usual monthly living expenses. His payments on his truck will finish in May 2011, and he hopes to use this money to pay the fees for filing bankruptcy. He views bankruptcy as the only way he can resolve his significant unpaid business debts.

Applicant is married and has a son. He prefers to spend time with his son and not at the parties where marijuana is smoked. He does not intend to smoke marijuana in the future and understands the consequences if he does. While he has taken affirmative action to resolve his mortgage debts, he still has significant unpaid debts arising from his business. These unpaid debts raise security concerns. He plans to file bankruptcy at some time in the future. This appears to be the only way he can resolve these debts, as his income is insufficient to pay his remaining debts. Until these debts are resolved, a security concern remains. For the reasons stated, I conclude Applicant mitigated the security concerns arising from his drug involvement under Guideline H, but he has not mitigated the security concerns arising from his finances under Guideline F.

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 H:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraph 2.a-2d:	Against Applicant
Subparagraph 2.e:	For Applicant
Subparagraph 2.f:	Against Applicant
Subparagraph 2.g:	Against Applicant
Subparagraph 2.h:	For Applicant
Subparagraph 2.i:	For Applicant
Subparagraph 2.j(1):	Against Applicant
Subparagraph 2.j(2):	For Applicant
Subparagraph 2.j(3):	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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

MARY E. HENRY
Administrative Judge