



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



In the matter of:	)	
	)	
	)	ISCR Case No. 09-07248
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: William T. O'Neil, Esquire, Department Counsel  
For Applicant: *Pro se*

October 29, 2010

**Decision**

HEINY, Claude R., Administrative Judge:

Starting in 2004, Applicant invested heavily in the Florida real estate market. She purchased three houses and six lots. By 2009, the dramatic decline in the real estate market left her owing approximately \$5,700,000 on property worth \$4,000,000. The lender has accepted short-sales on the houses. Applicant is awaiting responses from the mortgage company as to her requests to surrender the lots in lieu of foreclosure. Applicant has rebutted or mitigated the security concerns under financial considerations. Clearance is granted.

**Statement of the Case**

Applicant contests the Defense Department's (DoD) intent to deny or revoke her 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 a

<sup>1</sup> Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security*

Statement of Reasons (SOR) on May 17, 2010, detailing security concerns under financial considerations.

On June 24, 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 August 10, 2010. The FORM contained 15 attachments (Items). On August 19, 2010, Applicant received a copy of the FORM, along with notice of her opportunity to file objections and submit material to refute, extenuate, or mitigate the potentially disqualifying conditions.

On September 3, 2010, Applicant responded to the FORM and submitted Exhibits (Ex.) I through V. Department Counsel did not object to the material. Applicant's response was admitted into the record. On September 17, 2010, I was assigned the case.

### **Findings of Fact**

In Applicant's Answer to the SOR, Applicant admitted all of the factual allegations, with explanations. Her admissions to the SOR allegations are incorporated herein. After a thorough review of the record, pleadings, and exhibits, I make the following findings of fact:

Applicant is a 59-year-old president and CEO of an information technology business who has worked for a defense contractor since December 1989, and is seeking to maintain a security clearance.

In 2004, Applicant and her husband formed a limited liability company (LLC)<sup>2</sup> and began purchasing residential lots. Their intent was that the profits from the sale of a home would support construction of additional homes on the vacant lots. However, their timing was not good and the real estate market in Florida declined dramatically. (Item 10, page 7 of 12) Prior to entering into the venture, both Applicant and her husband studied the Florida real estate market. Applicant and her husband had no experience in the real estate market, but she had 15 years of experience running a multi-million dollar information technology business and her husband had a PhD in molecular biology. (Applicant's FORM response)

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*Clearance Review Program* (January 2, 1992), as amended (Directive), and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

<sup>2</sup> A limited liability company is a legal form of business organization with daily activities like a partnership but with limited liability similar to a corporation. The owners of an LLC are called "members" rather than partners or shareholders. A single-member LLC is taxed as a sole proprietorship, while a multiple-member LLC is taxed as a partnership. The record is not clear if the property was purchased by Applicant or by the LLC. In either event Applicant would be liable either as purchaser or partner of the LLC.

Applicant purchased three homes, six<sup>3</sup> additional lots, and two residences. (Item 9) She borrowed \$5,733,000 on the real estate and, as of December 2009, the fair market value of the property was \$4,000,000. (Item 9, page 5 of 6) The monthly mortgage on the property was between \$30,000 and \$35,000. (Ex. 10, page 7 of 12) She was able to pay her monthly mortgages until March 2009. (*Id.*)

The adverse economic situation prevented them from selling the homes or lots. The homes and lot prices were lowered to 60% of their former asking price in order to secure buyers for the property. The homes and lots did not sell. Applicant attempted to sell a home and the lots at auction, but found no buyers. Attempts to sell by owner, through realtors, and on computer sites did not meet with success.

Since 2006, Applicant has called the creditor weekly, attempting to renegotiate the loans. (Ex. 10, page 7 of 12) She is attempting to sell the property by “short sale.”<sup>4</sup> It took her five to six months from the date of submission for the creditor to approve the short sales. (Item 5) She hired a real estate attorney to assist her in submitting Deeds-In-Lieu (DIL) requests on the lots. With a DIL request Applicant would surrender the property to the creditor. She may have to contribute funds to the creditor. If the DIL requests were accepted, she would owe the creditor the difference between the appraised value and the sale price. (Item 10, page 8 of 12) If the property sells for more than the appraised value, the creditor keeps the amount. (*Id.*) The creditor routinely takes approximately 60 days to process a DIL request. (Item 5)

The lender has approved short sales on the three homes. Applicant had a \$1,052,000 mortgage on the debt listed in SOR ¶ 1.a. She was \$61,000 past due on the note. The house went to settlement in July 2010 with her contributing \$50,000 at time of settlement. (Items 4, 5)

Applicant was approximately \$43,000 past due on a \$700,000 mortgage (SOR ¶ 1.d). In June 2010 the house went to short sale. (Item 4) The amount received on the sale covered the debt owed. She was not required to pay any additional amount on the home.

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<sup>3</sup> Although there are six lots, there are only five mortgages for the lots. Two lots (SOR ¶ 1.h) are on the same mortgage.

<sup>4</sup> A short sale is a sale of real estate in which the mortgage lender agrees to allow a sale of the mortgaged property for less than the outstanding balance of the loan. The proceeds of the sale go to the lender. The lender must approve any proposed short sale.

A short sale typically is executed to prevent a home foreclosure, but is based on the most economic way for the mortgage lender to recover the amount owed on the property. A short sale is typically faster and less expensive than a foreclosure. A short sale is simply negotiating with the mortgage lender for a payoff for less than the full debt amount. It does not extinguish the remaining balance unless settlement is clearly indicated on the acceptance of offer.

Applicant was \$48,000 past due on a \$1,290,000 mortgage (SOR ¶ 1.g). In February 2010, the creditor approved a short sale, but the purchaser chose to walk away from the purchase. In May 2010, another short sale was approved, selling the house for approximately \$800,000. (Items 4, 5) The house was to close September 30, 2010 with her paying \$24,000 at closing. (Exs. I, III).

In June 2010, Applicant submitted DIL requests to the creditor for the six unsold lots. She realizes she may be required to pay additional funds if the DIL requests are approved. Creditor has yet to respond. (Item 4) She was approximately \$156,000 past due on the six lots (SOR ¶¶ 1.b, 1.c, 1.e, 1.f, and 1.h.). She owed the lender approximately \$2,700,000. As of December 2009, the fair market value on the lots was approximately \$1,400,000, approximately one-half of the value owed on them. (Item 9, page 5 of 6)

There is no showing Applicant has been unable to address her other financial obligations in a timely manner. Other than the real estate delinquencies, there is no evidence of financial problems.

### **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 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.

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 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.

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

A person's relationship with her 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 her finances to meet her financial obligations.

Applicant purchased three homes and six lots for resale, incurring mortgages of \$5,700,000. Until March 2009, she was able to make timely mortgage payments. She became more than \$300,000 past due on the property. Disqualifying Conditions AG ¶

19(a), “inability or unwillingness to satisfy debts” and AG ¶ 19(c), “a history of not meeting financial obligations,” apply.

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.

The mitigating conditions of AG ¶ 20(a) have limited application. She started buying the houses and lots in 2004, which is behavior that started six years ago. The failure to pay the mortgages occurred in 2009, which is recent. Additionally, the debts are considered recent because the houses have only recently gone to short sales and the lender has not accepted the DIL requests on the six lots. Such conduct is unlikely to recur. She will not be buying Florida real estate in the future.

The conditions listed in AG ¶ 20(b) apply. The financial problems were largely beyond her control. She and her spouse carefully considered the real estate venture before entering it. She could not have anticipated the drastic change in the real estate market. As of December 2009, she owed approximately \$5,700,000 on property worth \$4,000,000. The real estate markets nationwide, and especially in Florida, suffered greatly. It was a factor beyond her control. Once she realized the problem, she acted responsibly under the circumstances. She lowered the home prices to 60% of their former asking price, she attempted to sell the homes and lots at auction, but found no buyers. She did what she could to sell the property. Her efforts were unsuccessful. Starting in 2006, she has called the creditor weekly to renegotiate the loans and do what she could to address the problem. Short loans and DIL requests were made.

The mitigating conditions of AG ¶ 20(c) have limited application. Although there is no evidence Applicant has received financial counseling, there is some indication her financial problems are being resolved. The three homes have been sold. The creditor has yet to act on her DIL requests to surrender the lots. As to the lots, it is too soon to find a clear indication that the problem is being resolved or is under control. Considering how she has pursued the short sales of the three homes it can be assumed her pursuit of the DIL requests will be just as aggressive. Except for the real estate, there has been no showing Applicant has experienced a problem with any other lender or account. None of her other accounts are delinquent.

Under AG ¶ 20(d), Applicant has made a \$50,000 payment at the sale of one home, \$24,000 at the sale of a second home, and the third home was sold at a price where she was not required to submit additional funds. She has submitted DIL requests for the lots, acknowledges she may have to make some type of payment at the time the lots sell, and is willing to make the payments. Having made \$74,000 worth of payments when the two homes sold, it is likely she will carry through on her promise to make payments required on the sale of the lots. 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 her 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. Although not experienced in the real estate market, Applicant and her husband did not go into this venture blindly. They knew there were risks involved in real estate purchase and development. However, the dramatic loss in fair market value of the property could not have been foreseen in 2004, when they started purchasing property. The downturn of

the real estate market nationwide was beyond their control. They realized the problem and did all they could to limit their losses. However, everyone else in the real estate market was attempting to do likewise.

The three houses have now gone to short sale and her financial liability as to the house has been addressed. The six lots remain unsold and the DIL requests yet to be accepted. Her past conduct in getting the houses to sale indicates she will be just as aggressive in attempting to have the DIL requests accepted. There is no showing of Applicant being unable to address her 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 her 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
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Subparagraph 1.a – 1. h:	For Applicant
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### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

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CLAUDE R. HEINY II  
Administrative Judge