



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



In the matter of:)	
)	
)	
[NAME REDACTED])	ISCR Case No. 09-08115
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Richard A. Stevens, Esquire, Department Counsel
For Applicant: Donald Witmeyer, Esquire

March 9, 2011

Decision

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and transcript, Applicant's request for a security clearance is granted.

On August 11, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to renew a security clearance required for his job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a set of interrogatories¹ to clarify or augment information obtained in his background investigation. After reviewing the results of the background investigation and Applicant's responses to the interrogatories, DOHA adjudicators were unable to make a preliminary affirmative finding² that it is clearly consistent with the national

¹ Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

interest to continue Applicant's access to classified information. On March 18, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise security concerns addressed in the adjudicative guidelines (AG)³ for financial considerations (Guideline F).

Applicant timely answered the SOR and requested a hearing. The case was assigned to an administrative judge on July 6, 2010. However, due to scheduling difficulties, the case was transferred to me on September 23, 2010. Pursuant to a Notice of Hearing issued on September 30, 2010, I convened a hearing in this matter on October 13, 2010. The parties appeared as scheduled. The Government presented four exhibits that were admitted without objection as Government Exhibits (Gx.) 1 - 4. Applicant testified and submitted six exhibits that were admitted without objection as Applicant Exhibits (Ax.) A - F.⁴ DOHA received a transcript (Tr.) of the hearing on October 28, 2010.

Findings of Fact

Under Guideline F, the Government alleged that Applicant owed \$174,927 for six unpaid real estate mortgage or related debts (SOR 1.a - 1.f). Applicant denied with explanations the allegations at SOR 1.a and 1.e. He admitted with explanations the remaining allegations. Applicant's admissions are incorporated in my findings of fact. Having reviewed Applicant's response to the SOR, the transcript, and exhibits, I make the following additional findings of relevant fact.

Applicant is 60 years old and is employed by a defense contractor as a senior flight safety assessor. He requires a security clearance to perform his work in support of U.S. military special operations missions. He has held this job on a full-time basis since January 2009, but was first hired for his position on a part-time basis in February 2002, ten months after he retired from active duty in the U.S. Air Force. Applicant served as an officer in the Air Force from May 1973 until his retirement and honorable discharge in April 2001 as a Lieutenant Colonel. Applicant held a security clearance without incident for his entire military career, but it lapsed sometime after his retirement.

Applicant was a pilot for most of his Air Force career, most recently in F-15 jets. After he retired, he flew commercial jets for "fractional ownership" companies. His employers owned jets for use by individuals who owned shares in the aircraft and could use them based on the percentage of their ownership interest in the jet. His work as a commercial pilot allowed him to earn additional income working for a defense contractor for several weeks each year. However, in January 2009, he was furloughed when demand for private jets declined during an economic downturn. In addition to his work in

³ The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006). Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

⁴ Information Applicant submitted as Tabs A - D with his answer to the SOR was also admitted into the record without objection. (Tr. 7 - 8)

support of special operations flights, Applicant travels to various U.S. Air National Guard commands to inspect their flight safety programs. (Gx. 1; Tr. 22 - 27)

Applicant and his wife have been married since January 1988. They have owned a home in the U.S. Gulf Coast region for over 20 years. They settled in that home after he retired from the Air Force. In 2004, they decided to begin investing in real estate. The market for both rentals and purchases had been strong for several years in that area, with property values increasing dramatically. Accordingly, mortgages were easy to get as well. They learned about the real estate market in their region from trusted friends who had already begun buying investment properties, as well as from persons they believed were reputable real estate agents. Based on the information at hand, which reflected a 10-year history of positive market performance by such investments, Applicant took equity out of his principle residence, used it for down payments on mortgages for single-family homes and at least one condominium. He also used the equity funding for repairs and renovations of those properties. His loans were three-year or five-year adjustable interest rates mortgages (ARM). Applicant bought the properties intending to rent them for two or three years, then sell them for a profit before the ARMs adjusted upwards.

In August and September 2004, after Applicant had bought his properties, two tropical storms and Hurricane Ivan severely impacted the areas where Applicant lived and where the properties were located. The region also suffered multiple extreme weather events in 2005, with two tropical storms, Hurricane Dennis in July 2005, and Hurricane Rita in September 2005. In August 2005, Hurricane Katrina directly impacted areas west of Applicant; however, the cumulative effect of the 2004 and 2005 hurricane seasons on the Gulf Coast region and its economy was disastrous. The market for buyers willing to own real estate in an area that seemed, at the time, plagued by destructive weather, virtually disappeared. This resulted in a glut of houses which could not be sold. As a result of increased inventory and reduced demand, prices and market values dropped precipitously. Also, because houses and condominiums could not be sold, they flooded the rental market, where the effect was similar. The increased inventory meant lower rental prices, which usually fell short of the monthly mortgage payment for the property owners, whose mortgages were obtained for prices much higher than could be realized after 2005. Finally, insurance costs for all properties in that region also increased significantly.

Applicant's financial difficulties began in 2007, when the ARMs on his properties began to adjust. He struggled to make the required payments, because he could not find sufficient rental income. Also contributing to his financial difficulties was the loss of his income as a commercial pilot at the beginning of 2009. Detailed disclosures by Applicant in his e-QIP, as well as credit reports obtained during his background investigation, and Applicant's detailed responses to DOHA interrogatories, showed that by the end of 2009, Applicant owed approximately \$174,927 in delinquent or past-due mortgage or related payments. (Gx. 2; Gx. 3; Gx. 4) The debt alleged at SOR 1.a is for payments past-due on the mortgage for his primary residence. The debt alleged at SOR 1.b is for past-due mortgage payments on one of Applicant's investment properties (Prop A); the debts alleged at SOR 1.c and 1.d are for past-due payments on the first mortgage and a home equity loan, respectively, on another investment property (Prop

B); the debt alleged at SOR 1.e is for unpaid mortgage payments on a condominium Applicant bought for investment (Prop C); and the debt alleged at SOR 1.f is for unpaid homeowners' association dues for the condominium interest they bought for their own use (Prop D).

Since 2004, Applicant has used approximately \$180,000 of the equity in his home, not only to finance property acquisitions, but to make payments on those properties when rental could not cover the costs, and to repair and renovate the properties. He initially obtained the mortgages for Prop B through Countrywide Home Loans, Inc.; however, Bank of America (BAC) acquired Countrywide in early 2008. BAC also holds the mortgage and equity loans on his primary residence. Different lenders issued the mortgage for Prop C and Prop D.

Rather than simply letting his mortgages go to foreclosure, since 2007, Applicant has been trying to work out agreements with his lenders to modify his mortgages in light of the drastic change in home values since 2005. His efforts have met with mixed results. However, all of his lenders told him that, before he could obtain any relief through change of terms, he would have to be in default. Therefore, following their advice, he stopped paying his mortgages, which resulted in the delinquencies alleged in the SOR. (Answer to SOR; Gx. 2; Ax. A; Ax. B; Tr. 28 - 32, 40 - 45)

However, as to the delinquency alleged in SOR 1.a, Applicant never completely stopped paying the lender. He had also fully paid an initial home equity loan in 2007. (Answer to SOR, Tab C) Through most of 2010, he paid at least 50% of the original monthly requirement. At one point, Applicant was advised that the mortgage was in forbearance, but later learned he was in default. In September 2010, Applicant and BAC agreed to a loan modification through which Applicant made an initial payment to reduce the unpaid principal, and which reduced his interest rate, resulting in affordable monthly payments. Applicant's mortgage obligation on his primary residence is back in good standing. (Answer to SOR, Tab A and Tab B; Ax. C; Tr. 48 - 52)

Applicant has had the most difficulty negotiating a resolution to the mortgage for Prop B and Prop C (SOR 1.c - 1.e), for which he has not been able to find consistent renters. In support of his requests, Applicant submitted multiple "hardship letters" in 2007, in which he explained why he was having trouble with his mortgage, and in which he proposed solutions that would put him back in good standing. (Gx. 2) Also in 2007, Applicant retained a law firm to contest a foreclosure action brought by BAC for Prop B. Applicant and his lawyers have been in regular contact about this matter ever since. As recently as June 2010, they engaged in formal mediation but an impasse was declared when the lender proposed a modification that Applicant could not afford. (Ax. A; Tr. 32 - 42)

As to the mortgage obligations for Prop B (SOR 1.c and 1.d), Applicant has only been offered modifications that would require him to pay more each month based on addition of unpaid interest, penalties and fees to the principle. (Ax. B) Applicant has declined this offer, but he is continuing his negotiations with BAC in the hopes that he can rehabilitate the mortgage and eventually sell the house at a price that meets everyone's needs. (Tr. 42 - 46, 87)

Applicant denied that he is still obligated for the mortgage on Prop C (SOR 1.e). This property was a condominium, which by 2006, could not be rented or sold for a price that would cover the mortgage. Applicant put the property on the market in 2006. He also corresponded regularly with the lender through 2007 and 2008 about possible modification of his mortgage. He also received at least five reasonable short-sale offers, the lowest of which was still for almost 75% of the loan value. The lender did not accept any of the offers and eventually foreclosed on the property. Subsequently, the lender bought back the property at auction for \$100. Applicant has been advised by his attorneys that, because the lender bought the property, the debt has been written off and there is no further obligation. The most recent credit report lists a zero balance on this debt. (Answer to SOR, Tab B; Gx. 2; Tr. 52 - 54)

Applicant and his wife also bought a partial interest in a condominium that was yet to be built (Prop D), and which they intended for personal use when they have more time in retirement. Their interest is for use of the condominium for five weeks each year. They did not close on that purchase, as required by their contract to purchase, until 2008, well after his other mortgages went bad. They were able to pay for this property interest using part of an inheritance his wife received. (Tr. 55 - 56, 96) As alleged in SOR 1.f, Applicant owes \$7,500 for unpaid homeowners' association (HOA) dues for this property. He has been unable to pay due to his other mortgage obligations. He is currently working with the HOA and the lender to resolve this debt. Applicant is optimistic he can sell his interest in 2011 and that the proceeds will cover his debt. The HOA has not placed a lien on the property or otherwise tried to enforce this debt because they do not want to interfere with Applicant's efforts to sell the property. (Answer to SOR; Gx. 2; Tr. 55 - 58, 92)

Applicant also bought at least two other properties that were not addressed through the SOR. He was able to sell one house, albeit at a loss, to satisfy his mortgage obligation. In contrast to his efforts to negotiate with his other lenders, Applicant was able to work out a mortgage modification with GMAC, the lender for a rental property he still owns. The agreement provided for a lower interest rate and monthly payment, which has enabled Applicant to rent the property at the market rate in his area. (Answer to SOR, Tab D; Gx. 2; Ax. D; Tr. 58 - 59)

Applicant's credit has always been good. Despite negative entries in his credit reports, his other debts are all listed as current. He and his wife live well within their means. They pay their credit card balances every month, drive modest cars they owe nothing on, and they file and pay their taxes on time. A personal financial statement (PFS) submitted in response to interrogatories in February 2010, shows he has about \$5,200 remaining each month after he pays his expenses, which include his home mortgage and the GMAC-financed property. Pending resolution of the mortgages for Prop B and Prop C, any money that Applicant would have used to pay those notes is set aside for upkeep of those properties. (Gx. 2; Gx. 3; Gx. 4; Tr. 78 - 87)

Applicant's military career was exceptional. In 38 Air Force Officer Evaluation Reports and Officer Performance Reports, he consistently received the highest possible marks. (Ax. F) Ten letters of support and recommendation were submitted from former Air Force colleagues as well as current professional associates and co-workers, some

of whom knew Applicant before he was hired by his current employer. Each of the letters were based on the authors' knowledge of Applicant for between 8 and 30 years. They also reflected knowledge of Applicant's current circumstances; however, they all expressed strong support for his request for a clearance based on their extensive knowledge of his good character, reliability, and integrity. (Ax. E)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁶ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole-person" concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁷ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as his or her own. The

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ Directive. 6.3.

⁷ See *Egan*, 484 U.S. at 528, 531.

“clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government.⁸

Analysis

Financial

The security concern about Applicant’s finances, as stated in AG ¶ 18, is that:

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 Government’s information, as well as Applicant’s admissions in his e-QIP, in response to DOHA interrogatories, and in response to the SOR established the allegations at SOR 1.a - 1.f. The facts established showed that Applicant has accrued nearly \$175,000 in delinquent or past-due debt for six mortgage-related obligations. Applicant has been unable to pay his debts until recently, when he reached a mortgage modification agreement with the lender holding the mortgage on his primary residence. Despite the fact that he has satisfied the debt obligations alleged in SOR 1.a, and the debt at SOR 1.e appears to no longer exist, available information shows that Applicant still owes about \$126,500 for the debts alleged at SOR 1.b - 1.d, and 1.f. It is unclear when those debts will be resolved. Accordingly, the record requires application of the disqualifying conditions listed at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*), and AG ¶ 19(c) (*a history of not meeting financial obligations*).

By contrast, Applicant’s debts did not arise from the real estate speculation or opportunistic use of sub-prime loans that caused the housing market collapse in 2007. His real estate investment plan was based on a 10-year track record of reliable performance by the market he was entering. Unfortunately, a series of hurricanes and other damaging weather events occurred in quick succession in 2004 and 2005 as Applicant was beginning his investment activities. While hurricanes do occur in the Gulf Coast region, that three such storms (including Hurricane Katrina) hit the same region within an 18 month span was highly unusual. The effect on Applicant’s investments was uncontrollable. Nonetheless, Applicant demonstrated good judgment, responsible conduct, and trustworthiness by working diligently to try to meet his obligations rather than walk away from them as many others probably did. Accordingly, available information requires application of the mitigating conditions at AG ¶ 20(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*) and AG ¶ 20(b) (*the conditions that resulted in the financial problem were largely beyond the person’s control (e.g. loss of employment, a*

⁸ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances).

Applicant's proactive, detailed approach in his, at times unrequited, efforts to work with his lenders since 2007, constitutes timely, good-faith action on his part. Indeed, he was able to sell one of his properties at a loss, rather than let it go to foreclosure. He was also able to obtain a mortgage modification from a responsive lender, and he still owns that property as a viable rental asset. Thus, available information further requires application of the mitigating condition at AG ¶ 20(d) (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*).

Finally, Applicant has presented sufficient information to support his denial of the allegations at SOR 1.a and 1.e. As to the latter debt, Applicant's mortgage was foreclosed despite extensive efforts to sell it or otherwise resolve his obligation. The lender's opportunistic repurchase of the property for \$100 after foreclosure relieved Applicant of any obligation for the remainder. As to SOR 1.a, Applicant's mortgage has been modified and he is again in good standing with this obligation. The record requires application of the mitigating condition at AG ¶ 20(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*).

On balance, the record shows that Applicant's financial problems are not due to any misconduct, lack of fiscal discipline, deceptive practices or unreasonable investment expectations. His debts arose out of unique circumstances during a limited period that is an aberration from Applicant's history of sound personal finances. The ongoing presence of past-due debts requires examination, but it is not the end of the inquiry into Applicant's suitability for a security clearance. Of equal importance is the manner of Applicant's response to financial adversity, and his ongoing management of his personal finances. Long before he applied for a clearance, Applicant was acting responsibly to resolve his debts and, more important, to meet his obligations. The totality of information bearing on this issue supports a conclusion that Applicant's judgment and reliability are sound, and that he is not likely to engage in unacceptable conduct to resolve his financial problems. On balance, I conclude that the security concerns about his unpaid debt are mitigated.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines F. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is 60 years old, has been married for over 20 years, and served with distinction as a U.S. Air Force officer for nearly 30 years. He and his wife live in a home they have owned for most of their marriage. Applicant's record of stability makes it unlikely that he lightly entered into his real estate investment venture and he has been proactive in trying to resolve the problems he experienced through unforeseen circumstances. There has been no misconduct here, and Applicant has provided detailed information about his financial

problems and efforts to resolve them. He previously held a security clearance without incident while in the military, and his character, judgment, and reliability are enthusiastically endorsed by his military performance record and by numerous longtime personal and professional references. It is as likely that Applicant will continue his efforts to meet his financial obligations or to otherwise resolve them in a responsible way as it is unlikely he will incur similar debts in the future. A fair and commonsense assessment of all of the available information shows that Applicant has mitigated the security concerns doubts about his suitability for access to classified information.

Formal Findings

Formal findings 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: FOR APPLICANT

Subparagraphs 1.a - 1.f: For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest for Applicant to have access to classified information. Request for security clearance is granted.

MATTHEW E. MALONE
Administrative Judge