



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



In the matter of: )  
 )  
 [Redacted] ) ISCR Case No. 10-00045  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Julie R. Mendez, Esq., Department Counsel  
For Applicant: *Pro se*

September 30, 2011

**Decision**

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Consideratons). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application on July 22, 2009. On May 17, 2011, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline F. DOHA acted 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 September 1, 2006.

Applicant received the SOR on June 11, 2011; answered it on June 30, 2011; and requested a hearing before an administrative judge. DOHA received the request on July 7, 2011. Department Counsel was ready to proceed on July 18, 2011, and the case

was assigned to me on July 25, 2011. DOHA issued a notice of hearing on August 17, 2011, scheduling it for September 7, 2011. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. I kept the record open until September 16, 2011, to enable Applicant to submit additional documentary evidence, and he timely submitted AX D and E. Department Counsel's response to AX D and E is attached to the record as Hearing Exhibit I. DOHA received the transcript (Tr.) on September 15, 2011.

### **Amendment of SOR**

Department Counsel moved to amend SOR ¶¶ 1.a and 1.b to delete the words "the deficiency" and to substitute the article "a." I granted the motion, with no objection from Applicant. (Tr. 18.) As amended, SOR ¶ 1.a alleges a debt to a mortgage lender "for a balance of \$401,000.00"; and SOR ¶ 1.b alleges a debt to a mortgage lender "for a balance of \$163,000.00."

### **Findings of Fact**

In his answer to the SOR, Applicant admitted the delinquent first and second mortgages alleged in SOR ¶¶ 1.a and 1.b, but he denied the allegations that there were deficiencies after foreclosure. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 49-year-old technical training specialist employed by a defense contractor since April 2009. He served on active duty as a U.S. Navy officer from May 1984 to March 1996. He worked for a defense contractor and served in the U.S. Navy Reserve from March 1996 until he returned to active duty in March 2000. (Tr. 40-41.) He was involuntarily retired on July 1, 2008, for failure to be promoted. (GX 2 at 5-6.) He held a security clearance during his Navy career and is seeking to continue it.

Applicant married in April 1986 and divorced in February 2005. Two children, now ages 25 and 23, were born during the marriage. Applicant's ex-wife receives one-third of his retired pay. (Tr. 53.)

After his divorce in 2005, Applicant purchased a home for \$500,000, with 100% financing through two adjustable-rate mortgages. He lived in the home, intending to let it appreciate, sell it, and use the profits to buy another home after retirement. He refinanced the home in the spring of 2006 and took out about \$60,000 in equity. He used about \$20,000 of the equity for repairs and maintenance on the house, and the remainder to pay for his children's college expenses, which totaled about \$20,000 per year. (Tr. 29, 32, 49-50.) At the time he bought and later refinanced his home, he was on active duty and had part-time jobs as a real estate agent and as a baseball umpire. His payments were between \$3,000 and \$3,500 per month, but he had no difficulty making the payments, because he was earning more than \$10,000 per month from his

Navy service and two part-time jobs. (Tr. 29.) He also had about \$70,000 in an investment account and about \$10,000 in his Thrift Savings Account. (Tr. 52, 70.)

Applicant's financial situation changed when he was involuntarily retired in June 2008. For about 10 months his only income was his retired pay, real estate commissions, and his seasonal part-time work as an umpire. The downturn in the housing market drastically reduced his real estate sales commissions. His retired pay was reduced by about 58% to recoup the separation pay of \$47,219.49 he received when he left active duty in 1996. (Answer to SOR at 2; GX 2 at 5.) As of the date of the hearing, the recoupment was continuing, although the amount had been reduced to 40% of his retired pay. The recoupment will be completed in July 2012. (Tr. 54.)

The combination of involuntary retirement, recoupment of separation pay, and the loss of real estate commissions reduced Applicant's monthly income to less than \$1,000. He used his investments to make his mortgage payments through 2008, but in 2009 he fell behind. He attempted a short sale in early 2009, but the lender for the first mortgage refused to accept an offer of \$400,000 to satisfy the \$420,000 balance due. At that point, Applicant decided to let the house go to foreclosure. (Tr. 28-37.)

Applicant's credit reported dated March 17, 2011, reflected that foreclosure had been started on the first mortgage, with a balance of \$401,000, and the second mortgage, with a balance of \$163,000, had been transferred or sold. (GX 4 at 3.) In a response to DOHA interrogatories in October 2010, Applicant reported that the home had been sold in March 2010. (GX 2 at 1.) After the hearing, he submitted evidence that the home had been listed for \$414,500, reduced to \$375,000, and sold for \$375,000. (AX D at 4.)

Although the property is located in a "recourse" state that allows deficiency judgments, there is no evidence that the lenders have initiated action to collect a deficiency from Applicant. Applicant testified at the hearing that he had not received any documentation reflecting cancellation of the debt from the first or second mortgages. (Tr. 56-57.) He testified that he received collection notices from the current holder of the second mortgage, but he had not contacted the creditor since the foreclosure. (Tr. 61.) Thus, the debts arising from the deficiencies on the two mortgages after foreclosure have not been resolved.

After his retirement, Applicant encountered state tax problems. While on active duty, he was a legal resident of a state with no income tax and thus paid no state taxes even though he was stationed in a state with an income tax. He continued to reside in the income-tax state after he retired, and he was assessed with state taxes for all of 2008. After some negotiation, the state agreed that he was liable only for the partial year after his retirement. He knew he was required to file a state tax return in 2009, but he did not do so "because of all the things [he] was going through." As of the date of the hearing, he had not filed his state tax returns for 2008 and 2009, but he had filed his 2010 return. (Tr. 65-68.) In his post-hearing submission, he stated that he had made three monthly \$200 payments to the state, pending final resolution of his tax debt, if any.

However, he did not submit documentation of any payments. According to his computations, he owes the state \$1,521 for tax year 2009 and \$1,505 for tax year 2010. As of the date of his post-hearing submission, he had not paid his 2010 taxes. (AX E.) The SOR does not allege failure to file returns or pay taxes.

Applicant submitted a personal financial statement (PFS) in response to October 2010 interrogatories. It reflects that his net monthly income is \$6,580; his expenses are about \$3,000; and his debt payments are about \$1,777, leaving a net remainder of about \$1,803. (GX 2 at 4.) At the hearing, he submitted an updated PFS reflecting net monthly income of \$6,900, expenses of \$2,800, and debt payments of \$1,787 (not including the two defaulted mortgages or any state tax liability), leaving a net remainder of about \$2,313. (AX C.)

The debt payments reflected on the first PFS include two credit cards with balances of \$19,000 and \$15,000, and a line of credit with a balance of \$14,000. The second PFS reflects the same two credit card accounts and the line of credit, but it reflects that the \$15,000 credit card balance has been reduced to \$13,000. Applicant testified that during his unemployment he contacted the credit card issuers and renegotiated the interest rates to make the payments more affordable. (Tr. 36.) Neither PFS reflects any payments on the defaulted mortgages or his state tax liability.

Except for the defaulted mortgages and his state income taxes, Applicant is current on all his obligations. He has no car payments, and most of the charge accounts and credit card accounts reflected on his credit report have zero balances. (GX 4.)

Applicant's performance appraisal for the period ending in April 2011 describes his performance as "outstanding." His overall numerical rating was a "4" on a five-point scale, with "5" being the highest rating. (AX B.) His direct supervisor submitted a letter describing him as "a person of high moral character," very diligent in maintaining physical and information security, dedicated, patriotic, and capable. (AX A.)

## **Policies**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative

judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## **Analysis**

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

The SOR alleges two delinquent mortgages with balances of \$401,000 and \$163,000. The concern under this guideline 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.

Applicant's testimony and his credit reports establish that he defaulted on the first and second mortgages on his home, that the holder of the first mortgage foreclosed on the property, and that the proceeds of the foreclosure sale were inadequate to satisfy the balances due. The evidence establishes two disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and AG ¶ 19(c) ("a history of not meeting financial obligations").

The record also reflects that Applicant failed to timely file state income tax returns for 2008 through 2010, implicating AG ¶ 19(g) ("failure to file annual Federal, state, or local income tax returns as required . . ."). This conduct was not alleged in the SOR, and thus may not be an independent basis for denying a clearance. However, conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006). I have considered Applicant's failure to timely file his state income tax returns for these limited purposes.

Security concerns based on financial problems can be mitigated by showing that "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." AG ¶ 20(a). Applicant's defaults on his mortgage obligations were recent and did not occur under circumstances making them unlikely to recur. They involved a single transaction, *i.e.* the purchase of a home in 2005, and are arguably infrequent. However, the delinquencies occurred as a result of several events. Applicant purchased the home with 100% financing, using two adjustable-rate mortgages, increased his indebtedness by refinancing the home, used his \$60,000 in equity to satisfy other financial obligations, and then failed to make payments on the two mortgages. I conclude that AG ¶ 20(a) is not established.

Security concerns under this guideline also can be mitigated by showing that "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." AG ¶ 20(b). Both prongs, *i.e.*, conditions beyond the person's control and responsible conduct, must be established.

Applicant's marital breakup, involuntary retirement from the Navy, subsequent period of unemployment, and the downturn in the real estate market were conditions beyond his control. He took several responsible steps, including renegotiating his credit card debts and attempting a short sale of his home. However, he did not act responsibly after the foreclosure, because he has done nothing to resolve the deficiencies on the two mortgages. Thus, I conclude that AG ¶ 20(b) is not fully established.

Security concerns under this guideline also can be mitigated by showing that "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." AG ¶ 20(c). This mitigating condition is not applicable because Applicant has not sought or received financial counseling and the problem is not being resolved.

Security concerns under this guideline also can be mitigated by showing that "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." AG ¶ 20(d). Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at \*4 (App. Bd. Oct. 12, 1999). An applicant is not required, as a matter of law, to establish resolution of every debt alleged in the SOR. An applicant need only establish a plan to resolve financial problems and take significant actions to implement the plan. There is no requirement that an applicant make payments on all delinquent debts simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008).

Applicant has reacted passively to the foreclosure. His credit card debt is under control, and his net monthly remainder after paying all his obligations is significant, but he has not contacted the mortgagees or their successors or taken any steps to resolve the deficiencies remaining on the loans. I conclude that AG ¶ 20(d) is not established.

Security concerns under this guideline also can be mitigated by showing "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." AG ¶ 20(e). This mitigating condition is not established because Applicant has admitted that the mortgage debts are unresolved but has taken no action to resolve them.

### **Whole-Person Concept**

Under the whole-person concept, an 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. An 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. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a well-educated, mature, intelligent adult. He has served his country, both in and out of uniform, for many years. He held a security clearance for many years, apparently without incident. He was candid, sincere, and remorseful at the hearing. On the other hand, he exercised bad judgment by overextending himself to purchase a home. He gambled on the housing market, while he still had two children in college and his future was uncertain. His passive reaction to the foreclosure is troubling. His failure to timely file state tax returns, while not alleged, indicates that he still is not conducting his personal affairs with the sense of duty and obligation required of persons entrusted with a security clearance.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on financial considerations. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations)     **AGAINST APPLICANT**

Subparagraphs 1.a-1.b:   **Against Applicant**

### **Conclusion**

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman  
Administrative Judge