



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 10-00327

**Appearances**

For Government: Melvin A. Howry, Department Counsel  
For Applicant: Joseph Testan, Attorney At Law

January 28, 2011

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**Decision**

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LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on August 3, 2009. (Government Exhibit 1.) On July 8, 2010, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, (as amended), issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR on August 16, 2010, and he requested an administrative hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on October 14, 2010. A notice of hearing was issued on October 19, 2010, and the hearing was scheduled for November 23, 2010. At the hearing the Government presented six exhibits, referred to as Government Exhibits 1 through 6. The Applicant called two witnesses and presented fifteen exhibits, referred to as Applicant's Exhibits A through O. He also testified on his own behalf. The official transcript (Tr.) was received on December 3, 2010. Based upon a review of the case

file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

## **REQUEST FOR ADMINISTRATIVE NOTICE**

Applicant's Counsel requested that I take administrative notice of the Nevada Revised Statute, Chapter 40.455 concerning Deficiency Judgments. The Government had no objection. (Tr. p. 36). The request and the attached documents were not admitted into evidence but were included in the record. The facts administratively noticed are set out in the Findings of Fact, below.

## **FINDINGS OF FACT**

The Applicant is 44 years old and married with four children. He is employed with a defense contractor as a Principal Software Engineer and is seeking to obtain a security clearance in connection with this employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline F - Financial Considerations) The Government alleges that the Applicant is ineligible for clearance because he is financially overextended and at risk of having to engage in illegal acts to generate funds.

During the housing boom, in late December 2005 or early 2006, the Applicant invested in real estate and purchased two rental properties. He did so in hopes to pay his children's college tuition and provide for a more comfortable retirement. At the time, he thought they were prudent investments. He rented the properties and was able to cover the mortgage payments. In late 2008, when the housing market collapsed, he lost his renters, and did not have the income to support the mortgages. Initially he tried to attract other renters by fixing up the property, but was unsuccessful. (Applicant's Exhibit G.) He then tried to short sale one of the properties, but there were no offers. (Applicant's Exhibit H.) He finally made the decision to let it be foreclosed upon in April 2009.

At the time of the foreclosure, the Applicant was indebted on the loan to a lender holding the first mortgage in the amount of \$267,000.00, and to the lender holding the second mortgage in the amount of \$67,000.00. (Government Exhibits 2, 3, 4 and 5.) The Applicant contacted the original lender who held the first trust deed on the property, and the lender who was assigned, purchased or was transferred services, and was informed that there was no outstanding deficiency on the foreclosed property. (Applicant's Exhibit J). He has been notified of no deficiency judgments or lawsuits. The holder of the second trust deed settled with the Applicant for \$7,000.00 and he has no further liability. Applicant's tax accountant indicates that the resulting gain on the

foreclosed property was completely offset by the realization of the accumulated tax losses from the rental property. (Applicant's Exhibit N.)

The Applicant still owns the second rental property in question. He was delinquent on the loan, but he has since brought it current. (Applicant's Exhibit E). Presently, he is trying to short sale the property, but only if it is a full settlement of the debt. (Applicant's Exhibit F.) If he is unsuccessful, he will hold on to the property and rent it. He is now in a position to make the monthly mortgage payments. He has settled the second loan on this property for the amount of \$4,946.15. (Applicant's Exhibits C and D.)

The Applicant is current with all of his other monthly expenses and has never had trouble paying his bills. He has no intentions of ever investing in any rental properties again.

Testimony from two witnesses who have known the Applicant both professionally and personally attest to his good judgment, reliability, honesty and trustworthiness. (Tr. pp. 43-46 and 52-55.)

Applicant's performance appraisals for 2007, 2008 and 2009 reflect that he either meets or exceeds the job requirements. (Applicant's Exhibit B.)

Letters of recommendation from professional associates, including his front line manager and section managers, coworkers, friends, and pastor of the Applicant attest to his reliability, trustworthiness and honesty. He is described as a man of great integrity, who is extremely dedicated to his work. He is a great technical engineer who is an asset to the company and highly recommended for a position of trust. (Applicant's Exhibit A.)

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

### Guideline F (Financial Considerations)

18. *The Concern.* 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.

Conditions that could raise a security concern:

19.(a) inability or unwillingness to satisfy debts; and,

19.(c) a history of not meeting financial obligation.

Conditions that could mitigate security concerns:

20.(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;

20.(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,

20.(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

a. The nature, extent, and seriousness of the conduct and surrounding circumstances;

b. The circumstances surrounding the conduct, to include knowledgeable participation;

c. The frequency and recency of the conduct;

d. The individual's age and maturity at the time of the conduct;

e. The extent to which participation is voluntary;

f. The presence or absence of rehabilitation and other permanent behavior changes;

g. The motivation for the conduct;

h. The potential for pressure, coercion, exploitation or duress; and

i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question,

posed in Section 2 of Executive Order 10865, of whether it is “clearly consistent with the national interest” to grant an Applicant’s request for access to classified information.

The DoD Directive states, “The adjudicative process is an examination of a sufficient period of a person’s life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination.” The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, “Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned.”

## **CONCLUSIONS**

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in instances of financial irresponsibility, which demonstrates poor judgment or unreliability.

It is the Government’s responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant’s conduct and the holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government’s case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has been financially irresponsible (Guideline F). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant’s conduct, I conclude there is a nexus or connection with his security clearance eligibility.

The evidence shows that circumstances largely beyond the Applicant’s control, namely, the downturn in the real estate market, caused his financial difficulties. It was unforeseeable that the Applicant would have problems finding tenants for his rental properties and when he did, he acted responsibly and with integrity under the circumstances. In regard to the foreclosed upon property, the Applicant first tried to

attract other tenants, then tried to short sale the property, and was ultimately forced into foreclosure. According to the law of the state in which the property is located, he no longer has any liability or any deficiency or action by the holder of the first mortgage, and he has settled his liability to the lender on the second mortgage. He did the best he could under the circumstances. Turning to the property he still owns, he is current on the first mortgage, and has settled the amount owed to the holder of the second mortgage. He has done as much as is humanly possible to resolve his financial problems. The Applicant has learned a harsh lesson from his unsuccessful real estate investments and has no intentions to continue this involvement.

Under the particular circumstance of this case, the Applicant has made a good faith effort to resolve his past due indebtedness. He has a stellar record demonstrating that he has always paid his bills on time. But for these two investments, his record is unblemished. He understands the importance of paying his bills on time and living within his means. He also knows that he must remain fiscally responsible in the future. There is sufficient evidence of financial rehabilitation. The Applicant has demonstrated that he can properly handle his financial affairs and that he is fiscally responsible. Considering all of the evidence, the Applicant has introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case.

Under Guideline F (Financial Considerations), Disqualifying Conditions 19.(a) *inability or unwillingness to satisfy debts*; and 19.(c) *a history of not meeting financial obligation* apply. However, Mitigating Conditions 20.(b) *the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation)*, and *the individual acted responsibly under the circumstances*, 20.(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, 20.(d) *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts* also apply. Accordingly, I find for the Applicant under Guideline F (Financial Considerations).

I have also considered the "whole-person concept" in evaluating the Applicant's eligibility for access to classified information. Under the particular facts of this case, the totality of the conduct set forth above, when viewed under all of the guidelines as a whole, support a whole person assessment of good judgement, trustworthiness, reliability, candor, and a willingness to comply with rules and regulations, and/or other characteristics indicating that the person may properly safeguard classified information.

I have considered all of the evidence presented, including the Applicant's favorable work history. They mitigate the negative effects of his financial indebtedness and the effects that it can have on his ability to safeguard classified information. On balance, it is concluded that the Applicant has overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the SOR.

## **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: For the Applicant.  
Subpara. 1.a.: For the Applicant.  
Subpara. 1.b.: For the Applicant.

## **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson  
Administrative Judge