



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



In the matter of:)	
)	
)	ISCR Case No. 10-00723
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace Garcia, Esquire, Department Counsel
For Applicant: *Pro se*

May 16, 2011

Decision

HENRY, Mary E., Administrative Judge:

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

Statement of the Case

Applicant signed an Electronic Questionnaire for Investigations Processing (e-QIP) version of a security clearance application (SF-86) on January 26, 2009. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on July 26, 2010, detailing security concerns under Guideline F, Financial Considerations, 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*

For Determining Eligibility for Access to Classified Information (AG) implemented on September 1, 2006.

Applicant received the SOR on July 28, 2010. He answered the SOR in writing on August 10, 2010 and requested a hearing before an administrative judge. DOHA received the request on August 16, 2010, and Department Counsel was prepared to proceed on January 24, 2011. I received the case assignment on February 1, 2011. DOHA issued a notice of hearing on February 23, 2011, and I convened the hearing as scheduled on March 8, 2011. The Government offered exhibits marked as GE 1 through GE 11, which were received and admitted into evidence without objection. Applicant testified. He did not submit any exhibits. DOHA received the hearing transcript (Tr.) on March 14, 2011. I held the record open until April 8, 2011, for Applicant to submit additional matters. Applicant did not submit any additional documents. The record closed on April 8, 2011.

Procedural Rulings

Notice

Applicant received the hearing notice less than 15 days before the hearing. I advised Applicant of his right under ¶ E3.1.8 of the Directive to receive the notice 15 days before the hearing. Applicant affirmatively waived his right to the 15-day notice. (Tr. 9.)

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegation in ¶ 1.c of the SOR. His admission is incorporated herein as a finding of fact. He denied the factual allegations in ¶¶ 1.a and 1.b of the SOR.¹ After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 37 years old, works as a tester for a Department of Defense contractor. He began this job in September 2008.²

¹When SOR allegations are controverted, the government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). 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. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

²GE 1; Tr. 20.

Applicant was born in Mexico and immigrated to the United States in 1990. He completed his general equivalency diploma (GED), and he became a U.S. citizen in 2008. He married in 1994. He and his wife have four children, who are 16, 13 (twins), and 10.³

From 1997 until 2006, Applicant worked in the restaurant industry as a cook. In 2006, he began working as a realtor. He earned a good income, which led to a decision to purchase an investment house in 2006. He purchased a house for approximately \$169,000, and his monthly mortgage payment was \$1,800 a month. He rented the house until late 2007, when his tenants notified him that they could no longer pay the rent and moved. He was unable to find new tenants who could pay the \$1,400 a month rent.⁴

About this same time, Applicant's income started decreasing quickly because real estate sales seriously declined. As a result, he stopped making his mortgage payment on the rental property. With the mortgagee's agreement, Applicant tried to sell his house through a short sale, but was unsuccessful. The mortgagee foreclosed on his loan in 2008, took possession of the house, and sold the house. The mortgagee has not provided Applicant with any documents, which indicate the sales price of the property, the total amount of his debt prior to the sale of the property, and any balance owed following the sale of the property. Applicant has not received any documents from the court, indicating a judicial foreclosure sale. The only source of information on this property is Applicant's credit reports, which reflect a debt of \$240,000, (This is substantially higher than his mortgage), and a past-due amount of \$28,970. The December 9, 2009 and February 2, 2010 credit reports contain a credit profile on Applicant. Each profile identifies his mortgagee and indicates a past-due balance of \$28,970 in September 2008. (GE 8, p. 10; GE 9, p. 5) The February 20, 2009 credit report indicates that the mortgagee reclaimed this property in December 2008 to settle the defaulted mortgage. Applicant has not been in contact with the mortgagee since it foreclosed on his property. He attempted to locate information on the mortgagee on the internet, but could not find any contact information. He did not know that the credit reports contained an address and telephone number for the mortgagee. He seemed reluctant to contact this creditor, since he had not received any letters from the mortgagee, advising that he owed money on his mortgage.⁵

Applicant attempted to find real estate clients during 2008, but with the decline in the housing market, he could not. He collected \$240 a week in unemployment benefits because he did not earn any income as a realtor. With his months of unemployment and lost income, he fell behind in paying his bills. Once he returned to work, he worked towards the resolution of his outstanding debts. He resolved \$6,656 past-due credit card

³GE 1; Tr. 19.

⁴GE 2; Tr. 21, 49-51.

⁵GE 4-GE 11; Tr. 31-34.

debt and a \$561 credit card debt. He recently negotiated a settlement on two past-due debts in his wife's name. He also negotiated a debt reduction plan on a credit card, in which the creditor agreed not to charge him interest on his account provided he paid \$82 a month on his debt. He is paying this debt monthly.⁶

Applicant paid the August 2008 \$295 medical bill in SOR allegation 1.b. He indicated that he established a payment plan for the September 2008 \$578 medical bill in SOR allegation 1.a. He stated that he paid this bill, which is not listed on the January 24, 2011 credit report, but did not provide documentation verifying his payment. Given his history of resolving past-due debts, I find this debt has been paid.⁷

Applicant indicated that his household income had increased since he prepared his personal financial statement in March 2010. He estimated his current net monthly income at \$2,400-\$2,500 and his wife's current net monthly income at \$1,800. His net monthly income has increased by approximately \$400 to \$500. Certain monthly expenses have declined because he cancelled his satellite dish and cable services. He did some repairs in his house, which reduced his electric bill by \$100 a month. One small loan was paid in full in March 2011 and two other monthly credit card payments will be resolved by summer. His monthly expenses total approximately \$2,700.⁸ A review of the eight credit reports of record revealed that Applicant pays his bills as required and did so before the economic downturn. The above mortgage foreclosure debt is the only major financial issue for him.⁹

Applicant has not obtained financial counseling, nor has he retained the services of a debt consolidation firm. He chose to pay his past-due debts on his own. Since beginning his current position, his finances have improved and enabled him to pay his debts.¹⁰

State Anti-Deficiency Law

The state in which Applicant resides and purchased his rental property has two anti-deficiency statutes: State Law § 33-729(A) and § 33-814(G).

State law § 33-729(A) provides:

⁶GE 2; GE 3; Tr. 30, 37-41.

⁷GE 11; Tr. 23-24.

⁸I requested Applicant to provide updated information on his income and expenses, but he did not submit this information. Tr. 60-61.

⁹GE 4-GE 11.

¹⁰Tr. 36.

If a mortgage is given to secure the payment of the balance of the purchase price, or to secure a loan to pay all or part of the purchase price, of a parcel of real property of two and one-half acres or less which is limited to and utilized for either a single one-family or single two-family dwelling. . . [there shall be no deficiency judgment]

And State law § 33-814(G) provides:

If trust property of two and one-half acres or less which is limited to and utilized for either a single one-family or single two-family dwelling is sold pursuant to the trustee's power of sale, no action may be maintained to recover any difference between the amount obtained by sale and the amount of the indebtedness and interest, costs and expenses.

In 804 P.2d 1310, the State's Court of Appeals stated:

. . . Assuming that the deed of trust falls within one of the anti-deficiency statutes, an action for a deficiency is prohibited after a trustee's sale on any deed of trust and after judicial foreclosure on purchase money deed of trust. See [State law] §§ 33-814(G) and 33-729(a). If a lender holds a non-purchase money deed of trust, he may recover a deficiency if he does so through an action for judicial foreclosure because [State law] §33-729(A) applies only to purchase money liens. In this latter case, of course, the debtor receives the protections of judicial foreclosure, including a statutory redemption right.

Under the State's Anti-Deficiency statute, a homeowner and an investor who obtained a purchase money loan on a property which is less than 2.5 acres and is utilized for either single one-family or a single two-family dwelling, is protected from a mortgagor or lender obtaining a deficiency judgment after foreclosure of the property. See 804 P.2d 1310. If a property is sold under a trust deed pursuant to §33-807, an action to recover a deficiency judgment must be filed within 90 days after the date of sale of the trust property. See § 33-814(A) In construing § 33-729(A), the appellate court held that this provisions barred the lender from waiving the security in property and sue directly on the note. See 804 P.2d 1310.¹¹

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

¹¹As of September 20, 2009, state law requires the trustor under a deed of trust to "utilize" the property for six consecutive months and provide a certificate of occupancy. This amendment to the law took effect months after the foreclosure on Applicant's property.

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; and
- (c) a history of not meeting financial obligations.

Appellant developed financial problems when the economy and real estate market significantly declined. As a result of his drastic income decline, he could not rent his investment house; he could not sell it; and he could not pay the monthly mortgage payment. The mortgagor foreclosed on the house. These two disqualifying conditions apply.

The Financial Considerations guideline also includes examples of conditions that may 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's financial problems arose when the economy seriously declined in 2007 and 2008, and his work as a realtor evaporated, causing a significant loss of income for him. While his wife worked and he collected unemployment, he lacked sufficient income to pay all his bills, resulting in past-due debts for him. Since starting his current job, he has paid or settled his debts without the assistance of a financial

counselor. His current finances are solid; his monthly bills are paid; and his old debts paid.

The only issue of major concern is the foreclosure on his rental house and any unpaid balance. Two credit reports reflect that in September 2008, the mortgage company listed a past-due balance of \$28,970. In December 2008, the mortgage company redeemed the mortgage collateral, his investment house, which has been sold. The mortgage company has never notified Applicant that he owed additional money after the sale of the house, even though the credit reports continue to list the same past-due amount of \$28,970. The credit reports do not identify this amount as a deficiency after the sale of his property. The Government argues that the continued past-due amount is a deficiency owed by Applicant, and based on the Government's assertion, not information he has received from the mortgage company, Applicant has agreed that there is a deficiency on this mortgage loan. Given that before the mortgagee's foreclosure on Applicant investment property in December 2008, the credit reports clearly list a past-due amount of \$28,970 in September 2008, the continued listing of this past-due amount on the credit reports is not evidence that this amount is a deficiency balance on the mortgage debt. A deficiency balance occurs after the sale of the property, not before the foreclosure and sale of the property. The information on the credit reports do not establish that the \$28,970 is a deficiency balance owed by Applicant, only that as of September 2008, his mortgage was past-due in this amount.

Applicant's property is located in a State which has two anti-deficiency statutes. Under state law, a mortgagee cannot collect any balance owed on a mortgage after a trust's sale of the property or after a judicial foreclosure on the property. The statute includes investment property. It is unknown if the Applicant's rental property proceeded through a trustee's sale or a judicial foreclosure. Given that the law allows Applicant a right of redemption at the judicial foreclosure, one can reasonably assume that Applicant must receive notice of such a sale before it occurs. Applicant never received any documents from the court about the sale of his property. The December 2009 credit report indicates that the mortgagee redeemed the rental property and a foreclosure took place. Even if the foreclosure occurred under §33-807, the mortgagee had 90 days from the date of sale to file an action for a deficiency judgment. The record contains no evidence that the mortgagee filed an action for a deficiency judgment against Applicant. Thus, under state law and the facts of this case, Applicant does not owe the mortgagee any additional money following foreclosure. This conclusion is supported by the mortgagee's redemption of Applicant's rental property and by the lack of action by the mortgagee against Applicant to collect any additional debt from Applicant. Applicant has mitigated the security concerns under AG ¶¶ 20(b), 20(c), and 20(d).

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.

The evidence in support of granting a security clearance to Applicant under the whole-person concept is more substantial than the evidence in support of denial. Applicant paid his bills and supported his family for many years. In 2006, he started working as a realtor. He earned a good income, as the housing market was extremely active. With his income and knowledge, he decided to purchase an investment house, which he did in 2006. He rented the house and used the rental income to pay the mortgage. In late 2007, his tenant moved because they could no longer afford the rent. He unsuccessfully tried to rent the house. When he could not, he tried to sell the house through a short sale, which failed. At the same time, his income declined significantly because the housing market no longer provided an income for him. He fell behind in his bills and stopped making the mortgage payments on his rental house. In December 2008, the mortgage company assumed ownership of his investment house during the foreclosure process and later sold it. The mortgage company has never notified Applicant that he has a deficiency balance after it sold the property nor has it obtained a deficiency judgment against Applicant. Under state law, Applicant does not owe any money on his defaulted mortgage.

Applicant returned to work full time in September 2008. Since then, his income has improved as has his ability to pay his past-due debts. He has paid or resolve all his debts arising from his period of underemployment and unemployment. He does not live extravagantly or beyond his financial means. He pays his bills and supports his family. The issue is not simply whether all his debts are paid: it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. His past financial problems are insufficient to raise security concerns because, except for the economic downturn, Applicant has always managed his income and expenses. See AG ¶ 2(a)(1).)

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant 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 F:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant

Conclusion

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

MARY E. HENRY
Administrative Judge