



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



In the matter of:)
)
) ISCR Case No. 10-09734
)
Applicant for Security Clearance)

Appearances

For Government: Philip Katauskas, Esquire, Department Counsel
For Applicant: Marvin Liss, Esquire.

November 21, 2011

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the Government’s security concerns under Guideline F, Financial Considerations. Applicant’s eligibility for a security clearance is granted.

On July 13, 201, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline F. 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 (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on August 23, 201, and requested a hearing before an administrative judge. The case was assigned to me on October 6, 2011. DOHA issued a Notice of Hearing on October 20, 201. I convened the hearing as scheduled on November 7, 2011. Due to the unavailability of Applicant’s attorney, the case was postponed until November 8, 2011. The Government offered Exhibits (GE) 1 through 7.

Applicant did not object and they were admitted. Applicant testified and offered Exhibit (AE) A, which was admitted without objections. DOHA received the hearing transcript (Tr.) on November 14, 2011.

Findings of Fact

Applicant admitted all of the allegations in SOR except ¶¶ 1.e and 1.i. I have incorporated his admissions into my findings of fact. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 44 years old. He earned his bachelor's degree in 1990 and has taken some post-graduate courses. His first marriage ended in divorce in 2001. There were no children from the marriage. He has eight-year-old twins from a relationship. He has shared custody of the children with their mother. She has primary custody. He remarried in May 2011. Applicant has held a security clearance since 2003, without incident.¹

Applicant lived with the mother of his children and they shared a residence until approximately 2005 when he moved out. Applicant and the mother owned the house jointly. She remained in the house but was not willing to help pay the mortgage. Applicant continued to make the \$2,900 monthly payments, but also had to pay his living expenses. He used some of his savings to make the mortgage payments. In addition to his own car payments, he was also paying \$700 monthly payments for the lease on the mother's car because she needed the transportation for the children. The mother agreed to buy out Applicant's interest in the house, and in late 2005 provided him \$40,000 to cover the equity he had in the house. Applicant used approximately \$34,000 for a down payment on a preconstruction condominium. It was to be ready in the middle of 2006. It was delayed and was not completed and delivered until 2007.²

From July 2004 to September 2005 Applicant was living with a friend and helped pay expenses, but did not pay rent. In September 2005, he leased an apartment, and his rent and utilities were about \$2,000. The apartment was unfurnished and he had to buy furniture and other household items. He needed an appropriate home for his children to visit. Applicant remained in this apartment until February 2006 when he moved back in with his friend. He did not pay rent.³

Applicant was not paying child support from about September 2005 to January 2006. He was paying the \$2,900 mortgage payment where his children were living until he was bought out. In January 2006, Applicant was ordered to pay \$1,700 a month for child support. In June 2006, Applicant returned the mother's leased car, and the

¹ Tr. 37-40, 156.

² Tr. 41, 46-55, 59-62.

³ Tr. 58-79.

mileage was over the limit. He owed an extra \$5,000 for the car. He rolled the amount owed into a new leased car for himself.⁴

In February 2006, Applicant was required to pay additional fees for the price increases and upgrades on the condo he had paid a down payment for that was still being constructed. He continued to meet his monthly expenses and did not accumulate delinquent debts. When the condo was nearing completion, by the terms of the contract, he was required to apply for a mortgage. At this point, the real estate market was declining. The purchase price of the condo was about \$660,000. He looked into getting out of the contract, but if Applicant withdrew from the contract he would lose his down payment and other money he already paid, and he would be responsible for the deficiency of what he had agreed to pay and the amount it eventually sold for. He went through with the contract and completed the sale in January 2007. He was required to pay additional money for closing and other settlement fees. He estimated the amount to be about \$31,000. His mortgage was for \$590,000. He had to obtain two mortgages so he would not have to pay mortgage insurance because of the amount of the loan. His combined mortgage payment was \$4,400. He also was required to pay \$650 in monthly condo fees. Appellant's parents gave him \$15,000 to help pay the fees. He needed to buy additional furnishings for the children's room. He obtained a home equity loan which replaced the \$120,000 second mortgage. The home equity loan was for \$168,000. He used the additional money to satisfy some credit card debt and pay for a car lease. At this point, Applicant was still able to meet his obligations.⁵

In 2008, Applicant's cousin asked him for financial assistance. His cousin had lost his job, and he had a family with six children. Applicant agreed to sign a lease in his name for a single family rental home. His cousin was to pay Applicant the rent and then Applicant would pay the landlord. The amount of the rent was \$1,350. He made sure his cousin understood that Applicant had other financial obligations, and he needed his cousin to pay the rent. His cousin paid the rent for three or four months and then stopped. Applicant spoke to his cousin, but to no avail. Applicant maintained the payments so he would not default on the lease. He contacted the landlord, but was unable to negotiate an agreement. Applicant paid the rent throughout the terms of the lease until the landlord forgave the last month's rent. His cousin remained in the house, but failed to pay the rent or move. Applicant threatened legal action to remove his cousin from the premises. This event severely affected Applicant's finances.⁶

Applicant and his girlfriend had been living together at the condo since January 2007. She had been contributing about \$300-\$500 toward expenses. She became upset about his cousin and how Applicant was handling the situation, so she decided to move out in December 2008. Applicant had been helping her with her car payments which were \$1,000 a month. He provided her about \$800 a month during 2008 until

⁴ Tr. 43-55.

⁵ Tr. 74, 79-93, 128-129.

⁶ Tr. 93-99, 105.

about February or March 2009. He was hoping to reconcile with her, which they eventually did and married.⁷

Applicant used his \$20,000 tax refund he received in March or April 2008 for an investment. The investment scheme was fraudulent and Applicant secured a judgment against the perpetrator. The judgment has not been satisfied. Applicant lost the \$20,000.⁸ Applicant secured a \$20,000 signature loan to help pay his debts.⁹

In 2008, Applicant decided to pursue a real estate license. He bought educational material and took classes. He financed this endeavor with credit cards. It did not come to fruition.¹⁰

With all of the events that took place, Applicant had difficulty paying his mortgage and other debts. Realizing his debts were becoming overwhelming, he sought legal advice and decided in May 2010 to file for Chapter 13 bankruptcy. His plan was approved, which calls for the full satisfaction of arrearages on the first mortgage on his condo (SOR ¶1.j). Because the condo is worth less than his mortgage the law provides for the overage to be written off, subject to Applicant completing the Chapter 13 plan. That means the second mortgage, that is a home equity loan, is removed from the condo. Its removal is subject to Applicant successfully completing the Chapter 13 plan. This is the debt in SOR ¶1.k. If the plan is dismissed or changed to a Chapter 7, Applicant will be liable for the home equity debt. Applicant is paying, through the bankruptcy trustee, those creditors who filed a proof of claim. The creditor in SOR ¶1.c failed to file a timely claim and the trustee dismissed it. Applicant is no longer legally responsible for this debt.¹¹

Applicant has a 60-month payment plan. During the first five months he was required to pay \$1,250.89. After that he is required to pay \$2,000 a month for 55 months. All payments are made to the trustee and the trustee distributes the payments to the creditors who filed claims. Applicant attempted to contact the creditor in SOR ¶1.i but never received a response. The debt in SOR ¶1.e (\$37) was paid in May 2011. The remaining debts alleged in the SOR are part of the Chapter 13 plan, except the debt in SOR ¶1.c for which the creditor did not file a timely claim.¹²

⁷ Tr. 99-105.

⁸ Tr. 107-111; GE 5.

⁹ Tr. 106.

¹⁰ *Id.*

¹¹ Tr. 40; AE A.

¹² Tr. 112-124.

Applicant's girlfriend moved back in with him and they were married in May 2011. Since filing for bankruptcy, Applicant has not incurred any additional credit card or delinquent debts. He and his wife maintain separate accounts and she contributes about \$1,000 toward the household expenses. She also has a part-time job. Applicant admitted he owed the other consumer debts on the SOR. Some of them were for cash advances so he could pay his bills.¹³

Applicant made numerous attempts to modify his mortgage loan with the lender from March 2009 to December 2009. The lender repeatedly lost his paperwork. They led him to believe they would modify the loan. While still leading him to believe his modification was imminent, the lender notified him that they were going to foreclose on his home in two days. If he tried to sell the condo, it was undervalued, and he would not receive enough proceeds to satisfy his first mortgage. He had reached an agreement for a loan modification on his second loan, but it was dependent on him getting the first mortgage modified.¹⁴

Applicant contacted a credit counseling agency to assist him. Knowing he needed to have a place for his sons, he decided to file Chapter 13 bankruptcy. His intention is to satisfy the plan by making consistent monthly payments. All of his other obligations are current. Part of the plan is that he must remit any income tax refund he receives to the trustee. The Chapter 13 stopped the foreclosure action. All of Applicant's debts are included in the plan as noted above. His payments are automatically deducted from his pay. His current finances are under control.¹⁵

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 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.

¹³ Tr. 130-139.

¹⁴ Tr. 143-151.

¹⁵ Tr. 151-156.

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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 and 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 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 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.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 19 and especially considered:

- (a) inability or unwillingness to satisfy debts; and

(c) a history of not meeting financial obligations.

Applicant had delinquent debts that were unpaid and unresolved for a period of time. I find there is sufficient evidence to raise these disqualifying conditions.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following 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.

Applicant has been addressing his financial obligations since May 2010 through a Chapter 13 bankruptcy plan. He has been making consistent payments. Because he is in the payment plan for the next four years, his debts are ongoing. I find mitigating condition AG ¶ 20(a) does not apply. In good faith, Applicant attempted to help his cousin who promised to pay the rent on a leased that was signed by Applicant. His cousin failed to abide by the agreement, and Applicant was forced to expend money he could not afford. Applicant also found himself contractually committed to purchase a condo after the real estate market was in a downturn. He was also swindled out of \$20,000. Although he obtained a judgment against the perpetrator it is unlikely he will receive any money from the judgment. These conditions were beyond Applicant's control. I find AG ¶ 20(b) applies because the conditions that resulted in the financial problems were largely beyond Applicant's control and he has acted responsibly under the circumstances in resolving them by filing for Chapter 13 bankruptcy and consistently making payments. I find Applicant's gesture in helping his girlfriend with her car lease payments because he was hoping to salvage his relationship with her was within his

control. Applicant is paying those creditors who filed a claim in his bankruptcy. He is living within his means and his finances are stable. I find his debts are being resolved and under control. Therefore, AG ¶¶ 20 (c) and 20 (d) apply.

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 the 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant experienced financial difficulty when the construction of his condo was delayed and the real estate market took a downturn. He had to find other living arrangements for a period of time after he moved from the house where his children live. He helped his cousin who had a large family and was unemployed by signing a lease for him. His cousin failed to reimburse Applicant for the monthly rent. This had a big financial impact on Applicant. He filed for bankruptcy in May 2010 and has a five-year repayment plan that he has consistently paid, and which is controlled by the bankruptcy trustee. Applicant has put his finances back in order and has many incentives to maintain the payment plan. I find Applicant has met his burden of persuasion and his finances are no longer a security concern. Overall, the record evidence leaves me with no 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 under the guideline for 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, Guideline F:

FOR APPLICANT

Subparagraphs 1.a-1.l:

For Applicant

Conclusion

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

Carol G. Ricciardello
Administrative Judge