



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



In the matter of:)	
)	
)	ISCR Case No. 10-02492
)	
Applicant for Security Clearance)	

Appearances

For Government: Fahryn Hoffman, Esquire, Department Counsel
For Applicant: *Pro se*

October 4, 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) on November 20, 2009. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on December 14, 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 February 9, 2011. He answered the SOR on February 22, 2011 and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on April 28, 2011. I received the case assignment on May 5, 2011. DOHA issued the first Notice of Hearing on May 17, 2011. I cancelled this hearing for workload considerations. DOHA issued a second Notice of Hearing on July 8, 2011, and I convened the hearing as scheduled on July 27, 2011. The Government offered exhibits marked as GE 1 through GE 6, which were received and admitted into evidence without objection. Applicant testified. He submitted exhibits marked as AE A through AE F, which were received and admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on August 11, 2011. I held the record open until August 11, 2011, for Applicant to submit additional matters. Applicant timely submitted AE G through AE K without objection. The record closed on August 11, 2011.

Procedural and Evidentiary Rulings

Notice

Applicant received the hearing notice on July 14, 2011, less than 15 days before the hearing. (Tr. 8.) 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. (*Id.*)

Findings of Fact

In his Answer to the SOR, Applicant denied the factual allegation in the SOR.¹ He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 34 years old, works as a systems engineer for a Department of Defense contractor. He began this employment as a college intern and has worked for his employer for 13 years. His performance evaluations reflect that he either met or exceeded his performance standards for the last two years. He has not had any problems with security issues or classified information.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; AE F; Tr. 18, 35.

Applicant graduated from college in 1999 with a Bachelor of Science degree in systems engineering. He married in 2003 and has one son, who is six years old. His wife worked as a job developer for the disabled until August 2011 and now works in social services.³

Applicant and his wife purchased their home for \$225,000 in 2003. They also own two cars, a 2001 Isuzu and a 2006 Audi. They have paid the loans in full on both cars. The credit reports of record indicate that they pay or have paid their credit cards and credit accounts in a timely manner, and many balances are fully paid.⁴

Applicant earns \$6,402 a month in gross income, and he receives \$3,472 a month in net income. He wife receives approximately \$2,100 a month in net income for a total net monthly household income of \$5,572.⁵ His monthly expenses total approximately \$4,559, including his mortgage of \$1,520, utilities of \$355, phones, cable, and internet of \$289, food of \$700, child care of \$500, gasoline of \$450, and miscellaneous expenses of \$600. He has a monthly remainder of \$1,041.⁶ His employer places funds from his earnings into a 401k account each payday. Applicant and his wife have separate savings accounts. He estimates that he has \$2,500 in his savings account. He does not know how much money his wife has in her savings account. They carry a positive balance in their joint checking account, and he has a positive balance in his checking account. He also has approximately \$7,000 to \$8,000 in a mutual fund.⁷

In 2006, after several years of discussion, Applicant decided to invest in the real estate market at the urging of several friends. These friends owned a rent-to-own business and a real estate business. They also had access to a mortgage investment business. Applicant conducted some investigation into his friends' businesses before he invested. In 2006, Applicant purchased three homes, one for \$185,000, one for \$190,000, and one for \$192,350. He financed these purchases for 100% of the purchase price with a first mortgage and a second mortgage. He provided some money towards the closing costs of each property.⁸

Applicant relied upon his friends' businesses to help with his real estate purchases and his investment plan. As his friends explained to him, an individual would

³GE 1; Tr. 18, 34.

⁴GE 5; GE 6; AE E; Tr.19-20, 33.

⁵He believes his wife increased her income with her new job, but since she did not begin her new job until after the hearing, this information is not available. Tr. 34.

⁶GE 4; AE D; AE E. Applicant provided a copy of three of his leave and earnings statements, which reflect a lower net pay than he listed in his budget and on his personal financial statement. Thus, his discretionary income is lower than he estimated. *Id.*

⁷*Id.*; Tr. 45-48, 62.

⁸AE I; AE J; AE K; Tr. 20, 37.

rent one of his houses for a year. The renter would agree to buy the house by a specific date in the future, generally within a year of signing the rental lease, and at a certain price. The renter in each house would pay the rent-to-own company between \$3,000 and \$5,000 at the time they signed the rental agreement, and this money would be used as earnest money towards the future purchase of the house. Finally, the renter agreed to vacate the property and forfeit the earnest money if the renter did not pay the rent, which was approximately \$1,300 a month. Likewise, if the renter did not purchase the property as agreed, the renter also forfeited the earnest money.⁹

In 2006, the rent-to-own company placed three renters in Applicant's three houses under the above agreement. During the first year he owned the properties, he believes each property had two renters because the first renters were evicted for nonpayment of rent. A year after his purchase of the three properties, Applicant realized that the rent-to-own company was placing unqualified renters into his rental properties. Because of the conduct of the rent-to-own company, in 2007, Applicant decided to rent his properties on his own. Initially, he rented the properties, but as the economy started to decline, his renters moved. By April 2008, he experienced difficulties renting his property. In addition, the rental income he received declined from the original amount he received, which increased his monthly costs for operating the rental properties.¹⁰

Applicant's mortgage payments on the rental properties averaged approximately \$1,500 a month, and he received \$1,300 a month in rent. Each month, he supplemented the cost of each property by \$200 for a total input of costs by him each month of \$600. He paid this expense with his own money and with his share of the earnest money (the rent-to-own company took 25% of the earnest money). By April 2008, Applicant could no longer afford the rental properties because he did not have steady, qualified tenants, and his rental income had reduced by \$300 a month on each property.¹¹

Applicant contacted his mortgage company to discuss his decision to sell the rental properties through a short sale.¹² The mortgage company advised that he could not short-sell the houses unless he was behind in his mortgage payments. A real estate agent confirmed this statement. Based on the statement of the mortgage company, the information from the real estate agent, and his increasing costs, he stopped making his payments on his mortgages for the rental properties by April 2008. In May 2008, he listed all three properties for sale. Two properties he listed for \$129,900, and one property he listed for \$135,000. He was unable to find a buyer for any of his rental properties. The mortgage company foreclosed on all three properties in November

⁹Tr. 21, 30-31, 40, 50-51.

¹⁰*Id.* 51-52, 54-55.

¹¹*Id.* 38, 40-41, 54-56.

¹²With the declining real estate sales market, he anticipated that he would receive less money than his purchase price.

2008. As a result of the foreclosure, the mortgage company considered all his first mortgages paid and two of the three second mortgages paid. The mortgage company charged off the remaining \$55,000 second mortgage, and the credit reports reflect a zero balance on this debt. Throughout this time, Applicant continued to pay the mortgage on his personal residence, which he still owns.¹³

Applicant and his wife believed that the foreclosure resolved all their financial issues related to the rental properties. During the security investigation, he learned that the \$55,000 second mortgage on one rental property was charged-off. Even with this information, he believed that the debt was resolved. In September 2010, Applicant's wife spoke with a person employed by the mortgage company about this debt and the other rental property mortgages. The mortgage company advised her that five of the six loans showed a zero balance and were closed. After further investigation, two employees of the mortgage company advised her that an error had occurred and that the \$55,000 debt had a zero balance and was closed. The mortgage company rejected her offer to work out a payment plan, indicating that no money was owed on the account.¹⁴

After receiving the SOR in February 2011, Applicant contacted a credit repair agency and a lawyer for assistance with resolving this one debt. The credit repair company told him that it worked with credit issues related to dollars and cents, not verbiage on his credit report. Because his credit report reflected a zero balance, the credit repair company could not help him take legal action against the mortgage company. A lawyer told his wife that he could not help them with this debt matter and with Applicant's security clearance.¹⁵

Since February 2011, Applicant has learned that "charge off" does not necessarily mean that he does not owe the money, as he previously thought. More recently, both he and his wife have tried to talk with the mortgage company about this charged-off debt. The mortgage company has refused to work with them on the grounds the debt is a zero balance debt, and thus, they do not owe the mortgage company any money.¹⁶

In 2009, the State Attorney General filed a civil complaint against the businesses with which Applicant worked to finance his real estate investment. The Attorney General alleged fraud by these individuals in their dealing with investors and rent-to-own buyers.

¹³GE 5; GE 6; AE I-AE-K; Tr. 22, 62-63.

¹⁴GE 3; GE 4; GE 6; AE H; Tr. 24-26, 42.

¹⁵Tr. 43-44.

¹⁶GE 3; GE 4; Tr. 29, 44-45.

In 2010, the State filed criminal charges against two owners of the rent-to-own business that worked with Applicant. The results of these cases are unknown.¹⁷

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.

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.

¹⁷AE A; AE B; Tr. 50, 58-59.

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 the following are potentially applicable:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Appellant developed significant financial problems after investing in real estate in 2006 because he was eventually unable to rent his properties and without the rent, he could not pay his rental property mortgages. One \$55,000 debt has not been resolved. These two disqualifying conditions apply.

The Financial Considerations guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 20(a) through 20(f), and the following 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; and

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

After much thought and some investigation, Applicant decided to invest in the real estate market in 2006. His investments turned sour when the economy declined, and he could no longer obtain sufficient rent to pay his rental property mortgages. He learned a valuable lesson because his credit has been harmed. There is little likelihood that he will make similar investments in the future. The economic downturn impacted his ability to rent his properties. When he realized the problems he had, he decided to sell the properties through a short-sale. He contacted the mortgage company, which told him he needed to default on his mortgages to sell his properties through a short-sale. He defaulted on his mortgages and unsuccessfully tried to sell his properties. Eventually, the mortgage company foreclosed on his rental properties and declared five of his six mortgages paid.

Applicant sought assistance from an attorney, a credit repair company, and the mortgage company to resolve his remaining debt. All declined to provide any help to him because his credit report reflected that the last remaining mortgage had a zero balance even though it is listed as a charge off. His wife offered to establish a payment plan with the mortgage company, but it declined because, from its perspective, Applicant does not owe it any money. Except for this one mortgage, Applicant pays all his bills in a timely manner and has money saved for the future. Applicant has mitigated the security concerns under Guideline F.

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.¹⁸ In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant always paid his bills, as shown on his credit reports. When the real estate market boomed, he decided to invest with a goal of developing income for his future. The economic boom times ended by 2008, and the real estate market declined sharply, leaving Applicant with serious financial problems because he could not rent his properties. Without the rental income, he could not pay his mortgages on his rental properties, as he lacked sufficient income. He realizes he made a mistake investing as he did in the real estate market. He did not fully understand the negative impact a declining economy or market could have, but he has learned this lesson. Except for his rental property mortgages, Applicant has always paid his debts and continues to live within his financial means.

At the time he bought the rental properties, Applicant believed he was making a sound investment, since the rental income paid much of the mortgage, and he could pay the remaining money due on the mortgages from his income. With the drastic

¹⁸ In assessing whether an Applicant has established mitigation under Guideline F, the Appeal Board provided the following guidance in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008):

In evaluating Guideline F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts." See, e.g., ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 200). However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. See, e.g., ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). All that is required is that an applicant demonstrate that he has "... established a plan to resolve his financial problems and taken significant actions to implement that plan." See, e.g., ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). The Judge can reasonably consider the entirety of an applicant's financial situation and his actions in evaluating the extent to which that applicant's plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) ("Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.") There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

change in the real estate market, his investment was no longer sound from several perspectives. The property value declined, and his rental income slowly evaporated, making it impossible for him to pay the mortgages. He tried to sell the property, but could not. During this time of financial crisis, he paid all his other bills in a timely manner.

Applicant manages his monthly income well and has a track record of paying his expenses. He has savings and is financially sound. The mortgage company refuses to talk with him on the grounds he does not owe them any money. He can do no more to fully resolve the debt listed in the SOR. This debt cannot be a source of improper pressure or duress as the creditor denies Applicant owes it money, and on this basis, Applicant does not believe he owes the creditor any money. Of course, 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. Applicant's decision to invest in the real estate market in 2006 was reasonable. When the economy drastically changed, his investment soured. In light of his overall finances, his decision to invest in the real estate market is insufficient to raise security concerns. (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

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