



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



In the matter of:)
)
) ISCR Case No. 10-02707
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esquire, Department Counsel

For Applicant: Alan V. Edmunds, Esquire

May 25, 2011

Decision

O'BRIEN, Rita C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant has mitigated the security concerns raised under the guideline for financial considerations. Accordingly, her request for a security clearance is granted.

Applicant requested a security clearance by submitting an Electronic Questionnaire for Investigations Processing (e-QIP) signed on September 25, 2009. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request.

On September 22, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) that specified the basis for its decision: security concerns addressed in the Directive under Guideline F (Financial Considerations) of the Adjudicative Guidelines

¹ Required by Executive Order 10865 and by DoD Directive 5220.6 (Directive), as amended.

(AG).² Applicant signed her notarized Answer on November 23, 2010, admitting to the four allegations in the SOR. She also requested a hearing before an administrative judge. Department Counsel was prepared to proceed on December 23, 2010, and the case was assigned to me on January 13, 2011. DOHA issued a Notice of Hearing on February 15, 2011, and I convened the hearing as scheduled on March 10, 2011.

During the hearing, I admitted Government Exhibits (GE) 1 through 7. Applicant testified, presented the testimony of two witnesses, and offered 20 exhibits, admitted as Applicant's Exhibit (AE) A through T. I held the record open to allow Applicant to submit additional documentation. She timely submitted four documents, admitted as AE U through X. The record closed on March 29, 2011.

Findings of Fact

Applicant's admissions to the SOR are incorporated as findings of fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the record evidence, I make the following findings of fact.

Applicant, 55 years old, is a widow with two adult children. She earned college credits, but did not complete a degree. She worked for defense contractors and held a security clearance without incident since 1987, with her highest level being TS/SCI with full-scope polygraph. In 2000, she began her own business. She performs information technology consultant services as a subcontractor to federal defense agencies. (GE 1; Tr. 47-48).

Applicant's husband was a mortgage broker, and also worked part-time for Applicant's company. They owned properties starting with a home in 1999, and another in 2003. Around 2005, they began investing more significantly in real estate, and bought three rental properties in 2006. Applicant relied on their joint income to fund their real estate purchases. Before 2009, their credit rating was solid. (Tr. 48-49, 85-88) However, the real estate market began to founder in 2008. They were unable to keep the properties rented, and Applicant foresaw that they would have trouble keeping up their loan payments. She began talking to her lenders. She was told that because her loan payments were still up-to-date, nothing could be done; she would have to miss several payments and actually be in arrears before the lenders would discuss loan modifications. (AE J; Tr. 58-59)

Applicant's largest loan was on a house she and her husband bought from a builder, with a five-year lease-back agreement (Property B). After about one-and-one-half years, his business was affected by the market collapse, and he defaulted on his agreement. Applicant was left with a hefty payment. She sought legal advice, but was told it would be financially pointless to pursue the builder. Applicant was unable to rent

² Adjudication of this case is controlled by the Adjudicative Guidelines, implemented by the Department of Defense on September 1, 2006.

the house, or her other properties. Of her four properties, three were consistently vacant, and one was intermittently vacant. Her financial position declined and delinquencies started to accrue in 2009. (AE J; Tr. 59-60)

Applicant's husband passed away suddenly in February 2010. She withdrew funds from her 401k to keep up with the loan payments. Applicant then retained an attorney to assist in resolving the mortgage debts. Upon investigation, the attorney filed quiet title actions against the lenders for the three properties listed in the SOR, alleging that Applicant has been the object of fraudulent lending practices. (AE A, S; Tr. 58-62)

Applicant's monthly remainder, after paying mortgages and other monthly expenses, is \$2,367. Her net worth statement shows that her assets include real estate, savings, a 401k account, and rental income. Her net worth after deducting her liabilities is \$332,000. The debts on the three properties cited in SOR ¶¶ 1.a through 1.d are supported by the Government's credit bureau reports. The status of each debt follows. (GE 4-7; AE B, C, K-O)

Property A (alleged in SOR ¶ 1.a and 1.d) – Applicant purchased the property in 2006 for \$325,000. She procured a first mortgage of \$275,000 (allegation 1.d), and a home equity loan of \$50,000 (allegation 1.a), both from Lender A. In 2008, she began to fall behind on payments. She applied to refinance the loan, but the lender rejected the request. In 2010, Lender B bought the first mortgage, though lender A still serviced the loan. Lender B threatened foreclosure. At about that time, Applicant began seeking legal assistance. Lender B did not follow through on the foreclosure. Lender A allowed Applicant to proceed with a short sale, but rejected the buyer Applicant procured. In December 2010, Applicant filed suit against both lenders. The suit contends that no evidence exists to show Lender B has a legal interest in the property, and therefore has no right to threaten to foreclose on it.³ (AE A[a]; Tr. 69-73)

Property A had a five-year adjustable rate loan. It was rented from January to June 2010, and became vacant when the renter left six months before the lease ended. The property was vacant until January 2011. The current renter is on a month-to-month lease, in light of the lawsuit. Applicant requested that the loan be reinstated, which involves re-starting the payments. She has been making payments on the first loan since January 2011. At that time, the rate dropped from seven percent to three percent, reducing the monthly payments. She deposits the rent she receives into an escrow account to cover the debt when the litigation is complete. She testified that "they're still negotiating what's going to happen with the arrears in light of the fraud." The balance on the first loan

³ Applicant also referred to violations of Real Estate Settlement Procedures Act (RESPA) and the Truth in Lending Act (TILA). (Tr. 50)

is now approximately \$272,000, and the second loan balance is about \$50,000. Lender A has responded to the suit by agreeing to negotiate a settlement with Applicant. (AE P; Tr. 51-52, 65, 73-80)

Property B (alleged in SOR ¶ 1.b) – Applicant and her husband purchased this property in 2006 for \$1,355,000, with a first mortgage of \$1 million, and a second of \$355,000. The loan included a builder lease buyback. In about 2008, the builder defaulted. Applicant and her husband used funds from their 401k account to make the payments, until they were no longer able to do so. Approximately \$124,000 was past due. Applicant's 2009 credit bureau report shows a payment plan in place. The lender agreed to a short sale, and made a counter-offer to the buyer's offer. The buyer has accepted the counter-offer, and the closing was imminent at the time of the hearing. The lender has agreed that the short sale will cover Applicant's past-due balance. (AE A[b]; Tr. 52-53, 80-83)

Property C (alleged in SOR ¶ 1.c) – In April 2006, Applicant and her husband bought this condominium for \$269,000. Their mortgage payments were current until October 2009. After her husband's death in February 2010, Applicant moved into this smaller property, which is now her primary residence. Applicant has filed a quiet title suit against the lender for RESPA and TILA violations. As of the date of the hearing, the lender was considering a loan modification. Applicant is placing the mortgage payments into an escrow account pending disposition of the suit. (AE A[c]; Tr. 53-56, 65, 83-85)

Applicant owns two other properties that are not alleged in the SOR. The current renter has requested to purchase Property D, and paperwork is to be initiated in May 2011. Property E is Applicant's first home with her husband, which is also rented. She has never been late on payments on either property (AE Q, R, T; Tr. 85-88)

Applicant's neighbor has known her for seven years. He served in the Air Force for 20 years and held a security clearance for 18 years. Before retiring he was an attorney and held a high government position in a U.S. territory. He testified and submitted a character reference. He noted Applicant is thorough and deliberate in financial matters. He testified to his own experience with lenders. Following surgery, he was having problems with meeting payments on a second home. When he approached his lender for a loan modification, he was told he had to miss three payments before the company would consider a modification or short sale. He stopped making payments so that he could be considered for a modification. (AE D; Tr. 34-45)

Character reference letters from Applicant's friends and business colleagues attest to her professionalism, integrity, and honesty. They describe her as stable and forthright. They noted that she has a solid character that is beyond reproach, and praised her inner strength and resilience. They commented on her years of supporting

missions in the intelligence community, and dedication to the success of her government client's mission. Applicant's subordinate has known her for the past three years and testified to Applicant's trustworthiness and honesty. (AE E-I; Tr. 25-32)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Adjudicative Guidelines (AG).⁴ Decisions must also reflect consideration of the "whole-person" factors listed in ¶ 2(a) of the Guidelines.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline F (Financial Considerations).

A security clearance decision is intended only to resolve the questions of whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁶ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁷

⁴ Directive. 6.3.

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

Analysis

Guideline F (Financial Considerations)

AG ¶18 expresses the security concern pertaining to financial considerations:

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 over-extended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

Applicant had good credit until the real estate market crisis in 2008. She was able to keep the mortgage payments up-to-date during 2008, but to be considered for a loan modification, she was required to stop making payments. Applicant's credit reports show that her delinquencies started in 2009. Disqualifying condition AG ¶19(c) (*a history of not meeting financial obligations*) applies.

I have considered the conditions listed at AG ¶ 20 that can mitigate security concerns under the Financial Considerations guideline, 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 mortgage delinquencies arose from one of the worst financial crises in recent memory, and it is unlikely that such circumstances will recur in the future.

Moreover, her solid credit before the mortgage crisis, and the evidence that she did not act in a negligent or frivolous manner, demonstrate her good judgment. Her trustworthiness is not in doubt. AG ¶20(a) applies.

Applicant and her husband chose to invest in real estate and were successful for several years. However, she had no way to foresee or control the mortgage crisis, which played havoc with her finances. In addition, Applicant's ability to pay the mortgage loans depended, in part, on her husband's income. In 2010, he unexpectedly passed away. She could not have foreseen that this would occur, or that she would be left to carry the properties on her single income. Applicant acted responsibly: she used her savings to continue the payments as long as she was able. She anticipated the pending difficulties and contacted the lenders before she had to default, in order to obtain loan modifications. She places all of her rental income in accounts so that it is available pending the outcome of the litigation. She has been able to obtain a short sale on the largest of the three debts in the SOR. Applicant has provided evidence that she did not ignore her financial obligations and acted responsibly in the face of major difficulties. AG ¶ 20(b) applies.

Both AG ¶ 20(c) and (d) apply. Applicant had been conscientious about her financial obligations. During the mortgage crisis, she made the loan payments as long as she was able, using her 401k funds. She contacted the lenders well before she became delinquent to either obtain a modification, or to be allowed to use short sales. Her efforts failed. Finally, in mid-2010, Applicant sought legal assistance to help her resolve her mortgage loans. The largest debt (Property B) is resolved, as the lender has agreed to permit a short sale, a buyer has been obtained, and the lender's counter-offer accepted. Applicant is placing the rent payments from Property A into an escrow account pending the outcome of the lawsuit. The lender has agreed to negotiate a settlement with Applicant. The lender for Property C, where Applicant currently resides, is considering a loan modification. Applicant is placing the mortgage payments into an escrow account pending disposition of the suit.

Whole-Person Analysis

Under the whole-person concept, an administrative judge must evaluate the Applicant's security eligibility by considering the totality of an applicant's conduct and the 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under each guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant's delinquencies stem from factors beyond her control. Until late 2008, Applicant had solid credit. Unfortunately, she and her husband owned several properties when the national mortgage crisis hit. Along with millions of others, they did not foresee what was coming. Another unforeseeable event occurred when Applicant's husband passed away.

Applicant has taken numerous steps to resolve the situation: She moved to a smaller home after her husband passed away. She contacted her lenders, and hired an attorney to assist in resolving her situation. She has obtained a short sale for the largest mortgage loan. She has reinstated one loan and resumed payments. Her neighbor corroborated her contention that the lender required her to stop making payments before it would consider her for a loan modification, as he was required to take the same actions to qualify. Applicant's neighbors and colleagues attest to her honesty and strong character.

Overall, the record evidence satisfies the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from the cited adjudicative guideline.

Formal Findings

Paragraph 1, Guideline F	FOR Applicant
Subparagraphs 1.a – 1.d	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, It is clearly consistent with the interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is granted.

RITA C. O'BRIEN
Administrative Judge