



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



In the matter of:)
)
) ISCR Case No. 10-02805
)
Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

September 27, 2011

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate the Financial Considerations concerns. He has not paid his mortgage since February 2009, is currently over \$90,000 in arrears, and his house is in foreclosure. Clearance is denied.

Procedural History

On May 10, 2011, the Defense Office of Hearings and Appeals (DOHA) made a preliminary determination to deny Applicant access to classified information.¹ The basis for this decision is set forth in a Statement of Reasons (SOR), which alleges the security concern under Guideline F (Financial Considerations).

On June 3, 2011, Applicant responded to the SOR (Answer). He admitted the sole allegation under Guideline F and requested a hearing.

¹ This action was taken pursuant to 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) implemented by the Department of Defense on September 1, 2006.

On June 21, 2011, Department Counsel filed its ready-to-proceed. After coordinating with the parties, I scheduled the hearing for July 22, 2011. As a time management tool, I issued a prehearing order requiring the parties to serve one another and me their anticipated exhibits prior to the hearing. (Hearing Exhibit II).

At hearing, Department Counsel offered five exhibits, which were marked and admitted into evidence as Government Exhibits (GE) 1 through 5. Applicant offered seven exhibits, which were marked and admitted into evidence as Applicant's Exhibits (AE) A through G. Applicant and his wife testified. The transcript was received on August 1, 2011.²

Findings of Fact

Applicant is 54 years old. He is married and has two children, who are 13 and 17 years old. He received a bachelor's degree in 1979 and a master's degree in 1984. From 1990 to 2009, Applicant owned a consulting business. In late 2008, early 2009, the business suffered a downturn. Applicant's income went from approximately \$123,000 in 2008, before the business setback, to about \$87,000 in 2009. In January 2010, Applicant secured a job with his current employer. His income in 2010 was \$153,000, and he expects to earn more than \$138,000 in the current year.³

Applicant has been living in his home since 1995. In 2006, he took out a \$330,000 mortgage on his home. He agreed to pay about \$3,300 a month to secure this loan. In 2008, Applicant hired an attorney to negotiate a modification of the loan because he could not afford the mortgage payments and was "upside down" on his home. Applicant explained that other comparable homes in his neighborhood are selling for about \$275,000, or about \$55,000 less than what he owes on his mortgage.⁴ *But see*, AE B, *Foreclosure Mediation Worksheet* (Applicant estimates house is worth \$450,000, which is far more than the \$330,000 owed).

The attorney recommended that Applicant stop paying his mortgage to force the bank to modify the terms of the loan.⁵ Applicant stopped paying his mortgage in February 2009 and the bank filed for foreclosure. A civil court dismissed the foreclosure

² On June 27, 2011, the parties agreed to hold the hearing on July 22, 2011. A formal Notice of Hearing (NOH) was issued on June 28, 2011. Applicant acknowledged receipt of the NOH on July 7, 2011. Thus, Applicant was afforded 15 days notice as required by ¶ E3.1.8. Further, at hearing, Applicant noted he had sufficient time to prepare and wanted to proceed with the hearing. (Tr. at 8-9).

³ Tr. at 57-60, 71-73, 77-85; GE 1; AE A; AE C; AE D; AE E

⁴ GE 1 at 3; Tr. at 75 and 80-81; GE 2 at 56 (2/10 subject interview); GE 3 at 89-92 (civil court decision).

⁵ Tr. at 80 ("On the advice of our legal counsel . . . , the reason why we have not made payments is because we're upside down in our mortgage."). *See also*, Tr. at 114 (Applicant's wife, who handles the finances and has followed the foreclosure case closely, testified that she does not believe they tried to negotiate a modification with the bank prior to stopping payments in February 2009).

filing in January 2010, because the bank had failed to comply with a state law procedural requirement. In December 2010, the bank re-filed its notice of foreclosure.⁶

Applicant has not paid his mortgage since February 2009. He offered a lump sum payment of \$30,000 in 2009 to bring his account current and modify the loan. At the time, Applicant was already about \$33,000 in arrears. The lender did not accept this offer. Applicant did not make any other offers to the lender until recently when his counsel filed for mediation. Applicant has now proposed a “significant reduction in the interest rate” in order to start repaying his loan. No negotiations with the lender had occurred as of the close of the record. Applicant is now over \$90,000 in arrears.⁷

Although Applicant has been fully employed since January 2010 and has a monthly net remainder of about \$2,500 a month, he will not pay his mortgage until the lender modifies the terms of the loan. Applicant testified that, if the lender lowers his mortgage payment down to about \$2,500 per month, than he will pay. Applicant has not offered to pay this lesser amount to the lender.⁸

Applicant used the mortgage money he was not paying to satisfy other debt.⁹ He had over \$12,000 in credit card debt alone when he stopped paying his mortgage in 2009. By 2010, Applicant had paid-off this credit card debt, as well as two vehicles with a combined outstanding loan amount of over \$24,000.¹⁰ Applicant recently paid-off another vehicle for which he had been paying \$509 per month.¹¹ According to Applicant’s credit reports, none of these debts were delinquent at the time he decided to pay them off.¹² He is currently paying \$386 per month for another car.¹³

Applicant claims that, since starting employment with his current employer in January 2010, he is current on all his financial obligations, except for his mortgage.¹⁴ However, as of August 2010, he was repaying over \$2,000 owed in federal taxes from

⁶ GE 3 at 81-82, 89-92. *See also*, Tr. at 60-61, 75-77, 81-82; GE 2 (answer to question no. 3).

⁷ Tr. at 66-68, 86-89, 92-93; AE B, *Foreclosure Prevention Proposal*. *See also*, Tr. at 102, 113, and 122-127.

⁸ Tr. at 62-65, 68, 77-82, 89-92; GE 2 at 109 (as of August 2010, monthly net remainder of nearly \$3,000); AE E (as of July 2011, monthly net remainder of over \$2,500). *See also*, Tr. at 115.

⁹ Tr. at 61-64 and 83. *See also*, Tr. at 103-106.

¹⁰ AE C, *Financial Obligations*.

¹¹ AE D and E.

¹² *See* GE 3 at 97-106; GE 4; and GE 5 (only debt reported as delinquent is the mortgage).

¹³ AE D and E.

¹⁴ *See* AE C, ¶ 18 (“All other financial obligations now up to date since employment in 2010”).

2008 and was planning on filing a “payment installment arrangement” to pay federal taxes owed for the 2009 tax year.¹⁵

Applicant pays about \$1,400 a month for medical expenses and his wife was recently fired from her job.¹⁶ He claims to have “significantly” reduced his living expenses.¹⁷ His current expenses total about \$6,000 a month, which does not include the mortgage.¹⁸ At hearing, Applicant was unaware of how much money, if any, he had in his checking account. He does not have a savings account.¹⁹ When asked whether he had taken a financial counseling course, Applicant responded that he had not, and then added: “I guess I never considered it.”²⁰

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 to be 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, administrative judges apply the guidelines 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

¹⁵ GE 3 at 109 and 110. *See also*, AE B, *Foreclosure Mediation Worksheet* (discloses owed \$9,420 for back taxes) and Federal Filing Instructions and 2009 Tax Returns (owed \$2,425 for 2009).

¹⁶ Tr. at 86-88, 98; AE E. *But see*, GE 3 at 109 (as of August 2010, only reported \$103 in medical expenses).

¹⁷ Tr. at 67. *But see*, AE B, Bank Statements from 2/5/11 to 2/17/11 (showing a number of consumer purchases, including purchases at upscale clothing chain).

¹⁸ Tr. at 83; AE E.

¹⁹ Tr. at 63 and 98. *See also*, AE B, *Foreclosure Mediation Worksheet* (discloses \$1,000 in checking and \$0 in savings).

²⁰ Tr. at 87. *See also*, Tr. at 116 (wife, who handles the family’s finances, has also not taken a financial counseling course).

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, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant 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 EO 10865 provides that adverse 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

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

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.

One aspect of the concern is that an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Thus, “[a] security clearance adjudication is not a proceeding aimed at collecting an applicant’s debts. Rather, it is a proceeding aimed at evaluating an applicant’s judgment, reliability, and trustworthiness.”²¹ The Appeal Board

recently re-affirmed this longstanding principle in ISCR Case No. 10-01978 at 5 (App. Bd. Aug. 24, 2011). The Board held that an applicant who walks away from their mortgage debt fails to show the requisite level of responsibility contemplated by the Directive, and such action casts doubt on an applicant's reliability, trustworthiness, and good judgment. Accordingly, Applicant's decision to not pay his mortgage, even after securing a well-paying job, directly implicates the financial considerations concern.

Applicant's failure to pay his mortgage obligation also establishes a number of disqualifying conditions under AG ¶ 19, namely:

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

An applicant may mitigate the concerns raised by their history of financial irresponsibility by establishing one or more of the mitigating conditions listed under AG ¶ 20. I have considered all the mitigating conditions, and find that the following warrant discussion:

- (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 is currently over \$90,000 in arrears on his mortgage and has not made a single payment towards his mortgage since February 2009. Applicant's inability to pay his mortgage obligation was initially due to a business downturn, but he has been gainfully employed since January 2010. His income in 2010 alone was over \$150,000. He has not paid his mortgage because he wants to force the bank to modify the terms of his loan that he freely entered into in 2006. Applicant's financial problems are current,

²¹ ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). See also, ISCR Case No. 09-07916 at 3 (App. Bd. May 9, 2011).

and he failed to act in a responsible manner after he secured a well paying job. AG ¶ 20(a) and (b) do not apply.²²

Applicant has not taken a financial counseling course and, at hearing, seemed dismayed at the mere suggestion. He used his freed-up income from not paying his \$3,300 a month mortgage to pay-off consumer debt, but still failed to pay his taxes on time. AG ¶ 20(c) does not apply.

Applicant refuses to pay his mortgage because he claims to be “upside down” on his home. However, he voluntarily agreed to the terms of the loan. Failing to live up to that obligation, once he had the financial means to do so, is not in keeping with the requisite level of responsibility contemplated by the Directive. Further, Applicant’s own documents show that his house is worth well more than what he owes. He has used state law intended to protect home owners as a sword in an attempt to force the lender to modify a loan he freely agreed to in 2006. Under these circumstances, Applicant’s recent attempt to resolve this debt was not done in good-faith. AG ¶ 20(d) does not apply. Applicant failed to mitigate the financial considerations concern.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of an applicant’s conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).²³ I have considered and given due weight to all the favorable and extenuating factors in this case. Applicant currently works three jobs to support his family and is a good worker. However, this favorable evidence, as well as the other mitigating record evidence, does not outweigh the security concern at issue.

Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

 Subparagraph 1.a: **Against Applicant**

²² ISCR Case 09-07792 at 2 (App. Bd. May 10, 2011) (“ . . . evidence that Applicant's debts remained delinquent at the close of the record supports . . . conclusion that these debts were ongoing.”)

²³ (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.

Conclusion

In light of the record evidence and the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant access to classified information. Applicant's request for a security clearance is denied.

Francisco Mendez
Administrative Judge