



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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-----) ISCR Case No. 10-03903
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

January 24, 2012

Decision

MOGUL, Martin H., Administrative Judge:

On June 6, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline F for Applicant. 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.

On July 11, 2011, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. I received the case assignment on August 26, 2011. DOHA issued a notice of hearing on November 3, 2011, and I convened the hearing as scheduled on November 22, 2011. The Government offered Exhibits 1 through 8, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through C at the time of hearing, which were also admitted without objection. DOHA received the transcript of the hearing (Tr) on December 6, 2011. I granted Applicant's request to keep the record open until December 9, 2011, to submit additional documents, and additional documents that were

received, have been identified and entered into evidence as without objection as Exhibits D through J. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is denied.

Findings of Fact

In his RSOR, Applicant admitted all of the SOR allegations, 1.a. through 1.e. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the following additional findings of fact:

Applicant is 33 years old. He is married, and he has two children. Applicant received a Bachelor of Science degree in Mechanical Engineering in 2003. He is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Guideline F, Financial Considerations

The SOR lists five allegations (1.a. through e.) regarding overdue debts under Adjudicative Guideline F. As reviewed above, Applicant admitted all of the allegations in his RSOR. The allegations will be discussed below in the same order as they were listed on the SOR:

1.a. This overdue debt is cited in the SOR as a past due mortgage account in the amount of \$8,000. The account is in foreclosure status with a total loan balance of \$288,000. At the hearing, Applicant testified that this debt, for a first mortgage for his personal residence, was resolved by a short sale, which was accepted by the bank. Exhibit B, pages 1, and 22 through 26, establish that the property, upon which this debt is based, was sold in September 2011. This debt has been resolved.

1.b. This overdue debt is cited in the SOR as a past due mortgage account in the amount of \$47,000. The account is in foreclosure status with a total loan balance of \$534,000. Applicant testified that this debt is for an investment property owned by Applicant. He has been trying for a year to negotiate a short sale, but the bank would not accept the short sale, and although the property is still listed as for sale, it is now in foreclosure. According to Applicant's testimony and the credit report in Exhibit C, the amount now owed on this debt for the first mortgage is \$534,900, and for the second mortgage the amount owed is \$107,000. (Tr at 35-36.) This debt has not been resolved.

1.c. This overdue debt is cited in the SOR as a past due mortgage account in the amount of \$7,000. The account is in foreclosure status with a total loan balance of \$213,000. Applicant testified that this debt, for an investment property, was resolved by a short sale, which was accepted by the bank. Exhibit B, pages 1, and 9 through 21,

establishes that the property, upon which this debt is based, was sold on May 5, 2011. (Tr at 39.) This debt has been resolved.

1.d. This overdue debt is cited in the SOR in the amount of \$590. Applicant testified that this debt, which is the second mortgage for the property of which the first mortgage, listed as 1.a., above, was resolved by a short sale, which was accepted by the bank. This debt was also resolved by that short sale. (Tr at 40.) Exhibit B, pages 1, 22 through 26, establishes that the property, upon which this debt is based, was sold on September 11, 2011. This debt has been resolved.

1.e. This overdue debt is cited in the SOR as a past due mortgage account in the amount of \$10,000. Applicant testified that this property, upon which this debt is based, is now in foreclosure, and the amount owed is \$107,000. (Tr at 42.) Exhibit C shows \$107,000 is owed on this loan. This debt has not been resolved.

Applicant testified that he began acquiring property for investments in 2003. At one point, he owned eight properties with 14 mortgages. He said things were going well from 2003 to 2006, when, as he stated, "the mortgage market, in general, in America sort of fell apart." He held on to the properties, but as the market continued decline, he lost renters for his property, the negative cash flow expanded, and he found his financial situation continuing to decline.

He testified that for the last two and one half years, he has been attempting to resolve his mortgages to get loan modifications with the bank, but since he purchased these properties as an investor, they were not willing to modify his loans. Ultimately, he resolved his debt from these properties, either by selling the properties in short sales or returning the deeds to the banks. The banks that would not cooperate foreclosed on his properties. At the time of the hearing, he continued to retain one property that is encumbered with two mortgages, and an amount he still owes of \$641,000. (Tr at 47-52.)

In addition to those eight properties Applicant reviewed above, he also has a one-third ownership of properties in Mexico and Belize, in which he has invested approximately \$20,000 and \$60,000, respectively. Upon questioning, Applicant testified that at one time he had invested in approximately 12 properties, not including his personal residence. Applicant did concede he was not certain if there would be future taxes owed on all the properties that have been returned by short sale or deed. In addition to the properties discussed above, Applicant and his two siblings received \$600,000 from their mother, and they purchased additional properties that have not been reviewed, with the exception of the property listed as 1.a. and 1.e., above. (Tr at 54-63.)

Upon further questioning, Applicant testified that, for most of the time he was purchasing these properties, he was the sole income earner, and his income did not exceed \$100,000, yet the debt on these properties far exceeded \$1,000,000. He believed that he had the situation under control until the market had its severe downturn, and the properties lost much of their value. Also the loss of renters and the

diminishing amount received for rent contributed to his financial problems. Applicant indicated that none of his debt came from overdue credit cards or other sources, other than the properties that he owned. Finally, Applicant testified that he does plan to invest in properties, again when the market improves, although less aggressively. He estimated that he might return to investing anywhere from next year to the next three or four years.

(Tr at 66-79.)

As discussed above, Applicant submitted several post hearing documents as had been requested. Exhibit D included more precise information about Applicant's holdings. They show the total of all the property purchased at the time of purchase was valued at \$2,019,800; the total of all real estate loans at the time of purchase was \$1,959,417; the total of the property value at the time of sale was \$598,828 (this does not include the property that is still in foreclosure); the total loan balance due at the time of sale was \$1,546,630 (this does not include the property that is still in foreclosure); the total debt forgiven (this does not include the property that is still in foreclosure).

Mitigation

Applicant also submitted five positive character letters, four from people who know Applicant in his work environment and the fifth from his wife. Applicant was described by his supervisors and colleagues as "reliable, trustworthy, with a 'strong moral compass' and solid ethical standards." His wife also wrote about Applicant's "honesty, integrity and loyalty." (Exhibit H.)

Applicant introduced his personal financial statement showing he had a net worth of \$85,363 with a monthly positive cash flow of \$1,276.

Finally, Applicant forwarded his past five Performance Reviews from his employer for the periods from April 2006 to March 2011. His overall performance was rated one "Meets Job Requirements," three "High Meets," and one "Exceeds Job Requirements." (Exhibit I.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching 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. 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, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to 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 the 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.

The guideline notes several conditions that could raise security concerns and could potentially apply in this case. Under AG ¶ 19 (a), “an inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly under AG ¶ 19 (c), “a history of not meeting financial obligations” may raise security concerns. I find that both of these disqualifying conditions apply to Applicant in this case. The evidence has established that Applicant has accumulated significant delinquent debt.

AG ¶ 20 provides conditions that could mitigate security concerns from financial difficulties: Under AG ¶ 20 (b), it may be mitigating where “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.” As noted above, Applicant testified that his financial problems resulted from the downturn in the economy, specifically in the housing market, which resulted in his properties being significantly devalued. I find that he has acted responsibly, since he has been resolving his debts through short sales and return of deeds. Therefore, I find that this mitigating condition is a factor for consideration in this case.

Finally, AG ¶ 20(d) is applicable since Applicant has “initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” I find that this mitigating condition is also a factor for consideration in this case.

So this case has both disqualifying and mitigating conditions. However, while I have determined that Applicant has acted responsibly in attempting to resolve the debt, I cannot conclude that he was responsible in his initially incurring the debt. Applicant, with an income of approximately \$100,000 a year, purchased property valued at \$2,019,800 on loans of \$1,959,417. When the market fell dramatically, he had no ability to resolve the problem outside of giving up all of the properties. At this time, he still owes on two mortgages for one property in foreclosure in the amount of \$641,000. It also is not clear what his tax liability will be for the loans that were defaulted or resolved in short sale. Finally, what is a great concern is Applicant’s express indication that he intends to continue this investing in the future, albeit not as aggressively. At this time I cannot conclude that Applicant has significantly resolved his overdue debt, and that there will not be additional financial difficulties in the future. Therefore, he has not mitigated the financial concerns of the Government.

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. Based on all of the reasons cited above as to why there are unresolved financial issues in the present and the future, I find that the record evidence leaves me with significant questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has not mitigated the security concerns.

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: **AGAINST APPLICANT**

Subparagraphs 1.a through 1.e.: **Against Applicant**

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Martin H. Mogul
Administrative Judge