



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 10-04046

Appearances

For Government: William O'Neil, Esquire, Department Counsel

For Applicant: *Pro se*¹

August 30, 2011

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant has mitigated the security concerns regarding financial considerations. Eligibility for a security clearance or access to classified information is granted.

Statement of the Case

On September 28, 2009, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a

¹ As noted below, this matter was scheduled for hearing on two occasions, with a March 2011 hearing cancelled based on Applicant's inability to be present. This second hearing was subsequently scheduled for a period of Applicant's agreed presence. One day before the hearing, he engaged the services of Alan V. Edmunds, Esquire, an attorney who indicated he was unable to be present for the scheduled hearing. In the mid-afternoon of July 13, 2011, Mr. Edmunds sent a notice to me and to Department Counsel at our respective offices by facsimile and e-mail, but both Department Counsel and I were already out of town involved in other hearings. Our respective offices contacted us. I telephoned Mr. Edmunds later that day, but was unable to reach him, so I left a message that I was disinclined to grant a continuance without good cause being shown in light of the previous continuance and the last moment engagement. I indicated to Applicant that he could supplement the record if he wished to do so. Applicant chose to proceed *pro se*.

Security Clearance Application (SF 86).² On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories pertaining to his financial situation. He responded to the interrogatories on August 17, 2010.³ On another unspecified date, DOHA issued him another set of interrogatories, again pertaining to his financial situation. He responded to the interrogatories on August 17, 2010.⁴ On September 22, 2010, DOHA issued a Statement of Reasons (SOR) to him, 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 and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive after September 1, 2006. The SOR alleged security concerns under Guideline F (Financial Considerations), and detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant acknowledged receipt of the SOR on November 1, 2010. In a written statement, notarized on November 10, 2010, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on February 4, 2011, and the case was assigned to another administrative judge on February 16, 2011. A Notice of Hearing was issued on February 22, 2011, for a hearing to be convened on March 2, 2011, but on February 25, 2011, Applicant requested a continuance, claiming he was engaged in military operations abroad, and was not anticipated to return until after the scheduled date. The matter was continued, and on April 18, 2011, the case was transferred to me. Another Notice of Hearing was issued on June 23, 2011, and I convened the hearing, as scheduled, on July 14, 2011. The request for a continuance, made by his attorney late in the day on July 13, 2011, was denied.

During the hearing, five Government exhibits (GE 1-5) were admitted into evidence without objection. Applicant testified. The record remained open to afford Applicant the opportunity to supplement it, and on July 29, 2011, his attorney submitted one exhibit (AE A) which was admitted into evidence without objection. The transcript (Tr.) was received on July 25, 2011.

Findings of Fact

In his Answer to the SOR, Applicant admitted both of the factual allegations in ¶¶ 1.a. and 1.b. of the SOR. Applicant's admissions are incorporated herein as findings of

² Government Exhibit 1 (SF 86), dated September 28, 2009.

³ Government Exhibit 2 (Applicant's Answers to Interrogatories, dated August 17, 2010).

⁴ Government Exhibit 3 (Applicant's Answers to Interrogatories, dated August 17, 2010).

fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 65-year-old employee of a defense contractor, currently serving as a master or vessel captain,⁵ and he is seeking to obtain a security clearance, the level of which has not been specified. He received a bachelor's degree in business administration in 1969.⁶ He was previously a mate and master of a vessel with another company, and in March 2003, he joined his current employer.⁷ Applicant has never served with the U.S. military.⁸ He has never been married, and has no children.⁹

Financial Considerations

Applicant has had some credit problems in the past,¹⁰ but they had apparently been favorably resolved. There was nothing unusual about Applicant's current financial situation until about 2008. In November 2005, the local real estate market was booming, with property values appreciating from 15 percent to 25 percent annually.¹¹ Although he had never been a real estate investor before, in November 2005, Applicant purchased a house with an appraised value of \$755,000, financed by a first mortgage and a second "purchase money" mortgage, in the total amount of \$648,000.¹² Over the course of a year, he resided in the house and made renovations himself or hired tradesmen to do so.¹³ The renovations were funded by his savings.¹⁴ Applicant's combined monthly mortgage payments were \$3,650,¹⁵ and he was able to remain current on his payments.¹⁶ In November 2006, he rented the property on a long-term, yearly basis, with a rent that nearly covered his mortgage payments.¹⁷ The situation remained steady until 2008, when the "bottom fell out" of the economy, and he had to reduce the rent to

⁵ Government Exhibit 1, *supra* note 2, at 13-14.

⁶ *Id.* at 12; Tr. at 8.

⁷ Government Exhibit 1, at 14.

⁸ *Id.* at 18.

⁹ Tr. at 26.

¹⁰ *Id.*

¹¹ *Id.* at 27.

¹² *Id.* at 27, 29.

¹³ *Id.* at 27-30.

¹⁴ *Id.* at 30.

¹⁵ Government Exhibit 2 (Personal Subject Interview, dated January 27, 2010), at 2. The monthly payment on the first mortgage was \$2,700, and on the second mortgage, \$950.

¹⁶ Tr. at 30-31.

¹⁷ *Id.*

keep renters in the property.¹⁸ Exacerbating his financial problem was that a friend who was supposed to take care of his business affairs while he was away from home for up to 45 days at a time during work-related absences, failed to do so and made several late payments.¹⁹

Applicant engaged the professional services of an attorney to negotiate with the original mortgage lender, as well as the banks to which the mortgages were later sold, in an effort to obtain mortgage modifications.²⁰ Applicant was told by the mortgage lenders-holders that he was not eligible, so formal applications were never submitted.²¹ Applicant was advised by the mortgage holder that he would not be eligible for a loan modification unless he was at least 90 to 120 days past due on his mortgage payments.²² In 2008, Applicant attempted to sell the property with short sales contracts.²³ The initial asking price was \$410,000, but it was eventually reduced to \$300,000.²⁴ There were two offers made for \$200,000 and \$220,000,²⁵ and the highest offer received was for \$240,000, or about \$400,000 short of the mortgage balance. The offers were submitted to the mortgage holders, but nothing was approved.²⁶

His realtor also advised Applicant that to qualify for a short sale, the mortgages had to be in arrears, so at some point in 2008, following the realtor's advice, Applicant stopped making his monthly mortgage payments on both mortgages.²⁷ By November 2009, on his first mortgage with a balance of \$518,400, Applicant was delinquent 180 days or more with a past-due balance of \$42,490, and foreclosure proceedings had already been initiated.²⁸ On his second mortgage, with a balance of \$129,600, he was delinquent 180 days or more with a past-due balance of \$4,420.²⁹ By August 2010, the

¹⁸ *Id.* at 32.

¹⁹ *Id.* at 20.

²⁰ *Id.* at 36-38.

²¹ *Id.* at 39, 46.

²² *Id.* at 44-47.

²³ *Id.* at 33.

²⁴ *Id.* at 34.

²⁵ *Id.* at 37.

²⁶ *Id.* Applicant characterized the mortgage holder's response as "undecipherable," because its office was in disarray.

²⁷ *Id.* at 20-21, 33-36.

²⁸ Government Exhibit 4 (Combined Experian, TransUnion, Equifax Credit report, dated November 3, 2009), at 7.

²⁹ *Id.* at 9. The data in the credit report is inconsistent in that TransUnion reported the 120 to 180-day past-due balance as \$4,420, while Experian reported the 90-day past-due balance of \$2,785.

purported mortgage holder had filed lawsuits seeking foreclosure.³⁰ The SOR identified only those two debts as continuing delinquencies. One of the suits was previously dismissed in 2010, and the plaintiff's effort to have the decision vacated was denied in April 2011.³¹ In June or July 2011, the remaining case had been assigned to a special magistrate, but no hearings are yet scheduled.³² The property has remained rented, and Applicant currently receives \$2,350 each month which goes into his "general funds."³³

In April 2009, Applicant earned \$82,318 in wages, and had an adjusted gross income of \$57,318, because of a rental real estate loss he sustained in the amount of \$25,000.³⁴ In August 2010, Applicant submitted a personal financial statement (PFS) reflecting an estimated monthly income of \$4,776.52, and monthly expenses of \$2,585.³⁵ Not included in the income was the rental income,³⁶ so the actual total is \$7,126.52. Not included in the expenses were monthly credit card payments.³⁷ At the time he completed the PFS, Applicant had a current credit card balance of \$2,124.61, which he paid off, because he does not carry balances, choosing instead to pay off his cards each month.³⁸ He has no outstanding balance on any other accounts.³⁹ Applicant estimated his current savings to be about \$12,000.⁴⁰ Applicant has never received financial counseling.⁴¹

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."⁴² As Commander in Chief,

³⁰ Government Exhibit 3, *supra* note 4, at 3; Tr. at 21.

³¹ Tr. at 40.

³² Tr. at 21.

³³ *Id.* at 32, 41.

³⁴ Government Exhibit 3 (U.S. Individual Income Tax Return (Form 1040) 2008, dated April 9, 2009), at 1, attached to Applicant's Answers to Interrogatories.

³⁵ Government Exhibit 3 (Personal Financial Statement, undated), attached to Applicant's Answers to Interrogatories.

³⁶ Tr. at 43.

³⁷ *Id.* at 44.

³⁸ *Id.*

³⁹ *Id.* at 26.

⁴⁰ *Id.* at 44.

⁴¹ Tr. at 38.

⁴² *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”⁴³

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. 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 meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”⁴⁴ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.⁴⁵

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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

⁴³ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

⁴⁴ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

⁴⁵ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

as to potential, rather than actual, risk of compromise of classified information. Furthermore, “security clearance determinations should err, if they must, on the side of denials.”⁴⁶

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”⁴⁷ Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

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. 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. As noted above, there was nothing unusual about Applicant’s finances until about 2008, when the “bottom fell out” of the economy, and he had to reduce the rent to keep renters in the property. At some point, he failed to keep up with his monthly mortgage payments, and they started to become delinquent. Following his realtor’s advice, Applicant stopped making his monthly mortgage payments on both mortgages. The eventual mortgage holder sued him for foreclosure on both mortgages, and while one suit was dismissed, the other is still pending. Nevertheless, AG ¶¶ 19(a) and 19(c) apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition

⁴⁶ *Egan*, 484 U.S. at 531

⁴⁷ See Exec. Or. 10865 § 7.

may be mitigated where *“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.”* Also, under AG ¶ 20(b), financial security concerns may be mitigated 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.”* Evidence that *“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”* is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows *“the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.”*⁴⁸

As noted above, the normal overriding concern pertaining to financial considerations in the security clearance context is that *“[f]ailure 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. . . .”* (emphasis supplied). But these are not “normal” times, for the world in general, and the United States in particular, and especially Applicant’s home state, are faced with economic chaos, plummeting real estate values, tightened credit, corporate layoffs and bankruptcies, diminished savings and retirement accounts, financial institution failures and takeovers, and soaring unemployment.

To determine if an applicant is (1) an unintentional victim; or (2) a willing participant and complicit in an otherwise unwise or irresponsible monetary scheme, or (3) a person with poor self-control or lack of judgment, an analysis of the individual’s original intentions and actions is essential. In this instance, Applicant’s financial history and actions reveal little evidence of poor self-control, lack of judgment, or an unwillingness to abide by rules and regulations. To the contrary, his goals were to ensure the success of his limited rental venture; to protect his investment; and pay his creditors. He originally obtained a first mortgage and a second “purchase-money” mortgage from the same mortgage lender with an affordable monthly payment, and when the rent payments adjusted downward because of the economic downturn, he set out to seek a mortgage modification, and when that seemed impossible, to sell the residence, even at a steep discount, under a short sale. Unfortunately for Applicant,

⁴⁸ The Appeal Board has previously explained what constitutes a “good-faith” effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the “good-faith” mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant’s debts. The Directive does not define the term ‘good-faith.’ However, the Board has indicated that the concept of good-faith ‘requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.’ Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy [or statute of limitations]) in order to claim the benefit of [the “good-faith” mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

none of his strategies or attempts succeeded. This same strategy was employed by thousands of Americans. His efforts were responsible and disciplined.

There are unusual circumstances in today's economy in general, as well as a series of events involving Applicant's mortgage loans and subsequent inability to modify the mortgages or sell the residence, in particular. Applicant's actions and his otherwise generally average, unremarkable, financial status provide clear indications that, except for these two mortgages, all of Applicant's financial issues have been resolved and are under control. While the local real estate market and the U.S. economy have not yet rebounded, his actions to mitigate his financial situation, under the circumstances, do not cast doubt on Applicant's current reliability, trustworthiness, and good judgment.⁴⁹ AG ¶ 20(a) applies.

AG ¶ 20(b) applies because there were several conditions, largely beyond Applicant's control, that made a substantial negative impact on Applicant's financial situation. The devastated economy and local housing market effectively destroyed Applicant's ability to maintain his rental property, at least in the short term, at the inflated rates of the past. The business downturn in the housing market, and its impact on the anticipated rent he could obtain, or a possible sale, was extraordinarily severe. They caused his financial problems. These events were clearly beyond Applicant's control, and Applicant acted responsibly to address the debts that resulted.⁵⁰

AG ¶ 20(c) partially applies because, while Applicant has never received financial counseling, there is clear and abundant evidence that his financial problems, with the exception of his foreclosures, are resolved and are under control. He still has the two delinquent mortgages, has established a budget, presented a personal financial statement, and has avoided any other delinquencies.

AG ¶ 20(d) partially applies because Applicant attempted to address his two delinquent mortgages well before the SOR was issued. Nevertheless, circumstances were such that he was unable to resolve them all either by mortgage modification or short sale, although he attempted to do so.⁵¹ He has maintained all of his other accounts in a current status. The sole exceptions are the foreclosure actions for his home mortgage and his "purchase money" second mortgage, with one of those foreclosure actions having been dismissed by the court, with a subsequent effort to have the dismissal vacated, dismissed by the court. The remaining action is awaiting a decision by the special magistrate.

⁴⁹ See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

⁵⁰ *Id.* at 4.

⁵¹ "Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

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.

There is some evidence against mitigating Applicant's conduct. Applicant has a "history" of financial delinquencies commencing in 2008. He permitted his first and second home mortgages to become delinquent, and both fell into a pre-foreclosure status. Both mortgages were the subjects of foreclosure litigation, with one of the lawsuits being dismissed, but the other still pending before a special magistrate. The property has remained rented, and Applicant continues to receive \$2,350 each month which goes into his "general funds," rather than being applied to his mortgages.

The mitigating evidence under the whole-person concept is substantial. Applicant's financial delinquencies were the unfortunate consequence of a devastated economy and local housing market. Upon the realization that he could not sustain the level of rent he had previously realized, Applicant lowered the rent or risked having a vacant property. He followed the advice of an attorney and a realtor in seeking mortgage modifications as well as short sales, but nothing has worked. Applicant is current in all other accounts. Of course, the issue is not simply whether both of Applicant's mortgages have been resolved; it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. I am mindful that while any one factor, considered in isolation, might put Applicant's credit history in a less than sympathetic light, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.⁵² His substantial good-faith efforts are sufficient to mitigate continuing security concerns. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

⁵² See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

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
Subparagraph 1.b:	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.

ROBERT ROBINSON GALES
Administrative Judge