



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



In the matter of:)	
)	
)	ISCR Case No. 10-04405
)	
Applicant for Security Clearance)	

Appearances

For Government: Stephanie Hess, Esq., Department Counsel
For Applicant: Darin M. Groteboer, Esq.

October 11, 2011

Decision Following Remand

LAZZARO, Henry, Administrative Judge

As noted in my original decision, Applicant’s financial problems are continuing and unlikely to be resolved in the foreseeable future. Clearance is again denied.

On September 28, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.¹ The SOR alleges a security concern under Guideline F (financial considerations). Applicant’s response to the SOR was received by DOHA on November 1, 2010. He denied all SOR allegations and requested a hearing.

The case was assigned to me on March 10, 2011. A notice of hearing was issued on April 19, 2011, scheduling the hearing for May 4, 2011. An amended notice of hearing was issued on April 21, 2011, changing the location of the hearing but not the date or time

¹ This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended (Directive), and adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

of the hearing.² The hearing was conducted as scheduled. The Government submitted four documents that were marked as Government Exhibits (GE) 1-4 and admitted into the record without objection. Applicant testified and submitted 11 documents that were marked as Applicant Exhibits (AE) 1-11 and admitted into the record without objection. The record was held open to provide Applicant the opportunity to submit additional documentation in support of his case. Three documents were timely received, marked as AE 12-14, and admitted into the record without objection. Department Counsel's forwarding e-mail indicating she did not object to the admission of Applicant's post-hearing submissions was marked as Appellate Exhibit (App. Ex.) I, and made part of the record. The transcript was received on May 17, 2011.

On June 29, 2011, I issued my decision in which I denied Applicant's request for a security clearance. Applicant appealed my adverse decision and on September 19, 2011, the DOHA Appeal Board remanded the decision to me with instructions that I, as the administrative judge, issue "a new decision in which he addresses more specifically how the Guideline F mitigating conditions and the whole-person factors apply to each of the three allegations in the SOR." The case was thereafter reassigned to me on September 28, 2011.

Findings of Fact

After a thorough review of the pleadings, testimony and exhibits, I restate the following findings of fact as contained in my original decision:

Applicant is a 57-year-old man who has been self-employed since October 2007. He was employed as a project manager/supervisor by a defense contractor from August 1999 until 2007. His pending application for employment with the same defense contractor is contingent on him obtaining a security clearance. Applicant has previously held a top secret security clearance without incident. No prior action was ever instituted to revoke or downgrade his clearance for adverse reasons, and no allegation has ever been made that he compromised or risked the compromise of classified information.

Applicant enlisted in the Army in October 1971, and served continuously on active duty until he was honorably separated in October 1974. He obtained a bachelor's degree in about 1982, and he then obtained a commission in the Army. He served continuously as an Army officer until he retired at the rank of major in June 1999. Applicant obtained a master's degree in civil engineering and construction management in August 1990.

Applicant was first married in July 1972. That marriage ended by divorce in June 1976. Applicant has been remarried since July 1982. He has one adult stepdaughter. Applicant's wife worked as a registered nurse earning approximately \$31,000 annually until she had to take medical leave in early-2006. She returned to work in November 2007, however, due to medical reasons, she was forced to permanently quit working in January 2008. She now receives monthly disability pay in the amount of \$1,181.

² Applicant waived on the record any technical defect that may be deemed to exist due to the amended notice of hearing being issued less than 15 days prior to the hearing. (Tr. p. 10)

Applicant began purchasing rental properties as a source of income in November 2004. Between then and March 2006, he acquired a total of 11 properties, at least some of which are co-owned with a friend. The combined purchase price for the properties was \$1,132,285. Applicant refinanced six of the properties in 2006 and 2007 for a combined total amount of \$1,071,200. His estimate of the total value of all investment property he owned as of July 2010, was \$948,000. The combined total amount owed on that property as of July 2010, was \$1,408,037. Applicant receives monthly rental payments totaling \$12,444. His combined mortgage payments on the properties is \$12,502. Applicant did not include any maintenance or management costs in the spread sheet he submitted for his investment properties. However, he did submit documents from a real estate company, in response to interrogatories (GE 2), that disclose that in July 2010, his expenses for two multi-unit rental properties exceeded his income for those properties in the combined amount of \$1,221.45.

In April 1993, Applicant purchased his home for \$153,000. In September 2007, he refinanced the home for \$280,000. Also in September 2007, Applicant obtained a second loan on the home in the amount of \$63,500. As of July 2010, the combined balance owed on the first and second mortgages on Applicant's home was \$291,000. He estimated the home was worth \$250,000 at that time. His combined monthly payment on the first and second mortgage loans on his residence is \$2,484.

Applicant resigned his position with the defense contractor in October 2007, to go into business for himself. He purchased a franchise from a nationally recognized business engaged primarily in disaster recovery. Essentially, Applicant's business is aimed toward repairing and restoring businesses and homes following disasters caused by hurricanes, fires, floods, etc. In an effort to make the business more profitable, Applicant has expanded into related services such as duct cleaning.

Applicant financed the purchase of his business by obtaining a bank loan in the amount of \$1,604,000 on October 5, 2007. The lender acquired a security interest in all the equipment, fixtures, inventory, accounts, and general intangibles of the business, plus seven vehicles. On December 9, 2009, the lender filed a complaint against Applicant for money damages and replevin of the collateral because he had defaulted in making at least one monthly payment that was due in the approximate amount of \$17,000. As of June 1, 2010, Applicant owed the following amounts on the loan: principal \$1,436,077.85, interest \$81,365.72, and late fees \$8,073.99, plus interest accruing at the daily rate of \$216.40.

Applicant and the lender entered in a forbearance agreement commencing on July 1, 2010, under which the principal owed on the loan was re-amortized at 5.00% interest for a period of 180 months. Under the terms of the agreement, Applicant is required to make monthly payments of \$11,356.41. In return for Applicant entering into the forbearance agreement, the lender agreed to waive the outstanding interest and late fees. As of the date of the hearing, Applicant had made all required payments under the forbearance agreement.

Applicant has an account listed in his credit reports as a charged off line of credit owed in the amount of \$16,771. The credit report he attached to his response to interrogatories (GE 2) indicates this account first became delinquent in October 2009.

Applicant testified he contacted the creditor in an effort to make payment arrangements, but the creditor gave him only three options: 1) pay a lump sum of \$13,000; 2) pay \$13,000 in three installments; or 3) pay \$17,000 over the course of 12 months. He is unable to afford any of those options and he has not made any payments on this account. As of the date of the hearing, the collection agency holding this account was threatening to file a lawsuit against Applicant.

Applicant has an account listed in his credit reports as a charged off credit card debt owed in the amount of \$20,230. The credit report he attached to his response to interrogatories (GE 2) indicates this account first became delinquent in February 2009, and that it has been continuously delinquent since July 2009. Applicant testified he contacted the creditor in an effort to make payment arrangements, but the creditor only gave him three options: 1) pay a lump sum of \$8,320; 2) pay an unspecified larger amount over the course of six months; or 3) pay the entire amount owed over the course of 12 months. He is unable to afford any of those options and he has not made any payments on this account.

In addition to his wife's inability to continue working as a registered nurse, Applicant attributes his ongoing financial problems to a number of factors. His brother-in-law became terminally ill at about the same time his wife was forced to take medical leave. His brother-in-law lacked insurance or the financial means to provide for himself once he became ill, and, thus, Applicant and other relatives had to provide for his financial support, medical care, and funeral expenses.

The main problem that placed Applicant in the untenable or barely tenable position he finds himself in, is the recession that began about the same time he decided to open his business. The recession has not only severely impacted that business, it has prohibited him from charging rent on his investment properties that allow him to break even on those properties. Additionally, approximately 25% of his rental units are vacant. Applicant is able to remain current on the mortgages on his investment properties by applying proceeds from the disaster recovery business to his investment properties.

Applicant's disaster recovery business has also been severely impacted by rising fuel costs. Insurance companies have established fee schedules for what they will pay for the services provided by Applicant and his competitors. Those schedules do not reflect the substantial increase for fuel that has occurred in the past year. Because he must charge for his services in accord with the insurance companies' fee schedules, Applicant is unable to increase the cost for his services to meet his increased cost for fuel.

Applicant's 2010 federal partnership income tax return discloses the ordinary income for the business was \$111,488. Applicant's personal 2010 federal income tax return discloses his and his wife's adjusted gross income was \$48,466. The attorney who negotiated the forbearance agreement on Applicant's behalf provided a letter in which he stated Applicant has resisted seeking bankruptcy protection, but, if it becomes necessary, he plans to file for a Chapter 11 reorganization. Applicant believes his business remains viable and profitable and will succeed when and if the local and national economy recover.

Applicant sought employment with his former employer in an effort to obtain additional funds until his business and investment properties again become profitable. His plan is for his wife to manage the business during the days while he works for the defense contractor, and for him to devote his evenings and weekends to the business.

Applicant's credit reports demonstrate he was financially solvent until he decided to open the disaster recovery business. His testimony and other record evidence indicate he has attempted to resolve his financial problems with every means available to him. The letters of recommendation he submitted establish that he is considered to be a trustworthy, dependable, reliable, and honest man who possesses good judgment and displays integrity.

Policies

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the disqualifying and mitigating conditions for each applicable guideline. Clearance decisions must be fair and impartial decisions based upon the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Guideline F (financial considerations), with its disqualifying and mitigating conditions, is most relevant in this case.

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.³ The Government has the burden of proving controverted facts.⁴ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁵ although the government is required to present substantial evidence to meet its burden of proof.⁶ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁷ Once the Government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁸ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁹

³ ISCR Case No. 96-0277 (July 11, 1997) at 2.

⁴ ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, Item E3.1.14.

⁵ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁶ ISCR Case No. 01-20700 (December 19, 2002) at 3 (citations omitted).

⁷ ISCR Case No. 98-0761 (December 27, 1999) at 2.

⁸ ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, Item E3.1.15.

⁹ ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, Item E3.1.15.

No one has a right to a security clearance¹⁰ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹¹ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹²

Analysis

Guideline F, 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 overextended is at risk of having to engage in illegal acts to generate funds. . . . (Adjudicative Guideline [AG] 18)

My analysis of the evidence and my conclusions as to the applicability of the relevant disqualifying condition and mitigating conditions and the reasons therefore, as contained in my original decision, remain unchanged. They are:

Applicant defaulted on a business loan owed in the amount of \$1,400,000 in 2009, and the lender filed a complaint against him seeking money damages and replevin of the collateral that was secured by the note. He entered into a forbearance agreement with the lender in or about June 2010, that re-amortized the principal owed at 5% interest payable over 180 months. He has two debts, owed in the combined amount of \$37,000, that have been charged off as bad debts, on which he has not made any payment. Applicant is unable to meet the repayment plans proposed by those creditors, and at least one of those creditors is threatening to commence a lawsuit against Applicant. Disqualifying Condition (DC) 19(a): *inability or unwillingness to satisfy debts* applies.

Applicant’s financial problems resulted from his wife’s loss of employment due to medical issues, his brother-in-law’s terminal illness and death, and the national recession that negatively impacted his business and his investment properties. He has done all within his means to resolve his financial problems, including entering into a forbearance agreement with his largest creditor on which he has made all required payments, and applying income from his business to remain current on the mortgages on his investment properties. Mitigating Conditions (MC) 20(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;* and MC 20(d): *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts* apply.

¹⁰ *Egan*, 484 U.S. at 528, 531.

¹¹ *Id.* at 531.

¹² *Egan*, Executive Order 10865, and the Directive.

Applicant unsuccessfully attempted to enter into repayment agreements with the creditors that arose from a credit card debt and a line of credit on which he had defaulted. He does not have the funds to make the payments those creditors demanded, and there is no record evidence to indicate he will be able to resolve those debts in the foreseeable future. Applicant's investment properties are generating a negative cash flow that is likely to continue into the foreseeable future. He is forced to take a portion of the profit his business generates to remain current on investment properties' mortgages and expenses.

Applicant's home and investment properties have a combined negative equity of about \$500,000. His 2010 partnership tax return reflects ordinary income of about \$111,000, although it is unclear what amount of that income was then applied to Applicant's investment properties. Applicant's 2010 personal adjusted gross income was \$48,466. The combined annual payments on the two loans secured by mortgages on his residence alone consume almost \$30,000 of his income. MC 20(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* does not apply.

Applicant consulted an attorney who assisted him in negotiating the forbearance agreement with the business's lender. The attorney is prepared to seek a Chapter 11 reorganization on behalf of Applicant when and if Applicant determines that is the only route left for him to take. However, Applicant's problems are neither resolved nor under control. Additionally, it is unclear how Applicant will be able to resolve the delinquent credit card and line of credit debts by obtaining a Chapter 11 reorganization. MC 20(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* does not apply. The remaining disqualifying conditions have no applicability to the facts of this case.

Applicant launched his business at a time that, unfortunately, coincided with the onset of a local and national recession. The impact has caused his investment properties and personal residence to severely decline in value. He has lost tenants and been unable to increase or even maintain rental amounts on his investment properties. His business expenses have increased due to higher fuel costs that cannot be offset by increased prices. Despite his best efforts, Applicant remains in a precarious financial position that is unlikely to improve in the foreseeable future.

Response to Issues Mandated by the DOHA Appeal Board Order of Remand

A whole-person analysis weighs heavily in Applicant's favor. He served honorably in the Army from October 1971 until he retired as a major in June 1999. He obtained a bachelor's degree while an enlisted man in the Army that allowed him to obtain a commission. He further obtained a master's degree in civil engineering and construction management while serving in the Army that not only enhanced his value to the Army but also allowed him to obtain a responsible position with a defense contractor after his retirement.

Applicant began purchasing rental properties while working for his civilian employer in an effort to enhance his financial worth. He only left his civilian employment to pursue

further entrepreneurial endeavors with a well-known franchise company in which he had every reason to believe he would be successful. Applicant's financial problems are at least partly the result of his commendable effort in assisting his brother-in-law after he became terminally ill.

SOR allegations 1.a and 1.b allege the two debts that Applicant lacks the financial ability to repay and on which he has been unsuccessful in negotiating repayment plans that would allow him to satisfy those debts over a period of time. As noted earlier, these debts resulted from the national recession, Applicant's wife's loss of employment, and his brother-in-law's health issues. Mitigating Condition (MC) 20(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* applies to those debts. Although he has been unsuccessful in resolving those debts, he is also entitled to application of MC 20(d): *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts* based on his unsuccessful efforts to negotiate repayment plans with his creditors.

SOR allegation 1.c alleges the debt on which Applicant has entered into the forbearance agreement. For the same reason as stated in the preceding paragraph, he is entitled to application of (MC) 20(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*; and MC 20(d): *the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*. However, under the forbearance agreement he entered into with this creditor, Applicant is required to make monthly payments in the amount of \$11,356.41 for the next 14 years. Considering the totality of his financial problems, it is highly unlikely he will be able to continue those payments and satisfy this debt.

If the only issues for me to consider under the financial considerations guideline were application of the mitigating conditions to the disqualifying condition and a determination under the whole-person analysis of whether Applicant's history indicates he is reliable and trustworthy, I would unhesitatingly grant him a clearance. However, the concern, as directed by the Under Secretary of Defense, is multi-faceted. The concern that has not been overcome in this case is: *An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.*

Applicant finds himself like the sailor shipwrecked in the middle of the ocean through no fault of his own who can only be expected to tread water for so long. The combined negative equity in his home and investment property is approximately \$500,000. He is "upside down" on his home mortgages, and his payments on those two mortgages consume almost two-thirds of his annual income. He is unable to satisfy or make payment arrangements on two outstanding delinquent debts, totalling \$37,000, and one of those creditors is already threatening to file a lawsuit against him. Approximately 25% of his rental properties are vacant, and he is only able to remain current on the mortgages owed on those properties by applying profits he receives from the disaster recovery business. While he did not submit documentation disclosing the full maintenance and management

costs for his rental properties, the evidence discloses the monthly negative cash flow for two of those properties is \$1,221.45.

Applicant stands on a financial precipice from which he is likely to fall at any moment. It is impossible to predict what he or any person in his circumstance would do when that fall becomes imminent. One of his attorneys indicated Applicant will seek Chapter 11 bankruptcy protection if it becomes necessary. However, he has not done so thus far, and it would be pure speculation as to whether he will actually do so in the future or what the outcome will be for him if he does choose to pursue that route.

I reiterate there is nothing in Applicant's background to indicate he is untrustworthy, unreliable, or that he will compromise classified information. While I am sympathetic to the position Applicant finds himself in, I am bound by the mandate that the purpose of a security clearance determination is to determine, based on all available evidence, whether or not it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Accordingly, for all the reasons stated above, I must conclude it is not clearly consistent with the national interest to grant Applicant a security clearance.

Considering all relevant and material facts and circumstances present in this case, the whole-person concept, the factors listed in ¶ 6.3.1 through ¶6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant failed to mitigate the financial considerations security concern. He has not overcome the case against him nor satisfied his ultimate burden of persuasion. Guideline F is again decided against Applicant.

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-c:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Henry Lazzaro
Administrative Judge

