



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



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| In the matter of: |) | |
| |) | |
| [NAME REDACTED] |) | ISCR Case No. 10-06060 |
| |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: Greg D. McCormack, Esquire
Jarrett L. McCormack, Esquire

03/12/2012

Decision

MALONE, Matthew E., Administrative Judge:

Applicant mitigated the security concerns about his finances raised by a delinquent second mortgage that is now resolved. His request for a security clearance is granted.

Statement of the Case

After reviewing the results of Applicant’s 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 continue Applicant’s access to classified information. On January 19, 2011, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security

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

concerns addressed in the adjudicative guideline (AG)² for financial considerations (Guideline F).

Applicant answered the SOR (Answer) on February 4, 2011, and requested a hearing. The case was assigned to an administrative judge on April 20, 2011, but was transferred to me on November 2, 2011, due to a change in venue. On November 4, 2011, I scheduled this matter for hearing to be held on December 2, 2011. However, Applicant requested, and I granted, a continuance until December 22, 2011. At the hearing, the Government presented seven exhibits, which were admitted without objection, as Government's Exhibits (Gx.) 1 - 7.³ Applicant testified, presented one witness, and proffered four exhibits, which were admitted, without objection, as Applicant's Exhibits (Ax.) A - D. I also left the record open until January 27, 2012, to receive additional relevant information from the Applicant. Applicant timely submitted information, which I admitted, without objection, as Ax. E. On February 15, 2012, Applicant submitted additional information to augment Ax. E. On February 22, 2012, Department Counsel waived objection to admission of Applicant's February 15 submission, and I admitted it as Ax. F. DOHA received a transcript (Tr.) of the hearing on January 3, 2012.

Findings of Fact

In the SOR, the Government alleged that Applicant owed approximately \$199,000 for a charged-off home equity loan (SOR 1.a). Applicant admitted this allegation, and provided additional explanatory information about the debt. His admissions are incorporated in my findings of fact. Having reviewed the response to the SOR, the transcript, and exhibits, I make the following additional findings of fact.

Applicant is 58 years old and requires a security clearance for his position as chief operating officer (COO) of a logistics company doing business with the Department of Defense and other federal agencies. He has been with the company since 2008 and became COO in 2009. Applicant's professional experience also includes ownership of his own construction firm after working as a project manager for other commercial contractors. Applicant received a bachelor's degree in business administration in 1981 and a master's degree in business administration in 2004. His reputation among his peers and his employees is excellent. (Gx. 1; Gx. 2; Ax. A; Ax. C)

Applicant and his wife have been married since 1985. His wife has worked for over 20 years in the wholesale mortgage industry. They have three adult sons, two of whom work for Applicant's company. The other is in his third year of law school. (Gx. 1; Gx. 2; Tr. 25 - 27)

² The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006). Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

³ Department Counsel also provided an index of its documents. It is contained in "Government's Proposed Exhibits" and included in the record as Hearing Exhibit (Hx.) 1.

In October 2003, Applicant and his wife bought a second home in the southwest United States. They initially intended to use it as a rental property, but eventually hoped to retire there. The two-year-old house was in a golf resort development and they obtained a \$612,000 mortgage for the purchase. The list sale price was \$650,000 and they made a 10% down payment. Applicant and his wife had owned several houses before this transaction. They followed regular procedures for negotiating through a realtor. They obtained an inspection that reported few problems, and obtained financing without any difficulty. Applicant estimated that the market value of the house at the time was about \$850,000. The transaction was done "remotely," in that Applicant and his wife were living and working in a different part of the country. They relied on their realtor, who was located near the property they were buying. The inspection was also done by a local firm. (Gx. 4; Tr. 50 - 51, 66 - 67)

After they closed on their purchase, they obtained a second mortgage in the form of a home equity loan for \$200,000. Half of those funds was applied to their first mortgage. The rest went to repairs and improvements of the house. For several months after they bought the house, weekly renters occupied the house. In the spring of 2004, the region's only period of measurable rain, four feet of water flooded the basement. Applicant had to replace all of the basement furnishings, carpeting, drywall, an air conditioning unit, and electrical wiring. A few weeks later, the basement flooded again after heavy rains. It was ultimately determined that the foundation and other engineering aspects of the house were defective, a fact that the seller probably knew and sought to conceal. (Gx. 4; Ax. B; Ax. D; Tr. 31 - 34)

In June 2007, Applicant and his wife sued the seller, but their attorney advised that to pursue their case to fruition would cost about \$100,000 in addition to expenses already incurred to inspect and partially repair the house. In November 2009, they settled the suit for \$30,000 through mediation. (Ax. A)

Applicant and his wife continued to pay the first and second mortgages until April 9, 2010. They had tried to sell the house, including by short sale, without success, and they had used all of their available savings, including a retirement account, to cover their costs and some of their mortgage payments. The home had lost about 50% of its value because it was structurally unsound. The holder of the first mortgage foreclosed in about September 2010. The house was eventually resold for about \$310,000. (Gx. 4; Tr. 35 - 38, 65 - 69)

Applicant and his wife thought that the second mortgage had been resolved through the foreclosure. However, the lender still reported the debt (SOR 1.a) as delinquent with a balance of \$194,210 (Ax. E) They began trying to resolve this debt, but contact with the lender was frustrating because of a lack of response. (Ax. B; Tr. 40 - 45) It was not until recently that Applicant was able to settle this debt, and the lien held by the second mortgagor has been released. (Ax. E; Ax. F)

Applicant earns about \$375,000 annually. He also receives an annual bonus averaging about \$125,000 after taxes. After expenses each month, Applicant estimates he has about \$3,000 remaining. Applicant's net worth, even after exhausting his savings, is about \$500,000. Applicant and his wife have never been delinquent on any

other debts. They still have a good credit rating and live within their means. Applicant and his wife estimate that they spent about \$260,000 in legal fees and repair expenses as a result of the damage to their house, but they did not have to borrow to do so. (Tr. 36, 75 - 78)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent⁴ with the national interest for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁵ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. 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. 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. Thus, 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

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ Directive. 6.3.

⁶ See *Egan*, 484 U.S. at 528, 531.

compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁷

Analysis

Financial Considerations.

The Government presented information that showed Applicant became delinquent on a second mortgage for a house they bought in 2003. They stopped paying on both the first and second mortgages in April 2009. The first mortgage was resolved through foreclosure and resale, but the second mortgage of about \$194,000 remained, and was not resolved until January 2012. This information raises a security concern about Applicant's finances addressed, in relevant part, at AG ¶ 18 as follows:

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.

More specifically, the Government's information requires application of the disqualifying conditions at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*) and AG ¶ 19 (c) (*a history of not meeting financial obligations*).

Of the mitigating conditions listed at AG ¶ 20, I conclude that the following apply:

(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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's finances are, and have always been sound. He is a successful businessman whose net worth is significant. Aside from the events related to the purchase of a second house in 2003, he and his wife have always had excellent credit and there is no indication they have ever had any other delinquencies. The debt at issue

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

here has been resolved. It arose through unforeseen circumstances. Applicant and his wife relied on a local realtor and a local inspector during the purchase of the house. While *caveat emptor* is always good guidance, it appears that material facts about the house were withheld from Applicant and he was left with an unsalvageable property. Indeed, the property had lost half of its value by 2009 as Applicant and his wife exhausted their cash assets in trying to salvage the property. Despite the problems with the house, they continued to pay their obligations for five years. Their decision to let the home go to foreclosure at that point, under all of these circumstances, does not reflect poor judgment or reliability. Although they were mistaken in thinking that the second mortgage had been resolved, once they learned they were still obliged to pay that loan, they acted responsibly to resolve it.

The facts herein constitute the only known financial difficulty Applicant has had, and he otherwise has managed his personal finances in a sound and prosperous manner. Based on all of the foregoing, I conclude that this isolated financial difficulty does not reflect poorly on his overall judgment and reliability. He has mitigated the security concerns under this guideline.

Whole-Person Concept

I have assessed these facts and have applied the appropriate adjudicative factors, pro and con, under Guideline F. I have also reviewed the record in the context of the whole-person factors listed in AG ¶ 2(a). I conclude that Applicant is a mature, responsible person, who is also a successful businessman. In general, his finances have always been sound, and his response to the problems he encountered here reflects positively on his suitability for access to classified information. A fair and commonsense assessment of all available information shows that he is not likely to be a security risk in the future because of his finances.

Formal Findings

Formal findings 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

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest to continue Applicant's access to classified information. Request for security clearance is granted.

MATTHEW E. MALONE
Administrative Judge