



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



In the matter of:)
)
) ISCR Case No. 10-06703
)
)
Applicant for Security Clearance)

Appearances

For Government: J. Theodore Hammer, Esq., Department Counsel
For Applicant: Michael D. Lovelace, Esq.

02/29/2012

Decision

LYNCH, Noreen A, Administrative Judge:

On October 21, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) listing security concerns arising under Guideline F (Financial Considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), implemented in September 2006.

Applicant timely answered the SOR and requested a hearing. DOHA assigned the case to me on January 3, 2012. A notice of hearing was issued on January 18, 2012, and the case was heard on February 13, 2012. Department Counsel offered four exhibits (GE) 1-4, which were admitted without objection. Applicant testified on his own behalf, and submitted three exhibits (AE) A-C at the hearing, which were admitted without objection. DOHA received the hearing transcript on February 22, 2012. Based on a review of the pleadings, submissions, and exhibits, I find Applicant has not met his burden of proof on mitigation regarding the security concerns raised. Security clearance is denied.

Findings of Fact

In his answer to the SOR, Applicant admitted the delinquent debts in the SOR with explanations. Applicant is 52 years old. He is divorced and has no children. He received his undergraduate degree in 1985. He is a doctoral candidate in physics. (Tr. 15) He held a security clearance from 1989 until 2006. (Tr. 15) Applicant worked as a senior design engineer from 1999 to 2009. (Tr. 35) Applicant has been employed with his current employer for two years.

Applicant purchased six single-family homes as investment properties from 2004 until 2006, including his primary residence. (Tr. 16) He researched the locations of the properties and followed the advice of a realtor. Applicant rented three homes to civilians and three homes to National Guard members. (Tr. 18) However, the tenants lost their jobs due to the economy and the National Guard members were deployed to Iraq. By 2006, Applicant's six properties were vacant. (Tr. 19)

Applicant purchased the investment properties using 100% financing. He obtained 30-year-fixed-rate mortgages. Applicant never made a cash down payment on any of the homes. He stated that the banks only required that he have assets in the bank to cover three months of one of the mortgages. (Tr. 46) He also had tenants in place for the homes. He never dreamed that he would have all the homes vacant at one time. He was adamant that real estate agents found buyers, but the banks would not engage in short sales and that is the reason that all the properties went to foreclosure. (Tr. 76) He also cited that he successfully sold one other property in 2004. (Tr. 90)

When Applicant began purchasing the investment properties, he earned a salary of approximately \$95,000. In 2009, he earned approximately \$110,000. He had some unemployment between contracts in 2009. He lived on his savings. (Tr. 38) As early as 2005, Applicant did not have sufficient cash to take care of a year of mortgage on any one property. (Tr. 56) The purchase price of the six properties amounted to almost \$1.7 million dollars.

Applicant testified that he paid the mortgages on his residence and the other properties for approximately seven months. He used his savings, consumer credit card, and a personal loan to pay his mortgage and the mortgages of the vacant homes for a period of time. His resources did not last beyond 2007. In fact, in November 2007, his primary residence went to foreclosure as he could not maintain the two mortgages on that property. (Tr.41) He was credible in his explanation that he worked with real estate agents to find qualified buyers or tenants. However, he also stated that around 2005, people in the particular geographic area were losing jobs. He purchased yet another property in late 2006 or 2007. (Tr. 77) He stated if he had known the economy would change drastically, he would not have purchased the properties. However, he did not have the cash to fund these investments. At any one time, he had approximately \$6,000 in liquid assets. (Tr. 49)

The SOR lists delinquent accounts totaling approximately \$149,000. The credit reports in the record confirm the debts. (GE 2, 3) In January 2012, Applicant arranged a settlement of \$3,311 for the account listed in SOR 1.b. (AE A) The payments are arranged until June 2012. Applicant did not provide documentation that any payments have been made. He is negotiating a settlement agreement with the account in SOR 1.f. He plans to use his recent tax refund to make the payments for the settlement. (AE B) Applicant does not have the terms of the cash settlement, but he believes it might be \$10,000. The remaining accounts are mortgage foreclosures in 2007. (Tr. 53) (AE C)

Applicant's net monthly income is \$6,688. In a recent personal financial statement, Applicant appears to have a net remainder of \$2,638. (GE 4) He is current on his monthly expenses and car payment. He has no new delinquent debt. He paid on several non-SOR consumer debts prior to the hearing. (GE 4) Applicant has approximately \$5,000 in savings. (Tr. 169)

At the hearing, Applicant noted that he learned that the houses have been sold for lesser amounts than his proposed short sales. He did not have any documentation to sustain his assertion. Applicant agreed that he owes any deficiency that would apply to the properties. (Tr.106) Applicant does not recall receiving any IRS 1099-C forms cancelling the debts. Applicant also agreed that he paid consumer debts that were not listed on the SOR. (Tr. 133) He also points to his October 2011 credit report that shows a zero balance for some of the properties. Applicant obtained the services of a credit repair company who contacted several mortgage companies. (Tr. 136) It is not clear when he contacted the representative or exactly what transpired. (Tr. 147) Applicant believes it may have been 2010. (Tr. 158)

Applicant explained that he believed real estate was the most secure investment. He did not engage in the stock market or "risky" ventures. (Tr. 116) His goal was to develop a real estate portfolio to purchase an apartment complex. (Tr. 116) He repeated that he would not have invested in the properties if he had foreseen the market decline. (Tr. 117) He wanted to quickly put together a real estate portfolio that would enable him to purchase a sizeable apartment complex. (Tr. 118) He had enough cash to pay the mortgage on three houses for maybe four months. (Tr. 118)

Policies

When evaluating an applicant's suitability for a security clearance, an 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. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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.

The U.S. Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”¹ The burden of proof is something less than a preponderance of evidence.² The ultimate burden of persuasion is on the applicant.³

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 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 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.”⁴ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁵ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁶ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

¹ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

² *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁴ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁵ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁶ *Id.*

Analysis

Guideline F, Financial Considerations

The security concern for Financial Considerations is set out in AG ¶ 18:

Failure or an 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." It also states that "an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Applicant admitted the delinquent debts that are approximately \$150,000. His credit report confirms the delinquent debts. Consequently, Financial Considerations Disqualifying Condition (FC DC) AG ¶ 19(a) (inability or unwillingness to satisfy debts), and FC DC AG ¶ 19(c) (a history of not meeting financial obligations) apply. With such conditions raised, it is left to Applicant to overcome the case against him and mitigate security concerns.

Applicant purchased six investment properties from 2004 until 2007. He lost his tenants and had vacant properties that eventually went to foreclosure. He had deficiency balances on his mortgages. He used his savings and consumer loans to help him pay the mortgages. He still has unresolved debt from the credit cards and loans. He has only recently reached a settlement agreement with one company. He is still working with the other account. Thus, from 2007 until the present, Applicant has not resolved the debts despite good intentions. Consequently, Financial Considerations Mitigating Condition (FC MC) AG ¶ 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.

Financial Considerations Mitigating Condition (FC MC) AG ¶ 20(b) (the conditions that resulted in the behavior 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) is potentially applicable. As noted, Applicant was unemployed for a short period between contracts. He also had no tenants in his six properties. He did not foresee the downturn in the economy. He tried short sales. Applicant was not prepared for the foreseeable problems associated with property ownership. However, he did not have enough capital to fund his investment properties. He did not act reasonably under the circumstances. His judgments were not wise. This mitigating condition partially applies.

FC MC AG ¶ 20(d) (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) partially applies. As noted above, Applicant tried to sell the investment properties in short sale. He tried to rent the properties. He only recently addressed the accounts in the SOR that represent his consumer loan and

credit card debt. He did not produce any documentation of actual payments on any of the accounts. He has not received financial counseling. FC MC AG ¶ 20(c) (the person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control) does not apply.

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 an 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case as well as the whole-person factors. Applicant is 52 years old. He obtained his undergraduate degree, graduate degree and a Ph.D, and has worked steadily with the exception of short unemployment between contracts in 2009. He has worked in the field for many years and held a security clearance without incident.

Applicant's financial difficulties do not stem entirely from circumstances beyond his control, nor has he acted reasonably for the past few years. Granted, he had no idea that all six investment properties would become vacant at the same time. He attempted to remedy the situation with short sales. However, he attempted to start a real estate portfolio without sufficient capital. He purchased six homes with no money down. He did not have liquid assets to cover the possibility that the homes would become vacant. On a salary of under \$100,000, he held properties worth \$1.7 million. He relies on the fact that a 2011 credit report shows zero balance on some mortgages and that he believes the houses have now been sold. Applicant did not produce any other documentation, including any tax returns. Certain events were beyond his control, but he did not act reasonably or prudently. He has not met his burden. He has not acted responsibly in resolving his delinquent debts. He has not submitted information to mitigate the security concerns raised in this case. Clearance is denied.

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-1.i:	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 a security clearance. Clearance is denied.

NOREEN A. LYNCH.
Administrative Judge