



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



In the matter of:)
)
) ISCR Case No. 10-07109
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

02/24/2014

Decision

DUFFY, James F., Administrative Judge:

Applicant rebutted the Guideline J (criminal conduct) allegation and mitigated the security concerns arising from the Guideline E (personal conduct) allegation. Clearance is granted.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on April 22, 2010. On October 1, 2013, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J and E. DOD CAF acted under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

The SOR detailed reasons why DOD CAF could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's security clearance. On October 21, 2013, Applicant answered the SOR and requested a hearing.

This case was assigned to me on December 19, 2013. The Defense Office of Hearings and Appeals (DOHA) issued the Notice of Hearing on December 19, 2013. The hearing was conducted in sessions held on January 9 and 31, 2014. During the first session, Department Counsel offered exhibits (GE) 1 through 5, while Applicant testified, called two witnesses, and offered no exhibits. At the second session, Department Counsel offered GE 6 and 7 and Applicant offered exhibits (AE) A through K. The record was left open until February 7, 2014, for Applicant to submit additional matters. Applicant timely submitted AE L through Y. All proffered exhibits were admitted into evidence without objection. Email exchanges between Applicant, Department Counsel, and me have been marked as Hearing Exhibits (HE) 1. Department Counsel's written argument was marked as HE 2. DOHA received the transcript of the first session (Tr1.) on January 17, 2014, and the second session (Tr2.) on February 10, 2014.

Findings of Fact

Applicant is a 46-year-old employee of a defense contractor. He served on active duty in the U.S. Air Force from 1985 to 1992 and then served in the Air National Guard and Air Force Reserve until 2008. He retired from military service in the grade of technical sergeant (E-6) and will be eligible for Reserve retired pay at age 60. He obtained a bachelor's degree in 2013. He married in 1990 and divorced in 2002. He married again in 2005. He has two children, ages 8 and 25, and a stepchild, age 15. He held a security clearance in the Air Force without incident.¹

The SOR contains one allegation under Guideline J that asserted Applicant was charged with four felony counts of residential mortgage fraud in October 2011 and that, after he agreed to cooperate with the prosecution, those charges were placed on a "dead docket" in January 2012 and *no longer prosecuted* in October 2012. This allegation was cross-alleged as the sole Guideline E allegation. In his Answer to the SOR, Applicant admitted the Guideline J allegation and denied the Guideline E allegation. His admission is incorporated herein as a finding of fact.²

Applicant lived overseas from about 1996 to 2005 and operated a successful business there specializing in home automation systems. When he returned to the United States in 2005, he operated a similar business here for about five years. Since then, his business in the United States closed, but he still provides consulting services for clients interested in such systems. In April 2010, he began working for a defense

¹ Tr1. at 6-7, 16-17, 43-62; GE 1; AE E.

² SOR and Applicant's Answer to the SOR.

contractor as an information technology technician. He now works overseas for another defense contractor as a integration technician.³

In 1991, Applicant purchased his first home in the United States for \$54,000 while he was serving in the Air Force. In 1996, he sold that home for about \$103,000. When he returned from overseas in 2005, his assets consisted of about \$425,000 in a bank account. Soon after he returned, he purchased his second home (hereinafter referred to as "625 HO") in which he made a down payment of \$28,000 and took out a \$355,000 mortgage loan. This was his primary residence from May 2005 to September 2009.⁴

The residential mortgage fraud charges brought against Applicant arose from real estate purchases arranged by Mr. S, who was a real estate agent. Mr. S lived in Applicant's neighborhood and had a son who was about the same age of Applicant's son. Applicant's and Mr. S's sons became friends, which led to Applicant becoming a friend of Mr. S. As their friendship developed over time, Applicant grew to trust Mr. S and advised him that he was interested in flipping homes to generate income. In early 2007, Mr. S assisted Applicant in purchasing two fixer-upper properties (1050 HP and 6020 RC) that were the basis of the residential mortgage fraud charges.⁵

Before the purchases, Mr. S showed Applicant the two fixer-upper properties and advised him of the purchase prices of comparable properties. At that point, Applicant decided to buy. Mr. S made arrangements with banks for Applicant to submit mortgage loan applications. Mr. S. also arranged the property appraisals and real estate closings. The same appraiser and attorney were used for both closings. The closings took place at the attorney's office.⁶

On January 9, 2007, Applicant purchased 526 RS for \$875,000 by obtaining a first mortgage loan of \$700,000 and a second mortgage loan of \$175,000. On the day before the sale, this property was appraised at \$875,000. On February 12, 2007, Applicant purchased 1050 HP for \$1,100,000 by obtaining a first mortgage loan of \$880,000 and a second mortgage loan of about \$130,000. On January 22, 2007, 1050 HP was appraised at \$1,100,000.⁷

Applicant indicated that, at the closings, he quickly signed various documents without reading many of them. Specifically, he unwittingly signed documents indicating

³ Tr1. at 40-62, 64-69; Tr2. at 14-18, 35-36; GE 1; AE V, X; Applicant's Answer to the SOR.

⁴ Tr1. at 62-69; Tr2. at 17-18, 28-31; GE 1, 5.

⁵ Tr1. at 69-76, 80-95, 128-130; GE 2-4.

⁶ Tr1. at 69-76, 80-95, 98-109, 133-140, 144-157; Tr2. at 27-29, 31-44.

⁷ Tr1. at 69-76, 80-95, 98-109; AE A, B, C, H, I.

that he intended to occupy each house as his primary residence and signed documents reporting inaccurate information about his monthly income. He also testified that a number of his purported signatures and initials on the loan applications and closing documents were not his, but were forgeries. Mr. S did not appear at the closings and his name does not appear on any of the closing documents.⁸

After Applicant purchased the two fixer-upper properties, he began making repairs to them. Mr. S assisted him in identifying contractors to work on the properties. He began making monthly mortgage payments of about \$6,200 on each property and continued doing so until his money ran out in 2008. As he began experiencing financial difficulties, Applicant's relationship with Mr. S deteriorated, and he decided to hire a real estate agent in an attempt to sell the properties. In about September 2007, he listed the properties for sale, but was unable to sell them.⁹

As his financial problems worsened, Applicant started using credit cards to make mortgage loan payments and pay other bills. In 2008, Applicant hired a company to negotiate a reduction in his credit card payments. He, however, became overwhelmed with his indebtedness and made his last mortgage loan payments in early 2008. On November 21, 2008, Applicant filed Chapter 13 bankruptcy. His bankruptcy was converted to a Chapter 7 proceeding on January 23, 2009. The bankruptcy petition listed that Applicant had \$2,476,000 in assets and \$3,706,456 in liabilities. Schedule A listed the following real estate holdings:

Description of Property	Current Value of Debtor's Interest in the Property	Amount of Secured Claim
625 HO	\$450,000	\$355,321
6020 RC ¹⁰	\$148,000	\$139,328
1050 HP	\$675,000	\$909,000
526 RS	\$725,000	\$946,040
7072 BW ¹¹	\$425,000	\$567,695
	\$2,423,000	\$2,917,384

⁸ Tr1. at 34-42, 80-95, 97, 108-109, 144-157; Tr2. at 18-27, 32-43; AE B, C, I, K.

⁹ Tr1. at 95-108, 128-130; Tr2. at 17-18.

¹⁰ In September 2007, Applicant purchased the 6020 RC property. A relative made a down payment of \$50,000 on that property. Applicant's mother occupied this house. The mortgage on this property was the only debt reaffirmed during Applicant's bankruptcy. He tried to catch up with this mortgage following the bankruptcy and attempted to renegotiate a new mortgage, but was unable to do so. In April 2013, Applicant eventually sold 6020 RC through a short sale with the agreement of the mortgage holder. Following the short sale, his mother began renting the property from the new owner. See Tr1. at 130-133; GE 2, 5.

¹¹ In May 2007, Applicant bought an undeveloped lot (7072 BW). He acquired a \$425,000 construction-to-permanent loan and built a home on that lot. He planned to use this home as a showcase for his home automation systems. See Tr1. at 77-79, 109-110.

The bankruptcy petition also listed that Applicant had 17 credit card debts totaling \$100,659 and a monthly income of \$7,350. Applicant received a bankruptcy discharge on May 13, 2009.¹²

On September 16, 2011, state law enforcement authorities indicted Applicant on four felony counts of residential mortgage fraud. These charges alleged that Applicant, with the intent to defraud, knowingly made deliberate omissions or misrepresentations during the mortgage lending process for the purchase of 526 RC (two counts) and 1050 HP (two counts). The omissions allegedly involved him failing to disclose that he would be paid illegally a portion of the proceeds from the sale of those properties, while the misrepresentations allegedly involved him falsely declaring that he would occupy the properties as his primary residence.¹³

Applicant was overseas when he learned of his indictment. He voluntarily returned to the United States to face the charges. He cooperated with investigators. He explained his involvement in the real estate purchases and contended that he was not involved in any fraudulent scheme. He signed an agreement to cooperate with law enforcement authorities and, with the court's consent, the charges were placed on the dead docket on January 12, 2012 and were *nolle prossed* in October 2012. On November 26, 2012, Applicant applied to have the charges expunged from his record.¹⁴

During the police investigation, Applicant learned that the seller of 526 RS had purchased that property for \$405,000 the day before Applicant bought it for \$875,000 and that 1050 HP was first sold for \$432,000 earlier on the same day that Applicant bought it for \$1,100,000. The seller of one property was married to the seller of the other property, but Applicant did not know they were married because they had different last names. Applicant indicated that, after those transactions, the profits from the sales were split among various people. He did not know how the proceeds were split or who received them, but he presumed Mr. S received some of the proceeds. Applicant testified that he did not receive any of those proceeds. Throughout this matter, he has claimed that he was a victim in the residential mortgage fraud scheme.¹⁵

At the hearing in this case, a witness testified that he met Mr. S in about 2002. He lived two doors from Mr. S and served on the board of directors of the homeowners association. Overtime, the witness and Mr. S became good friends. Mr. S recommended the witness invest with him by purchasing undeveloped property located at a lake. The property was being offered for sale at \$1,100,000. One morning, Mr. S told the witness that he needed \$200,000 as soon as possible to secure the property.

¹² Tr1. at 79-80, 110-130; GE 5.

¹³ Tr1. at 133-140; GE 2-4.

¹⁴ Tr1. at 32-42, 133-140; GE 3, 4; AE K, R.

¹⁵ Tr1. at 32-42, 133-157; GE 3, 4; AE D, F, J, K.

The witness informed Mr. S that it might take him a couple of days to obtain that money. Mr. S then asked how much money the witness could get his hands on that morning. Mr. S's aggressiveness made the witness nervous. At that point, the witness decided that it would be best not to become involved financially with Mr. S. The witness also indicated that Mr. S was later evicted from his home in the neighborhood. The witness said that he has not had any contact with Mr. S in the past two years, but saw him once or twice in the neighborhood during that period.¹⁶

Another witness testified that he purchased an investment property for \$700,000 with the assistance of Mr. S in 2007. Mr. S made all the arrangements for the loan application and closing. Mr. S also indicated that he had renters for that property. It was later learned that the seller of this investment property was also the seller of one of Applicant's properties. Soon after purchasing the property, the witness had difficulty contacting Mr. S. The witness hired a private investigator and attorney and instituted a lawsuit against Mr. S. The witness, however, eventually filed bankruptcy and was advised to dismiss the lawsuit during the bankruptcy proceeding. This witness described Applicant as the most honest man he has ever met.¹⁷

Department Counsel submitted a press advisory from law enforcement officials indicating that ten individuals were charged in similar residential mortgage fraud schemes. Another press advisory indicated that the appraiser of 526 RS and 1050 HP pled guilty to fraud offenses in November 2011. Applicant indicated that the attorney's office where the real estate closing took place was raided by the police and closed.¹⁸

At the hearing, Applicant testified in an open, honest, and forthcoming manner. He did not dodge any questions and was a credible witness. He admitted that he used poor judgment and failed to exercise due diligence in purchasing the properties. He acknowledged that he acted in an irresponsible manner by not reading many of the documents at that closing. He also indicated that, although he had no criminal intent, he played a role as the mark in the scheme by signing the documents and obtaining the homes. He further noted that, in the past seven years, he has exercised due diligence and achieved financial stability.¹⁹

Applicant provided character reference letters from friends, coworkers, and supervisors indicating that Applicant is honest, dependable, and trustworthy. He was described a professional with impeccable character. One letter noted that he strictly adhered to security regulations in handling classified information. His work evaluations

¹⁶ Tr1. at 165-181; AE R.

¹⁷ Tr1. at 181-205; AE G, L.

¹⁸ Tr2. at 47-48; GE 6, 7.

¹⁹ Tr1. at 38-39, 130; Tr2. at 53-60; GE 4; AE K.

for the past two years reflected that his performance exceeded requirements or was exceptional, which were the two highest performance categories.²⁰

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. 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.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See v.

²⁰ AE L- X.

Washington Metro. Area Transit Auth., 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 sets out the security concern relating to criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Two disqualifying conditions under criminal conduct AG ¶ 31 are potentially applicable in this case:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

In 2007, Applicant was charged with four felony counts of residential mortgage fraud. Those charges were later dismissed. Applicant cooperated with authorities throughout this matter. He established that he was a victim of a fraudulent scheme. While he signed documents that contained inaccurate information, he did not realize what he was signing at that time and had no intent to defraud. He has rebutted the criminal conduct allegation. None of the above disqualifying conditions apply. Alternatively, sufficient evidence was presented to establish the mitigating condition in AG ¶ 32(c), *i.e.*, evidence that the person did not commit the offense. I find in favor of Applicant under Guideline J.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; and

* * *

(3) a pattern of dishonesty or rule violations.

During two real estate closings in 2007, Applicant failed to read important documents and signed documents that contained incorrect and misleading information. Those documents may have been relied upon by banks in granting him mortgages loans. In purchasing those and other properties, he overextended himself financially, which resulted in him eventually filing bankruptcy. He admitted that he acted irresponsibly and failed to exercise due diligence in purchasing those properties. AG ¶ 16(d) applies.

AG ¶ 17 lists three personal conduct mitigating conditions that are potentially applicable:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant was a victim in a residential mortgage fraud scheme. He trusted others who took advantage of him. He has accepted responsibility for not acting responsibly in those real estate transactions. He has learned a tough lesson. His questionable conduct occurred over seven years ago under unique circumstances that are unlikely to recur. Since then, he has achieved financial stability and acted in a responsible manner. AG ¶¶ 17(c) and 17(d) 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 the applicant's conduct and all relevant 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. I have incorporated my comments under Guidelines J and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant served in the Air Force, Air National Guard, and Air Force Reserve for 23 years. He is a responsible husband and parent. He is a valued employee. Friend, coworkers, and supervisors attest to his honorable character. He has shown that he is reliable and trustworthy.

Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant has rebutted the criminal conduct allegation and mitigated the security concerns under the personal conduct allegation.

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 J: Subparagraph 1.a:	FOR APPLICANT For Applicant
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Paragraph 2, Guideline E: Subparagraph 2.a:	FOR APPLICANT For Applicant
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Decision

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Eligibility for access to classified information is granted.

James F. Duffy
Administrative Judge