



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 10-08249

**Appearances**

For Government: Gregg A. Cervi, Esquire, Department Counsel  
For Applicant: *Pro se*

December 7, 2011

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant's statement of reasons (SOR) lists one debt, a delinquent mortgage account for \$104,942. He permitted this debt to go into foreclosure even though he had the financial resources to keep it in current status. He failed to make sufficient progress in resolving this SOR debt, and financial considerations concerns are not mitigated at this time. Eligibility for access to classified information is denied.

**Statement of the Case**

On April 7, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF 86) (Item 5). On June 17, 2011, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to 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* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline F (financial considerations). (Item 1) The SOR detailed reasons why DOHA could not make the 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 Applicant's clearance should be granted, continued, denied, or revoked.

On July 13, 2011, Applicant responded to the SOR allegations and requested a decision without a hearing. (Item 4) A complete copy of the file of relevant material (FORM), dated September 14, 2011, was provided to him on October 3, 2011. He was afforded an opportunity to file objections and to submit material in refutation, extenuation, or mitigation.<sup>1</sup> Applicant did not respond to the FORM. The case was assigned to me on December 1, 2011.

### **Findings of Fact<sup>2</sup>**

In Applicant's response to the SOR, he admitted the debt in SOR ¶ 1.a; however, he denied that he was financially irresponsible.<sup>3</sup> His admissions are accepted as factual findings.

Applicant is a 29-year-old mechanical engineer employed by a government contractor since June 2007.<sup>4</sup> From August 2005 to April 2006, he was employed as an engineering intern. He attended a university from 2000 to 2007, and he earned a bachelor's degree. He has never served in the military. Applicant has never been married, and he does not have any children. He has cohabited with his fiancée since October 2007.

### **Financial Considerations**

Applicant's SOR lists one debt, a delinquent mortgage account for \$104,942. (Item 1) He disclosed this delinquent debt on his April 7, 2010 SF 86 and noted he had allowed his condominium to move to foreclosure. (Item 5)

On July 27, 2010, an Office of Personnel Management (OPM) investigator interviewed Applicant concerning his financial history.<sup>5</sup> Applicant explained that he

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<sup>1</sup>The DOHA transmittal letter is dated September 14, 2011, and Applicant's receipt is dated October 3, 2011. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information.

<sup>2</sup>Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

<sup>3</sup>Unless stated otherwise, the information in this paragraph is from Applicant's SOR response. (Item 2)

<sup>4</sup>Unless stated otherwise, the information in this paragraph is from Applicant's SF 86. (Item 5)

bought a condominium in Arizona in October 2007 for \$107,000. The monthly payment, including home owner's association dues, was \$860. In October 2007, he began living with his fiancée in a home she owns; however, Applicant pays the mortgage. (Item 6) It is unclear whether Applicant ever lived in the condominium. (Items 8, 9; FORM at 4)

Applicant stopped making payments in October 2009, and his credit report correctly indicated his account was behind by \$5,614. He attempted to refinance and obtain a lower payment; however, he did not qualify because his income was too high. The fair market value of his condominium was about \$17,000 to \$20,000. He elected to allow the condominium to go into foreclosure because of its decline in value. He completed a personal financial statement, which indicated he had a net monthly remainder of \$1,251. He had about \$15,000 in a 401K account.

In April 2010, the creditor repossessed Applicant's condominium, and in July 2010, Applicant's condominium was sold for \$19,250.<sup>6</sup> He explained his rationale for permitting his condominium to go into foreclosure and sale:

I obtained the mortgage in October of 2007 for approximately \$107,000. Due to the economy and the housing market, in October of 2009, condos similar to my unit in the same complex were selling in the range of \$17,000 to \$24,000. Due to the economic recession, I was grossly upside down on the value of the condo; I spoke with the mortgage company with regards to loan modifications or refinancing to a lower interest rate and due to my income and how upside down the unit was, they had stated there was no action they could take. Based on the depressed value of the condo I would have needed the property to appreciate at a rate of approximately 7% annually for the unit to be worth the original purchase price at the end of the mortgage. I missed my first payment on the condo in October of 2009 . . . . The foreclosure of my condo was not due to an inability to pay bills but was a strategic default, due to the value of the condo caused by the economic recession at the time.

The FORM at 5 describes the absence of record evidence that Applicant has been relieved from any deficiency arising from the foreclosure of his condominium. After receiving the FORM, Applicant did not provide any evidence to clarify his liability for the approximately \$90,000 that the creditor lost in principle, interest, and taxes.

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security

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<sup>5</sup> Unless stated otherwise, the information in this paragraph and the next paragraph is from Applicant's July 27, 2010 OPM personal subject interview (PSI). (Item 6 at 3-4)

<sup>6</sup> Unless stated otherwise, the information in this paragraph is from Applicant's July 13, 2011 SOR response. (Item 4)

emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, 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.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant’s 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines 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 overarching 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.

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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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), § 3.1. 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 about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant 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. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein 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 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**

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concern is under Guideline F (financial considerations).

### **Financial Considerations**

AG ¶ 18 articulates the security concern relating to financial problems:

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.

AG ¶ 19 provides two disqualifying conditions that could raise a security concern and may be disqualifying in this case: “(a) inability or unwillingness to satisfy debts;” and “(c) a history of not meeting financial obligations.” In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government’s obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

(internal citation omitted). Applicant’s history of delinquent debt is documented in his credit reports, his OPM PSI, his responses to DOHA interrogatories, and his SOR response. Applicant’s SOR lists one debt, a delinquent mortgage account for \$104,942. Applicant stopped making payments in October 2009, and his credit report correctly indicated his account was behind by \$5,614. In July 2010, Applicant’s condominium was sold for \$19,250. The unresolved loss to the creditor is about \$90,000. The Government established the disqualifying conditions in AG ¶¶ 19(a) and 19(c), requiring additional inquiry about the possible applicability of mitigating conditions.

Five mitigating conditions under AG ¶ 20 are potentially applicable:

(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;

(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;

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

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant's conduct in resolving his debts warrants very limited application of AG ¶¶ 20(b), 20(c), and 20(d).<sup>7</sup> There is no evidence of financial counseling. He showed some good faith when he admitted responsibility for his SOR debt in his SF 86, OPM PSI, and his SOR response. Applicant's financial situation was damaged by the precipitous decline in the real estate market in Applicant's state. The value of his condominium has declined by about 80% in two years. There is no guarantee that the value of the condominium will recover anytime soon. This decline in real estate values is a circumstance beyond his control. However, Applicant's decision to make a strategic default, when he had the income to keep his debt in current status did not show financial responsibility.

Applicant's financial circumstances have been relatively stable since he became employed in 2007. He completed a personal financial statement, which indicated he had a net monthly remainder of \$1,251. He had sufficient income to make his monthly payments on his condominium. He made an economic decision to make a strategic default.

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<sup>7</sup>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) 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)).

Applicant did not establish that he acted responsibly under the circumstances. The file lacks proof that he maintained contact with the mortgage holder of his condominium.<sup>8</sup> There are no receipts or account statements from the creditor, establishing any payments to his SOR creditor after October 2009. There is insufficient evidence that his financial problem is being resolved. The file lacks evidence that he has acted responsibly on his condominium mortgage.

## **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.

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. AG ¶ 2(c). I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline F, but some warrant additional comment.

Although the rationale for reinstating Applicant's clearance is insufficient to support a security clearance at this time, there are several factors tending to support approval of his access to classified information. Applicant is a 29-year-old mechanical engineer employed by a government contractor since June 2007. In 2007, he earned a bachelor's degree. He is sufficiently mature to understand and comply with his security responsibilities. He deserves some credit for volunteering to support the U.S. Government as an employee of a contractor. There is every indication that he is loyal to the United States and his employer. There is no evidence that he abuses alcohol or uses illegal drugs. Applicant's financial situation was damaged by the extraordinary decline in real estate value for condominiums in Applicant's state. His financial situation, aside from his default on his condominium mortgage, is excellent. I give Applicant

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<sup>8</sup>“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.

substantial credit for admitting responsibility for the SOR debt in his SF 86, OPM PSI, and SOR response. He has been honest about his failure to address his financial plight. These factors show some responsibility, rehabilitation, and mitigation.

The whole-person factors against reinstatement of Applicant's clearance are more substantial at this time. Applicant's SOR lists one debt, a delinquent mortgage account for \$104,942. He stopped making payments in October 2009, and his credit report correctly indicated his account was behind by \$5,614. In July 2010, Applicant's condominium was sold for \$19,250. The unresolved loss to the creditor is about \$90,000. Applicant did not provide any documentation showing attempts to establish a payment plan or any payments after October 2009. On the contrary, he said he had the available monthly income to keep his condominium mortgage in current status, and he chose to strategically default on his debt because the amount of the mortgage was about five times the value of his condominium. Applicant breached a contract he signed and violated a promise to make payments in accordance with that contract, even though he had the ability to make his monthly payments. His broken promise on this serious matter must be factored into the Government's assessment about whether Applicant will conscientiously abide by any promise to comply with security rules and requirements. The Government must be confident that Applicant will self-report security violations, even when the violation may result in personal hardship or other adverse consequences. Applicant has failed to make sufficient progress resolving his delinquent SOR debt to establish his financial responsibility.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude financial considerations concerns are not mitigated. Eligibility for access to classified information 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

Subparagraph 1.a:                              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 Applicant's eligibility for a security clearance. Eligibility for a security clearance is denied.

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MARK HARVEY  
Administrative Judge