



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



In the matter of:)	
)	
)	ISCR Case No. 10-09478
)	
Applicant for Security Clearance)	

Appearances

For Government: David Hayes, Esq., Department Counsel
For Applicant: *Pro se*

October 6, 2011

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline F, Financial Considerations. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On June 15, 2011, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline F. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on July 7, 2011, and requested a hearing before an administrative judge. The case was assigned to me on August 4, 2011.

DOHA issued a Notice of Hearing on August 11, 2011. I convened the hearing as scheduled on September 8, 2011. The Government offered Exhibits (GE) 1 through 6. Applicant did not object and they were admitted into evidence. Applicant and two witnesses testified. Applicant offered Exhibits (AE) A through KK, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on September 16, 2011.

Findings of Fact

Applicant admitted the allegations in SOR ¶¶ 1.b and 1.g. He denied the remaining allegations. I incorporated Applicant's admissions in my findings of fact. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 45 years old. He holds a bachelor's and master's degree. He married in 1995 and has a 13-year-old daughter and a 12-year-old son. He divorced in May 2008. He remarried in July 2010. He has been employed by a federal contractor since July 2009.¹

From 1999 to 2003, Applicant earned approximately \$200,000 to \$250,000 annually. He also received bonuses and in 2001, he earned a bonus of approximately \$1 million dollars. He decided to change jobs and work in the real estate business. He was involved with three different companies that purchased new residential property, bought and held other residential property, and purchased and remodeled other residential property. The business was successful until the real estate market took a downturn. Applicant had one partner, Mr. X and about eight investors in the business. From 2005 to 2008, the business purchased 55 different residential properties.² In 2007, due to the declining real estate market, Applicant and Mr. X split the properties, and through an informal agreement each agreed to resolve the financial issues on the properties they split. Most of the properties were valued at much less than the mortgages on them. Applicant resolved the financial issues on all of the properties he held except those alleged in the SOR. Applicant has worked with the different companies and had loans modified or sought other financial resolutions on his debts. Applicant used his savings to resolve some of the financial issues.³

The debt in SOR 1.a (\$4,408) is a past business obligation that Applicant held jointly with his partner. When they split the debts, Mr. X was to pay this debt. Applicant agreed he is the co-guarantor on the debt and understands he is still obligated to pay it. However, this debt was transferred to Mr. X in the summer of 2007. Applicant believes it became delinquent in 2009. Applicant believes Mr. X will eventually pay the debt, but Mr. X also has experienced financial problems and it is not a priority to him. Applicant

¹ Tr. 104-106.

² AE JJ, KK.

³ Tr. 32-37, 49-57.

stated he attempted to resolve the debt through negotiations with the bank holding the debt, but was unsuccessful. He understands if Mr. X does not pay the debt he is still responsible for it, and he intends to resolve it.⁴

The debt in SOR ¶ 1.b is for a mortgage account that is past due in the amount of approximately \$27,000. Applicant attempted to modify the loan before it went into arrearage, but the mortgage company will not modify it until the debt is delinquent. Applicant corresponded with the mortgage company and has actively pursued a short sale or a deed in lieu of foreclosure, but has been unsuccessful. His former business partner, Mr. X, lives in the residence, but he has not paid rent since late 2008. Applicant has made a business decision not to evict Mr. X, because then the property would be empty. The residence needs to be renovated and Applicant believes he would not be able to rent it in its current condition, and he does not have the money to repair it. Therefore, he has decided it is better to allow Mr. X to live there rent free than to have no one in the house. Applicant stated he is working with Mr. X to see if they can find a buyer for the house. The mortgage on the house is \$116,000, and Applicant believes it is worth about \$40,000 to \$50,000. He has not paid the mortgage since April 2009. The mortgage company will not modify the loan. He has an “as is” offer to buy the property, but it is for less than is owed on the property. At this point, he is hoping he can sell it, and is exploring other avenues to resolve the debt. The mortgage company filed a petition to foreclose on the property on August 18, 2009. They have taken no other action since then.⁵

The debt in SOR ¶ 1.c is a mortgage debt that was past due in the amount of \$9,095 on a loan balance of \$126,285. Applicant attempted to modify the loan before it went into arrears, but the loan company would not agree. After the loan was in arrears he was granted a temporary modification. He was granted forbearance where he paid half of the amount owed. He did this for the 90-day forbearance period. He stated he was told that if complied with the terms of the forbearance the company would permanently modify it. He attempted to sell the property, but was unsuccessful. However at the end of the period, the loan company would not give a permanent modification. The property was foreclosed, and the creditor charged off the debt. Applicant was issued an Internal Revenue Service (IRS) Form 1099-A.⁶ It does not appear the creditor is seeking a deficiency judgment. Applicant will file the tax document with his tax returns. The debt is resolved.⁷

⁴ Tr. 27-30, 36-40; AE A.

⁵ Tr. 40-50, 58-70; AE B-L.

⁶ An IRS Form 1099-A is issued to a taxpayer to determine gain or loss. If a lender cancels part of the debt, he must file an IRS Form 1099-C, Cancellation of Debt. IRS Publication 4681, *Canceled Debts, Foreclosures, Repossessions, and Abandonments*, April 20, 2011. ISCR Case No. 10-01978 at 4 (App. Bd. Aug. 24, 2011).

⁷ Tr. 63, 78-88; AE O, P, Q, R.

The debt in SOR ¶ 1.e is the second mortgage on the property in SOR ¶ 1.c. During the forbearance period of the primary loan, Applicant continued to pay the second mortgage. Once the property was foreclosed, he attempted to negotiate with the creditor to settle this debt. He has reached a settlement to pay \$1,600 on the \$16,010 loan to settle it. He paid the settlement amount on September 3, 2011.⁸ The debt is resolved.⁹

The debt in SOR ¶ 1.d is for a mortgage balance of \$130,876, which was past due. The property was foreclosed in September 2009. The creditor has not issued an IRS Form 1099-A. Applicant has inquired about the charged-off status and if the IRS Form 1099-A will be issued, but has not received a response. Applicant's accountant is working with the IRS to get transcripts from the creditor to see if any legal obligation remains. He believes there is likely a deficiency on the debt, but has not been advised by the creditor on how they are going to proceed. Applicant explained he had attempted to have the debt modified, but was unsuccessful. The debt in SOR ¶ 1.f is the second mortgage on the property. The holder of the second mortgage went out of business, and despite Applicant's attempt to determine who now holds the debt he has been unsuccessful. He sent payments for a period time to a company that he believed the loan was transferred to, but when he attempted to get a tax form from the company to show the interest that was paid on the loan, the company would not respond. He became suspicious that there was never a proper transfer of ownership. Applicant does not believe the current creditor is the valid owner. He has never received proper notification as to who is the valid creditor. Applicant is resolving the debt.¹⁰

In 2006, Applicant filed for divorce, which also affected his finances. His divorce was final in May 2008. He was ordered to pay \$2,500 a month for child support. Applicant stated that from May 2008 to April 2009, he was unemployed, but paid the full amount of child support. From April 2009 to July 2009, he was unable to make the full child support payment. He stated he began to deplete his savings, and in July 2009 he expanded his job search to other locations. He found a job, but was required to move. Since he moved he has incurred travel expenses to visit his children. Applicant's child support order was based on his salary of more than \$200,000 annually. He has an attorney, and on February 12, 2009, they filed a motion to modify the amount of the child support. Applicant believes that his motion will eventually be granted and the order will modify and decrease the amount of his monthly child support payments. He believes he has incurred additional expenses regarding his children, and this will be considered, along with his ex-wife's increase in annual income. Applicant's current annual income is \$173,000. He estimated he pays about \$1,040 in monthly child support payments. He provided documents to show that he believes based on the state's child support formula that his request to modify will be granted and he will be ordered to pay less than the current order of \$2,500. Applicant stated he paid the

⁸ AE Z, AA.

⁹ Tr. 89-91.

¹⁰ Tr. 91-102; AE S, T, U, V, W, X, BB, CC.

\$2,500 monthly child support payment until he could not afford to pay. He understood he was obligated by court order to pay \$2,500 monthly. Applicant believes based on other expenditures he has made for his children that he has paid approximately \$20,000 to \$30,000 more than required. The child support modification request has not been resolved by the state court.¹¹

Applicant stated that when he was going through his financial difficulties, he kept his business and personal expenses separate. He ensured that he could pay his monthly living expenses.¹²

Applicant's wife testified on his behalf. She confirmed that he has been involved in a long and expensive divorce. She believes Applicant to be an honest, trustworthy, reliable, and dependable person. She considers him a compassionate and caring husband and father. He has been proactive in attempting to resolve his delinquent debts.¹³

A relative who has known Applicant for more than 30 years testified on his behalf. The witness has held a security clearance and is a facility security officer. He was familiar with Applicant's business and divorce challenges. He has full faith and confidence that Applicant is a trustworthy person. He believes Applicant has integrity and can be trusted. He believes Applicant possesses good character and is worthy of holding a security clearance.¹⁴

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

¹¹ Tr. 103, 106-130; AE DD, EE, FF, GG.

¹² Tr. 70-78.

¹³ Tr. 136-146.

¹⁴ Tr. 147-152.

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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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 and has the ultimate burden of persuasion as to obtaining a favorable security decision.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon 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 or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

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

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.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 19 and especially considered:

- (a) inability or unwillingness to satisfy debts; and

(c) a history of not meeting financial obligations.

Applicant had numerous business debts that were delinquent and unresolved. He also has unilaterally decreased his child support payments and is in arrears. I find there is sufficient evidence to raise the above disqualifying conditions.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. I have considered the following mitigating conditions under 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;

(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 former business involved investing in residential real estate. When the real estate market took a downturn, it gravely affected his business. He resolved many debts that are not included on the SOR. The debts in SOR ¶¶ 1.a through 1.f are the remaining delinquent business debts. When Applicant and his business partner split their debts, his partner was to pay the debt in SOR ¶ 1.a. Applicant understands he is also obligated because he held it jointly. Mr. X is unable to pay it at this time. Under the circumstances, I do not find Applicant has abandoned the debt, but believes because he assumed many other joint debts, that his partner is responsible for this one. Applicant has also made a business decision to allow Mr. X to remain in the house that is the subject of SOR ¶ 1.b. If he evicted him, the value of the house would deteriorate and be more difficult to sell. He received notice in August 2009 that the house was being foreclosed. He continues to attempt to find a buyer. I find Applicant is actively attempting to resolve this debt. The debt in SOR ¶ 1.c was charged off and Applicant received an IRS 1099-A Form. He will file it with his annual income tax return. The debt

in SOR ¶ 1.d was for property that was foreclosed. Applicant and his accountant are attempting to find out if there is a deficiency. Applicant is actively attempting to resolve the debt. The debt in SOR ¶ 1.e was settled and paid. I find that the downturn of the real estate market were conditions that affected Applicant's business and were beyond his control. He was also going through a divorce during this period of time that affected his finances. He no longer is in the real estate business and has a well-paying job. I find it is unlikely that he will have future financial problems. I also find Applicant has been addressing his business debts and has resolved many of them and he is actively attempting to resolve the remaining ones. He has not walked away from his debts, but is negotiating different avenues to resolve the debts. I find he has acted responsibly under the circumstances. I find AG ¶¶ 20(a) and 20(b) apply to his business debts. I also find that there are clear indications that Applicant's financial issues with his business debts are under control and are being resolved. I find AG ¶¶ 20(c) and 20(d) apply to his business debts.

Applicant was ordered to pay \$2,500 a month in child support payments. He continued to make those payments until April 2009 through July 2009 when he stated his savings became depleted. He was able to find a new job and he moved in July 2009. His current annual salary is \$173,000. It was his choice to move. He has unilaterally decided that, because he now pays travel expenses for his children to visit him, his child support payments should be reduced. He decided to pay approximately \$1,040 a month instead of the ordered amount of \$2,500. Applicant has chosen to intentionally disregard the court-ordered child support amount based on his own interpretation and application of what he believes should be the modified amount. Applicant is required by law to pay \$2,500 a month in child support. He has the means to pay this amount. He chooses not to pay it. It is not within the purview of this decision to decide if Applicant's request for modification of his child support is substantiated or legitimate. However, Applicant clearly is aware that he is in defiance of the court order. I have considered the parameters of AG ¶ 20(e) and conclude they do not apply to the facts surrounding this allegation. I find none of the remaining mitigating conditions apply to this debt.

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.

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. Applicant's real estate business suffered when the market took a downturn. He had many debts that he resolved. Those included in the SOR, except the debt in ¶ 1.e that was settled, have not been paid, but are being resolved. He has not abandoned these debts, but each has a unique issue and he is addressing them from a business outlook. However, Applicant has not addressed his failure to comply with child support payments. he has unilaterally decided to reduce his current payment. Applicant has sufficient income to make the monthly payments, but chooses not to. Whether his child support payments should be reduced and the amounts of any reduction are matters for the family or divorce court to decide. His court-ordered payments remain a valid debt, and he has not provided evidence to mitigate this financial responsibility. At this juncture, I find Applicant has failed to mitigate the financial considerations security concerns. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance.

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:	AGAISNT APPLICANT
Subparagraphs 1.a-1.f:	For Applicant
Subparagraph 1.g:	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. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge