



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



In the matter of:)	
)	
)	ISCR Case No. 10-10462
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin Howry, Esquire, Department Counsel
For Applicant: Joseph Testan, Esquire

December 9, 2011

Decision

HOGAN, Erin C., Administrative Judge:

On July 19, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns 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 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 after September 1, 2006.

On August 25, 2011, Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on September 28, 2011. The case was assigned to another administrative judge on October 5, 2011, and transferred to me on October 25, 2011. That same date, a Notice of Hearing was issued, scheduling the hearing for November 17, 2011. The hearing was held as scheduled. During the hearing, the Government offered nine exhibits which were admitted as Government Exhibits (Gov) 1 – 9. Applicant testified, called two witnesses, and offered ten exhibits which were admitted as Applicant Exhibits (AE) A - J. Applicant’s Counsel submitted an additional document after the hearing which is

admitted as AE K. Department Counsel had no objection. (HE I) The transcript (Tr.) was received on November 27, 2011. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his response to the SOR, Applicant admitted all the SOR allegations.

Applicant is a 43-year-old senior engineer employed by a Department of Defense contractor, seeking to maintain his security clearance. He has worked for his current employer since 2005. He is married and has two children, ages 9 and 12. (Tr. 41-42; Gov 1; Gov 3)

In 2005, Applicant purchased a second home as an investment property in another state. There was a first and second mortgage on the property. The mortgage payment was \$1,200. He rented the property to a distant relative. His distant relative agreed to pay \$1,000 a month rent. In late 2008, the tenant stopped paying rent on the property. Applicant evicted the tenant in January 2010. (Tr. 43-44; Gov 5)

Applicant was initially able to afford the property. When his tenant stopped paying rent, he was no longer able to afford the property. He stopped making his mortgage payments on the property in October 2009. He immediately contacted the holder of the first mortgage to inquire about a home retention option. On November 28, 2009, the holder of the first mortgage sent him forms to complete in order to apply for a short sale. Applicant sent the forms to his cousin who was a realtor in the area where the property was located. Not much progress was made and the property was never sold. In May 2010, Applicant received a notice of foreclosure. (Tr. 43-47; 62-63; Gov 5; AE J) The debts alleged in the SOR include the first mortgage with a balance of \$164,000 (SOR ¶ 1.a) and the second mortgage with a balance of \$38,931. (SOR ¶ 1.b)

Upon receiving the foreclosure notice, Applicant hired an attorney to pursue alternative resolutions to prevent the foreclosure. The attorney is assisting him in applying for a short sale with the lender. His application package is currently being reviewed by the company holding Applicant's first mortgage. In the event that his application for a short sale is not approved, Applicant is able to afford the deficiency judgment on the property. (Tr. 48, 54; AE B)

On November 8, 2011, Applicant settled the second mortgage account for \$7,984.34. He paid this amount with a check dated October 16, 2011. (Tr. 51; AE A) Aside from this property investment, Applicant has no other delinquent accounts. All of his other debts are current. He was financially sound before he invested in the property. (Tr. 55; Gov 2; Gov 7; Gov 9)

During the hearing, Applicant provided a copy of his budget which he prepared a few days before the hearing. His net monthly income is \$9,504. His total monthly expenses are \$7,553. He has \$1,951 in discretionary income each month. (AE J) The

mortgage on his home is current. He has sound financial investments. (AE F; AE G; AE I)

Applicant's supervisor testified during the hearing. He has known Applicant since 1996. They met when they were employed by a former employer. When they work on the same projects, he sees Applicant on a daily basis. Currently, they are not working on the same project, and he sees Applicant once or twice every two weeks. His supervisor testified that Applicant is very reliable. He demonstrates very good judgment. The supervisor trusts Applicant. He socializes with him outside of work. He knows his wife and children. He has been aware of Applicant's financial issues for six months. He recommends that Applicant maintain his security clearance. (Tr. 15-21)

A former co-worker and personal friend of Applicant's also testified during the hearing. He first met Applicant in 2000 when they both worked at an overseas location. They worked together until 2003. They remain friends. They have lunch together on a monthly basis. He describes Applicant as an honest, hard working man. He is reliable, trustworthy and has sound judgment. He is aware of Applicant's real estate issue. He recommends Applicant for a security clearance. (Tr. 23-28)

Additional co-workers and friends provided written statements on behalf of Applicant. They said similar favorable things about Applicant. In addition to work, Applicant volunteers with a youth soccer program in his local community. (AE H)

Policies

When evaluating an applicant's suitability for a security clearance, the 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, which must be considered when determining 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.

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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The applicant 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 relating to the guideline 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 disqualifying conditions that could raise security concerns. I find AG ¶ 19(a) (an inability or unwillingness to satisfy debts); and AG ¶ 19(c) (a history of not meeting financial obligations) apply to Applicant’s case. The second home he purchased as an investment property in 2005 is now pending foreclosure.

An individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in their obligations to protect classified information. Behaving irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life. A person’s relationship with his creditors is a private matter until

evidence is uncovered demonstrating an inability or unwillingness to pay debts under agreed terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a situation of risk inconsistent with the holding of a security clearance. An applicant is not required to be debt free, but is required to manage his finances in such a way as to meet his financial obligations.

The Government's substantial evidence and Applicant's admissions raise security concerns under Guideline F. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶ E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005))

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions apply:

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) applies. Applicant's decision to purchase an investment property in 2005 did not work out as well as he anticipated. This is the only negative mark on his otherwise stellar financial history. Applicant is making an effort to resolve this issue. Aside from this debt, he is financially stable. The conduct that created this issue is unlikely to recur and does not cast doubt on Applicant's reliability, trustworthiness, or good judgment.

AG ¶ 20(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) applies. Applicant rented the property to a distant relative who stopped paying rent in late 2008 and lived in the property for over a year until Applicant was able to evict him in January 2010. Applicant was unable to keep up with the mortgage payments during the months that he was not receiving rent. A downturn in the real estate market further complicated matters. Applicant's attempts to sell or rent the property were unsuccessful. Upon receipt of the foreclosure notice, Applicant retained an attorney and is in the process of attempting to negotiate a short sale on the property. He is current on his other financial obligations. He acted reasonably under the circumstances.

AG ¶ 20(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) applies because Applicant resolved the second mortgage and has taken reasonable steps to negotiate a short sale with the owner of the first mortgage. Aside from this issue, he has no other delinquent accounts.

AG ¶ 20(d) (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) applies. Applicant settled the second mortgage (SOR ¶ 1.b) and his attorney is in the process of negotiating a short sale in lieu of foreclosure on the first mortgage (SOR ¶ 1.a). He made a good-faith effort to resolve this issue.

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. I considered Applicant's employment history with defense contractors. I considered the favorable testimony of his supervisor and the favorable statements of his friends and coworkers. But for this distressed property, Applicant is financially stable. He was unable to pay the mortgage after his tenant, a distant relative, stopped paying rent. He retained counsel when he was notified of the foreclosure action and is attempting to negotiate a short sale. He has the means to negotiate a settlement if the application for a short sale is not approved. He demonstrated a good-faith effort to resolve the issues with this mortgage. Security concerns are mitigated.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant

Conclusion

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

ERIN C. HOGAN
Administrative Judge