



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



In the matter of:)
)
) ISCR Case No. 10-11076
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: Vere O. Plummer, Esq.

November 4, 2011

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate the Financial Considerations concerns. He defaulted on the mortgages for four separate investment properties, all four properties were recently foreclosed upon, and he failed to handle his financial problems in a responsible fashion. Clearance is denied.

Procedural History

On June 8, 2011, the Defense Office of Hearings and Appeals (DOHA) made a preliminary determination to deny Applicant access to classified information.¹ The basis for this decision is set forth in a Statement of Reasons (SOR), which alleges the security concern under Guideline F (Financial Considerations).

Applicant's response to the SOR was received by DOHA on July 15, 2011 (Answer). He denied the SOR allegations and requested a hearing.

¹ This action was taken pursuant to 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) implemented by the Department of Defense on September 1, 2006.

On July 29, 2011, Department Counsel filed its ready-to-proceed. After coordinating with the parties, I scheduled the hearing for September 22, 2011.

At hearing, Department Counsel offered five exhibits that were marked and admitted without objection as Government Exhibits (GE) 1 through 5. Applicant appeared at the hearing with counsel and testified. He did not submit any documentary exhibits. The transcript was received on September 30, 2011.

Findings of Fact

Applicant is 34 years old. He graduated college in 1999 with a degree in management information systems and was able to land a job in his field of study. He then purchased his first home in 2000. He was laid-off in 2001, but was able to keep current with his expenses by working several odd jobs until he was able to secure a job with a government contractor in 2003. He married in October 2008. A few months later, in February 2009, he started a new job with his current employer, also a government contractor. Applicant's income from this new job increased to approximately \$145,000 a year. He has held a security clearance for over eight years.²

Applicant purchased his first investment property in 2003. He established a real estate investment and residential leasing company in 2006. He purchased four additional investment properties between 2006 and 2007. These properties were financed by mortgages that were generally interest only loans. Some of the properties had a first and second mortgage on them. By the end of 2007, Applicant's real estate holdings consisted of six separate properties and the combined amount of his mortgage obligations was in excess of two million dollars. Applicant's annual income at the time was roughly \$130,000, but he never felt that he was getting in over his head. He remained current on the mortgages until his tenants stopped paying their rents in late 2008, early 2009. He then stopped paying the mortgages on all six properties between February and May 2009. He testified that he attempted to resolve his mortgage debts with his creditors by either proposing a loan modification or short sale, but failed to submit any documentation to corroborate such efforts.³

Applicant secured legal counsel to resolve his financial problem in May 2009. He was able to secure a short sale of one of his former investment properties with his counsel's assistance. He moved into another of his former investment properties, made it his primary residence, and is paying the mortgage on that property. The remaining four properties were foreclosed upon between October 2009 and May 2010.⁴

² Tr. at 16-18, 59-60, 139; GE 1.

³ Tr. at 19-30, 70-72, 87-119, 139-140. See also GE 2, Subject Interview on May 5, 2010 (SI).

⁴ Tr. at 56-57.

Property A was the home Applicant purchased in 2000. The original purchase price of the property was \$130,000. He did not put any money down and fully financed the purchase price. Applicant pulled equity out of the property by twice refinancing his mortgage and securing a home equity line-of-credit (HELO). He used the equity to: purchase property, pursue other real estate opportunities, convert Property A into a multi-family dwelling, and “create supplemental income.”⁵

The principal loan and the HELO on Property A were with the same lender, and the combined amount of these obligations was nearly \$600,000. Applicant defaulted on both loans and attempted to short sale the property with no success. The lender foreclosed on the property in October 2009. With his Answer, Applicant submitted a 1099-C, *Cancelation of Debt*, for the primary loan. This is the debt alleged in SOR ¶ 1.f. The lender has sued Applicant for the amount still owed for the HELO, the second mortgage. Applicant’s July 2011 credit report, GE 4, notes that the balance due on this charged-off account is \$119,000. This is the debt alleged in SOR ¶ 1.a. Applicant claims that the lender’s foreclosure of Property A was illegal and believes such defense will bar the lender from recovering the amount owed on the second mortgage. He did not present any documentation to substantiate his claim and has not interposed this claim as an affirmative defense or as a counter-claim in the current litigation.⁶

Property B was an investment property Applicant purchased in December 2006 for approximately \$590,000. He financed the purchase price with a first and a second mortgage on the property. The property was foreclosed upon in August 2010. Prior to the foreclosure, Applicant proposed a loan modification to the lender. The lender refused to modify the terms of the mortgages because Applicant had too much delinquent debt. These are the debts alleged in SOR ¶¶ 1.b and 1.c. With his Answer, Applicant submitted a 1099-A, *Acquisition or Abandonment of Secured Property*, for this property. The 1099-A notes that the fair market value of Property B was \$383,000 and the principal outstanding is \$484,800. Applicant’s July 2011 credit report, GE 4, notes that the balance due on this account is \$88,000. Applicant claims to have a valid legal defense as to any amount owed. He claims that prior to closing on the property the lender substituted a higher interest rate than what was originally agreed to. He failed to submit any documentation to substantiate his claim.⁷

Property C was the first investment property Applicant purchased in 2003. He originally financed the purchase of this property with the funds he secured from refinancing the loan on Property A. He eventually secured a mortgage against Property C and it was foreclosed upon in September 2010. Prior to the foreclosure, Applicant proposed a short sale, but the bank refused the prospective buyer’s offer. With his

⁵ Tr. at 73-78.

⁶ Tr. at 44-51, 59-69, 73-78, 83, 89-91, 123-124, 137-138, 140, 146. See also Answer, ¶¶a and f; GE 1 at 40-41 (Applicant claims filing suit to regain property due to purported wrongful foreclosure).

⁷ Tr. at 21-23, 36-37, 52-54, 79-83, 125-126, 141-142, 146-148. See also Answer, ¶¶b and c; GE 1 at 48-49; GE 2, SI at 2 and 4.

Answer, Applicant submitted a 1099-A for Property C. The 1099-A notes that the fair market value of Property B was \$85,900 and the principal outstanding was \$85,849.38. Applicant's July 2011 credit report, GE 4, notes a \$0 balance for this account and that this Fannie Mae insured loan was "paid for less than full balance." This is the debt alleged in SOR ¶ 1.d.⁸

Property D was an investment property Applicant purchased in November 2007 for approximately \$590,000. He fully financed the purchase price by securing a mortgage on the property. The lender foreclosed on this property in May 2010. Prior to the foreclosure, Applicant proposed a loan modification that the lender rejected. With his Answer, Applicant submitted a 1099-A for this property. The 1099-A notes that the fair market value of the property was \$713,739 and the principal outstanding was \$590,000. Applicant's July 2011 credit report, GE 4, notes a \$0 balance for this account. This is the debt alleged in SOR ¶ 1.e. Applicant claims he was charged a higher interest rate by the lender than he qualified for at the time he secured the mortgage. He has filed a lawsuit against the lender.⁹

The table below summarizes each of the debts referenced in the SOR and their current status.

¶	Description	Status
a & f	Primary and secondary mortgages on Property A.	<ul style="list-style-type: none"> - Foreclosed in October 2009. - Applicant submitted proof that the primary mortgage was canceled by the mortgagee. - He owes about \$119,000 for the second mortgage (HELO). The mortgagee has filed a lawsuit against Applicant to recover this amount. - Applicant claims a defense to the amount owed, but failed to submit documentary proof.
b & c	Primary and secondary mortgages on Property B.	<ul style="list-style-type: none"> - Foreclosed in August 2010. - Applicant owes at least \$88,000 after the foreclosure sale. - He claims a defense to the amount owed, but failed to submit documentary proof.
d	Mortgage on Property C.	<ul style="list-style-type: none"> - Foreclosed in September 2010. - \$0 balance reported on recent credit report.

⁸ Tr. at 19-21, 34-35, 67-69, 122-123, 144-145. See also Answer, ¶d; GE 1 at 46-47; GE 2, SI at 2 and 4 (tried to short sale property for \$55,000, but owed \$85,000).

⁹ Tr. at 23-24, 37-41, 55-56, 84-85, 97-98, 124-125, 138, 142-144, 146. See also Answer, ¶e; GE 1 at 49-50; GE 2, SI at 2-5, 7.

e	Mortgage on Property D.	<ul style="list-style-type: none"> - Foreclosed in May 2010. - \$0 balance reported on recent credit report. - Applicant has filed suit against the mortgagee for applying a higher interest rate than he qualified for when the loan was originated.
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Applicant “feels that he was a victim of the housing bust and because of the changes in the banking industry he was not able to get loan modifications and refinances.”¹⁰ His “passion is real estate”¹¹ and he “wants to be credit worthy again to build his real estate business.”¹² He claims to have taken financial counseling in the past, but failed to submit documentary proof of such counseling.¹³ He is current on the mortgage on his home, pays about \$1,700 a month for a luxury car he owns, and owes more than \$100,000 in credit card debt.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 to be used 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, administrative judges apply the guidelines 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.

¹⁰ GE 2, SI at 8. See also Tr. at 57-58.

¹¹ Tr. at 76.

¹² GE 2, SI at 8.

¹³ Tr. at 127-129.

¹⁴ Tr. at 107-112, 129-136; GE 5 (as of April 2011, the total owed on the five credit card accounts was \$142,838 and the combined monthly scheduled payment on these credit card accounts was \$3,826). See also GE 2, SI at 6-7, *Financial Disclosure Explanation*, and *Stipulation of Settlement* (Applicant agreed to payback three delinquent credit card accounts held by one creditor, totaling about \$95,000, only after being sued by the creditor).

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to obtain a favorable security decision. In resolving this ultimate question, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b).

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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline F, Financial Considerations

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns 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.

One aspect of the concern is that an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Applicant’s failure to pay his mortgage obligations directly implicates the financial considerations concern.

Applicant’s failure to pay his mortgage obligations also establishes a number of disqualifying conditions under AG ¶ 19, namely:

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

- (c) a history of not meeting financial obligations.

However, an applicant's past or current indebtedness is not the end of the analysis, because "[a] security clearance adjudication is not a proceeding aimed at collecting an applicant's debts. Rather, it is a proceeding aimed at evaluating an applicant's judgment, reliability, and trustworthiness."¹⁵ Accordingly, Applicant may mitigate the financial considerations concern by establishing one or more of the mitigating conditions listed under AG ¶ 20. I have considered all the mitigating conditions, and find that the following warrant discussion:

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

Applicant had four separate properties foreclosed upon recently due to his failure to meet his substantial mortgage obligation on these properties.¹⁶ He still owes \$207,000 on the second mortgages for Properties A and B.¹⁷ He provided no documentary proof that he has attempted to resolve these debts.¹⁸ One of these debts, the \$119,000 owed on the second mortgage for Property A, has now been outstanding for over 2 years and the creditor has been forced to file a lawsuit to seek payment on this debt. Applicant claims he is not liable for these two second mortgages, but failed to submit documentary proof to substantiate his claim. Although I recognize that Applicant's financial situation is partially attributable to the recent economic downturn, this alone does not mitigate the concern at issue as he has failed to address his debts in

¹⁵ ISCR Case No. 07-08049 at 5 (App. Bd. Jul. 22, 2008). See also ISCR Case No. 09-07916 at 3 (App. Bd. May 9, 2011).

¹⁶ *Id.* ("even if a debt is legally unenforceable, the government is entitled to consider the facts and circumstances surrounding an applicant's conduct in incurring the debt and failing to satisfy it in a timely manner.").

¹⁷ ISCR Case 09-07792 at 2 (App. Bd. May 10, 2011) (" . . . evidence that Applicant's debts remained delinquent at the close of the record supports . . . conclusion that these debts were ongoing.")

¹⁸ ISCR Case 07-10310 at 2 (App. Bd. July 30, 2008) (an applicant is expected to present documentation to substantiate their claim about the debts at issue).

a responsible fashion. Applicant obligated himself to pay back the mortgages on these four properties – obligations that were well beyond his yearly income. He was wholly dependent on receiving rent from his tenants in a timely fashion and being able to refinance his properties to pay his mortgage obligations. Applicant continues to see himself as merely a “victim” of circumstances, and does not recognize that solely relying on rent or other outside factors to pay these mortgages placed him in a financially precarious situation.¹⁹ He has not engaged in financial counseling or otherwise tailored his lifestyle to address his financial situation. He plans on returning to his real estate venture in the future without apparently having gained any insight from his current situation. Under the circumstances, AG ¶¶ 20(a) through (d) do not apply. Applicant’s financial problems continue to cast doubt on his current reliability and good judgment.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of an applicant’s conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).²⁰ I incorporate my Guideline F analysis herein and highlight some additional factors. Applicant has held a clearance for eight years without issue. When faced with being laid-off in the past, he was able to stay financially afloat by working several odd jobs until he was able to land a well-paying job. He then invested in real estate and suffered huge financial losses like many other individuals. He is now repaying his sizeable credit card debt and is current on the mortgage on his home. However, this favorable evidence, as well as the other mitigating record evidence, does not outweigh the security concern at issue. Applicant has failed to address his debts in a responsible fashion while having the apparent means to do so, as evidenced by having the disposable income to afford a \$1,700 a month payment for a luxury vehicle. He only started paying back a large portion of his credit card debt after being sued by the creditor. The recency and on-going nature of Applicant’s financial problems, as well as his failure to establish a permanent change in behavior and the likelihood of recurrence, undercuts any whole-person factors.

¹⁹ See *generally* ISCR Case No. 10-01978 (App. Bd. Aug. 24, 2011) (Appeal Board holds that application of AG 20(a) - (c) was error in case where applicant purchased multiple homes obligating himself to mortgages well beyond his means and then, due to economic downturn, defaulted on the mortgages). See *also* ISCR Case No. 08-1125 (App. Bd. Oct. 4, 2011).

²⁰ (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.

Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): **AGAINST APPLICANT**

Subparagraphs 1.a – 1.e: **Against Applicant**

Conclusion

In light of the record evidence and for the foregoing reasons, it is not clearly consistent with the national interest to grant Applicant's request for continued access to classified information. Applicant's request for a security clearance is therefore denied.

Francisco Mendez
Administrative Judge