



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



In the matter of:)
)
) ISCR Case No. 10-11158
)
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn E. Hoffman, Esq., Department Counsel
For Applicant: Robert G. Cohen, Esq.

February 2, 2012

Decision

COACHER, Robert E., Administrative Judge:

Applicant has not mitigated the financial considerations security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On April 8, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F, Financial Considerations. DOHA acted under Executive Order (EO) 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 on September 1, 2006.

Applicant answered the SOR on May 11, 2011, and initially requested an administrative determination without a hearing before an administrative judge. She then retained counsel who requested a hearing on September 19, 2011. The case was

assigned to me on October 4, 2011. DOHA issued a notice of hearing on October 31, 2011, and the hearing was convened as scheduled on November 15, 2011. Applicant waived the 15-day requirement between notice and hearing based upon discussions between Applicant's counsel and Department Counsel.¹ The Government offered exhibits (GE) 1 through 4, which were admitted into evidence without objection. Department Counsel's exhibit index is marked as Hearing Exhibit (HE) I. Applicant testified, offered one witness, and submitted exhibits (AE) A through E at the hearing, which were admitted into evidence without objection. A demonstrative exhibit was used and marked as HE II. The record was held open for Applicant to submit additional information. Applicant submitted AE F through I, which were admitted into evidence without objection. Department Counsel's post-hearing memorandum was marked HE III. DOHA received the hearing transcript (Tr.) on November 28, 2011.

Findings of Fact

Applicant admitted the sole SOR allegation. That admission is incorporated as a finding of fact. After a review of the pleadings, testimony, and admitted exhibits, I make the following findings of fact.

Applicant is a 45-year-old employee of a defense contractor. She has worked for her current employer since September 2004. She is an engineer. She has a bachelor's degree in electrical engineering. She is married, with two children. Her husband works and his annual salary is over \$175,000. Her annual salary is over \$100,000. She has no military service and has never held a security clearance.²

The SOR alleges one delinquent debt. The debt is a charged off home equity debt (the credit reports refer to the debt as a home equity loan, while the testimony refers to the debt as a second mortgage) in the amount of over \$58,700. The charged off debt was listed on credit reports obtained on September 25, 2010, and February 22, 2011.³

Applicant's husband handled the finances for the family. Although Applicant is involved with the financial decisions, her husband deals with the regular financial issues that arise. In 1989, Applicant and her husband purchased a home. By 2008, they were able to pay off the mortgage on that home and own it unencumbered. They believe the home's current market value is \$250,000. In 2006, they bought a second home about 35 miles from their first home. They paid about \$600,000 for the second home, of which \$480,000 was financed by a first mortgage, \$60,000 was financed through a second mortgage, and a down payment of \$60,000 was made. They bought the second home because they believed this was a good location for the two of them as their children grew older and went off to college. They retained their first home primarily for the sake

¹ Tr. at 8.

² Tr. at 93, 111; GE 1.

³ GE 3-4.

of the children. They did not want to uproot them from their schools, friends, and extracurricular activities by moving them to the second home's location. They split their time between the two homes. Their daughter has gone off to college, but their son remains in high school.⁴

Applicant lives in an area hard hit by the mortgage crisis and recent property devaluations. In 2008, Applicant's husband discovered that the market value of their second home decreased significantly. He believed the value dropped to between \$200,000 and \$360,000. He based these numbers on the foreclosures and short sale prices of neighbors' homes in the area. These homes were very similar to Applicant's home. Up to that point of time, Applicant and her husband had not missed a monthly payment on their second home (the first home remained debt free). Because of the financial upheaval the area was experiencing, they decided to approach their mortgage holder about loan modifications for their two mortgages. At that time, they did not know that there were two mortgages on the property, because they paid the same mortgage holder for both loans through one payment. It was when they sought a loan modification that they discovered there were two mortgages on the property and that they would need to seek modifications to both mortgages. Applicant's husband claimed that he completed and filed the loan modification paperwork several times with the lender, but that it was lost. A duplicate modification application was completed in December 2008. Through the modification application, they asked the bank to reduce their interest rates (from 6.25% on the first mortgage and 7.25% on the second mortgage to 5% overall), combine both mortgages into one, and reduce the principle to \$240,000.⁵

Applicant's husband periodically inquired with the bank about the status of the modifications, but nothing seemed to be happening. He claimed he was told by a bank representative to stop making payments on his mortgages in order to speed-up the process. He independently researched, through the internet, whether stopping his payments was a constructive idea. He determined it was and stopped making monthly payments on both mortgages. In June 2009, the bank agreed to a modification of the first mortgage by lowering the interest rate and by tacking the delinquent payments on to the end of the mortgage. Applicant's husband continued to correspond with the bank about the second mortgage, but no definitive answer was forthcoming. Then in September 2009, while shopping for a car for their daughter, Applicant and her husband were informed during a credit check that the second mortgage showed as a "charge off" on their credit report (this is the debt alleged in SOR¶ 1.a).⁶

Applicant's husband did not immediately respond to the charged off account because it did not seem to affect their credit standing at the time. The family was still extended credit without any apparent repercussions. It was only when Applicant applied for a security clearance that the ramifications of the charged-off account became

⁴ Tr. at 36-38, 67-68, 111-112.

⁵ Tr. at 39, 40, 42; AE A.

⁶ Tr. at 42-45, 53, 55-57; AE B-C.

apparent. After she received the SOR in April 2011, her husband began negotiating with the bank to resolve the charged off second mortgage account. He initially offered \$5,000, but the bank wanted about 65% of the loan value. He then offered \$15,000, and the bank representative countered with \$20,000. Any settlement amount had to be approved by the bank's approval board. On November 18, 2011, Applicant's husband formally put the \$15,000 settlement offer into writing and sent it to the bank. Additionally, Applicant provided documentation showing a bank account that contained enough money to pay the settlement offer. Also, in her answer to the SOR, Applicant stated she and her husband had \$150,000 worth of liquid assets. There is no evidence in the record indicating the bank accepted Applicant's offer. The debt in SOR ¶ 1.a is still unresolved. There is no evidence Applicant received any financial counseling.⁷

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 that 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.

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable 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

⁷ Tr. at 59-63; AE F-1.

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 about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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* Executive Order 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 as follows:

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 under AG ¶ 19. One is applicable in this case:

(a) inability or unwillingness to satisfy debts.

Applicant intentionally stopped making payments on two mortgages in an attempt to seek modifications to those mortgages. She was successful in receiving a modification to her first mortgage, but not to her second mortgage, which was charged off by the lender. This debt remains outstanding despite Applicant having the resources to pay the debt. The evidence is sufficient to raise the disqualifying condition that Applicant is unwilling to satisfy her debt.

Several Financial Considerations 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; and

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

Applicant's charged-off second mortgage is an on-going debt and is recent. Her reliability, trustworthiness, and good judgment are called into question because she has the ability to pay the debt, but has chosen not to do so. AG ¶ 20(a) is not applicable.

Applicant and her husband made conscious decisions to stop payments on their mortgages in order to secure loan modifications. They were not forced into this position by their financial status at the time. Neither of them lost jobs, nor did they experience significant medical obligations, or any other type of family emergency. Nothing caused their house payments to become untenable. They simply chose to pursue this tactic to secure lower housing costs for themselves. While there is nothing wrong with using this tactic, it cannot be deemed beyond their control when it does not work out the way they intended. AG ¶ 20(b) is not applicable.

There was no evidence of financial counseling. Applicant's recent efforts to settle this debt, after it became apparent how the debt was impacting her ability to receive a security clearance, do not amount to a good-faith effort to repay her debt.⁸ AG ¶ 20(c) and ¶ 20(d) do not apply. At this point, Applicant's finances remain a concern.

⁸ 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 Financial Considerations Mitigating Condition 6, 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 Financial Considerations Mitigating Condition 6.

(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. Jun. 4, 2001)).

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 relevant facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

I considered Applicant's years of service to her employer. However, I also considered that she and her husband purposefully pursued loan modifications of their mortgages by stopping payments and causing their second mortgage to become delinquent and ultimately charged off. They only became interested in attempting to resolve this debt when they realized the impact it had on Applicant's chances to receive a security clearance. Even then, the debt remained unresolved, despite Applicant's apparent ability to pay the debt. Her unwillingness to resolve this debt puts into question her reliability, trustworthiness and good judgment.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the Financial Considerations security concerns.

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
Subparagraphs 1.a	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge