



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



In the matter of:)	
)	
[NAME REDACTED])	ISCR Case No. 11-00998
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: Greg D. McCormack, Esquire

03/26/2012

Decision

MALONE, Matthew E., Administrative Judge:

Applicant mitigated the security concerns about his finances, but doubts remain about his personal conduct. His request for a security clearance is denied.

Statement of the Case

After reviewing the results of Applicant’s background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to continue Applicant’s access to classified information. On August 4, 2011, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

addressed in the adjudicative guidelines (AG)² for personal conduct (Guideline E) and financial considerations (Guideline F).

Applicant answered the SOR (Answer) on August 25, 2011, and requested a hearing. The case was assigned to me on October 26, 2011, and I scheduled this matter for hearing to be held on December 22, 2011. The parties appeared as scheduled. The Government presented four exhibits (Gx.), which were admitted, without objection, as Gx. 1 - 4.³ Applicant testified and proffered three exhibits (Ax.), which were admitted, without objection, as Ax. A - C. I also left the record open after the hearing to receive additional relevant information from the Applicant. The record closed on January 26, 2012, when Department Counsel notified me there was no objection to Applicant's timely post-hearing submission, which I have admitted as Ax. D. DOHA received a transcript (Tr.) of the hearing on January 3, 2012.

Findings of Fact

In the SOR, the Government alleged, under Guideline F, that Applicant owed approximately \$120,050 for five delinquent debts (SOR 1.a - 1.e). The Government further alleged, under Guideline E, that he intentionally made false statements in his Electronic Questionnaire for Investigations Processing (eQIP), dated August 20, 2010, by answering "no" to eQIP question 26.c (*Have you failed to pay Federal, state, or other taxes, or to file a tax return, when required by law or ordinance?*) (SOR 2.a); and by answering "no" to eQIP questions 26.m (*Have you ever been over 180 days delinquent on any debt(s)?*) and 26.n (*Are you currently over 90 days delinquent on any debt(s)?*) (SOR 2.b).

Applicant admitted the allegations at SOR 1.a, 1.b, and 1.d, and denied the rest of the SOR allegations. His admissions are incorporated in my findings of fact. Having reviewed the response to the SOR, the transcript, and exhibits, I make the following additional findings of fact.

Applicant is 47 years old and requires a security clearance for his position as an aircraft mechanic for a defense contractor. He has been so employed since August 2010. Applicant and his second wife divorced in April 2010 after 15 years of marriage. His first marriage ended in divorce after 12 years and produced two children, now adults. Applicant does not pay any support to his first wife, but is required to pay his second wife \$2,400 each month until April 2013. His payment equates to her interest in businesses they co-owned while married, but which are now solely owned by Applicant. His second wife also received all of the funds in his 401k retirement account in the divorce. (Gx. 4; Ax. B; Tr. 32)

² The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

³ Department Counsel also provided an index of the Government's documents. It is contained in "Government's Proposed Exhibits" and included in the record as Hearing Exhibit (Hx.) 1.

Applicant served in the United States Air Force between 1987 and 1991. After receiving an honorable discharge, he went to work as an aircraft mechanic for a major airline, but was laid off in November 1994. Three months later, he was hired by another airline, but he was again laid off in November 2003. (Gx. 1; Ax. A)

In 2000, Applicant and his second wife opened a business teaching aircraft certification classes for mechanics and other aviation workers who require certifications from the Federal Aviation Administration (FAA). Applicant has been able to supplement his income through teaching these classes each month. (Gx. 1; Ax. A; Tr. 32 - 33)

In about 1994, Applicant began buying investment real estate as a business. He incorporated his business, through which he has been a landlord, a property manager and renovator, an owner-financier in the sale of properties, and as one who buys and “flips” distressed properties. He received his real estate broker’s license in 2003, and he is now licensed to work with bank-owned properties. In 2005 and 2006, his company held between 15 and 18 properties, which were financed through mortgages of about \$150,000 each. Applicant’s income from commissions in 2010 was about \$71,000, but that dropped to about \$25,000 in 2011. However, he is optimistic about the housing and commercial real estate markets in his area in the coming years. (Gx. 4; Ax. A; Ax. B; Tr. 12 - 13, 30, 33 - 35)

In 2008, as real estate market values dropped significantly, Applicant was unable to obtain the additional financing he needed to support his business. Thus, not being able to fill any of his rental properties for more than a month or two around that time had an adverse impact on his finances. Additionally, properties he was trying to renovate and/or sell had no buyers. In an attempt to keep his business running and continue to pay his employees, Applicant borrowed against business assets, such as vehicles, tools, lawn mowers, and so on. However, in 2009, when the market did not come back, he lost those assets and had to lay off his workers. (Tr. 35)

In 2010, Applicant was able to sell or otherwise successfully dispose of most of the properties he was having difficulty paying for. (Tr. 72 - 73) Nonetheless, he became delinquent on the first and second mortgages (SOR 1.a and 1.d) for a residential rental property that is located in an area recently re-zoned for commercial use. He is still in good standing on the accounts for another such property next door. In 2009, when it became clear that Applicant was having trouble meeting his obligations on the SOR 1.a property, he contacted the lender/mortgagee for the first mortgage to try to work out an acceptable loan modification. He asked that the payments he had missed (at that time about three months’ worth) be added to end of the mortgage term and that the interest rate be lowered so he could make his payments.

The lender on the first mortgage advised Applicant that his accounts would be “frozen” pending a resolution of his request. However, over the next several months, Applicant was unable to reach any resolution because of a lack of communication by the lender. He had to submit the same paperwork at least six times before being told that his request for a loan modification was denied. He had also inquired about conducting a short sale and met with the same lack of response. In late 2010 or early 2011, Applicant advised the lender that the market had improved so that he believed,

based on his experience as a real estate professional, he could sell the house for a price that would cover both mortgages. However, he could not get permission from the lender to list the property until late 2011. It was listed on December 16, 2011, but, as of the close of the record, it had not been sold. (Ax. B; Ax. D; Tr. 36 - 39, 64 - 70)

As to the second mortgage, a different lender/mortgagee was involved. In December 2011, that lender agreed to settle Applicant's obligation for 15% of the total balance due provided the payment was received by December 29, 2011. No information has yet been presented showing Applicant has paid this debt. (Ax. B; Tr. 38)

When Applicant's business began to suffer and he fell behind on the mortgages discussed above, he also had difficulty paying accounts for two credit cards he used for business-related expenses. In 2009, when he started trying to work with his mortgage lenders, Applicant also started trying to resolve his credit card debts. He paid an amount less than the balance due to settle the \$5,076 Chase account alleged at SOR 1.c, and he has negotiated a settlement for the \$5,287 Capital One credit card debt alleged at SOR 1.b. While negotiating with these creditors, Applicant, at times, was able to make payments to bring the accounts current or to reduce the scope of delinquency from 90 days to 30 days, for example. Applicant has also paid the debt alleged at SOR 1.e, which was incurred by his second wife. (Gx. 4; Ax. B; Tr. 55 - 59)

Applicant applied for his clearance when he submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on August 20, 2010. In response to questions about his finances, he disclosed only that he was paying off a \$506 balance due for a collection account. He did not disclose the credit card debts at SOR 1.b and 1.c because he had made some payments to those accounts and thought, at the time he submitted his e-QIP, that he was either current or no more than 30 days past-due on those accounts. However, he also knew that he had been delinquent on both accounts at some point within the previous seven years, and he acknowledged that, in hindsight, it would have been prudent to disclose the debts even if he was not sure of their exact status when he submitted the e-QIP. (Tr. 61 - 63)

Because he was told by the lender holding the first mortgage (SOR 1.a) that his account was "frozen," Applicant did not believe he was delinquent on that account and he did not disclose it as such in his e-QIP. (Tr. 42) However, he did not explain why he did not disclose that he was then either 90 days past-due or that he had been 180 days past-due on the second mortgage (SOR 1.d). It was not until December 2011 that Applicant and the second mortgage lender agreed that Applicant could resolve that debt through an amount far less than the actual balance owed. (Ax. B)

In March 2010, a tax lien was filed against one of Applicant's properties. (Gx. 3) Applicant averred that he did not know the taxes were due because the tax bills for that property were sent to the wrong address. For the same reason, he also was not aware that a lien based on non-payment of taxes had been filed, and he did not disclose the lien on his e-QIP. After becoming aware of the tax lien during his September 2010 subject interview with a government investigator, Applicant paid his past-due property taxes. (Gx. 3; Gx. 4; Ax. B; Tr. 57 - 58, 61)

Applicant was interviewed about his finances and other aspects of his background by a government investigator in September 2010. He discussed several past-due debts, including those eventually addressed in the SOR. He stated that he did not list all of his debts in his e-QIP (referred to in a summary of the interview as “case papers”) “because he knew he was going to pay off some debt, but he didn’t know which one.” (Gx. 4)

Applicant was discharged of his debts through a Chapter 7 bankruptcy in 1996. (Gx. 2) In 2004, his credit history showed he was carrying at least five mortgage accounts, all of which were in good standing. (*Id.*) His most recent personal financial statement shows that, after paying all of his expenses, including his support obligation to his ex-wife, Applicant has less than \$200 remaining each month. (Ax. B at 60 - 61) However, there is no indication that he is accruing more unpayable debt or that, aside from the debts alleged at SOR 1.a - 1.d, he is unable to meet his financial obligations.

Applicant has a good reputation among his business associates at work and through his real estate activities. They extol his integrity, honesty, and reliability. All of his references regard him as trustworthy. (Ax. C)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent⁴ with the national interest for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁵ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole-person” concept, those factors are:

- (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 presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. The Government bears the initial burden of

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ Directive. 6.3.

producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁶ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Thus, the government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.⁷

Analysis

Financial Considerations

The Government presented information that showed Applicant became delinquent on two mortgages, two credit card accounts, and a fifth account referred for collection, all of which totaled more than \$120,000. A credit card and the collection account have been paid, but significant delinquent debt remains unresolved. This information raises a security concern about Applicant's finances addressed, in relevant part, at 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.

More specifically, the Government's information requires application of the disqualifying conditions at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*) and AG ¶ 19 (c) (*a history of not meeting financial obligations*). Of the mitigating conditions listed at AG ¶ 20, I conclude that the following apply:

(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

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; AG ¶ 2(b).

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.

These mitigating conditions apply because Applicant's financial troubles occurred when the real estate market collapsed. His business had been a going concern for more than 10 years at that point, and all available information shows that he was a prudent businessman, who was not taking undue risks with his investments. In 2008 and 2009, after initially leveraging his assets for cash to keep his business afloat, Applicant acted responsibly by winding down his business and disposing of all but one of his distressed investments. He contacted his creditors and tried to negotiate resolutions of his obligations that were favorable to all concerned. Through no fault of his own, the primary mortgage lender for the property addressed in SOR 1.a and 1.d, did not timely respond to any of Applicant's requests until just before the hearing in this matter. This meant, in turn, that Applicant could not himself take more timely action to resolve his debts in a responsible way. Applicant showed that he paid the debts at SOR 1.b and 1.e, as well as other debts that were not alleged by the Government. It is likely he will be able to successfully sell his remaining investment property in the near future.

Further, Applicant's cash flow will remain low until April 2013. At that time, he will be free of his support obligation for his ex-wife. He has accrued no new unpayable debt and he is living within his means. On balance, Applicant has mitigated the security concerns about his finances.

Personal Conduct

The Government alleged in SOR 2.a and 2.b that Applicant deliberately omitted information about his past-due second mortgage and two delinquent credit card accounts, as well as a lien for unpaid taxes, in response to financial questions in his e-QIP. Applicant denied both allegations, thereby leaving with the Government the burden of establishing those facts.⁸ The Government established that, at the time he submitted his e-QIP, Applicant knew the second mortgage and credit card debts at issue were delinquent within the meaning of questions 26.m and 26.n. The Government did not, however, establish that he knew about a delinquent tax lien when he submitted his e-QIP. Thus, SOR 2.a is resolved for the Applicant. Nonetheless, the Government's information is sufficient to raise a security concern about Applicant's suitability for clearance. That concern is expressed at AG ¶ 15 as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions

⁸ Directive, E3.1.14.

about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

More specifically, the Government's information is sufficient to support application of the following disqualifying condition at AG ¶ 16:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant presented information that showed he reasonably thought the first mortgage on his property was not delinquent because it was "frozen" during negotiations with that lender. However, it was not alleged that he withheld this information. Rather, it was alleged that he omitted his delinquent second mortgage, a charge he did not directly address in response to the Government's information. Nor can it reasonably be argued, given Applicant's long experience as a real estate professional, that he thought both mortgages were "frozen" by the actions of the first mortgage lender. The second mortgage lender was a separate and distinct entity.

As to his credit card delinquencies, Applicant acknowledged at hearing that they had been delinquent, but he also averred that he made payments at times on both accounts to bring them current or to make them only 30 or 60 days delinquent. However, at his subject interview in 2010, he told the investigator that he decided not to disclose all of his debts because he planned to pay some of them in the near future.

All of the foregoing supports a conclusion that Applicant intended to falsify his e-QIP answers as alleged in SOR 2.b. This shifted the burden back to the Applicant to refute, mitigate, or extenuate the security concerns raised by the Government. Of the mitigating conditions listed at AG ¶ 17, the following are potentially applicable to these facts and circumstances:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

However, I conclude neither is supported by the record. Applicant did not promptly rectify his omissions, and he did not disclose the full scope of his financial problems until a government investigator confronted him with that information during a subject interview. His explanation given to the investigator is inconsistent with his testimony that he did not list his past-due credit cards because he thought at times he had brought the

accounts to a more current status. Applicant did not present any information that supported his claims of sporadic payments to the credit card accounts before he submitted his e-QIP. He also did not address his omission of the second mortgage.

Applicant's adverse financial information is relevant and material to any assessment of his suitability for access to classified information. Deliberately making false statements to any agency of the United States concerning a matter within its jurisdiction is a violation of Federal criminal law. More important, it is a fundamental breach of a basic tenet of the government's personnel security programs. Thus, it cannot be considered minor. The submission of his e-QIP was Applicant's first interaction with the government regarding his suitability for a security clearance. He knew or should have known he was expected to be candid and forthcoming in response to the government's reasonable inquiries, yet he decided to withhold important information needed to accurately assess his clearance suitability. Applicant has not mitigated the security concerns under the guideline because questions remain about his willingness to be truthful in his dealings with the government.

Whole-Person Concept

I have assessed the facts presented in this record and have applied the appropriate adjudicative factors, pro and con, under Guidelines E and F. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is a mature, responsible person, who has weathered unforeseen business and personal problems that adversely affected his personal finances. His financial problems do not present an unacceptable risk to national security, and he is highly regarded by his peers in the workplace and in his real estate business. However, his willingness to withhold from the government important information about his finances shows that he may not be willing to protect the national interest as his own should he be given a security clearance. Such conduct sustains doubts about his suitability for access. Because protection of the national interest is the overriding concern in these adjudications, those doubts must be resolved against the Applicant.

Formal Findings

Formal findings 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
Subparagraphs 1.a - 1.e:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to grant Applicant access to classified information. Request for security clearance is denied.

MATTHEW E. MALONE
Administrative Judge