



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



In the matter of: )  
 )  
 [Redacted] ) ISCR Case No. 11-01450  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Eric Borgstrom, Esq., Department Counsel  
For Applicant: Brian A. Bannon, Esq., and Lucas T. Hanback, Esq.

03/19/2012

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted a security clearance application on March 24, 2010. On July 26, 2011, the Defense Office of Hearings and Appeals (DOHA) notified her that it was unable to find that it is clearly consistent with the national interest to continue her access to classified information, and it recommended that her case be submitted to an administrative judge for a determination whether to revoke her clearance. DOHA set forth the basis for its action in a Statement of Reasons (SOR), citing security concerns under Guideline F. DOHA acted 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) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on August 2, 2011; answered it on August 18, 2011; and requested a hearing before an administrative judge. DOHA received the request on August 22, 2011. Department Counsel was ready to proceed on November 1, 2011, and the case was assigned to an administrative judge on November 4, 2011. It was reassigned to me on November 8, 2011, to consolidate the docket. DOHA issued a notice of hearing on November 15, 2011, scheduling it for November 30, 2011. Applicant's attorney entered an appearance on November 18, 2011, and requested a postponement. On November 22, I issued an order granting her attorney's request. On January 5, 2012, DOHA issued a second notice of hearing, rescheduling it for January 25, 2012. I convened the hearing as rescheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Department Counsel also submitted a demonstrative exhibit, which is attached to the record as Hearing Exhibit (HX) I.

Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) 1 through 47, which were admitted without objection. DOHA received the transcript (Tr.) on February 3, 2012.

At Applicant's request, I held the record open until February 29, 2012. She timely submitted AX 48 through 53. Based on Applicant's representations that significant relevant events were imminent, I extended the deadline for submission of documentary evidence until March 8, 2012, and she timely submitted AX 54 and 55.<sup>1</sup>

Department Counsel's exhibit list is attached as HX II. Applicant's exhibit lists for exhibits admitted at the hearing and post-hearing submissions are attached to the record as HX III. Department Counsel's comments regarding AX 48 through 55 are attached to the record as HX IV.

### **Findings of Fact**

In her answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.b, 1.d, 1.e, 1.f, and 1.g. She denied SOR ¶¶ 1.a, 1.c, and 1.h. Her admissions in her answer and at the hearing are incorporated in my findings of fact.

Applicant is a 62-year-old program manager employed by a federal contractor. She graduated from college in May 1971 with a bachelor's degree in electrical engineering. She was employed by the Navy as a program manager from May 1971 to September 1996, when the Navy installation where she worked was closed. She was the vice-president and chief engineer for a federal contractor from August 1998 to November 2003. From March 2003 to September 2009, she worked as a consultant for a federal contractor in the communications business. The federal contractor was her only client. In August 2009, her client told her that they were terminating the use of consultants because of downsizing and scheduled layoffs. Her client offered her a job,

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<sup>1</sup> Applicant's exhibit list for her post-hearing submissions erroneously duplicated AX 42 through 47, which were admitted at the hearing. I have amended the list of post-hearing exhibits to list AX 48 through 55 instead of AX 42 through 49.

at half the pay she was earning as a consultant, and she accepted it. (Tr. 94-96.) Since September 2009, she has been an employee of that federal contractor. She has held a security clearance for more than 40 years.

Applicant married in December 1969. She and her husband have three adult children, ages 36, 33, and 32, all of whom are college graduates.

While working for a federal contractor between August 1998 and November 2003, Applicant was cleared for top secret material and special access programs, and she worked at the highest levels of government on sensitive projects. She received top ratings for her work. (Tr. 97-99.) Because she worked long hours and too far from home to make the drive during the week, she purchased a condominium near her workplace. She was able to sell it for almost twice the purchase price in 2009, realizing a \$200,000 profit. (AX 1; Tr. 106-07.)

Applicant's husband retired in the summer of 2003. (Tr. 116.) In May 2004, Applicant and her husband purchased a condominium (Unit 203) in a beach community. They paid \$92,000, with a down payment of \$18,400. They intended to use it themselves, rent it when they were not using it, and sell it after about ten years, to provide retirement income. She testified that when they purchased Unit 203, "the market was flying, the homes were being bought and sold, and the whole area was being developed." The purchase of Unit 203 was their first experience with investing in real estate. Previously, all their investments had been in mutual funds. (AX 1; Tr. 107-08.) Applicant's three children graduated from college and all student loans were repaid before she and her husband bought their first investment property. (Tr. 105-06.)

In May 2005, Applicant and her husband bought another condominium in the same beach community (Unit 317) for \$421,000, with a \$93,000 down payment. In June 2005, they bought two more condominiums, Units 205 and 315. They purchased Unit 205 for \$153,000, with a \$30,600 down payment, and Unit 315 for \$450,000, with a \$102,000 down payment. (AX 19; AX 23.)

In March 2006, Applicant and her husband bought Units 202 and 302. They paid \$554,775 for Unit 202, with a down payment of \$110,820, and \$584,220 for Unit 302, with a down payment of \$116,805. In June 2006, they purchased Unit 101 for \$685,000, with a down payment of \$137,000. They used their equity in Units 203 and 317 for the down payment on Unit 101. (Tr. 168.) In August 2006, they purchased Unit 207 for \$153,000, with a down payment of \$30,600. (AX 1; AX 27.) All eight properties were in the same beach community. Units 202 and 302 were in one condominium, and Units 203, 205 and 207 were in another nearby condominium. (AX 1.) All their properties were in prime locations, close to the beach. (Tr. 109.) They made 20% down payments on all the properties so that they would be able to sell them and pay off the mortgages if they encountered unexpected financial problems or the property values declined. (Tr. 110.)

Before purchasing any of the condominium units, Applicant and her husband researched the properties' rental history and found that they were fully rented for each

season and rapidly rising in value. They bought Unit 203 before prices began rising. When they refinanced Unit 203 in June 2006, it had increased in value by 50%, and the selling prices of the surrounding properties had also increased dramatically. (Tr. 165-69.)

For tax year 2006, Applicant and her husband received gross rents of \$68,050. (AX 5.) They received gross rents of \$124,554 in 2007; \$128,855 in 2008; and \$132,020 in 2009. (AX 6; AX 7; AX 8.) Their gross rents dropped to \$90,300 in 2010 due to problems with their rental management agency and structural problems that prevented rental of Unit 101, their most expensive rental unit. (AX 9; Tr. 139-43.) In addition to the loss of rental income, the condominium association levied a special assessment of \$10,000 to repair the structural damage. (Tr. 172.)

As a consultant, Applicant earned almost \$309,000 in 2006, \$318,000 in 2007, \$305,000 in 2008, and \$255,000 from January to August 2009. After she became an employee of her former client, she earned \$152,000 per year. (Tr. 118; AX 4 through 9.)

A realtor, through whom Applicant bought some of her properties, testified that the area started to become a booming market in 2001. It was common for investors to purchase several properties, "flip" them, and buy other properties. Holding eight properties, as Applicant eventually did, was not uncommon. The market started to slow down in 2006, and it became more difficult to obtain a home loan. It is now a very difficult market, and it takes at least a year to sell a property. (Tr. 54-57.) When Applicant began to sell her properties, which were located close together, they staggered the times they listed them, to avoid depressing the prices. (Tr. 59-61.)

Applicant noticed in 2007 that the market for vacation rental property was declining. She knew from the beginning of their investment venture that the rental income was insufficient to cover all expenses, but she was earning enough to cover the mortgages and upkeep on the properties. Even though the properties were declining in value, they still generated a significant tax advantage. (Tr. 182-86.)

When Applicant learned in August 2009 that her consultant work was ending and her income would be cut in half, she contacted the banks who held the mortgages on their investment properties, seeking loan modifications until they could sell the properties or the property values began to rise again. Applicant was an officer in one of the condominium associations and she knew that the market was rapidly declining. In one 12-unit condominium, 7 units were in default. (Tr. 123.) Applicant and her husband inquired about short sales on their units, and they were informed that the bank would not consider short sales or loan modifications unless the loan was at least three months in default. This information was confirmed by a local real estate lawyer.<sup>2</sup> Based on this information, Applicant and her husband stopped making payments. (Tr. 123-27.) With

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<sup>2</sup> That fact that mortgage lenders routinely advised property owners to stop making payments was confirmed in testimony of the Special Inspector General for the Troubled Asset Relief Program before the House Subcommittee on Insurance, Housing and Community Opportunity on March 2, 2011. (AX 10 at 23.)

the assistance of a real estate lawyer and a realtor, they embarked on a plan to sell their investment properties, and they enrolled in a cooperative short-sale program with one of the two lenders for their investment properties.

In addition to their investment properties, Applicant and her husband owned a primary residence and a mountain vacation home. They kept the mortgage payments current on both homes. In February 2012, they sold the vacation home to generate income for resolving the delinquent mortgages on the investment properties, and realized a profit of \$97,147. (AX 1; AX 3; AX 45; Tr. 131-32, 138.) They also own three time shares. They tried to sell the time shares, but found that there is no viable resale market for them. (Tr. 175-76, 189.)

The evidence concerning the eight delinquent mortgages alleged in the SOR is summarized in the table below.

<b>SOR</b>	<b>Property</b>	<b>Amount alleged in SOR</b>	<b>Status</b>	<b>Evidence</b>
1.a	Unit 302	\$227,000	Short sale for \$300,000 in March 2011; deficiency not resolved.	AX 14-18
1.b	Unit 205	\$123,000	Short sale for \$72,900 in February 2011; deficiency cancelled.	AX 19-22
1.c	Unit 315	\$355,000	Short sale for \$227,000 in July 2011; deficiency cancelled.	AX 25, 53
1.d	Unit 207	\$126,000	Offer for \$76,300 accepted; awaiting approval by lender; lender has agreed to cancel deficiency.	AX 27-29
1.e	Unit 203	\$149,000	Offer for \$68,000 accepted; awaiting approval by lender; lender has agreed to cancel deficiency.	AX 32, 55
1.f	Unit 317	\$426,000	Offer for \$196,000 accepted; awaiting approval from lender.	AX 33-35
1.g	Unit 101	\$578,000	Offer for \$400,000 accepted; awaiting approval from lender.	AX 38
1.h	Unit 202	\$196,000	Short sale for \$305,000 in November 2010; lender offered settlement of \$196,019 deficiency for \$49,000; deficiency not yet resolved.	AX 40-43

As of the end of February 2012, Applicant's total net income was \$15,088 per month. Their monthly expenses were about \$12,107, leaving a net remainder of about \$2,981. Her spouse is retired and receives a monthly pension of \$4,116. Applicant retired from the civil service after her Navy job was abolished, and she receives a monthly retirement annuity of \$3,594. They are not making payments on any of the defaulted mortgages. They have savings of about \$126,809. All their credit card

accounts are current. (AX 52.) They drive modest cars and have only one car payment. (Tr. 180.)

After Applicant's income was dramatically reduced, she and her husband cancelled all their vacation and travel plans for 2009 and 2010. However, in March 2011 they went skiing in Europe for one week, paying cash for all trip expenses. Applicant explained that they decided to take the trip because they had not taken vacations for two years and the money they spent on it was not enough to make any difference on their defaulted mortgages. (Tr. 176-78.)

Applicant anticipates that they will incur a tax liability of almost \$260,000 if the deficiencies on all the properties are cancelled. She also anticipates that their monthly expenses will decrease from \$12,107 to about \$9,548 as their investment properties are sold, increasing her net monthly remainder to about \$5,540, which would be available to resolve any remaining deficiencies and tax liability. She anticipates that her current income, reduced expenses, current savings, and the profit from the sale of their second home in the mountains would allow her to pay off the deficiencies and tax liability in 3.6 years. (AX 48.)

Applicant's current supervisor submitted a statement on her behalf. He describes her as conscientious, dependable, extremely stable, and reliable. (AX 44.) In her performance rating for the period from September 2009 through December 2010, he rated her as "highly effective," scoring 4.5 on a 5-point scale. (AX 45.)

### **Policies**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. 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. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## **Analysis**

### **Guideline F, Financial Considerations**

The SOR alleges eight mortgages that are delinquent in a total amount of about \$2,180,000. The concern under this guideline 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.

Applicant's admissions, corroborated by her credit reports, establish several disqualifying conditions under this guideline: AG ¶ 19(a) ("inability or unwillingness to satisfy debts"); AG ¶ 19(c) ("a history of not meeting financial obligations"); and AG ¶ 19(e) ("consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis").

AG ¶ 19(b) is raised when there is evidence of "indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt." Applicant's investment in vacation properties was not "frivolous"; it was a serious, calculated decision based on her market research and her observation of the rapidly rising prices in a popular beach area, and it was intended to generate retirement income. Whether her rush into buying investment properties may have been "irresponsible" is a closer question. On the one hand, she already had a mortgage on her primary residence, a vacation home, and three time shares. She purchased eight investment properties in 27 months. In June 2006, she used her equity in two investment properties to buy another investment property, thereby reducing her ability to tolerate a market downturn. On the other hand, she was at the peak of a very successful career, had family income of over \$400,000 per year, and good prospects for continued employment. Her children had graduated from college and were self-supporting. All their student loans had been repaid. She hedged against a downturn in the market by making a 20% down payment on each property. She researched the rental history of her properties and determined that they could offset a considerable portion of the costs of ownership and could provide tax advantages for someone in her income bracket. For three years, she received gross rental income well above \$100,000. Many financial leaders in the country did not foresee the crash in the real estate market.

For all the above reasons, I am not satisfied that she was irresponsible. In any event, even if her conduct was arguably irresponsible, the second prong ("absence of willingness or intent to pay") is not established. I conclude that AG ¶ 19(b) is not established. However, the evidence establishing AG ¶¶ 19(a), (c), and (e) shifted the burden to Applicant to explain, extenuate, or mitigate the facts.

Security concerns based on financial problems can be mitigated by showing that "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." AG ¶ 20(a). Applicant's debts are ongoing and numerous. While another market downturn could well occur, Applicant is unlikely to speculate in real estate again. She has acted responsibly by staying in contact with her creditors, seeking expert advice, and carrying out a plan to divest herself of her investment properties and resolve any deficiencies. I am satisfied that her financial mistakes of the past do not cast doubt on her current reliability, trustworthiness, and good judgment. Thus, I conclude that AG ¶ 20(a) is established.



Security concerns under this guideline also can be mitigated by showing that “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.” AG ¶ 20(b). Both prongs, *i.e.*, conditions beyond the person’s control and responsible conduct, must be established.

As soon as Applicant realized that her steep income reduction jeopardized her ability to make timely payments on her multiple mortgages, she began contacting her creditors. When the real estate market crashed, she obtained advice from a real estate attorney and assistance from an experienced realtor. She sold her family vacation home to generate income to pay off any deficiencies. She enrolled in a cooperative short-sale program with one of her two lenders, and she has aggressively pursued her plan to divest herself of all the investment properties, resolve any deficiencies, and deal with the tax consequences of any cancelled debts. I conclude that AG ¶ 20(b) is established.

Security concerns under this guideline also can be mitigated by showing that “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.” AG ¶ 20(c). Applicant obtained advice from a real estate lawyer and an experienced real estate agent, and her financial problems are being resolved. I conclude that this mitigating condition is established.

Security concerns under this guideline also can be mitigated by showing that “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” AG ¶ 20(d). Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at \*4 (App. Bd. Oct. 12, 1999). A security clearance adjudication is aimed at evaluating an applicant’s judgment, reliability, and trustworthiness. It is not a debt collection procedure. ISCR Case No. 09-02160 (App. Bd. Jun. 21, 2010.) An applicant is not required, as a matter of law, to establish resolution of every debt alleged in the SOR. An applicant need only establish a plan to resolve financial problems and take significant actions to implement the plan. There is no requirement that an applicant make payments on all delinquent debts simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008).

Applicant has adopted a plan to sell all her investment properties and taken significant steps to carry out that plan. She has resolved two of the delinquent mortgages (SOR ¶¶ 1.b and 1.c). She has completed two short sales and is negotiating resolution of the deficiencies (SOR ¶¶ 1.a and 1.h). She has short-sale contracts on four properties (SOR ¶¶ 1.d, 1.e, 1.f, and 1.g). Two of those properties are in her cooperative short-sale program, and the deficiency will be forgiven if the short sale is approved. (SOR ¶¶ 1.d and 1.e). She is still employed, earning a good income, has no financial problems other than the defaulted mortgages on her investment properties. She has a budget that generates a substantial net monthly remainder, and has

substantial savings that are available to resolve any deficiencies or tax liability. Based on all these considerations, I conclude that AG ¶ 20(d) is established.

### **Whole-Person Concept**

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. In applying the whole-person concept, an 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. An 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.

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.

Applicant is a mature, intelligent, well-educated adult. She was candid, sincere, and credible at the hearing. She has served in positions of great responsibility and held a security clearance for over 40 years. She was caught up in the real estate crash that many experts did not foresee. She responded to her financial crisis aggressively and responsibly.

After weighing the disqualifying and mitigating conditions under Guideline F, evaluating all the evidence in the context of the whole person, and mindful of my obligation to resolve close cases in favor of national security, I conclude Applicant has mitigated the security concerns based on financial considerations. Accordingly, I conclude she has carried her burden of showing that it is clearly consistent with the national interest to continue her eligibility for access to classified information.

### **Formal Findings**

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

Paragraph 1, Guideline F (Financial Considerations): FOR APPLICANT

Subparagraphs 1.a-1.g:

For Applicant

## **Conclusion**

I conclude that it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman  
Administrative Judge