



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



In the matter of:)
)
) ISCR Case No. 11-03370
)
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn E. Hoffman, Esq., Department Counsel
For Applicant: *Pro se*

January 27, 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 July 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 August 3, 2011, and requested a hearing before an administrative judge. 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 18, 2011. 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 and submitted exhibits (AE) A through D at the hearing, which were admitted into evidence without objection. The record was held open for Applicant to submit additional information. Applicant submitted AE E through G (AE F is a signed version of AE B), which were admitted into evidence without objection. Department Counsel's post-hearing memorandum was marked HE II. DOHA received the hearing transcript (Tr.) on November 29, 2011.

Findings of Fact

Applicant admitted both of the SOR allegations. Those admissions are incorporated as findings of fact. After a review of the pleadings, testimony, and admitted exhibits, I make the following findings of fact.

Applicant is a 68-year-old employee of a defense contractor. He has worked for his current employer since November 2007. He is a software engineer. He has a bachelor's degree in engineering. He is married, with no children. His wife works and her annual salary is over \$100,000. His annual salary is over \$105,000. He served in the Army for two years from 1967 to 1969 and held a security clearance at that time. He does not currently hold a secret security clearance.¹

The SOR alleges two delinquent debts. Both are mortgage debts, the first in the amount of over \$48,000 on a total loan balance of \$404,000. The second past-due mortgage debt is over \$41,000 on a total loan balance of \$324,000. The debts were listed on credit reports obtained on December 3, 2010, and April 6, 2011.²

Applicant's financial problems arose because of various real estate purchases he made in about 2002 to 2003. He had been purchasing real estate for investment purpose since the 1970s with varying degrees of success. From 2003 through 2007, he operated his own software consulting business. In about 2005, his income from his business began to slow down because of the recession. As a result, he was unable to continue to put money into his rental properties. He claims to have expended hundreds of thousands of dollars from his savings to pay for extensive remodeling and improvements to his rental holdings. These expenditures are not documented in the record. One house in particular required major structural changes to put it in compliance with local laws so that it could be either rented or sold. He made some of the changes, but ran out of money before he could complete them. One property was foreclosed upon for nonpayment (not an SOR listed property).³

¹ Tr. at 4-5, 31, 34, 36; GE 1.

² GE 3-4.

³ Tr. at 20, 22; GE 2.

The debt alleged in SOR ¶ 1.a is the mortgage debt on his personal residence. He bought this property in 1978 for approximately \$140,000. He has refinanced his home several times through the years and used the equity taken out during the refinance process to finance the purchase of other rental properties. His most recent cash out was in 2005. He used this money to pay his other mortgages on rental properties to keep them current. In 2008, he stopped making his \$2,400 monthly mortgage payment on his residence because he was attempting to qualify for a loan modification. He was told by the bank that in order to qualify for the modification he had to be delinquent on his current mortgage. It is currently in a delinquent status. Applicant blames the bank for the delayed loan modification process, alleging lost paperwork and bank personnel changes on its part. Ultimately the loan modification was denied and the bank attempted to foreclose on the property. Applicant filed a Chapter 7 bankruptcy action to preclude a trustee's sale. This tactic was successful and the sale did not happen. The Chapter 7 bankruptcy was then dismissed. Recently, he re-filed a Chapter 7 bankruptcy action that was converted to a Chapter 11 bankruptcy. This property is included in the bankruptcy estate. He told a defense investigator in December 2010 that he does not intend to make the loan whole unless the bank offers an affordable loan modification. However, he testified that he intends to pay all of his debts through the Chapter 11 bankruptcy. The bankruptcy action is still pending and this debt remains unresolved.⁴

The debt alleged at SOR ¶ 1.b is a delinquent mortgage debt on a rental four-plex property in another state. Foreclosure proceedings were initiated by the bank on this property, but because the bank sought numerous court continuances, the court dismissed the foreclosure action. Applicant is currently delinquent on this debt and has included it in his Chapter 11 bankruptcy. Two apartments in the complex are currently generating about \$1,000 of monthly rental income, but because of maintenance, management fees, and uncertainty about the property's future, Applicant does not receive any of that income. Applicant stopped making his \$2,200 monthly mortgage payment in May 2008 in an attempt to receive a loan modification. No modification was approved.⁵

Applicant is current on all his other obligations. He received financial counseling through the bankruptcy process and by consulting a financial consultant.⁶

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

⁴ Tr. at 37-40, 51; GE 2; AE B-C, G.

⁵ Tr. at 37-38; GE 7; AE A.

⁶ Tr. at 67; AE B.

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 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. Two are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant is delinquent on two mortgages and was unable or unwilling to satisfy his obligations. The evidence is sufficient to raise the above disqualifying conditions.

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 delinquent mortgages are recent, multiple, and there is no indication that they will not recur as long as he stays in the rental income business. AG ¶ 20(a) is not applicable.

Applicant made conscious decisions to invest in real estate and to refinance his personal residence to help finance those purchases. He has been engaged in this investment strategy since the 1970s. He benefitted financially when the market was good. However, given this background it is unwarranted to now conclude that because the real estate market is down and he experienced some unforeseen costs with his

rental investments, that these were conditions beyond his control. These are part of the risks inherent in this type of business investment. AG ¶ 20(b) is not applicable.

The only evidence of financial counseling is Applicant's seeking bankruptcy relief and seeking assistance from a financial counselor to assist with his loan modification attempts. However, seeking bankruptcy relief is not a good-faith effort to repay his debts.⁷ Although AG ¶ 20(c) partially applies, ¶ 20(d) does not.

At this point, Applicant's finances remain a concern despite the presence of some mitigation.

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

⁷ 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)).

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 his employer. However, I also considered that he purposefully engaged in his rental income investment strategy for many years. He is seeking a bankruptcy action to extricate himself from his highly leveraged rental income investments. His past financial track record reflects a troublesome financial history that causes me to question his ability to resolve his debts.

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 – 1.b:	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