



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



In the matter of:)
)
-----) ISCR Case No. 11-03623
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: *Pro se*

05/31/2012

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding financial considerations. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On November 10, 2010, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86).¹ On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued a set of interrogatories. He responded to the interrogatories on October 24, 2011.² On another unspecified date, DOHA issued him a set of interrogatories. He responded to the interrogatories on October 24, 2011.³ On January 13, 2012, DOHA issued a Statement of Reasons (SOR) to him, pursuant to

¹ Item 4 (SF 86), dated November 10, 2010.

² Item 7 (Applicant's Answers to the Interrogatories, dated October 24, 2011).

³ Item 8 (Applicant's Answers to the Interrogatories, dated October 24, 2011).

Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guideline F (Financial Considerations), and detailed reasons why DOHA was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant acknowledged receipt of the SOR on January 30, 2012. In a statement, notarized February 6, 2012,⁴ Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM) was provided to Applicant on March 12, 2012, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the FORM on April 4, 2012, but as of May 23, 2012, he had not submitted any further documents or other information. The case was assigned to me on May 24, 2012.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the factual allegations pertaining to financial considerations in the SOR (§§ 1.a. through 1.d.). Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 60-year-old employee of a defense contractor. He has been serving as a principal systems engineer since January 2006. He was previously employed as a senior reliability engineer from April 1995 to January 2006.⁵ Applicant served in the U.S. Army for 18 months from June 1970 until December 1971, and received an honorable discharge.⁶ The record is silent regarding Applicant's employment status or activities between 1977 and 1995, but he has apparently held a secret security clearance since 1987.⁷ Applicant attended a university from September 1973 until December 1977, when he received his bachelor's degree in an unspecified field.⁸ Applicant was married the first time in August 1975, and divorced in August 1995.

⁴ Item 2 (Applicant's Answer to the SOR, dated February 6, 2012).

⁵ Item 7 (Personal Subject Interview, dated December 1, 2010), at 3. Applicant had initially indicated he left one job for the current job in November 2005, but that date was in error. See Item 4, *supra* note 1, at 14-17.

⁶ Item 4, *supra* note 1, at 18-19.

⁷ Item 4, *supra* note 1, at 44-45.

⁸ Item 4, *supra* note 1, at 13.

He and his first wife have two children, born in May 1979 and March 1981.⁹ He married his current wife in September 1995.¹⁰ He and his wife have three children, born in January 1998, December 1999, and October 2002.¹¹ His wife also has a child from her first marriage, born in June 1991, residing with the family.¹²

Financial Considerations

It is unclear when Applicant first started having financial problems, but he attributed it to the “downturn in the real estate market and the bad economy.”¹³ He purchased a new home for \$392,000, and financed the purchase with an 80 percent first mortgage at an interest rate of 7.5 percent, and a 20 percent second mortgage at an interest rate of 11.5 percent, all with no money down.¹⁴ In order to install a swimming pool, he obtained a third mortgage.¹⁵ The total amount financed for the three mortgages was \$450,000.¹⁶ Applicant’s monthly payment for the combined mortgages was \$3,650.¹⁷

At some unspecified point, Applicant felt “stuck” because he wanted to be in a position to retire in three and one-half years. However, because the value of the home had decreased to \$220,000, he had no equity in the home.¹⁸ Applicant acknowledged that he had the ability to continue making his monthly mortgage payments.¹⁹ He sought professional guidance from two bankruptcy attorneys, and they advised him that he earned too much money to qualify for a Chapter 7 bankruptcy, and that a Chapter 13 bankruptcy would cost him \$7,600 per month in mortgage payments over a period of five years.²⁰ The alternative was what he selected: a strategic default to lower both the principle owed the mortgage lenders and the monthly payments, because simply lowering the monthly payments would not build equity in the house.²¹ Accordingly,

⁹ Item 4, *supra* note 1, at 27-28.

¹⁰ Item 4, *supra* note 1, at 22-23.

¹¹ Item 4, *supra* note 1, at 28-30.

¹² Item 4, *supra* note 1, at 31.

¹³ Item 7, *supra* note 5, at 1; See Item 10 (Internet download from Bloomberg.com: “U.S. ‘Underwater’ Homeowners Increase to 28 Percent, Zillow Says,” dated May 9, 2011).

¹⁴ Item 7, *supra* note 5, at 1.

¹⁵ Item 7, *supra* note 5, at 1.

¹⁶ Item 7, *supra* note 5, at 1.

¹⁷ Item 7, *supra* note 5, at 1.

¹⁸ Item 7, *supra* note 5, at 1.

¹⁹ Item 7, *supra* note 5, at 1.

²⁰ Item 7, *supra* note 5, at 1.

Applicant stopped making monthly payments on the first two mortgages in July 2010.²² The first two mortgages were transferred to a mortgage servicing company, and Applicant started working with that company. Applicant's position is that if the principal for the first two mortgages is not reduced, he will let the property go into foreclosure.²³

The SOR identified four continuing delinquencies. One of those accounts (SOR ¶ 1.a.) is a 120 day delinquency of \$12,167 on the first mortgage loan with a balance of \$300,087.²⁴ At some point after December 2010, Applicant was notified by the mortgage servicing company that he did not qualify for a loan modification through the Federal Home Affordable Modification Program (HAMP), and the home was placed in a foreclosure status.²⁵ In September 2011, the first mortgage was in foreclosure.²⁶ Another account (SOR ¶ 1.b.) is the second mortgage loan with a balance of \$110,537 that was past due approximately \$3,337.²⁷ In October 2011, the second mortgage was in foreclosure.²⁸ The third account (SOR ¶ 1.c.) is the third mortgage loan with a balance of \$47,619 that is also in foreclosure.²⁹ Applicant had stopped making monthly payments on his third mortgage in about May 2011.³⁰

Another account (SOR ¶ 1.d.), completely separate from the home mortgages, was a loan for a motor home that was purchased for an estimated \$99,000 in 2004.³¹ Although Applicant still owed between \$78,000 and \$87,000 on the loan, he managed to sell it at a "short sale" for between \$42,000 and \$43,000, with the purchaser paying \$25,000, and Applicant paying the difference.³² Applicant contended he borrowed \$18,009 from his 401(k) to pay the bank to satisfy the remaining portion of the debt.³³ In May 2010, the remaining \$35,209.67 debt was cancelled and Applicant was issued a Form 1099-C.³⁴

²¹ Item 7, *supra* note 5, at 1.

²² Item 7, *supra* note 5, at 1.

²³ Item 7, *supra* note 5, at 1.

²⁴ Item 2, *supra* note 4, at 1.

²⁵ Item 7, *supra* note 2, at 5.

²⁶ Item 8 (Letter from mortgage servicing company, dated September 14, 2011); Item 8, *supra* note 3, at 2.

²⁷ Item 2, *supra* note 4, at 1; Item 8, *supra* note 3, at 2.

²⁸ Item 8, *supra* note 3, at 2.

²⁹ Item 8, *supra* note 3, at 3.

³⁰ Item 8, *supra* note 3, at 3.

³¹ Item 7, *supra* note 5, at 2.

³² Item 7, *supra* note 5, at 2; Item 2, *supra* note 4, at 3.

³³ Item 2, *supra* note 4, at 3.

³⁴ Item 8, *supra* note 3, at 2; Item 8 (Form 1099-C, dated May 26, 2010).

As of December 2010, Applicant earned an annual salary of \$117,000, while his wife, also an employee of the same company, had an annual salary of \$65,000.³⁵ He contended he made enough money to pay his debts and remain current on all other financial obligations.³⁶ He also indicated he was paying off all the accounts that he intended to resolve in bankruptcy, including credit card accounts, car loans, and student loans, but did not explain what his repayment arrangements might be. Furthermore, Applicant submitted no documentation to support his contentions. Considering the continuing presence of the three foreclosed mortgages, and the absence of more specific financial information, there are no indications that Applicant's financial problems are being resolved or are under control.

Applicant stated he had received unspecified financial "advice" regarding the actions taken by him, but the record is silent regarding any financial counseling pertaining to money management, debt consolidation, or repayment plans.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."³⁷ 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."³⁸

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider

³⁵ Item 7, *supra* note 5, at 2.

³⁶ Item 7, *supra* note 5, at 2.

³⁷ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

³⁸ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”³⁹ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.⁴⁰

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, “security clearance determinations should err, if they must, on the side of denials.”⁴¹

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”⁴² Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

³⁹ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “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).

⁴⁰ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

⁴¹ *Egan*, 484 U.S. at 531

⁴² See Exec. Or. 10865 § 7.

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations 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. . . .

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an *"inability or unwillingness to satisfy debts"* is potentially disqualifying. Similarly, under AG ¶ 19(c), *"a history of not meeting financial obligations"* may raise security concerns. Applicant's financial "problems" commenced at an unspecified time between 2007 and 2010, when Applicant decided to intentionally stop making the monthly payments on the mortgages on his residence because the value of his property had decreased by about 50 per cent and he no longer had equity in the property. While he maintained that he had the money to continue making his monthly mortgage payments, Applicant instead chose to make a strategic default on his mortgage loans to force the mortgage lenders to lower both the principal owed and the monthly payments. Mortgages and other accounts became delinquent, and his mortgages went into a foreclosure status. Although he had a combined family annual income of \$182,000 in December 2010, his financial difficulties remain unresolved. AG ¶¶ 19(a) and 19(c) apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where *"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."* Also, under AG ¶ 20(b), financial security concerns may be mitigated where *"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."* Evidence 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"* is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows *"the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."*⁴³

⁴³ The Appeal Board has previously explained what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

AG ¶¶ 20(a) and 20(b) do not apply. The nature, frequency, and recency of Applicant's continuing financial "problems" make it difficult to conclude that it occurred "so long ago" or "was so infrequent." Applicant attributed his financial "problems" to the "downturn in the real estate market and the bad economy." It is true that the national economic conditions, including the devastated housing market, were unexpected and beyond Applicant's control. However, the degree to which those factors had an impact on Applicant's ability to overcome them has not been explained. Applicant was unhappy that his residence had depreciated in value, and he no longer had any equity in it. He admittedly had sufficient funds to continue making his monthly mortgage payments, but he felt that to do so might negatively impact his ability to retire on schedule as he had planned. Instead, Applicant considered the possible bankruptcy options,⁴⁴ but decided to intentionally stop making the monthly payments, supposedly to qualify for mortgage modifications under HAMP. But Applicant's applications were denied, and foreclosure proceedings were commenced by the mortgage lenders. Applicant has not acted responsibly under the circumstances, and his actions cast doubt on his current reliability, trustworthiness, or good judgment.⁴⁵

AG ¶ 20(c) only minimally applies. Applicant claimed he had received unspecified financial "advice" regarding the actions eventually taken by him, but the record is silent regarding any financial counseling pertaining to money management, debt consolidation, or repayment plans. Moreover, while the mortgages remain in foreclosure, there are no clear indications that the problem is being resolved or is under control.

AG ¶ 20(d) only partially applies. Applicant did address his delinquent motor home account. Although he still owed between \$78,000 and \$87,000 on the loan, he managed to sell it at a short sale for between \$42,000 and \$43,000, with the purchaser paying \$25,000, and Applicant purportedly paying the difference. However, in May 2010, the remaining \$35,209.67 debt was cancelled and Applicant was issued a Form 1099-C. By making cold financial decisions related to his three home mortgages and his

In order to qualify for application of [the "good-faith" mitigating condition], 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 she or she relied on a legally available option (such as bankruptcy [or statute of limitations]) in order to claim the benefit of [the "good-faith" mitigating condition].

(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. June 4, 2001)).

⁴⁴ In this regard, Department Counsel makes an interesting observation regarding the bankruptcy options. "[o]ne of the primary purposes of [bankruptcy] is to 'relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh from the obligations and responsibilities consequent upon business misfortunes.'" *Local Loan v. Hunt*, 292 U.S. 234, 244 (1934). Applicant's sole purpose was simply to avoid paying his mortgages by dishonoring his obligations which imposed losses on his creditors.

⁴⁵ See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

motor home, especially when he had the financial ability to continue making his monthly payments, Applicant has not shown reasonableness, prudence, honesty, or adherence to duty or obligation.⁴⁶ The evidence does not support a conclusion that Applicant acted responsibly under the circumstances.

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 the 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. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.⁴⁷

There is some evidence in favor of mitigating Applicant's conduct. He has been employed by the same company for approximately ten years and honorably served in the U.S. military. He sought mortgage modifications from his three mortgage lenders and sold his motor home at a short sale.

The Appeal Board has addressed a key element in the whole-person analysis in financial cases stating:⁴⁸

In evaluating Guideline F cases, the Board has previously noted that the concept of "meaningful track record" necessarily includes evidence of actual debt reduction through payment of debts." However, an applicant is not required, as a matter of law, to establish that he [or she] has paid off each and every debt listed in the SOR. All that is required is that an applicant demonstrate that he [or she] has ". . . established a plan to resolve his [or her] financial problems and taken significant actions to

⁴⁶ See ISCR Case No. 10-10045 at 2-3 (App. Bd. Jan. 17, 2012).

⁴⁷ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

⁴⁸ ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) (internal citations omitted).

implement that plan.” The Judge can reasonably consider the entirety of an applicant’s financial situation and his [or her] actions in evaluating the extent to which that applicant’s plan for the reduction of his outstanding indebtedness is credible and realistic. See Directive ¶ E2.2(a) (“Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.”) There is no requirement that a plan provide for payments on all outstanding debts simultaneously. Rather, a reasonable plan (and concomitant conduct) may provide for the payment of such debts one at a time. Likewise, there is no requirement that the first debts actually paid in furtherance of a reasonable debt plan be the ones listed in the SOR.

The disqualifying evidence under the whole-person concept is more substantial. There are some questionable actions by Applicant in handling his delinquent accounts. Although he had sufficient funds to continue making his monthly mortgage payments, Applicant made a decision to stop paying his monthly mortgage payments in an effort to force the mortgage lenders to comply with his wishes to lower his monthly payments and otherwise modify all of the mortgages. As a result, he permitted three mortgages to fall into arrears and become delinquent. They are now in foreclosure. His motor home loan was partially resolved in a short sale, and \$35,209.67 of the debt was cancelled by the lender. I conclude that Applicant has failed to establish a meaningful track record of actual debt reduction through payment of debts. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

Overall, the record evidence leaves me with questions and doubts as to Applicant’s eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his financial considerations.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For 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 ROBINSON GALES
Administrative Judge