



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



In the matter of:)
)
) ISCR Case No. 11-04589
)
Applicant for Security Clearance)

Appearances

For Government: Daniel F. Crowley, Esq., Department Counsel
For Applicant: Paula Phinney, Esq.

09/13/2012

Decision

LOUGHRAN, Edward W., Administrative Judge:

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

Statement of the Case

On April 4, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline F, financial considerations. The action was taken 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) implemented by the Department of Defense on September 1, 2006.

Applicant answered the SOR on April 27, 2012, and requested a hearing before an administrative judge. The case was assigned to me on June 22, 2012. DOHA issued a notice of hearing on July 11, 2012, scheduling the hearing for August 8, 2012. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 7 were

admitted in evidence without objection. Applicant testified, called three witnesses, and submitted Applicant's Exhibits (AE) A through P, which were admitted without objection. The record was held open for Applicant to submit additional information. Applicant timely submitted documents that were marked AE A through G. I have remarked them AE AA through GG and admitted them without objection. Correspondence about the additional exhibits is marked Hearing Exhibit (HE) I. DOHA received the hearing transcript (Tr.) on August 16, 2012.

Findings of Fact

Applicant is a 39-year-old employee of a defense contractor. He has worked for his current employer or a predecessor contractor in the same location since 2008. He is applying for a security clearance for the first time. He is a high school graduate. He served in the military for several years in the early-to-mid 1990s before he was dishonorably discharged.¹ He is married with no children.²

Applicant bought a house in about 2002. He estimated the purchase price as \$156,000. He worked long hours and was able to save about \$35,000 that he put towards the purchase price. The remainder was financed. He estimated his monthly mortgage loan payments were \$1,200. He refinanced the mortgage loan in about 2004. He took out about \$25,000 in equity from the home, which he used for his wedding and to pay bills.³

Applicant had to travel a long distance for his job. He lived in a state where the real estate market was booming. Property values close to his job location kept increasing. In 2005, he decided to buy a plot of land near his job site to be used to build a house. He stated that he chose not to sell his home before buying the plot because his mortgage had a prepayment penalty that would cost him more than \$30,000 if he refinanced the loan or sold the property before two years. He was also concerned that the cost of the plot would continue to increase. He refinanced his primary residence with a mortgage loan of about \$220,000 and a home equity loan of about \$100,000. In February 2006, he bought the plot for about \$180,000. He paid for the plot with a \$110,000 mortgage loan and \$80,000 obtained from the refinance and home equity loan. His realtor testified that based on the information available at the time, Applicant's purchase was "a sound investment."⁴

Applicant never built a house on the plot. The economy went into a recession, and the housing market collapsed. The majority of Applicant's income was commissions. His income declined about 50%, and he was unable to pay all his

¹ Applicant's criminal conduct was not alleged in the SOR, and it will not be used for disqualification purposes. It may be considered in assessing the weight to be accorded Applicant's character evidence, in determining his credibility, and in analyzing the "whole person."

² Tr. at 65-66, 123-126; GE 1, 4.

³ Tr. at 67-74, 120; GE 4, 5.

⁴ Tr. at 42-45, 63, 67-83, 88-89, 105-106; Applicant's response to SOR; GE 2-7.

mortgages. The financial institutions were difficult to work with, and his attempts to sell or short sell the properties were unsuccessful. He spent his savings attempting to keep the properties, but he eventually lost his home and the plot to foreclosure.⁵

When his home was foreclosed, Applicant owed more than \$200,000 on the mortgage loan. The holder of the mortgage issued an Internal Revenue Service (IRS) form 1099-C (Cancellation of Debt) for tax year 2008. The form indicated that the fair market value of the property was \$158,000 and the amount cancelled was \$56,870.⁶

The holder of the second mortgage on Applicant's home charged off the debt for about \$104,000. Applicant stated that the mortgage holder was willing to accept \$3,000 on the loan in a short sale, but the short sale fell through. He stated that he spoke with the mortgage holder after the foreclosure and he was told that "after foreclosure, the second [mortgage holder] gets nothing, and [Applicant] can't do anything about it because it is already foreclosed." Applicant argued that the mortgage holder did not lose any actual money in the foreclosure and that it only took a theoretical loss.⁷ He stated:

When a bank writes, gives you money for a loan for. Let's say \$100,000, they don't take anything substantial like this and say "here you go." They create the money out of thin air and hand it to you.⁸

The bank that held the mortgage on the plot sold it for about \$90,000. Applicant lost the \$80,000 that he placed down on the property. The bank noted a deficiency of about \$20,000 on the mortgage loan. The bank charged off the debt. Applicant asked the bank to waive the deficiency, but the bank never got back to him. Applicant did not have any contact with the bank for about three years. On September 5, 2012, Applicant contacted the bank and offered to settle the debt. He and the bank agreed to settle the debt for \$5,453. The agreement calls for a payment of \$1,000 due by September 21, 2012, followed by 21 monthly \$200 payments, and a final payment of \$253.⁹

Applicant and the collection company handling the \$3,106 debt alleged in SOR ¶ 1.b agreed in April 2012 to settle the debt for \$1,552, payable in three monthly payments of \$517. The settlement payments were completed on May 8, 2012.¹⁰

⁵ Tr. at 45-63, 83-98, 106-107; Applicant's response to SOR; GE 4, 5; AE C-E.

⁶ Tr. at 120-122; Applicant's response to SOR; GE 2-7; AE B.

⁷ Tr. at 109-118; Applicant's response to SOR; GE 2-7.

⁸ Tr. at 113-114.

⁹ Tr. at 105-108; Applicant's response to SOR; GE 2-7; AE GG.

¹⁰ Tr. at 66-67, 108-109; Applicant's response to SOR; GE 2-7; AE A, P.

Applicant received financial counseling; he took online financial classes; and he has read a great deal about finances. He testified that he has become well educated “when it comes to how banks work and how the markets work.” He paid several debts that were not alleged in the SOR. He and his wife now have a budget, which they follow strictly.¹¹

Applicant submitted a number of letters and documents, and three witnesses attested to Applicant’s excellent job performance, trustworthiness, work ethic, loyalty, patriotism, generosity, reliability, dedication, and honesty. He is recommended for a security clearance. He also volunteers in his community.¹²

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which 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.”

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 security 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

¹¹ Tr. at 101-105; GE 2-7; AE K, L, O.

¹² Tr. at 26-40; AE F-J, M, N, AA-FF.

classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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* EO 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:

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 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 accumulated a number of delinquent debts and was unable or unwilling to pay his financial obligations. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate financial considerations security concerns are provided under AG ¶ 20. The following 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 lived in a state where the real estate market was booming. He had a long commute, and he bought a plot of land near his job site to be used to build a house. He bought the plot before he sold his home. The economy went into a recession, and the housing market collapsed. The recession affected his commissions, and his income declined about 50%. The recession and the collapse of the real estate market were beyond Applicant's control. To be fully applicable, AG ¶ 20(b) also requires that the individual act responsibly under the circumstances.

Applicant's attempts to sell or short sell the properties were unsuccessful, and his home and the plot were lost to foreclosure. Applicant settled and completed the payments on the only unsecured debt alleged in the SOR. The holder of the mortgage on Applicant's home issued an IRS form 1099-C, cancelling any deficiency owed on the loan after the house was sold. He has taken no action on the \$104,000 charged-off second mortgage loan. He apparently does not believe the mortgage holder lost any actual money in the foreclosure and that it only took a theoretical loss, stating banks "create the money out of thin air and hand it to you." There is a deficiency of about \$20,000 on the mortgage loan for the plot of land. Applicant did not have any contact with the bank for about three years, but reached a settlement agreement with the bank after the hearing. The first payment is due by September 21, 2012. He received financial counseling, and he follows a budget.

Applicant receives credit for settling his one unsecured debt, but he did little about his mortgage debts until after the hearing. I am particularly concerned about his belief that money borrowed from banks does not constitute real money. Applicant did not act responsibly under the circumstances, and he did not make a good-faith effort to pay his mortgage debts.¹³ His financial issues are recent and ongoing. I am unable to

¹³ 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 [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 he or she relied on a legally available option (such as bankruptcy [or a creditor's cancellation of a debt]) 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. Jun. 4, 2001)).

determine that they are unlikely to recur. They continue to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 20(a) and 20(d) are not applicable. AG ¶ 20(b) is partially applicable. The first section of AG ¶ 20(c) is applicable; the second section is not. I find that financial concerns remain 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 the facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

I considered Applicant's favorable character evidence and work record, which is somewhat offset by his criminal record and dishonorable discharge. Applicant settled and paid the only unsecured debt, and he recently reached a settlement agreement to resolve the deficiency owed on the mortgage loan for the plot of land. The mortgage holder cancelled the deficiency owed on the primary mortgage loan for his home. He has taken no action on the \$104,000 owed on the second mortgage loan, and he believes the mortgage holder only took a theoretical loss on the transaction. I have unresolved doubts about Applicant's judgment, reliability, and trustworthiness.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has not mitigated 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
Subparagraph 1a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraphs 1.c-1.d:	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.

Edward W. Loughran
Administrative Judge