



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



In the matter of:)	
)	
)	ISCR Case No. 11-06177
)	
Applicant for Security Clearance)	

Appearances

For Government: Gina Marine, Esquire, Department Counsel
For Applicant: *Pro se*

06/28/2013

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is granted.

Statement of the Case

Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) on November 9, 2011. The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) on December 17, 2012, detailing security concerns under Guideline F, financial considerations. The action was taken 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 For Determining Eligibility for Access to Classified Information* (AG) implemented on September 1, 2006.

Applicant received the SOR on January 28, 2013, and he answered it the same day. Applicant requested a hearing before an administrative judge with the Defense Office of Hearings and Appeals (DOHA). Department Counsel was prepared to proceed on April 11, 2013, and I received the case assignment on April 18, 2013. DOHA issued a Notice of Hearing on April 26, 2013, and I convened the hearing as scheduled on May 14, 2013. The Government offered exhibits (GE) marked as GE 1 through GE 3, which were received and admitted into evidence without objection. Applicant testified. He submitted exhibits (AE) marked as AE A through AE C, which were received and admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on May 22, 2013. I held the record open until June 7, 2013, for Applicant to submit additional matters. Applicant timely submitted AE D - AE L, which were received and admitted without objection. The record closed on June 7, 2013.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegation in ¶ 1.a of the SOR. His admission is incorporated herein as a finding of fact. He denied the factual allegation in ¶ 1.b of the SOR.¹ He also provided additional information to support his request for eligibility for a security clearance. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant, who is 46 years old, works as a material handler for a DOD contractor. He has worked for his employer for 14 years without incident. He has held a security clearance for many years. He holds a commercial drivers license, class A with HAZMAT endorsement.²

A coworker and past manager provided a written recommendation for Applicant. He described Applicant as a team player and knowledgeable employee. Applicant is trustworthy and accountable when handling sensitive information and material. Applicant is reliable and dependable. His peers nominated him to become a certified explosives instructor. Applicant is a man of integrity and sound moral judgment.³

Applicant served in the Navy Reserve for 20 years, retiring in 2005. He served in Kuwait in 2004 in support of Iraqi Freedom. Applicant graduated from high school in

¹When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). 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. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

²GE 1; Tr. 21, 22.

³AE L.

1985. He married his first wife in 1995, but divorced her within a few months after learning she was involved with illegal drugs and extramarital affairs. He married his current wife in February 2000. They have no children, although she has two adult children from a prior marriage. His wife recently started receiving Social Security. She works part-time as a nanny.⁴

In 2000, Applicant and his wife purchased a single-family home on less than one-quarter acre of land for approximately \$135,000. They had a \$103,000, 7%, fixed-rate mortgage with a monthly payment of \$865. In August 2003, they refinanced the mortgage to get a lower interest rate. The mortgage lender refinanced \$104,000 at an interest rate of 5.5%, but they did not realize that it was an adjustable rate mortgage. Their initial monthly payment was \$761, but the monthly payments increased. In February 2005, they obtained a second mortgage for \$30,000 to make improvements to their home. Their monthly payment was \$266. They contributed \$5,000 to the improvements, which included a pool and landscaping. They did not use any of the money for other items; instead they applied the remaining loan balance of \$2,000 to their debt. In December 2005, they refinanced their mortgage a third time. They obtained a 6% fixed-rate mortgage of \$119,000 with a monthly payment of \$918. Both times they refinanced, the appraisers valued their house between \$200,000 and \$300,000.⁵

In 2003, Applicant earned \$17 an hour, plus occasional overtime. He did not receive a pay raise until 2009, when his salary was increased to \$17.15 an hour. His health insurance costs increased from \$10 a month in 1999 to \$200 a month by 2009. During this time, his wife worked as a house cleaner then a nanny. In 2009, she lost her job as a full-time nanny when the child started school. She was unemployed about six months and did not receive unemployment. They experienced difficulty paying their bills, as they used credit cards to pay car repairs, to replace damaged furniture, and to pay travel expenses for his mother-in-law's funeral.⁶

Due to the increased financial problems, Applicant and his wife retained the services of a credit counseling service. They signed a contract with this service on June 16, 2009. They identified all their unsecured debts, which totaled almost \$30,000. With the assistance of this company, they developed a payment plan, which included a service fee of \$49 a month, and received credit counseling. They agreed to a monthly payment of \$810. They began payments immediately and have complied with the terms of their agreement. They will make their final payment under the plan in July 2013.⁷

⁴GE 1; Tr. 21, 22, 66-67.

⁵GE 2; GE 3; AE B; Tr. 39-42, 48-49, 52-59.

⁶GE 2; Tr. 27-28, 61-64, 82.

⁷GE 2; GE 3; AE A; AE E; AE F; Tr. 23-27, 74, 87-88.

By 2010, Applicant and his wife experienced difficulty paying their mortgage. Around May 2010, they applied to their mortgage company for a modification of their mortgage terms. They sought a two and one-half percent reduction in the six to seven percent interest rate on their first mortgage. Their mortgage company denied their request a month later, then referred them to another company. This company guaranteed a loan modification, requested \$700 for its services, and directed them not to pay their mortgage. They hired this company. They stopped their \$918 monthly payments on the first mortgage, but continued to pay the \$266 monthly payment on the second mortgage. The company obtained a one-tenth of one percent reduction in their mortgage interest rate, and because they had not paid their monthly payment, their mortgage payment increased \$60 a month.⁸

Applicant and his wife could not pay the increased mortgage payment. Since they were behind in their first mortgage payments, the mortgage lender proceeded to foreclose on their house. They moved out of their house in January 2011 and the lender foreclosed on the house on January 19, 2011. The second mortgage lender purchased their house for approximately \$121,000. They do not owe any money on their first mortgage and documents reflect that after the sale of the property, surplus proceeds totaled \$1,536. The second mortgage lender sold Applicant's house in August 2011 for \$139,000. The second mortgage lender has not provided an accounting of the sale proceeds to Applicant, nor has it provided a 1099C tax form to Applicant. In addition, the second mortgage lender has never made a demand for payment of debt to Applicant.⁹

Applicant understood that he is not liable for balance due on his mortgages under the state anti-deficiency statute. The state statute provides as follows:

33-729 Purchase money mortgage; limitation of liability

A. Except as provided in subsection B, if a mortgage is given to secure the payment of the balance of the purchase price, or to secure a loan to pay all or part of the purchase price, of a parcel of real property of two and one-half acres or less which is limited to and utilized for either a single one-family or single two-family dwelling, the lien of judgment in an action to foreclose such mortgage shall not extend to any other property of the judgment debtor, nor may general execution be issued against the judgment debtor to enforce such judgment, and if the proceeds of the mortgaged real property sold under special execution are insufficient to satisfy the judgment, the judgment may not otherwise be satisfied out of other property of the judgment debtor, notwithstanding any agreement to the contrary.

⁸GE 2; AE D; Tr. 27-28, 34-39, 72, 75.

⁹AE B; AE C; AE K; Tr. 29-33, 40, 76-77.

B. The balance due on a mortgage foreclosure judgment after sale of the mortgaged property shall constitute a lien against other property of the judgment debtor, general execution may be issued thereon, and the judgment may be otherwise satisfied out of other property of the judgment debtor, if the court determines, after sale upon special execution and upon written application and such notice to the judgment debtor as the court may require, that the sale price was less than the amount of the judgment because of diminution in the value of such real property while such property was in the ownership, possession, or control of the judgment debtor because of voluntary waste committed or permitted by the judgment debtor, not to exceed the amount of diminution in value as determined by the court.

State law provides that the mortgage loans given to Applicant are a nonrecourse loan. The Trustee's Deed Upon Sale indicates that Applicant's property sold on January 19, 2011. This document does not reflect any diminution in the value of this property because of waste, as defined in the statute, by Applicant. Applicant and his wife remained in the property and continued to maintain the property until its sale. The final sale document does not show that Applicant owes any money due to waste of the property, and under state law, he does not have a deficiency balance on his second mortgage.

Congress passed the Mortgage Forgiveness Debt Relief Act of 2007, then later extended its provisions through calendar year 2012. This federal statute allows taxpayers to exclude income from the discharge of debt on their principal residence on their taxes for the year in which the debt was cancelled. The statute also provides some exceptions on what is taxable income from cancelled debt, and specifically identified non-recourse loans as non-taxable income. A non-recourse loan is a loan for which the lender's only remedy when default occurs is to repossess the property financed or used as collateral. The lender has no further right to pursue the debtor personally for any balance due. See www.irs.gov/individuals/article/0,,id=179414,00.html (The Mortgage Forgiveness Debt Relief Act and Debt Cancellation). Property sold at a Trustee's sale is treated for tax purposes as a sale of the residence, which requires the mortgage lender to issue a 1099-C. The lender should check the box on the form which indicates that the individual is not personally liable. The lack of liability arises from the state anti-deficiency statute.

Applicant currently earns \$22.67 an hour and usually works 40 hours a week. His wife works approximately 15 hours a week, earning \$9 an hour. She receives Social Security and a small pension. Their net household income is \$4,625 a month, and their monthly expenses total \$4,584, including the \$810 credit counseling service payment. They have sufficient income to pay their normal living expenses. Beginning in August 2013, they will have an additional \$810 a month as their credit counseling payments will

have ceased. Their tax returns reflect an increase in income from 2009. Each year they receive a small tax refund. They owe no debt on their cars.¹⁰

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 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, 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. 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, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for obtaining 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 an applicant may deliberately or inadvertently fail to protect or 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.

¹⁰AE G - AE J; Tr. 64-69.

Section 7 of Executive Order 10865 provides that 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 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.

AG ¶ 19 describes the disqualifying conditions that could raise security concerns. I have considered all the conditions, and the following are potentially applicable:

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

Applicant developed financial problems in 2009 when his expenses exceeded his income. He experienced difficulties paying his bills. These two disqualifying conditions apply.

The Financial Considerations guideline also includes examples of conditions that can mitigate security concerns. I have considered mitigating factors AG ¶ 20(a) through ¶ 20(f), and 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.

AG ¶ 20(b) applies. For six years, Applicant's income remained the same, while his expenses increased, including his health insurance payments. Many expenses were unexpected and not the result of living beyond his means. Applicant's wife lost her job in 2009, which reduced household income. The loss of income placed stress on the family budget and resulted in an inability to pay all his bills. In 2009, Applicant and his wife retained the services of a credit counseling company. Through this company they developed a payment plan to resolve their \$30,000 of unsecured debt. They began their payments in June 2009. When they could no longer pay their mortgage, they sought a reduction in their mortgage interest rate twice. The bank declined their first request without explanation, and their second request resulted in an increase in their monthly mortgage payment. While their second request was being considered, they stopped their mortgage payments, an action necessary for a loan modification. They acted reasonably under the circumstances.

The sale of his property resolved his first mortgage debt. Applicant's second mortgage debt on his property is resolved by operation of law. The state anti-deficiency statute prohibits Applicant's mortgage lender from seeking to recover any balance due on his mortgage loan after foreclosure. Under state law, the loan on his primary residence is a non-recourse loan. Federal law requires the mortgage lender to issue a 1099-C, a tax form, which shows that no taxable income arose from the sale of his property, which he never received.¹¹ Applicant pays his other bills, and his finances are under control. He also received financial counseling through the counseling services. AG ¶ 20(c) applies.

AG 20(d) applies. In 2009, Applicant recognized that his debts were becoming unmanageable, and on his own initiative, he contacted a credit counseling service. He developed a payment plan for all his unsecured debts and has complied with the payment plan. His final debt payment will be made in July 2013. He also contacted his mortgage lender in 2010, requesting a mortgage loan modification to reduce only his mortgage interest rate. His mortgage lender denied his request. He applied to a second company which did not reduce his mortgage payment. Applicant has mitigated the security concerns about his finances.

¹¹The Appeal Board held that a 1099-C is one way to show there is clear evidence that the state law extinguished the debt. See ISCR Case No. 10-01978. The 1099-C is a tax form which provides information to the Internal Revenue Service on whether taxable income arose from the sale of a property. In this case, state law makes it clear that Applicant does not owe any money on his second mortgage loan. State law does not require a 1099-C for this determination.

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 an 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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In assessing whether an Applicant has established mitigation under Guideline F, the Appeal Board provided the following guidance in ISCR Case No. 07-06482 at 3 (App. Bd. May 21, 2008):

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." See, e.g., ISCR Case No. 05-01920 at 5 (App. Bd. Mar. 1, 2007). However, an applicant is not required, as a matter of law, to establish that he has paid off each and every debt listed in the SOR. See, e.g., ISCR Case No. 02-25499 at 2 (App. Bd. Jun. 5, 2006). All that is required is that an applicant demonstrate that he has ". . . established a plan to resolve his financial problems and taken significant actions to implement that plan." See, e.g., ISCR Case No. 04-09684 at 2 (App. Bd. Jul. 6, 2006). The Judge can reasonably consider the entirety of an applicant's financial situation and his 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. See, e.g., ISCR Case No. 06-25584 at 4 (App. Bd. Apr. 4, 2008). 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 evidence in support of granting a security clearance to Applicant under the whole-person concept is more substantial than the evidence in support of denial. In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant paid his bills and managed his income for many years. Between 2003 and 2009, his income stagnated, but his expenses did not. In 2009, his wife lost her job, which increased stress on his finances. Recognizing that his finances were out of control, he took control of his debts by developing a payment plan for his unsecured loans. When his first mortgage became difficult to pay, he twice requested a loan modification on his interest rate only on his first mortgage. He was not successful, and the bank foreclosed. During this time, he always paid his second mortgage. The foreclosure sale paid his first mortgage in full and the resale of his house several months later by the second mortgage lender appears to have resolved much of the second mortgage debt. Any remaining debt is resolved by operation of law. When his property value increased, Applicant did use the increased equity in his house to finance a lifestyle. His house was never underwater after the economic downturn. He simply lacked sufficient income to pay all his bills. He pays his current expenses and lives within his financial means. Applicant has acted responsibly towards his debts and has a track record for resolving his debts. Of course, the issue is not simply whether all his debts are paid: it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. His past financial problems are insufficient to raise security concerns because he manages his income and expenses prudently and has a track record of paying debt. (See AG ¶ 2(a)(1).)

Overall, the record evidence leaves me without questions or doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his finances under Guideline F.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

MARY E. HENRY
Administrative Judge