



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



In the matter of:)
)
) ISCR Case No. 11-06993
)
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

11/30/2012

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant became seriously delinquent on the mortgages on the home that he had shared with his ex-wife. He chose to default on the mortgages to trigger the foreclosure process, but he is now in the process of resolving the debt through a short sale of the property. He has no other past-due obligations. Clearance granted.

Statement of the Case

On August 9, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline F, Financial Considerations, and explaining why it was unable to find it clearly consistent with the national interest to continue security clearance eligibility for him. DOHA took the action 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) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR allegations on September 14, 2012, and he requested a hearing. On October 12, 2012, the case was assigned to me to conduct a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. He waived the 15-day notice requirement, and on October 17, 2012, I issued a notice scheduling a hearing for October 24, 2012.

I convened the hearing as scheduled. Six Government exhibits (GEs 1-6) and ten Applicant exhibits (AEs A-J) were admitted without objection. Applicant testified, as reflected in a transcript (Tr.) received on November 2, 2012.

I held the record open until November 26, 2012, for Applicant to submit additional exhibits, primarily concerning the status of the title on the property at issue. On November 26, 2012, Applicant forwarded nine exhibits, which were entered without objection as AEs K-S.

Findings of Fact

The SOR alleges under Guideline F that Applicant was over 120 days past due on his \$377,000 primary mortgage (SOR 1.a) and on his \$147,000 second mortgage (SOR 1.b) as of August 9, 2012. Applicant admitted the debts and explained that he had made a decision to protect his family's financial future. After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 51-year-old college graduate, who earned his bachelor's degree through online coursework. He has been employed by a defense contractor since January 2002. He worked as a manager in logistics until mid-2007, when he was promoted to a senior manager product support position. (GEs 1, 2; AE I.) From April 1981 to March 1987, Applicant served in the enlisted ranks of the U.S. military in the occupational specialty of explosive ordnance disposal. (GE 1; Tr. 84-85.) He held a DOD top secret clearance for his duties. (GEs 1, 2.) In March 1988, he enlisted in a different branch of the military, where he began warrant officer training in 1991. From February 1992 until he retired, he served on active duty in the occupational specialty of missile system technician. (GE 1; AE J; Tr. 85.) A Bronze Star recipient, Applicant retired from the United States military at the rank of chief warrant officer 3 (CWO3) in late March 2002. (AE J.) Applicant held a DOD secret clearance for his duties as a CWO3. His security clearance eligibility was renewed for his defense contractor employment, and he currently holds a top secret clearance. (GE 2; Tr. 11.)

Applicant was married to his first wife from October 1981 to May 2006. They had two children together: a son born in December 1983 and a daughter born in December 1985. (GE 1; Tr. 81.) Around March 2002, Applicant and his first wife bought the property at issue in the SOR (property X), a four-bedroom colonial on 1.04 acres. (AE R.) They took out a joint mortgage of \$330,000. In August 2002, Applicant took out a second mortgage of

\$35,350. Both loans were refinanced in February 2004. In September 2004, Applicant moved out of the home due to marital discord. Applicant continued to make the monthly payments on the mortgage of \$311,999 and a \$78,000 home equity loan. (GEs 2-4; Tr. 32-33, 38.)

In June 2006, Applicant married his current wife. (GE 1; Tr. 82.) Applicant's ex-wife did not work outside the home (Tr. 88.), and on his divorce, Applicant paid her \$800 per month from his military retirement. He continued to pay the mortgage on property X. He also assumed repayment responsibility for all the credit card debt incurred during the marriage, about \$18,000 in liabilities, in lieu of paying child support. (Tr. 89.) Applicant's ex-wife remained at property X until May 2007, when their daughter finished college. In May 2007, Applicant gave his ex-wife \$5,000, and she vacated the property. (Tr. 38-39.) Applicant and his new wife moved into the home. It needed significant repair as well as cleaning before he could put it on the market. (GE 2; Tr. 34.) He planned on keeping the property for about three years. (Tr. 41, 47.)

In August 2007, Applicant refinanced both loans on the property, which he asserts was overvalued at \$440,000. He took out a primary mortgage of \$377,575 and a second mortgage of \$147,425. Applicant accepted loan obligations based on 125% of the home's value because he expected the housing market to continue to appreciate between 10% and 12% per year. (Tr. 33-34, 46.) Applicant used the equity in his home to fix up the house and pay off other debts (i.e., cars bought for both his children and his former wife, a credit card, his spouse's wedding ring). (Tr. 49.) He spent between \$60,000 and \$80,000 on the house. (Tr. 39.) Both mortgages were transferred in 2008 to new lenders, and Applicant continued to make his monthly payments of \$2,705 and \$1,598 according to terms. As of June 2009, the principal balance of the first mortgage was \$371,602 (SOR 1.a) and of the second mortgage \$145,692 (SOR 1.b). (GEs 2-4.)

On June 24, 2009, Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP) to renew his secret clearance. He reported no financial delinquencies (GE 1.), and a check of his credit on July 3, 2009, showed he was paying his financial obligations on time, including his mortgages. (GE 3.)

Around May 2010, Applicant attempted without success to refinance his mortgages to lower the interest rates of 7.5% on his primary mortgage and 12.418% on the second mortgage. Property X was assessed at \$380,000, and the mortgage lenders would not agree to a modification or short sale because he was not delinquent in his payments or in financial hardship.¹ Applicant's offer of the deed in lieu of foreclosure was also rejected because he held a second mortgage. Applicant continued to make his payments on the mortgages through November 2010, when he decided to stop paying on the house because he considered it a bad financial investment. By his expected retirement at age 65,

¹Applicant testified as follows about the bank's refusal to refinance:

It was a 12 percent interest rate on the second. At the time I tried to refinance, it was in the five to six percent. With the bank, just give me a competitive rate today—Throw me a bone. You guys kind of caused this and they absolutely refused to. (Tr. 40-41.)

he would have paid around \$774,000 for a property estimated to be worth \$510,000. Applicant decided to “deliberately trigger” the foreclosure process. (GEs 2-5; Tr. 28-30, 39-40.)

In December 2010, Applicant and his spouse bought their present residence, a three acre farm, for \$269,000. (Tr. 42, 91.) His spouse did not want to live in the home Applicant had shared with his first wife, and she wanted to be close to her siblings. (Tr. 96.) Applicant took out a \$216,000 mortgage, to be repaid at \$1,617 per month, and he borrowed \$58,000 from his mother to buy the home. (Tr. 36, 42.) Applicant has paid his mortgage on his new home on time. Yet, in a “business decision,” he stopped paying the mortgage loans on property X, which has stayed vacant since he and his spouse moved out. (GEs 2, 5; Tr. 39-40.) In early January 2011, Applicant told his security manager about his decision to stop paying the mortgages because he realized his decision could be detrimental to his clearance. (AE A; Tr. 25-26.)

A check of Applicant’s credit on February 9, 2011, revealed that he was behind \$8,114 on his primary mortgage and \$3,196 on his second mortgage on property X. He was making timely payments on a vehicle lease opened in September 2010; on a \$27,500 truck loan taken out in May 2009; on credit card and line of credit debt totaling \$34,706 in his name; and on student loan balances totaling \$23,029 for his now adult children. (GE 4.)

On March 3, 2011, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM), in part about the past-due mortgages and the pending foreclosure of property X. Applicant admitted that he made a poor decision in hindsight to take out loans based on 125% of his home’s over-appraised value. After consulting with an attorney, Applicant defaulted on the mortgages so that they would go to foreclosure.² Applicant expressed his intent to settle any remaining debt after the foreclosure sale. He attributed his financial difficulties to assuming \$18,000 in credit card debt from his first marriage and to bearing the cost of preparing an apartment (remodeling, plumbing, and appliances) for his mother in his current home. His monthly net income after expenses was around \$3,328 because he was not paying the mortgages on property X. (GE 2.)

On July 1, 2011, Applicant was notified that his primary mortgage on property X was in default, and that the lender intended to initiate foreclosure. The lender demanded payment of the \$386,075.75 loan balance, although Applicant could reinstate the loan by bringing it current. (GE 2.) Foreclosure was forestalled pending clarification of a title issue on property X unknown to Applicant, who had no trouble refinancing his mortgages in the past. Applicant asked the bank to explain the title defect, but he was given no explanation. (AE B.) On July 27, 2011, Applicant was informed that his second mortgage was being transferred. As of January 2012, the second mortgage was \$24,935.52 in arrears on a principal balance of \$143,883.30. (GE 2.)

² Applicant testified that the attorney told him he would not advise him to walk away from the home. (Tr. 58.) The attorney explained his three options, which were that the lenders would do nothing, issue a 1099 form cancelling the debt, or sue him for the delinquency. (Tr. 59-60.) The decision to default was Applicant’s and not on the advice of the lawyer.

In response to DOHA interrogatories, Applicant indicated on April 16, 2012, that the bank had scheduled three auctions of property X, in September 2011, November 2011, and January 2012, which were canceled, apparently due to the title issue. (GE 2; Tr. 31.) His mortgages were listed in foreclosure status. As of early April 2012, the primary mortgage on property X was \$43,279 past due. Applicant reported net monthly income of \$2,947 after paying his household expenses and debts, which included the mortgage on his present home, his truck loan, his leased car, the educational loans for his children, about \$65,419 in credit card debt, and a \$14,845 loan for a tractor.³ (GE 2; Tr. 50.) He was making more than the scheduled monthly payment on several of these accounts. (GEs 2, 5.)

As of July 26, 2012, Applicant was making timely payments on credit card debt totaling \$75,942, student loan debt of \$19,442, and his vehicle loans. He was reportedly \$57,090 past due in his payments on the primary mortgage for property X. His second mortgage on the property was also more than 120 days past due. (GE 6.)

As of October 2012, the lender holding the primary mortgage on property X was willing to consider a short sale without a showing of hardship by Applicant if he could get fair market value, around \$340,000, for the home. (Tr. 48.) Applicant had been unable to list the home for sale because of the outstanding title issue. (Tr. 31.) Applicant testified that if his lenders pursued him for the deficiency balances in court, he intended to make them culpable for some value of the loss. (Tr. 60.) He planned to pay any settlements with his \$41,000 in 401(k) monies or the equity in his current home.⁴ (Tr. 33, 51.) Applicant had not consulted with an attorney about the title issue. He had been waiting for the bank to resolve the issue since July 2011, believing it would be resolved eventually without having to “go to the expense of hiring somebody to chase [the title issue] down.” (Tr. 62-64.) Concerning his lack of urgency about the issue, Applicant testified that he has taken all appropriate actions to inform the government about his actions. (Tr. 65.) He considered the delay advantageous in that his financial situation, including his 401(k) balance and the equity in his current home, would improve with time. (Tr. 67.) Applicant indicated that he would check the county records about the deed after his hearing. (Tr. 69, 93.)

After his October 24, 2012 hearing, Applicant contacted the attorney who handled his last closing on property X. The attorney surmised that the title problem may well relate to a clerk in his office having filed the mortgages in reverse order (second before the first). As of mid-November 2012, the primary mortgage lender had placed the matter with a title insurance company for resolution. (AEs K, L.)

Applicant also contracted with a local, licensed realtor, who has extensive experience in short sales and loss mitigation counseling. (AEs K, S.) Based on the values of three similar homes in the area, the realtor assessed the current market value of

³Applicant's net monthly income had decreased from \$3,328 in March 2011 to \$2,947 in April 2012 largely because he was making \$400 monthly payments for the tractor. (GE 2.)

⁴Applicant assumed he would receive a favorable settlement based on lenders in the industry having taken “\$6.6 billion in TARP funds” because of all the bad mortgage loans. (Tr. 33.)

property X at \$260,379. (AE M.) On November 16, 2012, Applicant entered into an agreement with the realtor to list the property at \$229,900. (AE N.) On November 19, 2012, Applicant received a “realistic” offer of \$225,000. (AEs R, S.) On November 25, 2012, Applicant accepted the offer, which is contingent on his first and second mortgage lenders approving the short sale by February 4, 2013. (AE R.) If the short sale is approved, the bank holding the first mortgage will likely receive \$197,000 after other costs are paid at closing, including \$3,000 in taxes due, the realtor’s 6% commission, and 6% of the sale proceeds to the agency servicing the second mortgage. The deficiency balance on the first mortgage will be around \$178,000 (SOR 1.a). (AEs K, S.) Applicant could be required to cover up to 20% (\$35,600) of the lender’s loss, payable either in cash at closing or through an interest-free, unsecured note. (AE S.) The realtor expects the mortgage lenders to approve the short sale by the February 18, 2013 closing date. The purchase and sale agreement will be nullified if the mortgage lender forecloses on or before the short sale approval date of February 4, 2013. To resolve any debt remaining to the primary mortgage holder after the short sale, Applicant intends to make monthly payments, or if cash is demanded at closing, to use either the \$32,000 in 401(k) funds available to him or the equity in his home (around \$60,000). The agency servicing the second mortgage has apparently agreed to waive any deficiency beyond 6% of the sale proceeds. Applicant intends to “do whatever it takes to resolve this issue in an honorable manner.” (AE K.)

Applicant is repaying his mother \$250 every two weeks for the \$58,000 he borrowed to purchase his new home. His mother and his spouse’s aunt live with him and his spouse rent free. (AE C; Tr. 36, 42-43, 83.) Applicant is also repaying two loans that he borrowed from his 401(k) for an automatic generator and other expenses for his current house. He is repaying the loans at \$135.93 and \$160.05 every two weeks. (GE 2; Tr. 89-90.) Applicant is required to pay \$800 per month from his military retirement to his ex-wife for as long as he lives. (Tr. 89.)

Applicant’s work for his defense contractor employer required his assignment in Southwest Asia for 45 days in 2004. (AE G; Tr. 87.) A professional colleague of Applicant’s for the past eight years describes Applicant as “a man of outstanding character and the highest moral principles.” He personally witnessed Applicant’s dedication and patriotism. (AE G.) Applicant also has the favorable endorsement of a co-worker familiar with his work for ten years with the defense contractor and for seven years in the military. Applicant is known to the company’s managers as the person to consult for teaming and resolving difficult weapon systems problems. Applicant enjoys the respect of his colleagues and exhibits a “can-do” attitude. (AE H.) Applicant’s annual performance reviews for the years 2005 through 2011 indicate that he exceeded requirements. For 2005, 2006, and 2010, his work far exceeded requirements. (AE I.)

Applicant’s spouse does not work outside of the home. She cares for their two horses, 19 chickens, two dogs, and seven cats. (Tr. 91-92.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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 overall 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 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 that 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 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 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.

When he refinanced the mortgage on the home that he shared with his first wife in August 2007, Applicant took on a primary mortgage of \$377,575 and a second mortgage of \$147,425. Applicant accepted loan obligations based on 125% of the home's assessed value because he expected the housing market to continue to appreciate between 10% and 12% per year. Instead, property values declined, and he found himself about \$130,000 "upside down" on the home. He made what he considers to be a "business decision" and triggered the foreclosure process by stopping payments on his loans after November 2010. Available records show he was about \$24,935 behind in his payments on the second mortgage as of January 2012 and \$43,279 behind on his primary mortgage as of April 2012. AG ¶ 19(a), "inability or unwillingness to satisfy debts," and AG ¶ 19(c), "a history of not meeting financial obligations," are established.

Concerning potential factors in mitigation, AG ¶ 20(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," cannot reasonably apply because his default is recent and ongoing. As of the close of the record in late November 2012, the mortgage delinquencies were still accruing pending the lenders' approvals of a short sale.

Mitigating condition AG ¶ 20(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," has limited applicability. Applicant may not have reasonably foreseen the decline in property X's value, but it is difficult to conclude that he exercised sound financial judgment when he took on debt in excess of the home's value in August 2007 and then chose to default on his mortgages in December 2010. Applicant knew the terms of the loans when he refinanced, and he assumed the financial risk.

Mitigating conditions AG ¶ 20(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 AG ¶ 20(d), "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts," speak to efforts to address the financial issues. As of March 2011, Applicant intended to allow the foreclosure process to proceed and then take care of any remaining debt. Around July 2011, Applicant learned that there was a problem with the title, which caused the primary lender to cancel three auctions of the property between September 2011 and January 2012. Applicant called the bank periodically to see if the title had been cleared, but he did little else for more than a year. He did not want to

spend the funds for an attorney, assuming that the issue would likely be resolved eventually. While his inaction could preclude consideration of AG ¶ 20(d), Applicant did not fully understand the security concerns raised by his ongoing disregard of these mortgage obligations. He believed that he had sufficiently demonstrated his trustworthiness by reporting the delinquent mortgages to his FSO. After his October 2012 hearing, Applicant took credible steps to establish AG ¶ 20(d). He checked with the attorney who handled the refinancing in August 2007. He learned that the mortgages had been filed in reverse order, and that a title insurance company was working on the title defect. In mid-November 2012, Applicant listed the property for sale with a realtor experienced in short sales and loss mitigation. Within days, he accepted a reasonable offer, albeit one contingent on his mortgage lenders approving the short sale. While Applicant has been led to believe that his creditors will not object, it would be premature to fully apply AG ¶ 20(c) before formal approval of the short sale. Foreclosure either on or before February 4, 2013, would nullify the purchase contract.

Moreover, if the property is sold, Applicant would be responsible for any deficiency balance demanded by the primary lender. As of July 2012, Applicant was making timely payments on approximately \$75,942 in credit card debt and \$19,442 in student loan debt. He had no history of late payments on those accounts, but his overall debt burden must be considered in determining whether he is in a position to make good on his intent to resolve any debt owed on his first mortgage. Applicant's take-home pay of \$4,309.25 every two weeks from his defense contractor employment is supplemented by his share of his military retirement. His total income exceeds his monthly expenses and debt payments by about \$2,947, so he has the means to make payments toward any deficiency balance remaining on his primary mortgage. Should the bank require a cash payout at closing, Applicant has 401(k) assets as well as the equity in his present home. Given the considerable progress Applicant has made in addressing his debts in the past month, he is likely to continue to work on resolving the mortgages if the short sale fails.

Whole-Person Concept

Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(a).⁵

Applicant's decision to default on the home loans for his previous residence calls into question whether he can be counted on to comply with his obligations irrespective of

⁵The factors under AG ¶ 2(a) are as follows:

- (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.

personal interest or convenience. Yet, this exercise of poor financial judgment appears to be an aberration in a lengthy career of unblemished service to the Nation's defense. Applicant's prompt, voluntary disclosure of his default to his FSO is consistent with security requirements. On being made aware more fully of the security implications of his loan defaults, he took credible steps to address the issues. The DOHA Appeal Board has held that 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. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). Applicant is working with a credentialed realtor to resolve the debts through a short sale of the home. Should the contract to purchase be nullified before the closing date, Applicant is likely to continue to work on resolving the delinquent mortgages through legal means. For the reasons noted above, I conclude that it is clearly consistent with the national interest to grant Applicant a security clearance at this time.

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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Elizabeth M. Matchinski
Administrative Judge