



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



In the matter of:)
)
) ISCR Case No. 11-07747
)
Applicant for Security Clearance)

Appearances

For Government: Robert Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

12/12/2012

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the security concerns arising under Guideline F (Financial Considerations). Eligibility for access to classified information is denied.

Statement of the Case

On May 22, 2012, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline F. This 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 on September 1, 2006.

On June 13, 2012, Applicant answered the SOR and requested a hearing. The case was assigned to me on October 12, 2012. DOHA issued a notice of hearing on November 2, 2012, and the hearing was convened as scheduled on November 14, 2012. At the hearing, Department Counsel offered Government's Exhibits (GE) 1

through 4. Applicant testified and offered Appellant's Exhibit (AE) A. The record was left open until December 3, 2012, for Applicant to submit additional matters. He timely submitted AE B. After the record closed, Applicant submitted another document that was marked as AE C. AE A through C were admitted into evidence without objection. Department Counsel's memorandum and email forwarding Applicant's post-hearing submissions were marked as Hearing Exhibits (HE) 1 and 2. DOHA received the hearing transcript (Tr.) on November 26, 2012.

Procedural Matters

At the hearing, Applicant affirmatively waived the 15-day notice requirement in Paragraph E3.1.8 of the Directive.¹

Findings of Fact

Applicant is a 35-year-old software test engineer who works for a federal contractor. He has been working in his current position for about 7 years. Due to the expiration of a government contract, his employer changed to another contractor in August 2012. He graduated from high school in 1995 and earned a bachelor's degree in 2005. He is currently studying for a medical degree. He has never been married and has no children. Since May 2006, he has held a security clearance without incident.²

The SOR alleged that Applicant's two mortgage loans totaling \$138,000 were placed for collection. Those loans were listed as delinquent on his credit reports obtained on April 6, 2011, and April 6, 2012. In his Answer to the SOR, he denied both allegations and indicated that a short sale of the property was pending.³

In March 2003, Applicant purchased a home for \$149,000. This was his primary residence. He was the sole owner. The home had two fixed mortgage loans. The interest rate was seven percent on the first mortgage loan and nine percent on the other. His total monthly mortgage payments were about \$1,400.⁴

After purchasing the home, Applicant resided there with his girlfriend. She was employed and contributed about \$300 to \$400 per month to their living expenses, which included the mortgage payments. At that time, his annual income was about \$40,000. He stated that the mortgage payments were about half of his monthly income. After residing together in the home for a year and a half, Applicant and his girlfriend terminated their relationship, and she moved out. At that point, he became solely responsible for the mortgage payments. In 2010, he stopped making the mortgage

¹ Tr. at 11-12.

² Tr. at 6-7, 30-31; Applicant's Answer to the SOR; GE 1.

³ Applicant's Answer to the SOR; GE 1- 4.

⁴ Tr. at 23-29, 31; Applicant's Answer to the SOR, GE 2-4.

payments. About two months after stopping those payments, he moved from the home to an apartment closer to his place of work.⁵

During an Office of Personnel Management interview in May 2011, Applicant reportedly stated that he “no longer wanted the expense [of the home] or to spend the time to keep up the maintenance on the residence.” In that interview, he acknowledged that, although he could afford to make the mortgage payments, he no longer wanted to do so. After consulting with an attorney, he decided his best option was to let the home go into foreclosure. He acknowledged that a foreclosure would be a negative mark on his credit record, but indicated that mark would eventually go away. He described the home as a “dead-end investment.” In response to DOHA interrogatories, he also stated that he stopped making the mortgage payments on the advice of an attorney to begin the foreclosure process.⁶

In his Answer to the SOR, Applicant provided a letter from an attorney who was representing him in a short sale of the home. The attorney’s letter stated in part:

Although [Applicant] could afford to make the mortgage payments at the time [of the purchase], his financial situation changed which ultimately prevented him from making the mortgage payments to [both mortgage holders]. While [he] was residing in the Property, [he] received financial assistance from a co-tenant to supplement the monthly expenses related to the Property. Unfortunately, the tenant moved out and [Applicant] was left to cover all of the expenses related to the Property. [He] also incurred additional expenses related to his long commute from the Property to his place of employment. According to [Applicant], the long commute to and from work became physically draining and was impacting his work performance. [He] decided that it would be in his best interests to relocate to an apartment closer to his place of employment in order to reduce the stress and impact of the commute. [Applicant] has been unable to find a suitable tenant for the Property and ultimately decided that it was in his best interests to short sale the Property.⁷

In his Answer, Applicant also stated, “At no time, did I walk away and wash my hands of this situation.”⁸

At the hearing, Applicant testified that he could afford to make the mortgage payments after his ex-girlfriend moved out. He also indicated that his commute from that home to his place of employment was about one hour each way. He stated that he had

⁵ Tr. at 25-46; GE 2.

⁶ GE 2.

⁷ Tr. at 23-46; Applicant’s Answer to the SOR.

⁸ Applicant’s Answer to the SOR.

no health problems that would exacerbate his work commute. When asked why he vacated the home, he responded:

I think there were several contributing factors. Some of it was -- it did remind me of the failed relationship, which I am not proud to admit, but yeah. The commute tired me out. I wanted to have some kind of social life or activity after work and I found that hard to do. And the maintenance on the house was a lot more than I expected.⁹

Before stopping the mortgage payments, Applicant did attempt to refinance the first mortgage loan, but those efforts were unsuccessful. After moving out of the home, he did not attempt to rent it because it was in poor condition and renting it was not economically feasible. Two months before the hearing, the first mortgage holder indicated to him that it planned to initiate foreclosure proceedings.¹⁰

In October 2011, Applicant hired an attorney to represent him in a short sale of the home. In March 2012, he entered into an agreement with a realtor listing the property for a short sale. At the time of the hearing, Applicant had received two short sale offers. The first offer was made in April 2012, and withdrawn in July 2012. The second offer in the amount of \$38,000 was made in September 2012. The first mortgage holder submitted a counteroffer of \$45,000, which the prospective buyers accepted in October 2012. At the time of the hearing, the short sale was still pending final approval. The second mortgage holder agreed to accept \$2,500 of the proceeds from the short sale as full settlement for that mortgage. On December 5, 2012, the first mortgage holder advised that the short sale had been finally approved. As part of that short sale, the second mortgage holder will receive \$2,500 and the first mortgage holder will waive the right to pursue collection for the deficiency arising from the sale. The first mortgage holder indicated that it will report the deficiency from the sale to the Internal Revenue Service on a 1099 Form. The date for the closing of the short sale is not known.¹¹

Applicant has no other delinquent debts. In April 2012, he submitted a Personal Financial Statement (PFS) that reflected he had a net monthly remainder of \$861. The PFS indicated that he had a monthly rent payment of \$903, but did not mention the mortgage payment obligations. It also indicated that he had \$52,685 in a 401(k) plan.¹²

Applicant submitted a reference letter from a co-worker who described him as a trustworthy and well-balanced individual. The co-worker indicated that he has lent money to the Applicant and was always paid back promptly.¹³

⁹ Tr. at 34.

¹⁰ Tr. at 25-46; Applicant's Answer to the SOR; GE 2.

¹¹ Tr. at 23-46; Applicant's Answer to the SOR, GE 2; AE A-C.

¹² Tr. at 29; GE 2

¹³ Applicant's Answer to the SOR.

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 that are to be used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern for Financial Considerations is set out in AG ¶ 18 as follows:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. Two are potentially applicable in this case:

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

In 2010, Applicant intentionally defaulted on two mortgage loans totaling about \$138,000. This evidence is sufficient to raise the above disqualifying conditions.

Several Financial Considerations mitigating conditions under AG ¶ 20 are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;
- (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and
- (e) the individual has a reasonable basis to dispute the legitimacy of the past due debt which is the cause of the problem and provides documented

proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant's home significantly decreased in value due to a downturn in the real estate market. At the time of the hearing, the property was worth about \$45,000, which was approximately 67 percent less than the \$138,000 he owed on the mortgage loans. Even though he had the financial means to make the mortgage payments, he decided to stop making them in 2010 so that the property would go into foreclosure. After consulting with an attorney, he listed the home for a short sale. Shortly after the hearing, a short sale offer on the home was finally approved. Although this short sale will relieve him of the financial obligations arising from the two mortgage loans, such a sale neither constitutes a "good-faith" resolution of those loans nor eliminates the security concerns resulting from his default on them.¹⁴ Contrary to his assertion in his Answer to the SOR, Applicant did "walk away" from his legal obligations on the mortgage loans. His willful default on those loans continues to cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 20(a) and 20(d) do not apply. AG ¶ 20(c) applies, but does not mitigate the security concerns in this case.

Although the downturn in the real estate market was a condition beyond the Applicant's control, his financial problems were the result of his decision to stop making the mortgage payments when he was able financially to make them. In making his decision to strategically default on the two mortgage loans, he placed his personal interests over his legal obligations and did not act responsibly under the circumstances.¹⁵ AG ¶ 20(b) does not apply.

Applicant denied the alleged debts. However, he provided no documents to substantiate that he had a reasonable basis for disputing the legitimacy of those debts. AG ¶ 20(e) does not apply.

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):

¹⁴ See ISCR Case No. 99-0201 (App. Bd. Oct 12, 1999) ("[T]he 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. Such standards are consistent with the level of conduct that must be expected of persons granted a security clearance.") (citations omitted); ISCR Case No. 02-30304 (App. Bd. Apr. 20, 2004)(relying on a legally available option, such as Chapter 7 bankruptcy, is not a good-faith effort) (citations omitted); ISCR Case No. 99-9020 (App. Bd. Jun 4, 2001) (relying on the statute of limitations to avoid a debt is not a good-faith effort). Likewise, when an applicant intentionally defaults on mortgage loans while being financially able to make the mortgage payments, reliance later on a short sale to get out from underneath mortgage loans does not amount to a "good-faith" resolution of those loans.

¹⁵ As used here, "strategically default" means a decision by the borrower who has the financial means to make the monthly mortgage payments, but chooses not to do so and, instead, intentionally defaults (i.e., stops making payments) on the mortgage loans.

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my 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.

Applicant is a mature, hard-working individual. A co-worker described him as trustworthy. Nevertheless, he willfully defaulted on his legal obligation to pay two mortgage loans. His decision to default on those loans reflected poorly on his judgment, reliability, and trustworthiness. It calls into question his willingness to follow the rules for properly handling and safeguarding classified information if doing so might conflict with his personal interests. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline F.

Formal Findings

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F: AGAINST APPLICANT

Subparagraphs 1.a – 1.b: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

James F. Duffy
Administrative Judge