

KEYWORD: Guideline F

DIGEST: The Government presented substantial evidence of Guideline F security concerns. The Judge’s material findings were supported by substantial record evidence. Any error in the findings was harmless. Adverse decision affirmed.

CASE NO: 11-07780.a1

DATE: 10/15/2013

DATE: October 15, 2013

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In Re:	)	
	)	
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	)	
Applicant for Security Clearance	)	
	)	

**APPEAL BOARD DECISION**

**APPEARANCES**

**FOR GOVERNMENT**

James B. Norman, Esq., Chief Department Counsel

**FOR APPLICANT**

Kevin Peck, Esq.

The Department of Defense (DoD) declined to grant Applicant a security clearance. On August 3, 2012, DoD issued a statement of reasons (SOR) advising Applicant of the basis for that decision—security concerns raised under Guideline F (Financial Considerations) of Department of Defense Directive 5220.6 (Jan. 2, 1992, as amended) (Directive). Applicant requested a hearing. On August 6, 2013, after the hearing, Defense Office of Hearings and Appeals (DOHA) Administrative Judge David M. White denied Applicant’s request for a security clearance. Applicant appealed pursuant to Directive ¶¶ E3.1.28 and E3.1.30.

Applicant raised the following issue on appeal: whether the Judge’s adverse decision was arbitrary, capricious, or contrary to law. Consistent with the following, we affirm the decision.

## **The Judge's Findings of Fact**

Applicant is an employee of a Defense contractor. He has worked in his current job since 2002. He holds two master's degrees and has held a security clearance for more than ten years.

In 2005, Applicant applied for a position with his employer in a different city from his place of residence. Based upon the assumption that he would obtain the position, and anticipating a continuation of the housing boom, he purchased two properties: a single family home (A) and a triplex (B). He stated that he intended to live in A and rent B as an investment. Applicant had no prior experience or training in real estate investing. The position he applied for did not materialize, and he never moved away from his home city or occupied A.

Applicant purchased A with first and second mortgages, with no money down. Although he stated that he had intended to occupy it as his home, the deeds of trust which secured his loans included language that "clearly contemplat[ed] that the property would be rented out." Decision at 3. A was vacant for several months before Applicant found a renter, who soon fell behind on his rent. It took a year of effort before Applicant succeeded in evicting the tenant. Applicant depleted his savings in making his mortgage payments without the benefit of rental income and tried for two years to sell the house, to no avail. Applicant received a Notice of Trustee's Sale due to his failure to make his payments. Subsequently, the lender on the first loan approved a request for a loan modification.

Applicant stated that he was not making payments on the first loan on A, and his credit report shows that his last payment was in March 2010. Applicant has not made payments even though his parents recently moved into the house and have been paying him \$1,760 a month in rent. Applicant retained an attorney who is also a real estate agent. In May 2013, Applicant listed the property for a short sale, and the attorney expressed optimism that one could be completed. He provided a statement that, under the law of the state in which A is located, if a lender accepts a short sale any deficiency is extinguished. He also stated that lenders may not collect deficiencies after foreclosure of an "owner-occupied purchase money loan." *Id.* at 4.

Applicant also experienced significant problems making his payments on B, the triplex rental property. His last rental payment was in May 2008, and the lender initiated foreclosure proceedings the following April. In August 2009, the lender offered a "Trial Plan Agreement," which Applicant accepted. Under this agreement, Applicant would make three monthly payments in order to qualify for a "workout solution" to bring his loan current. *Id.* at 5. Applicant did not make any further payments, and the lender foreclosed. In May 2013, the lender gave Applicant a letter stating that he owes no further balance on this debt. The record is silent about the possible tax ramifications of the forgiveness of the substantial deficiency resulting from this sale.

Applicant has undergone no financial counseling, although his most recent master's degree program included finance classes. He has a net monthly income of \$6,521, with a \$2,508 surplus after expenses. His bank statement showed \$2,488 in his checking account and \$201 in savings.

He did not explain what happened to the rest of his monthly surplus. He had \$124,327 in a retirement plan and about \$128,000 in equity in his current home.

Applicant enjoys a good reputation for the quality of his work performance, his trustworthiness, and character. He has never had a security violation and has received regular promotions over the years.

### **The Judge's Analysis**

The Judge stated that Applicant had made two large speculative real estate investments on risky terms. Due to the crash of the real estate market, his inability to manage the property from a distant city, and his insufficient rental income, he became unable to pay the mortgages associated with the properties. It is not clear that he would be shielded from paying deficiency judgments should the remaining property be foreclosed. The Judge concluded that Applicant's circumstances raised concerns under disqualifying conditions 19(a)<sup>1</sup> and (c).<sup>2</sup> In examining Applicant's case for mitigation, the Judge noted that he had been carrying significant debt since 2008. He also noted that Applicant had some retirement savings and home equity but had been unable or unwilling to make payments toward his first mortgage on A in over three years prior to the hearing. The Judge stated that Applicant had only listed the property for a short sale less than a week prior to the hearing.

Although he acknowledged evidence of the burst housing bubble that affected Applicant's financial circumstances, the Judge concluded that Applicant had not demonstrated responsible behavior in regard to his debts. He stated that Applicant's response to his financial difficulties was to stop paying his obligations while delaying foreclosure actions through proposing loan modifications on terms he knew he could not meet. Despite collecting \$1,760 in monthly rent from his parents, Applicant has not made a mortgage payment on A in three years. He failed to demonstrate that he would not owe a substantial deficiency judgment should the lender foreclose on the property. The Judge stated that Applicant's last-minute efforts to resolve his debts on A and his abandonment of B to foreclosure are not sufficient to mitigate the concerns arising from these debts. In the whole-person analysis, he noted that Applicant had been unable to obtain a short-sale of A despite his claims that he had been attempting to do so for several years. He also stated that Applicant's conduct regarding B was neither responsible nor indicative of trustworthiness.

### **Discussion**

Applicant contends that his circumstances do not raise Guideline F security concerns. Among other things, he argues that the delinquent mortgages on his two properties are the only financial problems he has had in his life and constitute neither a history of failing to pay debts nor an unwillingness to pay debts. When an applicant controverts a SOR allegation, the Government bears the burden of producing substantial evidence of the allegation. Substantial evidence is "such

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<sup>1</sup>Directive, Enclosure 2 ¶ 19(a): "inability or unwillingness to satisfy debts[.]"

<sup>2</sup>Directive, Enclosure 2 ¶ 19(c): "a history of not meeting financial obligations[.]"

relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record.” Directive ¶¶ E3.1.14; E3.1.32.1. *See also* ISCR Case No. 11-08063 at 3-4 (App. Bd. Jul. 19, 2013). The Directive presumes a nexus between proven or admitted conduct under any of the Guidelines and an applicant’s security worthiness. *Id.*

In the case before us, Applicant admitted the allegation pertaining to A. Therefore, this allegation was not controverted. Nevertheless, the Government presented evidence regarding this debt, as it did with B. The record evidence supports the Judge’s findings about Applicant’s mortgage debts, including the circumstances through which they became delinquent, the length of time they have remained unresolved, and the fact that Applicant’s failure to make his mortgage payments was due, at least in part, to his conscious choice. These findings support a favorable application of the disqualifying conditions at issue here. They raise a reasonable concern that Applicant has been either unable or unwilling to pay his mortgage debts for several years, the number of delinquent debts *per se* not being determinative in a Guideline F analysis. *See, e.g.*, ISCR Case No. 98-0783 at 4 (App. Bd. Aug. 7, 1998). Moreover, Applicant’s failure to pay his monthly mortgage installments, each of which represents a separate obligation, can reasonably be characterized as a history. *Id.* The Judge’s analysis of the disqualifying conditions is consistent with the record that was before him.

Applicant takes issue with the Judge’s conclusion that he had failed to demonstrate that he would not owe a deficiency were A to go into foreclosure. The Judge made a finding about state protections of homeowners facing deficiency judgments from short sales or foreclosures. The challenged conclusion by the Judge appears to be based on his finding that Applicant always contemplated treating A as rental property, denying it the status of an owner-occupied dwelling, apparently one of the criteria for a favorable application of the state’s anti-deficiency law in foreclosure situations.<sup>3</sup>

Even if the Judge’s statement were erroneous, however, it did not exert a material effect on the overall decision. The Judge appears to have based his adverse decision, for the most part, on his conclusions that Applicant had undertaken risky real estate investments without sufficient experience or forethought and that his efforts at debt resolution had been deficient in significant ways. Also, even if a delinquent debt is legally unenforceable, a Judge may consider the facts and circumstances surrounding the debt in evaluating an applicant’s judgment and reliability. *See, e.g.*, ISCR Case No. 10-03656 at 3 (App. Bd. Jan. 19, 2011). This, in essence, is what the Judge did in this case. Therefore, any error in the challenged statement was harmless.

The Judge examined the relevant data and articulated a satisfactory explanation for the decision. The decision is sustainable on this record. “The general standard is that a clearance may be granted only when ‘clearly consistent with the interests of the national security.’” *Department*

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<sup>3</sup>“A loan made for the purchase of residential property containing one-to-four units, one of which the borrower intends to occupy, and which loan is secured by that same property, is called an owner-occupied purchas[e] money loan. For such loans, the lender may only pursue the security, and will not be allowed a deficiency after either a trustee’s sale or a judicial foreclosure.” Applicant Exhibit A24 at 6-7.

*of the Navy v. Egan*, 484 U.S. 518, 528 (1988). *See also* Directive, Enclosure 2 ¶ 2(b): “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.”

**Order**

The Decision is **AFFIRMED**.

Signed: Jeffery D. Billett  
Jeffrey D. Billett  
Administrative Judge  
Member, Appeal Board

Signed: William S. Fields  
William S. Fields  
Administrative Judge  
Member, Appeal Board

Signed: James E. Moody  
James E. Moody  
Administrative Judge  
Member, Appeal Board