



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



In the matter of:	)	
	)	
	)	ISCR Case No. 11-07780
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Braden M. Murphy, Esquire, Department Counsel  
For Applicant: Kevin A. Peck, Esquire

08/06/2013

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**Decision**

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WHITE, David M., Administrative Judge:

Applicant purchased two properties in a different city in 2005, thinking that he might move there. His prospective job did not materialize, and he had problems with renters in both. Unable to make his mortgage payments, he defaulted; abandoning one property to foreclosure and attempting to delay foreclosure proceedings on the other, where his parents now live, for the last five years. The evidence is insufficient to mitigate resulting security concerns. Based upon a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SF-86) for a periodic review on November 18, 2010. On August 3, 2012, the Department of Defense issued a Statement of Reasons (SOR) to Applicant, 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*, effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing (AR) on November 8, 2012, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on December 10, 2012. The case was assigned to me on December 13, 2012. I initially scheduled Applicant's hearing for January 23, 2013. Applicant's counsel requested a continuance because he was unavailable during the dates of Department Counsel's travel to the hearing location for other hearings, and to permit Applicant to complete the pending resolution of his remaining delinquent debt. Department Counsel agreed to the indefinite continuance, which I granted. Due to an unusually low caseload, the next proposed hearing date was in April 2013. On April 9, 2013, Applicant's counsel submitted a written motion to continue the hearing until June or July 2013. Department Counsel opposed this motion in writing on April 10, 2013. On April 12, 2013, I denied Applicant's motion in part, but offered him several dates in early May from which he could select to accommodate his busy schedule. Applicant's counsel chose May 7, 2013.

The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Video Teleconference Hearing on April 18, 2013, and I convened the hearing, as scheduled, on May 7, 2013. Applicant, his counsel, and the court reporter attended the hearing in person. Department Counsel participated from DOHA Headquarters by video teleconference. The Government offered Exhibits (GE) 1 through 5, which were admitted without objection, and Hearing Exhibit (HE) I, a Government exhibit list. Applicant offered Exhibits (AE) A1 through A21, which were admitted without objection, and testified on his own behalf. I granted Applicant's request to leave the record open until May 24, 2013, for submission of additional evidence. DOHA received the transcript of the hearing (Tr.) on May 17, 2013. On May 23, 2013, Applicant submitted AE A22 and A23, together with another request to leave the record open for an indefinite period for resolution of the remaining delinquency. On May 30, 2013, I granted Department Counsel's request to keep the record open until June 7, 2013, to permit him to respond to the new evidence, with Applicant's counsel given until June 14, 2013, to respond. Department Counsel forwarded those exhibits to me on June 6, 2013, with no objection to their admission and providing additional argument. Department Counsel objected to holding the record open for an indefinite period. Applicant's counsel submitted his response to Department Counsel's argument, together with AE A24, on June 14, 2013. Department Counsel did not object to this additional evidence. AE A22 through A24 were admitted, the indefinite continuance was denied, and the record closed as scheduled.

### **Findings of Fact**

Applicant is a 36-year-old employee of a major defense contractor, where he has worked as a system engineer since 2002. He is single, with a six-year-old son. He also presently cares for two daughters of his son's mother, ages 18 and 14. He is no longer in a relationship with their mother. He is a college graduate, with two master's degrees, all in engineering fields. He has no military service, but has held a security clearance for more than ten years. (GE 1; AE A1; Tr. 16, 30-33.)

In his response to the SOR, Applicant admitted the truth of allegations 1.a through 1.c, and denied allegation 1.d, all with some explanation. Applicant's admissions, including his statements in response to DOHA interrogatories (GE 4 and GE 5), are incorporated in the following findings.

Applicant was born and raised in the city that is the original home of his employer, and where he began working for them in 2002. He purchased his current home there in 2003, and has timely made all payments toward that mortgage loan. In 2005, Applicant applied for a position with his company in a different city, where his father and stepmother now live. Anticipating that he would obtain that position, and that the housing boom would continue, he purchased property A (a single family home) and property B (a triplex) in that city in late 2005. He had no prior experience or education in real estate investing. He testified that he intended to live in property A, and continue renting the three already-occupied units in property B as an investment. Property B was purchased with a single fixed-rate mortgage. The position for which he applied did not materialize, however, and he never moved away from his home city or occupied property A. (AR; GE 1; GE 4; GE 5; Tr. 50, 75-80.)

After his hearing, Applicant provided a copy of the deeds of trust under which he entered into the first and second mortgage loans to purchase property A. (AE A24 at Exhibits E and F.) This was an 80/20 loan arrangement under which he paid no money down. (*Id.*; Tr. 60, 87.) Although Applicant said that he intended to occupy this property as his home, the deeds of trust contain "family riders" that clearly contemplate that the property would be rented out. These riders delete Applicant's obligations, under Section 6 of the first deed of trust, to occupy property A within 60 days of the deed's execution date and to continue occupying it as his principal residence for at least a year. The riders further obligated him to maintain rent loss insurance, and to assign all leases and rents to the lender if he defaulted on his mortgage payments. (AE A24 at Exhibits E at 18-19, and F at 11-12.) The first mortgage, for \$360,000, was a 30-year adjustable rate loan, with interest-only payments for the first five years and principal payment amortized over years 6 through 30. The initial interest rate was 6.75% for two years, after which the rate would be adjusted every six months. The deed limited the initial adjusted rate to a range of 3.75% to 9.75%, with subsequent changes of no more than 1% above or below the rate for the preceding six months. (AE A24 at Exhibit E.) The second mortgage, for \$67,500, was a 15-year balloon payment loan. (AE A24 at Exhibit F.)

After Applicant purchased property A it remained vacant for several months, then he found a renter. Shortly thereafter, the tenant began to fall behind on rent payments, then stopped paying rent altogether but refused to move out. Applicant filed a year-long eviction action in civil court, which was finally successful in January 2008. In his November 14, 2008 letter to the property A first mortgage lender seeking to restructure that loan, Applicant described how making the payments without rental income caused him to deplete all his savings and, "maxed out all my credit." (GE 5 at 14.) He also said that he had been unsuccessfully trying to sell property A for about two years, and that his parents had recently moved into the home and made repairs to the

damages caused by the former tenant in an attempt to improve its value. However, due to the housing crisis, its value remained well below his 2005 purchase price. (*Id.*)

On November 2, 2008, Applicant was issued a Notice of Trustee's Sale of property A, to occur on November 24, 2008, because he was in default on the first mortgage payments. (GE 5 at 15.) On November 14, 2008, he wrote the letter described above seeking to restructure the loan. On July 8, 2009, the mortgage servicing company that had purchased his first mortgage on property A approved his request for a loan modification. The modification called for a 5.75% interest rate, with principal and interest payments of \$2,418 per month. (GE 5 at 17.) Applicant testified that his original first mortgage payment was around \$1,500 per month, but had adjusted to a present payment of \$2,888. (Tr. 89-90.) This is the debt alleged in SOR ¶ 1.b.

Although his parents are paying Applicant \$1,760 per month to rent property A, he testified that he is not making any payments on the delinquent first mortgage loan. He testified that he thought his last payment was "about a year ago," and that he was holding his parents' payments for eventual payment toward the mortgage. (Tr. 88-91.) However, the record credit reports indicate that his last payment was in March 2010, with an outstanding balance due of just over \$388,000, and the bank statement he submitted does not show accumulated rent funds. (GE 2; GE 3; AE A2.) All records indicate that the mortgage is being foreclosed. (*Id.*; AE A7.) In his November 2010 SF-86, Applicant listed this loan as being delinquent over 90 days, and said its status was, "In review for short sale of associated property." (GE 1 at 48.) Applicant subsequently said that he had been trying to negotiate another loan modification. (AR; AE A7; Tr. 59-62, 89, 91-96.)

Applicant provided documentation that he retained an attorney, who is also a real estate agent in the city where property A is located, He formally listed the property for a short sale on May 1, 2013, after the lender denied another loan modification. (AE A23.) This attorney provided a copy of one offer to buy the property for \$242,500, dated June 4, 2013, and two other informal inquiries about purchasing it. The attorney expressed optimism, that a short sale could eventually be completed; however he said that he had been instructed by the lender's representative to allow the property to remain on the market long enough for sufficient exposure to obtain the highest and best offer. (AE A23; AE A24.)

Applicant's real estate attorney/agent provided information concerning applicable state law on collecting first mortgage deficiency debts after foreclosure or short sale of the secured property. In sum, if Applicant's lender accepts a short sale, any outstanding balance not recovered in the sale is extinguished. Similarly, state statutes preclude collection of a deficiency after foreclosure of an "owner-occupied purchase money loan." (AE A23; AE A24.)

On October 23, 2012, Applicant succeeded in negotiating a settlement with the holder of the second mortgage on property A, which went into default in May 2008 with an outstanding balance of \$71,346. The creditor agreed to accept monthly payments of

\$459 for 36 months to settle the debt for a total of \$16,522. Applicant provided documentation that he made such payments from October 2012 through April 2013. (AR; AE A8; AE A22; Tr. 60-61.) This is the debt alleged in SOR ¶ 1.c.

Applicant also had significant problems making his mortgage payments on property B. The rental units were substandard, and rents were reduced until he made necessary repairs. After he completed the repairs, one of the tenants moved out and the other two sought to pay reduced rent due to the market downturn. His credit report shows that his last payment on this \$452,000 mortgage (with no down-payment) was made in May 2008. (GE 3; See also GE 5 at 23; Tr. 78-79.) The lender initiated foreclosure proceedings in April 2009, but Applicant again tried to forestall things by seeking a loan modification in June 2009. In August 2009, he accepted the lender's offer of a "Trial Plan Agreement," under which he would make three monthly payments in September through November 2009 in order to qualify for a potential workout solution to bring his loan current. Applicant offered no evidence of any further payments toward this debt, and the lender foreclosed this mortgage in July 2010. On May 2, 2013, the lender provided Applicant a letter indicating that he does not owe any further balance on this debt. He did not discuss whether he had addressed any income tax implications resulting from the apparent forgiveness of the \$323,300 deficiency after the foreclosure sale of the property. (AR; GE 3; GE 5; AE A9; AE A15; Tr. 50-54, 78-86.) This is the debt alleged in SOR ¶ 1.d.

Applicant also accumulated unpaid water bills for property B that totaled \$3,443 at the time of the foreclosure sale in July 2010. Applicant said that he thought this debt was absolved by the foreclosure process, and did not realize that he still owed it until he received the SOR. He paid this debt on October 30, 2012, by credit card, and testified that he has since paid the credit card debt. (AR; AE 6; Tr. 52-55, 68, 100, 108.) This is the debt alleged in SOR ¶ 1.a.

Applicant provided substantial evidence of the significant real estate market downturn and resulting surge in foreclosure activity in the city where properties A and B are located. (AE A10, A11, A16, A17, A18, A19; Tr. 62-67.) He also received a \$400 payment as a result of an agreement between federal banking regulators and his mortgage lender on property B in connection with an enforcement action related to deficient mortgage servicing and foreclosure processes. (AE A20; Tr. 55-56.)

Applicant has undergone no financial counseling, although his most recent master's degree program included some finance classes. His personal financial statement reflected net monthly income of \$6,521, monthly expenses of \$3,993, and one monthly debt payment of \$20. This resulted in a \$2,508 monthly surplus. He submitted a bank statement showing \$2,488 in his checking account and \$201 in savings. He did not explain what has happened to the rest of his monthly surplus, or include his parents' monthly \$1,760 rent payment for property A in his personal financial statement. He had \$124,327 in his company's contributory investment retirement plan. He estimated that he has about \$128,000 in equity in the home where he lives. (GE 5 at 9; AE A2; AE A3; Tr. 34-35, 100, 107.)

Two managers, for whom Applicant worked over the past ten years, wrote letters praising his good character, dedication, responsibility, trustworthiness, and work performance. (AE A4; AE A5.) Cognizant company officials certified that he has never had a security violation, an ethics issue, or other adverse personnel action. He has worked on the same program since beginning full-time employment in 2002, and has received regular promotions every few years. (AE A 12; AE A13; AE A14; Tr. 41-42.)

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions (DCs) and mitigating conditions (MCs), 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, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, "[t]he 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides: "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

A person applying for access to classified information seeks to enter 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 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.

## **Analysis**

### **Guideline F, Financial Considerations**

The security concerns under the guideline for financial considerations are set out in AG ¶ 18, which reads in pertinent part:

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 record evidence potentially raises security concerns under two Guideline F DCs, as set forth in AG ¶ 19:

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

Applicant made two large speculative real estate investments on very risky terms in 2005. Due to the crash of the real estate market and his inability to properly manage the rental properties in a distant city, his rental income was insufficient and he was unable to pay the mortgage loans associated with those purchases. In May 2008 he had exhausted his savings and defaulted on the \$452,000 property B mortgage and the \$67,500 second mortgage on property A. Through a series of short-sale attempts and attempts to renegotiate the terms of his first mortgage on property A, he has not yet lost that property where his parents have lived since mid-2008. They have paid him rent of \$1,760 per month, but he has not made a payment to the mortgage creditor since March 2010, and currently owes the creditor who has begun foreclosure proceedings more than \$388,000. Since the first mortgage Deed of Trust was modified to delete requirements that he occupy property A as his principal residence, and he never did so, it is far from clear that applicable state statutes would shield him from a deficiency judgement if the foreclosure is completed. This evidence raised significant security concerns under DCs 19(a) and (c), thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns. The evidence does not support any other DC under this guideline.

The guideline includes five conditions in AG ¶ 20 that could mitigate security concerns arising from Applicant's financial difficulties:

- (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 has carried significant outstanding delinquent debt since May 2008, more than \$400,000 of which continues to date. He has some equity in his home and some retirement savings, but has been unable or unwilling to make payments toward his first mortgage on property A for more than three years, and only took steps to actually list it for short sale less than a week before his hearing. The only documented offer to date would result in a deficiency of \$145,500, which is \$17,500 more than his estimated equity in the home he lives in. Applicant failed to establish substantial mitigation under MC 20(a).

Applicant also offered insufficient evidence to support significant mitigation under MC 20(b). He entered into two very risky real estate speculations with little or no knowledge or experience concerning his subsequent challenges and obligations as an absentee landlord. It is uncontested that the bursting real estate bubble caused widespread mortgage defaults, rent reductions, and foreclosure actions. However, Applicant's response to these issues was to stop paying his obligations while delaying foreclosure actions through attempts to modify the loans on terms he knew he could not meet. He has been collecting \$1,760 in monthly rent for property A from his parents since mid-2008, yet has not made a mortgage payment on that property since March 2010. He only started to address these issues when he realized that his security clearance was in jeopardy, not because it was the responsible thing to do. He failed to



demonstrate that he would not be liable for a substantial deficiency judgement if the lender forecloses his first mortgage deed of trust on property A.

Applicant did not undergo financial counseling, but his ability to manage his other debts and his master's-level courses in finance make this issue less significant. He has negotiated and complied with the first seven monthly payment requirements of an agreement to settle his \$66,000 second mortgage debt for \$16,522. He repaid the \$3,443 water bill related to property B in October 2012. His creditor foreclosed on property B, and provided him documentation that he no longer owes anything toward that mortgage debt. These facts establish some mitigation under MC 20(c).

Applicant did not realize he owed the property B water bill until he received the SOR, and paid it fairly promptly thereafter. This establishes mitigation under MC 20(d) for that debt. His last-minute efforts to resolve his mortgage debts on property A, and his abandonment of property B to foreclosure, do not qualify as good-faith efforts to resolve those debts under applicable Appeal Board precedent. Accordingly, security concerns arising from those mortgage debts are not mitigated under MC 20(d). Applicant admitted that he owed each of the SOR-alleged debts at some point, so the evidence did not raise mitigation under MC 20(e).

### **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 pertinent facts and circumstances surrounding this case. Applicant is a sincere and hard-working individual, who suffered economic hardship due to the severe economic recession since 2008 because he voluntarily entered into substantial and risky real estate speculations without sufficient knowledge or experience to succeed. He is mature and accountable for his choices and actions, and has remained current on other debt

obligations. He abandoned property B to foreclosure, and remains liable for more than \$400,000 in debt on property A mortgage loans. He is only seven months into a 36-month program to resolve that second mortgage, and has been unable to short sell property A despite his claims that he has been attempting to do so for over six years. (See GE 5 at 17 and GE 1 at 48.) While his efforts may prove successful in time, he has not yet demonstrated positive permanent behavioral changes or rehabilitation. Although he no longer owes his property B creditor for any foreclosure deficiency, his conduct with respect to that property was neither responsible nor indicative of trustworthiness.

The potential for exploitation or duress remains significant because the potential deficiency debt arising from completion of ongoing foreclosure proceedings on property A would exceed Applicant's net assets, and there is no evidence that his lender would accept a proposed short sale. The single offer he received while the record was left open after the hearing for that purpose was not accepted. The likelihood of continuation of these issues has not yet been reduced. Applicant has a long and distinguished record of valuable service to the national security, and the trust and confidence of his supervisors. Overall, however, the record evidence creates ongoing doubt as to Applicant's present eligibility and suitability for a security clearance.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 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.

DAVID M. WHITE  
Administrative Judge