



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



In the matter of: )  
)  
) ISCR Case No. 11-08271  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Chris Morin, Esq., Department Counsel  
For Applicant: Christopher Graham, Esq.

03/12/2013

**Decision**

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings, testimony, and exhibits, I conclude that Applicant failed to mitigate the Government's security concerns under Guideline F, Financial Considerations. His eligibility for a security clearance is denied.

**Statement of the Case**

Applicant completed a Questionnaire for Investigations Processing (e-QIP) on March 15, 2011. On June 8, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) 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; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within DOD for SORs issued after September 1, 2006.

On July 20, 2012, Applicant answered the SOR in writing. He elected to have a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). The case was assigned to me on January 4, 2013. A Notice of

Hearing, setting Applicant's hearing for January 28, 2013, was issued January 10, 2013. I convened the hearing as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The Government called no witnesses and introduced six exhibits, which were marked Ex. 1 through 6 and entered in the record without objection. Applicant testified and introduced two exhibits, which were marked as Ex. A and Ex. B and entered in the record without objection.

At the conclusion of the hearing, I left the record open until close of business on February 11, 2013, for two purposes. First, I asked both parties to provide citations to DOHA cases that addressed the issue of strategic default. Second, I left the record open, so that Applicant could, if he wished, provide additional information.

Applicant timely filed eight evidentiary documents. I marked Applicant's submissions as Ex. C through Ex. J and entered them in the record without objection. Department Counsel provided citations as requested. Applicant provided citations as requested and also included additional argument and interpretation. Department Counsel objected to the additional argument and interpretation provided by Applicant. In response, Applicant provided further information. I granted Department Counsel's objection, and I did not consider Applicant's additional argumentation and interpretation. I marked Applicant's citations, argument, and interpretation as Hearing Exhibit (HE) 1. I marked Department Counsel's citations as HE 2. I marked Department Counsel's objection and Applicant's response as HE 3. I marked my statement granting Department Counsel's objection as HE 4. DOHA received the transcript (Tr.) of the hearing on February 6, 2013.

### **Findings of Fact**

The SOR contains two allegations of disqualifying conduct under AG F, Financial Considerations. Applicant denied the two allegations and offered additional information.<sup>1</sup> (SOR; Answer to SOR.)

Applicant is 46 years old and employed by a government contractor as a program manager. He has worked for his present employer for almost seven years. In 1985, Applicant enlisted in the U.S. military, where he served on active duty for 20 years. For most of his time in military service, Applicant held a security clearance. In

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<sup>1</sup> When 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).

2005, he retired as a master sergeant and received an honorable discharge. His last security clearance review was in 2005. (Ex. 1; 28-32, 64.)

During his military service, Applicant earned a meritorious service medal, two accommodation medals, three achievement medals, seven good conduct medals, a Global War on Terrorism Service medal, and a Military Outstanding Volunteer Service medal. He also attended night school and earned an associate's degree and a bachelor's degree. In 1999, he earned a master's degree in human resources development. In 2010, Applicant began studies toward a doctorate in emergency management. (Ex. 1; Ex. 2; Tr. 29-30.)

In 1987, Applicant married; his wife died in 2001. On his e-QIP, Applicant did not report that he had any children. Since 2006, Applicant has cohabited with a domestic partner. Applicant's partner was born in Lebanon. He became a naturalized U.S. citizen and acquired a new legal name. In a March 2011 interview with an authorized investigator, Applicant could not recall when his partner became a U.S. citizen. (Ex. 1; Ex. 2.)

In April 2005, Applicant purchased a condominium apartment in a new development for \$417,000. He purchased the unit from the original owner of the property. At the time he purchased, he noted that similar units were being offered by the real estate developer for \$469,000. Applicant, who had made real estate purchases in the past, believed he was making a good investment because he paid approximately \$50,000 less for his unit than the developer was asking for similar units. He stated: "I thought I was walking into something with \$50,000 equity already." (Ex. 1; Ex. 2; Tr. 33, 64-65.)

Applicant financed the property with two mortgage loans. The primary mortgage loan was for \$332,000 and the secondary mortgage loan was for \$62,000. Both mortgages were held by the same commercial lender. (Ex. 1; Ex. 2; Tr. 32-34.)

Applicant's monthly payments on the primary mortgage and the secondary mortgage totaled approximately \$3,300. Insurance and condominium fees were included in the \$3,300 figure. (Tr. 48-50.)

After purchasing the condominium, Applicant's income continued to rise. He reported that his net after-tax income in 2009 was about \$95,000; in 2010, it was approximately \$105,000; and in 2011, it was between \$130,000 and \$140,000. (Tr. 42-43.)

In May 2012, in response to DOHA interrogatories, Applicant submitted a personal financial statement. He reported that his net monthly income from his salary as a government contractor was \$9,664. In addition, he received \$1,931 each month in military retirement pay. Applicant's total net monthly income was \$11,595. (Ex. 2.)

Applicant reported the following monthly expenses: rent, \$1,700; groceries, \$300; clothing, \$100; utilities, \$100; car expenses, \$500; and miscellaneous (entertainment, transportation, etc.), \$300. Applicant's reported monthly expenses total \$3,000 (Ex. 2.)

Additionally, Applicant reported that he has a \$4,531 automobile debt and is obligated to pay \$221 each month on that debt. Instead of the \$221 payment, however, Applicant pays \$500 each month on his automobile debt. (Ex. 2.)

Applicant's net remainder each month is \$8,095. Additionally, he listed the following financial assets: bank savings, \$39,060; stocks and bonds (retirement and non-retirement), \$288,178; and automobile, \$22,000. Applicant's current financial assets total \$349,238. (Ex. 2.)

The SOR alleges at ¶ 1.a. that Applicant's primary mortgage account is in foreclosure and he owes the mortgage lender approximately \$332,000. The SOR alleges at ¶ 1.b. that Applicant owes about \$61,799 on a charged-off debt arising from his second mortgage, a home equity account.

Applicant stated that, beginning in 2007, the financial downturn in the housing market caused his condominium apartment to lose value. In 2007, he reported, the property value had depreciated from its initial fair market value to \$316,000. In 2008, the value of the property depreciated to \$270,000. In 2009, the property value depreciated to \$187,000, and in 2010, the property had depreciated to \$181,000. (Ex. H; Ex. I; Ex. J; Tr. 34-35.)

Applicant decided he did not want to keep the property, even though paying the two monthly mortgages was not a financial hardship for him. He also elected not to put the property on the market and offer it for sale in a traditional manner, a choice which would have made him liable for paying the difference between the price for which he was able to sell the property and the amount he still owed on the two mortgages. He stated that he wanted to use his income for other purposes and, in uncertain times, to save for his retirement. He consulted with his tax attorney and his real estate broker. They advised him that a strategic default "was a smarter financial play" for protecting his financial situation and saving for his retirement.<sup>2</sup> (Ex. E; Ex. F; Tr. 55-58.)

Applicant learned that lenders will not consider an application for a short sale<sup>3</sup> of a property until the borrower is 90 days in arrears in making payments on a mortgage. In December 2010, he stopped making payments on his second mortgage. After about six months, he also stopped making payments on his primary mortgage. His mortgage lender rejected, without explanation, three offers Applicant put forward from potential

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<sup>2</sup> A strategic default occurs when a borrower stops paying on a debt or contractual obligation even though he or she has the financial means to make the agreed-upon payments.

<sup>3</sup> A short sale occurs when the proceeds from the sale of a property are less than the combined liens against the property, the borrower cannot repay the full amounts of the liens, and the lender agrees to release the liens and accept less than the amounts owed on the debt.

short-sale purchasers of his property. The lender sold the property at foreclosure in April 2011 for \$144,900, and, for tax year 2011, it provided Applicant with an Internal Revenue Service (IRS) Form 1099-A reflecting the fair market value of the property and Applicant's financial obligation of \$332,000 on the primary mortgage. As of the date of the SOR, the debt remained unpaid. (Ex. 3; Ex. 6; Tr. 36-37, 51-57.)

Applicant also provided a copy of IRS Form 1099-A for tax year 2011 showing a principal balance outstanding on the second mortgage of \$61,799.41. In June 2012, Applicant's mortgage lender agreed to a settlement of the amount owed under his second mortgage. The settlement agreement specified that Applicant would pay the lender \$6,328.04, which was ten percent of the payoff balance of the second mortgage of \$63,208.43. Applicant provided documentary evidence corroborating payment of the settlement amount. He also provided a copy of a 2012 IRS Form 1099-C showing that a debt of \$55,471.37 had been discharged on the second mortgage, was imputed income to Applicant, and was therefore subject to federal income tax in 2012. (Ex. A; Ex. B; Ex. C; Ex. D.)

Applicant's former military colleague, who is now a security professional, provided a letter of character reference for Applicant. He stated that Applicant had informed him of his financial situation and his decision to intentionally default on his two mortgage loans. The individual stated that he explained to Applicant how this decision might impact his security clearance. He also stated that he "was hard pressed to give [Applicant] a viable alternative." (Ex. G.)

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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, the administrative judge applies these 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 applicant or proven by Department Counsel. . . .” The applicant has the ultimate burden of persuasion in seeking 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 the applicant may deliberately or inadvertently fail to protect or 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 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.

The guideline notes two conditions that could raise security concerns in this case. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns.

In 2005, Applicant voluntarily purchased a condominium residence and contracted to satisfy a first mortgage of \$322,000 and a second mortgage, a home equity account, of approximately \$62,000. At the time of purchase, Applicant believed he had the better part of a bargain because he was able to purchase his property from a private seller for \$50,000 less than a real estate developer was asking for similar properties in the same development. When the property lost significant value in a housing market decline that began in about 2007, Applicant decided in 2010 to stop paying both mortgages, even though he had sufficient income to do so, in order to qualify for a short sale. This record evidence is sufficient to raise the potentially disqualifying conditions found at AG ¶¶ 19(a) and 19(b).

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Several Guideline F mitigating conditions could apply to the security concerns raised by Applicant’s financial delinquencies. Unresolved financial delinquency might be mitigated if it “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.” (AG ¶ 20(a)) Additionally, unresolved financial delinquency might be mitigated if “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.” (AG ¶ 20(b)) Still other mitigating circumstances that might be applicable include evidence that “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” (AG ¶ 20(c)) or “the individual has initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” (AG ¶ 20(d)) Finally, if “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 options to resolve the issue,” then AG ¶ 20(e) might apply.

Applicant’s financial delinquencies arose in 2010 and 2011 when he elected to stop making payments on two mortgage debts on a property he had purchased. He did so because he was disappointed with the way in which a financial downturn in the real estate market had diminished the value of his property. Applicant had sufficient funds to make the monthly payments on the two mortgages as well as a substantial monthly remainder. Nevertheless, upon learning that the financial institution holding his two debts would not consider approving the property for a short sale until a debtor was 90 days in arrears, he stopped paying his second mortgage in 2010 in order to meet the

90-day criterion. Later, for the same reason, he also stopped paying his primary mortgage. The financial institution denied Applicant's three requests to sell his property in a short sale. As a consequence, Applicant's property went into foreclosure, and he owed a balance due of \$322,000 on his primary mortgage. His home equity account, totaling approximately \$61,799, was charged off as a delinquent debt.

Applicant's financial delinquency is fairly recent, and it involves substantial sums of money. He was an experienced buyer, and he had purchased and sold other homes in the past. He knew what he was doing when he purchased a condominium apartment for \$417,000 in 2005. His decision to default on his two mortgages, even though he could afford to make the monthly payments, casts doubt on his current reliability, trustworthiness, and good judgment. I conclude that AG ¶ 20(a) does not apply to the facts of Applicant's case.

The subsequent decline in the real estate market and the economic downturn in 2007 were beyond Applicant's control. These facts suggest that AG ¶ 20(b) might apply in mitigation. It is important, however, to recognize that AG ¶ 20(b) has two parts: the identification of events beyond an individual's control that could cause a failure to meet financial obligations and an examination of the individual's subsequent actions to assess whether he or she acted responsibly when faced with an uncontrollable event that impacted his or her financial obligations.

Applicant did not act responsibly under the circumstances when he elected to "walk away" from a contractual obligation he had incurred voluntarily because he was disappointed with the outcome of his bargain. At his hearing, Applicant recounted how he had acted in his self-interest when he forced his mortgages into default in order to invoke a short sale.<sup>4</sup> However, in doing so, he set aside his contractual obligations to his creditor and failed to act responsibly under the circumstances when confronted with the decline in value of his two mortgages. I conclude that AG ¶ 20(b) does not apply to the facts of Applicant's case.

Applicant sought the counsel of his tax attorney and his real estate agent before he elected to default on his mortgages. He was advised that a default that would generate a short sale was a good business decision. His former military colleague discussed with him how his decision might affect his security clearance. The record does not reflect that Applicant received financial credit counseling. I conclude that AG ¶ 20(c) applies only in part.

The record reflects that Applicant entered into an agreement with his creditor to settle his delinquent home equity mortgage account in June 2012. The terms of the settlement agreement required Applicant to pay the creditor \$6,328.04 or ten percent of the total debt. The remaining debt was forgiven, and Applicant was responsible for paying federal income tax on the forgiven portion.

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<sup>4</sup> Applicant did not address his inability to meet the hardship provision of the short sale.



Applicant's \$322,000 primary mortgage account was subject to foreclosure. He received a Form 1099-A from his creditor for the debt in 2011, and the debt remains unpaid.

DOHA's Appeal Board has explained what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the "good-faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term "good-faith." However, the Board has indicated that the 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.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good-faith" mitigating condition.]

(ISCR Case No. 02-30304 at 3 (App. Bd. April 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001))).

Applicant's attempt to force a short sale by defaulting on his two home mortgage debts was not reasonable. By failing to honor his contractual agreement with the mortgage lender, Applicant did not adhere to his obligation as a borrower, and he did not act in good faith. Moreover, Applicant failed to demonstrate a reasonable basis to dispute the legitimacy of his two mortgage obligations. I conclude that AG ¶¶ 20(d) and 20(e) do not apply to the facts of Applicant's case.

### **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 the facts and circumstances surrounding this case. Applicant is a mature adult of 46 years. He served honorably in the U.S. military, and he holds a responsible position as a government contractor. His monthly net remainder is over \$8,000.

Despite an ability to pay his two mortgage debts each month without hardship, Applicant elected to default on them when the mortgaged property precipitously declined in value. He hoped the defaults would persuade the lender to authorize a short sale. He provided documentary evidence supporting his claim that he was told by his lawyer and his real estate broker that his strategic default was a good business decision. He followed their advice and acted in his self-interest.

However helpful to one's self-interest a good business decision may be, other matters should also be considered when one has been granted a security clearance. Applicant also had a good-faith obligation to honor his financial commitments and contracts, even, and especially, in difficult circumstances. To seek a short sale, a remedy normally reserved for hardship cases, was neither reasonable nor responsible.

Overall, the record evidence leaves me with questions and doubts at the present time as to Applicant's eligibility and suitability for a security clearance. Accordingly, I conclude, after a careful review of the facts of his case, the financial considerations adjudicative guideline, and the whole-person analysis, that Applicant failed to mitigate the security concerns arising from his financial delinquencies.

### **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:           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 national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Joan Caton Anthony  
Administrative Judge