



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



In the matter of:)
)
) ISCR Case No. 11-09682
)
Applicant for Security Clearance)

Appearances

For Government: Candace L. Garcia, Esq., Department Counsel
For Applicant: *Pro se*

08/30/2013

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense’s (DOD) intent to revoke his eligibility for a security clearance to work in the defense industry. The concerns raised by the January 2011 foreclosure of Applicant’s home are mitigated because his finances are currently under control. However, Applicant’s drugs use, which resumed after his security clearance was upgraded in 2009 and continued during the current review of his security clearance, is not mitigated. Clearance is denied.

Statement of the Case

On November 14, 2012, the DOD issued a Statement of Reasons (SOR) detailing security concerns under the drug involvement, personal conduct, and financial considerations guidelines.¹ DOD adjudicators were unable to find that it is clearly

¹ This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this

consistent with the national interest to grant or continue Applicant's security clearance and recommended that the case be submitted to an administrative judge for a determination whether to revoke or deny Applicant's security clearance.

Applicant timely answered the SOR and requested a hearing. At the hearing convened on June 11, 2013, I admitted Government's Exhibits (GE) 1 through 8 and Applicant's Exhibits (AE) A through F, without objection. Applicant timely submitted AE G post-hearing and it is also admitted without objection.² The Defense Office of Hearings and Appeals (DOHA) received the transcript (Tr.) on June 19, 2013.

Findings of Fact

Applicant, 35, has worked for his current employer, a federal contractor, since September 2008 as an engineer. Initially granted a secret clearance in 2007, Applicant obtained a Top secret clearance in 2009. During the course of both investigations, Applicant disclosed marijuana use that occurred between 2002 and 2004. He stopped using the marijuana before his marriage in 2005 at the request of his wife. An incident report in the Joint Personnel Adjudication System (JPAS) regarding Applicant's February 2011 home foreclosure triggered the present adjudication.³

In 2006, Applicant purchased a single-family home, sitting on 0.18 acres of land for \$348,000. Applicant financed the property with two purchase money mortgages⁴ for \$248,000 and \$50,000, respectively, secured by a deed of trust. At the time, Applicant and his wife, who were expecting their first child in early 2007, earned a joint income of approximately \$75,000. A few months later, Applicant obtained a loan to purchase a \$45,000 car. After the birth of their child, Applicant and his wife decided that she would not work outside the home. Applicant cites this decision as the genesis of his financial problems. For the next two years, Applicant struggled to meet his family's financial obligations on a single income. He relied on credit cards to make ends meet, accumulating \$20,000 in consumer debt. In 2008, Applicant realized that the arrangement was not sustainable. Between August 2009 and February 2010, he attempted to negotiate a short sale with his mortgage holders, but the secondary mortgage holder would not agree to the terms of sale. In the summer of 2009, he stopped paying the mortgage, but stayed in the home until December 2010. During that period, Applicant diverted the funds previously earmarked for the mortgage to resolve other financial obligations, including the couple's car loans and credit card debt. The

case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

² The Government's memorandum regarding Applicant's post-hearing submission is included in the record as Hearing Exhibit (HE) 1.

³ Tr. 19-20, 51; GE 1-4.

⁴ A "purchase money mortgage" for purposes of State 1's antideficiency statutes is one that encumbers the property being sold. *Cely v. DeConcini*, 803 P.2d, 911, 916 (1990).

trust holder foreclosed on the home in January 2011, selling it at auction a month later for \$154,000.⁵

Applicant and his wife purchased their current residence in April 2011 for \$169,000, using a private loan obtained from Applicant's parents. Applicant, who earns \$95,000 annually, lives within his means and does not have any outstanding consumer debt. Applicant and his wife have changed their attitude toward money in hopes of preventing their past financial problems from recurring.⁶

In addition to financial problems, Applicant's 2011 background investigation revealed recent drug use. At times, Applicant used family member's prescription pain medication to address his own medical issues, but his use of prescription narcotics was largely recreational. In the midst of his 2009 security clearance investigation, Applicant began using drugs with his brother-in-law. Applicant and his brother-in-law would ingest narcotic pain medication, sometimes mixing different types of medications, while drinking alcohol at Applicant's home. In 2010, Applicant's brother-in-law gave him some marijuana for his personal use. Applicant stowed the drug in his car for at least a year, claiming that he had no intention of using the drug, but did not know how to properly dispose of it. Applicant did not return the unwanted drugs to his brother-in-law for fear of offending him. After his 2011 subject interview, during which his history of illegal drug use was discussed at length, Applicant flushed the drugs down the toilet and disavowed future use of any illegal drug because it could interfere with his ability to retain his security clearance. In June 2012, Applicant used marijuana during both days of a two-day concert he attended with his brother-in-law.⁷

Applicant has not used any illegal drugs since June 2012. He again vows not to use illegal drugs or abuse prescription drugs in the future, wishing to be a better example for his three children, ages two, four, and six. Although he still frequently socializes with his brother-in-law, Applicant has asked him to refrain from offering him drugs. Applicant believes his brother-in-law, a new father, will comply with Applicant's request.⁸

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 and mitigating conditions, which are used in evaluating an Applicant's eligibility for access to classified information.

⁵ Tr. 22-26, 79-85; GE 5- 6; AE G.

⁶ Tr. 25-26, 28-69; GE 5.

⁷ Tr. 28-33, 39-44, 52-60; GE 5.

⁸ Tr. 21-22, 60-62.

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.” 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 the applicant may deliberately or inadvertently fail to protect classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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

Drug Involvement

“Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness . . . because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.”⁹ Applicant has a history of illegal drug use dating back to 2002.¹⁰ He began abusing prescription drugs and resumed smoking marijuana after being granted a security clearance. He continued to use drugs while his access to classified information was under review.¹¹ In addition to his drug use, he stored illegal drugs in his car for at least a year.¹²

Applicant presented no evidence to mitigate his disqualifying conduct. Applicant’s history of drug use casts doubts on his current security worthiness. His behavior shows a disregard for the law and the fiduciary relationship he voluntarily entered into with the government when he was granted access to classified information. Applicant’s conduct also shows his lack of judgment. Not only did he willfully engage in illegal activity, he

⁹ AG ¶ 24.

¹⁰ AG ¶ 25(a).

¹¹ AG ¶ 25(g).

¹² AG ¶ 25(c).

exposed others – his family and any other unsuspecting passengers in his car – to the consequences of his criminal conduct. Despite Applicant’s statements to the contrary, the record does not support a finding that he will not continue to use drugs in the future. Applicant continues to associate with his brother-in-law, his supplier and enabler. Furthermore, Applicant is unable to identify any life changes, beyond his brother-in-law becoming a parent, which may provide a deterrent for future use. He used drugs in direct contravention of his wife’s wishes and after becoming a father. He also continued to use illegal drugs after his statements in his 2007 and 2011 subject interviews with a background investigator disavowing any future use. He has not signed a statement of intent with automatic revocation of his security clearance for any future violation.

Personal Conduct

The allegations regarding Applicant’s history of illegal drug use are cross-alleged under the personal conduct guideline. For the reasons discussed under the drug involvement concern, the conduct is disqualifying. If Applicant’s recent history of drug abuse and possession became known it could affect his professional and community standing.¹³ None of the personal conduct mitigating conditions apply.

Financial Considerations

Unresolved delinquent debt is a serious security concern because failure to “satisfy debts [or] 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.”¹⁴ Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information within the defense industry.

The SOR alleges that Applicant owes the secondary mortgage holder a deficiency balance of \$50,000 after the trustee’s sale of his home in February 2011. Applicant denies that allegation, arguing that he is protected by his state’s anti-deficiency law. According to the statute:¹⁵

If a trust property of two and one-half acres or less which is limited to and utilized for either a single one-family or a single two-family dwelling is sold pursuant to the trustee’s power of sale, no action may be maintained to

¹³ AG 16(e).

¹⁴ AG ¶ 18.

¹⁵ At hearing, Applicant presented State 1’s anti-deficiency statute covering purchase money mortgages. Because Applicant’s home was sold pursuant to a deed of trust, I am taking administrative notice, *sua sponte*, of the anti-deficiency statute as it applies to the sale or foreclosure of properties by a trust deed. Neither the Government nor Applicant objected to my considering the statute.

recover any difference in the amount obtained by the sale and the amount of the indebtedness and any interest, costs, and expenses.¹⁶

The statute, which also applies to secondary mortgages even if the second mortgage holder did not exercise its rights under the second deed of trust, intended to protect certain homeowners from the financial disasters of losing their homes to foreclosure plus all of their other non-exempt property on the execution of a judgment for the balance of the purchase price.¹⁷ While resolving issues of state law is not ideal in the context of security clearance cases, in cases such as this one where the statutory language is clear on its face, and the case law interpreting the statute is also clear, the speculation or conjecture regarding the applicability of the statute is absent. Applicant's property falls within the plain language of the statute and he is protected by the anti-deficiency statute.

However, a finding that the SOR debts are legally uncollectible does not end the inquiry into Applicant's security worthiness; the facts and circumstances surrounding an applicant's conduct in incurring and failing to satisfy the debt in a timely manner must also be examined.¹⁸ Applicant's decision to accumulate over \$400,000 in consumer debt he could not afford to pay, resulting in the foreclosure of his home impugns his judgment and overall security worthiness. Applicant's actions demonstrate his inability to pay his debts and establish his history of failing to do so.¹⁹ Applicant's financial problems were not caused by events beyond his control, but he has since taken steps to regain control of his finances. Applicant's current housing expenses are commensurate with his income and he has eliminated his consumer debt. Applicant may have to deal with the negative consequences of a foreclosure on his credit report, but it does not serve as a source of vulnerability or exploitation.

Whole-Person Concept

I have doubts about Applicant's current reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(a). The purpose of the security clearance adjudication is to make "an examination of a sufficient period of a person's life to make an affirmative determination that the personal is an acceptable security risk."²⁰ Applicant has breached his fiduciary duty to the government by engaging in off-duty conduct that impaired his judgment and created areas of vulnerability and exploitation. Applicant has proven himself an unacceptable security risk. Clearance is denied.

¹⁶ HE A.

¹⁷ *Baker v. Gardner*, 770 P.2d 766 (1988).

¹⁸ See ISCR Case No. 10-07393 (App. Bd. Jun. 16, 2012).

¹⁹ AG ¶ 19(a) and (c).

²⁰ AG ¶ 2(a).

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, Drug Involvement:	AGAINST APPLICANT
Subparagraphs 1.a – 1.f:	Against Applicant
Paragraph 2, Personal Conduct:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Financial Considerations:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

In light of the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Clearance is denied.

Nichole L. Noel
Administrative Judge