



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



In the matter of:)	
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Applicant for Security Clearance)	ISCR Case No. 11-11782

Appearances

For Government: Tovah Minster, Esquire, Department Counsel
For Applicant: *Pro se*

06/27/2013

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

On February 22, 2013, the Department of Defense (DOD) issued to the above-referenced Applicant a Statement of Reasons (SOR). The SOR enumerated security concerns arising under Guideline F (Financial Considerations). DOD took action 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) implemented by the DOD on September 1, 2006.

In an undated response, Applicant submitted a response in which she denied the two allegations raised and requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. DOHA assigned the case to me on April 24, 2013. The parties agreed to a hearing date of May 23, 2013, and a notice setting the hearing for that date was issued on May 1, 2013.

The hearing was convened as scheduled. Applicant gave testimony and offered two documents, which were accepted into the record without objection as exhibits (Exs.) A-B. She was given until May 6, 2013, to submit any additional documents. On request, that deadline was later extended to May 12, 2013. The Government offered five documents, which were accepted into the record as Exs. 1-5. On June 21, 2013, the

Government forwarded five documents, which were timely received from Applicant and included in the record as Exs. C–G. The record was then closed. Based on a review of the testimony, official case file, and exhibits, I find Applicant failed to meet her burden of mitigating security concerns related to financial considerations. Clearance is denied.

Findings of Fact

Applicant is a 34-year-old assistant program manager who has worked in that capacity for the same defense contractor for the last three years. She has earned a bachelor's degree in mechanical engineering and a master's degree in technical management. She is separated and has one minor child.

In the summer of 2005, Applicant and her sister purchased a house worth approximately \$450,000 without a down payment. They assumed ownership in 50-50% shares. The entire purchase was financed with a primary and secondary mortgage administered by the same lender.¹ Their joint ownership was reflected on the title and the mortgages. In 2008, Applicant's sister got married. The sister then followed her new husband to another metropolitan area, where they bought a new home. Before the sister moved, the two women decided to try to sell the property, rather than let it go into foreclosure. By then, the market value of the house had depreciated into the \$300,000s.² They approached their mortgagor, who gave the sisters the option of selling the house through a short sale. Applicant understood that "in a short sale, since the house was appraised for less [than its original purchase price], we could sell it for less than they agreed"³ The short sale closed in 2008. After about four years of mortgage payments and the eventual short sale, the balances on the two mortgages were approximately \$17,655 and \$83,726, as noted in the SOR at allegations ¶¶ 1.a-1.b.

Applicant and her sister were given the impression that they would be liable for any deficiencies remaining on the mortgages after the short sale.⁴ With her sister now relocated and no longer active with the home, Applicant began making payments on the deficiency. Applicant does not recall the full amount of the payments she made, or for how many months she made such payments.⁵ She does not have documentation reflecting those payments.⁶ After an unspecified amount of time, however, Applicant testified that a realtor told her that a law had been passed "that said . . . if you did a short sale from 2007 to . . . 2012, you were not allowed to pay that mortgage any more,

¹ Tr. 18-19.

² Tr. 19. (" . . . it was valued at like 3-something").

³ Tr. 20.

⁴ Tr. 21.

⁵ Tr. 22.

⁶ Tr. 23. Applicant believes the payments were deducted from her checking account.

or the difference any more”⁷ Based on her realtor’s word alone, Applicant ceased making payments on the discrepancy left after the short sale. Applicant offered no documents from this realtor regarding this change in the law, nor does she offer any documents related to the short sale. The conversation with the realtor apparently occurred after November 2010, when Applicant told investigators that she was trying to work out a repayment plan with her mortgagor regarding the debt balance owed.⁸ Consequently, a dozen or more monthly mortgage discrepancy payments were more than likely made. She has had no success obtaining any documents regarding the short sale or the discrepancy on the loans from her mortgagor.⁹ There is no evidence these payments were refunded to her as being improperly made. Applicant did not provide a copy of an IRS Form 982, which is commonly used to report a forgiven debt, or either an IRS Form 1099-A or 1099-C.¹⁰ She did submit a state certificate of satisfaction regarding Applicant’s mortgage. It does not, however, explicitly release her from liability on her mortgage, and Applicant provided no narrative information regarding its applicability to the question of her liability.

In 2012, Applicant bought another home with funds secured from a different mortgagor.¹¹ The home price was about \$425,000. Applicant is unsure how much money she put down toward the purchase, if anything. She maintains a 401k retirement account (approximately \$70,000), a savings account (about \$2,000), and a savings account linked with her stock market investments (approximately \$2,000). She is presently maintaining custody of her minor child. She and her estranged husband are presently filing for divorce. Applicant has been frustrated in her attempts to obtain paperwork from her former mortgagor. Her realtor has been of little help because her paperwork is in storage and he has yet to find the necessary documents. Applicant’s sister has no documentation regarding the property. Notice is taken that the state in question does not have an anti-deficiency statute.

Policies

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider the AG. In addition to brief introductory explanations

⁷ Tr. 23. Applicant is unsure as to what year she was informed by her realtor of this purported change in the law. Tr. 24. Applicant identified the law as the Mortgage Forgiveness Debt Relief Act of 2007. This law was not mentioned in Applicant’s security clearance application or in interrogatory responses, but was first noted by Applicant in her 2013 response to the SOR. Tr. 25. Applicant’s generalized interpretation of the law is inaccurate.

⁸ Tr. 33; Ex. 3 (Interrogatories, Interview of Nov. 3, 2012, pg. 1).

⁹ Tr. 29. The mortgagor’s response to Applicant’s requests have generally emphasized that her account balances were previously charged-off, as noted in her credit reports and in the SOR. The payments Applicant had made were transacted both before and after the debts had been turned over for collection. Tr. 30-31.

¹⁰ Tr. 28-29.

¹¹ Tr. 35.

for each guideline, the AG list potentially disqualifying conditions and mitigating conditions. 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 the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all 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.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." ¹² The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant. ¹³

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 those 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 Executive Order (EO) 10865 states 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 EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified/sensitive information). "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."¹⁴ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.¹⁵

¹² See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

¹³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

¹⁴ *Id.*

¹⁵ *Id.*

Analysis

Guideline F - Financial Considerations

Under Guideline F, failure or an 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.¹⁶ It also states that an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.¹⁷ The Government's evidence indicates that Applicant owes approximately \$100,000 in charged-off, delinquent debt related to a mortgaged home after short-sale. This is sufficient to raise Financial Considerations Disqualifying Conditions AG ¶ 19(a) (*inability or unwillingness to satisfy debts*) and AG ¶ 19(c) (*a history of not meeting financial obligations*). With such conditions raised, it is left to Applicant to overcome the case against her and mitigate security concerns.

Applicant and her sister bought their home with no money down, committing themselves to their mortgage in equal parts. Apparently without objection, Applicant's sister simply walked away from her share of responsibilities when she decided to wed, move, and buy another house. In turn, rather than put the property up for regular sale and see if could attract a buyer, find a roommate, renegotiate with the mortgagor, or seek some other recourse that might fully honor her obligation to the lender, Applicant directly moved to dispose of the property, which was declining in value, through short sale. She understood the meaning and repercussions of a short sale. After the home was so conveyed, she made payments toward the deficiency caused by the short sale of the property on the mortgage balances.

Applicant only ceased to make those payments when a realtor – not a mortgagor, bank, lawyer, financial counselor, or tax professional – incorrectly told her that a new law absolved her of satisfying any balance connected to her mortgage. There is no evidence she sought to confirm that her situation was covered by the law. She did not receive a 1099 or other IRS form indicating she was relieved of responsibility on the mortgage. She did not receive confirmation from her mortgagor that she was absolved from further payments on the discrepancy. She was not issued a refund of the money she had paid between the short sale closing and her hearing of a new law. Apparently, she simply took this favorable news as applicable and correct, then financed the purchase of her next home soon thereafter. To proceed on the oral advice of a realtor without affirmation from the mortgagor or confirmation from the IRS shows dubious judgment and reliability. Neither Financial Consideration Mitigating Condition AG ¶ 20(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*) nor AG ¶ 20(b)

¹⁶ AG ¶ 18.

¹⁷ *Id.*

(the conditions that resulted in the behavior 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) apply.

Resort to a peremptory short sale might be considered a responsible form of recourse, especially giving the declining value of the property. Here, however, the short sale appears to have been premature in light of the alternative options that were left unexplored. AG ¶ 20(d) *(the individual indicated a good-faith effort to repay overdue creditors or otherwise resolve debts)* does not apply. Given the above-cited facts, none of the remaining mitigating conditions apply.

Whole Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2 (a). Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based on careful consideration of the guidelines and the whole-person concept.

I considered the specific facts and circumstances in this case. Applicant is a mature and well-educated woman who, in 2005 while in her mid-20s, bought a home with her sister. Around 2008, the sister married, moved, and bought a new home. Realizing she could not afford to make the mortgage payments by herself, and understanding the value of the house had significantly depreciated, Applicant sought and received permission from her mortgagor to use a short sale to move the property. She then started making payments to satisfy the discrepancy between the mortgage debt and the short sale price. Up to this point, Applicant can be said to have generally acted responsibly given the circumstances.

At some unspecified time thereafter, Applicant was given legal advice by a realtor that she did not need to make any payments to her mortgagor after her short sale. Applicant assumed the law the realtor cited encompassed her situation. She then quit making payments to her lender without first checking with her lender, a tax professional, or someone without an interest in encouraging the purchase of a new home. Moreover, there is no evidence Applicant ever received an IRS form 1099-C regarding the discrepancy. Finally, her state is not an anti-deficiency state, and the state certificate of satisfaction regarding Applicant's mortgage does not explicitly release her from liability on her mortgage.

The burden in these cases is placed squarely on an applicant. Here, the burden placed on Applicant demands that she provide documentary evidence substantiating her representations as correct – specifically, evidence that she was absolved of financial responsibility for the approximately \$100,000 discrepancy between her mortgage balance and the short sale price that were shown by the Government as

