



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



In the matter of:)
)
) ISCR Case No. 11-12803
)
Applicant for Security Clearance)

Appearances

For Government: Candace Le'i Garcia, Esq., Department Counsel
For Applicant: *Pro se*

12/13/2013

Decision

O'BRIEN, Rita C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and the Government's File of Relevant Material (FORM), I conclude that Applicant has not mitigated the security concerns raised under the financial considerations guideline. Accordingly, his request for a security clearance is denied.

Statement of the Case

On July 30, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) (Item 1), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006. The SOR listed security concerns addressed in the Directive under Guideline F (Financial Considerations) of the AG. In his Answer to the SOR, notarized on April 8, 2013, Applicant admitted all of the allegations, and requested a decision without a hearing. (Item 3)

Department Counsel for the Defense Office of Hearings and Appeals (DOHA) prepared a presentation of the Government's case in a FORM dated July 30, 2013¹ It contained the Government's argument and documents to support the preliminary decision to deny Applicant's request for a security clearance. Applicant received the FORM on September 9, 2013. He was given 30 days from the date he received the FORM to file a response. He did not submit a response. The case was assigned to me on December 9, 2013.

Procedural Matters

On December 12, 2013, Applicant forwarded to Department Counsel five documents. I consider this to be a request by Applicant to extend the deadline to submit a response. Department Counsel did not object; her memorandum is marked as Hearing Exhibit I. Applicant's request to submit a response to the FORM is granted, and his documents are admitted as Items 9 – 13.

Findings of Fact

Applicant's admissions in response to the SOR are incorporated as findings of fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the FORM, I make the following additional findings of fact.

Applicant is 50 years old. He attended two years of community college, but did not receive a degree. He married in 1993, and did not list children in his security clearance application. He served as an enlisted member of the military from 1982 until his honorable discharge in 2007. He stated in his 2011 security clearance application that he held a secret security clearance since 2001, but in his Answer noted that he held one since 1984. He has been employed by a defense contractor since 2008. He is also a real estate investor. (Items 3, 4, 6)

In his 2001 security clearance application, Applicant lists no financial delinquencies. However, in his 2011 security clearance application, he listed numerous delinquent debts he had accrued in the interim that related to his real estate investments. At his 2011 security interview, he could not recall specifics of numerous properties or the associated loans, but estimated he had owned as many as eight investment properties simultaneously. He discussed loan balances varying from smaller second mortgages of about \$41,000, to a primary loan of \$440,000. Applicant met his mortgage payments by renting his properties. However, when the housing market crashed in 2008, his tenants lost their jobs and were unable to pay their rents. He contacted the lenders seeking ways to save the properties. He states in his Answer, ". . . I have spent most of my savings to prevent losing the properties that I owned." He also sought assistance from a real estate attorney. He admits in his Answer that he defaulted on nine mortgage loans, all of which proceeded to foreclosure. (Items 3-5)

¹ See Directive, Enclosure 3, Section E3.1.7. The FORM included eight documents (Items 1 - 8) proffered in support of the Government's case.

The allegations in the SOR comprise the two mortgages on Applicant's residence and the defaulted mortgages on two investment properties. The residence has a first and second mortgage, which are both currently delinquent (allegations 1.a and 1.b). In April 2013, Applicant was offered two options to pay the second mortgage/home equity line of credit (HELOC): a payment plan of \$130 per month, or a settlement of \$13,628, 25 percent of the outstanding debt. Applicant's wife in the meantime, filed a bankruptcy petition, and included the debt. However, the petition is solely in her name.² Applicant did not proceed with either option, and has placed the property for sale, in an attempt to secure a short sale. Applicant and his wife are divorced, and his wife is residing in the house. (Items 9, 10, 12)

Applicant does not believe he is indebted on the balances remaining after the foreclosures of the two investment properties alleged at ¶¶ 1.c and 1.d. He submitted a letter from an attorney citing his state's statute concerning these two properties sold following foreclosure. The letter states,

As these sales were conducted by a mortgagee or trustee under power of sale contained in the mortgage or deed of trust, [Applicant] has no further liability to the lenders after the completion of these sales. See, [state] Code of Civil Procedure, §580d.

In pertinent part, §580d states that

580d. No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property or an estate for years therein hereafter executed in any case in which the real property or estate for years therein has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust.

However, §580b from the state code states:

580b. (a) No deficiency judgment shall lie in any event for the following: . . .
. (3) Under a deed of trust or mortgage on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling, *occupied entirely or in part by the purchaser*. [emphasis added].

Based on §580b, and the record evidence, Applicant does not reside in either of these properties, as they are rental properties for investment purposes. The release for liability does not apply to investment properties, and Applicant would be liable for a deficiency following the sale of his investment properties alleged at ¶¶ 1.c and 1.d.

The attorney also advised Applicant that if he sells his primary residence through short sale, he will also be relieved of liability for any deficiency under the state code.

² Applicant's wife also recently filed for divorce, which was final on November 10, 2013. (Item 9)

Under §580e, Applicant is not liable for payment of a deficiency after foreclosure on the property where he resides (allegations 1.a and 1.b) (Items 3, 13)

Applicant's delinquencies appear in his credit reports of July 2011 and October 2012. (Items 7, 8) The status of the SOR debts follows.

Residence, first and second mortgages, allegations 1.a, 1.b, totaling \$571,515.

Applicant's residence has a delinquent primary mortgage of \$517,000 with Mortgagee B (¶ 1.b). He also has a HELOC of \$54,515, secured by the same residence, with Mortgagee A (¶ 1.a). He was denied a modification under the Making Home Affordable program, but was approved for an "in-house" loan modification in December 2012. He did not accept the modification, however, because he was unable to afford the proposed monthly payment. Applicant stated in his April 2013 Answer he intends to try to short-sell the property. If he is unsuccessful, he will attempt to negotiate a settlement or submit a deed in lieu of foreclosure. (Items 1, 3, 6)

Investment property, first mortgage, allegation 1.c, \$267,416. Applicant purchased an investment property in October 2006 with a loan from Mortgagee C. He defaulted on the loan, and the property was foreclosed. According to an Internal Revenue Service (IRS) Form 1099-A, Acquisition or Abandonment of Secured Property, the outstanding balance on the loan was \$267,416, and the fair market value of the property was \$148,000. The Form 1099-A also indicates that Applicant was personally liable for the loan repayment. In November 2009, the property was sold at a trustee's sale for \$148,000. (Item 3)

Investment property, first mortgage, allegation 1.d, \$263,511. Applicant bought this property in October 2006. He defaulted on the mortgage loan, held by Mortgagee D, with an outstanding balance of \$263,511. In May 2009, it was foreclosed. Applicant's Form 1099-A shows the fair market value of the property was \$93,500, and that Applicant was personally liable for the loan repayment. The property reverted to the lender for \$93,000 at a trustee's foreclosure sale on June 9, 2009. Applicant's 2009 federal tax return, Form 4797, Sales of business Property, shows a loss of \$67,530 on the property. (Items 3, 11)

Along with the above debts, Applicant's credit report of July 2011 lists numerous credit card accounts with individual balances up to \$43,000. He also had two auto loans with balances totaling almost \$65,000. None of the credit card or auto loans were delinquent. Although these debts are not alleged in the SOR, and will not be considered in determining Applicant's suitability for a security clearance, they can be considered for certain limited purposes.³ Applicant's October 2012 credit report shows the only

³ ISCR Case No. 08-09232 at 3 (App. Bd. Sept. 9, 2010). "Even without amending an SOR, a Judge may nevertheless consider unalleged conduct for certain limited purposes. These include assessing an applicant's credibility, evaluating his evidence in mitigation, and considering the extent to which an applicant has demonstrated rehabilitation. See, e.g., ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

delinquencies to be the first mortgage and HELOC on his residence, alleged at ¶¶ 1.a and 1.b. (Items 7, 8)

Applicant completed a Personal Financial Statement (PFS) in December 2012, showing that his gross monthly income, along with his wife's, totaled \$9,242. Their monthly expenses and debt payments totaled \$7,778, leaving a monthly net remainder of \$1,464. The monthly debt payments included \$2,800 for their residential mortgages, and \$1,300 for two auto loans. (Item 6)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the AG.⁴ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the guidelines, commonly referred to as the “whole-person” concept. The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed when a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline F (financial considerations).

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to applicant to refute, extenuate, or mitigate the Government's case.

Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁶ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁷

⁴ Directive. 6.3.

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

Analysis

Guideline F, Financial Considerations

AG ¶ 18 expresses the security concern pertaining to financial considerations:

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

I have considered the following disqualifying conditions under AG ¶19:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (e) consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis.

Applicant's debts stem from his investments in real estate. He bought numerous properties, holding as many as eight properties simultaneously. He purchased the two investment properties at ¶¶ 1.c and 1.d in October 2006, during the real estate bubble. His mortgages ranged from smaller HELOCs of \$50,000 to \$70,000 to substantial mortgages ranging up to \$440,000. At least nine loans became delinquent and were foreclosed, and his two residential mortgage loans are currently delinquent. AG ¶ 19(a) and (c) apply. However, without further information about Applicant's income and expenses at the time he assumed these debts, I cannot determine if Applicant was spending beyond his means. The record contains insufficient evidence to support application of AG ¶ 19(e).

Under AG ¶ 20, the following conditions could potentially mitigate security concerns:

- (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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's debts were numerous—he had as many as eight loans open simultaneously, and nine properties were foreclosed. They are also recent, because they are currently delinquent. As to recurrence, the housing crash and Applicant's real estate ventures may not recur. However, his actions in the period preceding the crash are troubling: he bought multiple properties that he eventually could not support, and that ultimately resulted in many foreclosures. Applicant's conduct shows a lack of good judgment and willingness to engage in financially risky behavior. AG ¶ 20(a) does not apply.

The national real estate market crash significantly affected Applicant's fortunes, and he could not predict or control that event. The file contains insufficient information to determine if any other events beyond Applicant's control contributed to his financial problems. For full mitigation under this condition, an applicant must act responsibly under the circumstances. Applicant states that he contacted lenders and spent money trying to retain his properties when the market changed, but the file lacks information about the specific actions he took in the years between 2008 and 2013. Applicant receives partial mitigation under AG ¶ 20(b).

Similarly, the record evidence is insufficient to show whether Applicant made good-faith efforts to repay creditors or resolve the debts. His financial problems are not under control. Applicant's loans on his primary residence, totaling \$571,515, are delinquent. Although the residence is on the market, it is unknown whether he will be able to successfully short-sell it. The loans on the other two foreclosed properties listed in the SOR are also unresolved because, as investment properties, Applicant is liable for deficiencies on the balances after a foreclosure sale. Applicant's financial situation is not under control. AG ¶¶ 20(c) and (d) do not apply.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. I have evaluated the facts presented and have applied the appropriate adjudicative factors under the cited guideline. I have also reviewed the record before me in the context of the whole-person factors listed in 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.

Along with his employment by a defense contractor, Applicant is a real estate investor. He has owned as many as eight properties simultaneously. Although it appears he was able to carry this debt load in the past, his numerous real estate investments undermined his financial stability when the housing market crashed. His tenants lost their jobs and were unable to pay the rent. Ultimately, nine properties were foreclosed. He currently owns only his residence. The primary loan and HELOC on that property are delinquent. Applicant is attempting a short sale, but the house was unsold as of November 2013.

As to the two other foreclosed properties alleged in the SOR, Applicant believes he is not liable for the deficiencies remaining after their sale, based on state law. However, his state's law only relieves him of liability as to his primary residence; it does not apply to investment properties. Therefore, applicant remains subject to pursuit by the lenders who foreclosed on the two properties cited at allegations 1.c and 1.d. Even if, *arguendo*, he were not liable for the deficiencies on the two investment properties in the SOR, Applicant's risky behavior by taking on numerous properties that ultimately led to a debt load he could not support, and multiple foreclosures raises security concerns. The Government's doubts about Applicant's suitability to hold a security clearance remain, and must be resolved in favor of the national interest.⁸

Formal Findings

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a – 1.e	Against Applicant

⁸ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

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 allow Applicant access to classified information. Applicant's request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge