



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



In the matter of:)
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-----) ISCR Case No. 11-15081
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)
Applicant for Security Clearance)

Appearances

For Government: Pamela C. Benson, Esquire, Department Counsel
For Applicant: James R. Kingsley, Esquire

09/25/2013

Decision

HOWE, Philip S., Administrative Judge:

On October 4, 2011, Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP; SF 86). On April 1, 2013, 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; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant acknowledged receipt of the SOR on April 8, 2013. He answered the SOR in writing through counsel on April 8, 2013, and requested a hearing before an administrative judge. Defense Office of Hearings and Appeals (DOHA) received the request on April 10, 2013. Department Counsel was prepared to proceed on July 25, 2013, and I received the case assignment on August 6, 2013. DOHA issued a Notice of Hearing on August 6, 2013, and I convened the hearing as scheduled on August 20,

2013. The Government offered Exhibits 1 through 4, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through N, without objection. DOHA received the transcript of the hearing (Tr.) on August 30, 2013. I allowed the record to remain open until September 12, 2013, in order for Applicant to submit documents pertaining to the current status of the lawsuit with the lending bank, and in particular, whether a settlement was reached by the parties. On September 11, 2013, he submitted Exhibits O and P, without objection. These documents were an accord and satisfaction agreement between the Applicant, the bank lender, and the collector. The record closed on September 12, 2013. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR Applicant admitted the factual allegations in ¶ 1.a of the SOR, with explanations. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 34 years old, unmarried and has no children. He is a mechanical engineer who owns his own home, which he purchased at a sheriff's sale. He pays that mortgage regularly. Applicant works for a defense contractor and requires a security clearance to perform work on government installations for his employer under various contracts. Applicant has no debt other than his personal residence mortgage, and the money sought by the bank on the condominium purchase, which will be discussed below. (Tr. 36-39, 58; Exhibit 1)

Applicant invested in a condominium in a southern state in 2006 when the real estate market was booming. His state has a history since the 1920's of having successive real estate "booms and busts." Applicant did not know the economic history of that state. A friend convinced him to make the purchase. He financed the transaction using two mortgages. The purchase price was \$365,000. Applicant had a mortgage for 80% of the purchase price and another mortgage for 20% of the purchase price. Applicant dealt with one bank for both of the two mortgages, a real estate agent for both properties, and other parties with whom his friend also dealt. He used no money of his own as a down payment on the purchase. The first mortgage was guaranteed by the U.S. Department of Housing and Urban Development (HUD). Applicant rented the condominium at market prices for the first year he owned it, but as the real estate market crashed he did not obtain a large enough rent to pay for the monthly mortgage costs. He tried to sell the property but got only offers in the mid-one hundred thousand dollar range. The bank denied his two attempts at short sales. Applicant was later sued by the mortgage holder in a foreclosure action and he allowed it to proceed to summary judgment against him. The first mortgage was fully satisfied by the foreclosure action and the HUD guarantee. (Tr. 22-26, 40, 43; Exhibits 1-4, A-P)

Applicant claims there are class action lawsuits against the lending bank for predatory lending practices. Currently, Applicant is involved with a lawsuit against him

by a bank and its collection agent to recover \$68,980, on the second mortgage because that was the amount of that loan. That lawsuit is being contested by Applicant's lawyer, who is also his father. He is attempting to have the collector prove it has authority to collect the money owed and not have the bank lender later try to collect the same amount. Applicant saved \$70,000, which he deposited in his attorney's trust account to be used to pay any settlement on the lawsuit involving the bank on the second mortgage. (Tr. 26-31, 47; Exhibits 1-4, A-K, P)

Applicant negotiated with the bank and the collector on the second mortgage. On August 29, 2013, and after the hearing Applicant reached an agreement with the other two parties to settle the lawsuit filed on the second mortgage. Applicant tendered a signed Accord and Satisfaction and Release to the lender and collector, with a trust check from his attorney's account in the amount of \$34,490, to the opposing parties. The lawsuit is settled for that amount and the mortgage is to be released as part of this agreement. Therefore, upon the signing of the documents by the bank and the collector, this matter is resolved. (Tr. 17-47; Exhibits O and P)

At the same time he made the condominium investment, Applicant also borrowed over \$1 million to purchase a custom built home. The transaction was financed by the same bank and through the use of the same realtor involved with the condominium purchase. That home was eventually taken over by the bank because Applicant could not sell it or rent it for enough money to pay the mortgage of \$10,000 monthly. Applicant gave the bank a deed in lieu of foreclosure and does not owe any money on that house. That transaction is not the subject of any SOR allegations. (Tr. 45-47; Exhibit P)

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 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process (AG ¶ 2(a)). 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. 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, an “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.”

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 as to 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 at AG ¶ 19 contains nine disqualifying conditions that could raise security concerns. Four conditions are applicable to the facts found in this case:

(a) inability or unwillingness to satisfy debts;

(b) indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt;

(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 borrowed about \$1.5 million to purchase two real estate properties in 2006 and 2007. He was convinced they were a good investment he could later sell for a profit. He earned less than \$70,000 in those years. He was not able to meet the monthly mortgage payments of about \$10,000 on either the single family custom home or on the \$365,000 condominium. He rented the condominium for about a year and was able to earn the mortgage payments. After that he had difficulty finding a long term renter or selling the property because the real estate market in that area collapsed as it did nationwide.

Applicant incurred more debt than he could possibly repay on his salary or from the rental or sale of these two properties. He was unable to satisfy these debts to the bank from which he borrowed the money. AG ¶ 19 (a) applies.

Applicant spent his money irresponsibly and had no realistic plan to repay the \$1.5 million of debt, absent selling the two properties in a downward real estate market. Doing so would have resulted in Applicant having a remaining large debt owed to the bank. AG ¶ 19 (b) applies.

Applicant has a history since 2007 of having to repay his excessive debt. These two debts are the financial obligations he spent six years owing and trying to repay from the debacle of his misguided investment scheme. AG ¶ 19 (c) applies.

Finally, Applicant spent beyond his financial ability to repay the \$1.5 million in real-estate debt he borrowed in his investment program. He had excessive debt, did not use any of his funds on a down payment for either party, had a high debt-to-income ratio, and was burdened by his debt. AG ¶ 19 (e) applies.

The guideline in AG ¶ 20 contains six conditions that could mitigate security concerns arising from financial difficulties. Four conditions may be applicable:

(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's investment plan of buying two expensive properties with no personal funds invested, borrowing the total purchase prices for the real estate from one bank during a "boom time," was affected adversely by a national slump in the housing market about a year after he made the acquisitions. The business downturn was not his fault and was not predicted by Applicant. However, Applicant's initial plan was not responsible action on his part. He borrowed more money than he could ever possibly repay on his salary if he could not rent or sell the properties, which is what happened. AG ¶ 20 (b) has partial application.

There are clear indications from the documents submitted after the hearing concerning the settlement of the second mortgage issue that it is resolved. AG ¶ 20 (c) applies.

Applicant AG ¶ 20 (d) applies because of Applicant's good-faith efforts to repay his delinquent debts. He placed \$70,000 in his lawyer's trust account, with which to repay the second mortgage when his lawyer was able to negotiate a settlement. That settlement is now in place and the matter is resolved.

Applicant contends the lending bank engaged in predatory lending when it let him borrow all the money for his real estate purchases without any down payments and with knowledge of Applicant's salary, which at the time did not exceed \$70,000. Applicant has a reasonable basis to dispute the legitimacy of the past-due debt. He provided evidence of actions to resolve the issue, including information from his attorney who also represented him at the security hearing. AG ¶ 20 (e) applies.

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 an applicant's conduct and all the 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.

AG ¶ 2(c) requires each case must be judged on its own merits. 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 was an adult when he made these investments, in addition to being a licensed mechanical engineer. He made two inappropriate real estate investments during a real estate "boom" in a state that has seen such actions in property since the 1920's. His lawyer has extricated him from these investments, in addition to the lending bank foreclosing on the custom home and the FHA insured condominium. The second mortgage on the condominium is the subject of the SOR allegation.

Applicant acted responsibly by escrowing in his attorney's trust account \$70,000, with which to pay any settlement they could negotiate with the lender. Those negotiations have succeeded now and the matter is resolved. Applicant acted in good faith and showed good judgment in attempting to resolve this last excessive delinquent debt. Based on his testimony at the hearing, it is highly unlikely that Applicant will ever again engage in such risky financial activity. There is no potential for any pressure, coercion, exploitation, or duress now that the entire investment scheme has been resolved.

Applicant presented himself at the hearing as credible and contrite. He is a mechanical engineer who realizes his mistakes. He lives within his means and saves his money, which is how he obtained the funds with which to pay the settlement amount.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his financial considerations. I conclude the whole person concept for Applicant.

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

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

PHILIP S. HOWE
Administrative Judge