



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



In the matter of:)
)
) ISCR Case No. 12-00023
)
)
Applicant for Security Clearance)

For Government: Tovah Minster, Esquire, Department Counsel
For Applicant: Christopher Graham, Esquire

09/18/2013

Decision

DAM, Shari, Administrative Judge:

Applicant mitigated the financial security concerns related to a mortgage deficiency and foreclosure that involved a mortgage he held with his former wife. He mitigated the personal conduct security concerns raised by his non-disclosure of information related to that mortgage. Based upon a review of the record evidence as a whole, eligibility for access to classified information is granted.

Statement of the Case

On September 2, 2011, Applicant submitted a security clearance application (SF 86). On March 29, 2013, the Defense of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline F (Financial Considerations) and Guideline E (Personal Conduct). 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 effective within DOD for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on June 7, 2013, and requested a hearing before an administrative judge (Answer). On June 27, 2013, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On July 12, 2013, DOHA issued a Notice of Video Teleconference Hearing. The case was heard on August 1, 2013, as scheduled. Department Counsel and Applicant's Counsel were located in DOHA's office in Arlington, Virginia. I and Applicant were located in Arlington Heights, Illinois. Department Counsel offered Government Exhibits (GE) 1 through 4 into evidence without objection. Applicant offered Applicant Exhibits (AE) A through I into evidence without objection. Applicant testified. The record was left open until August 20, 2013, to give Applicant an opportunity to submit additional documents. That deadline was extended to August 23, 2013, per Applicant's request. DOHA received the hearing transcript on August 9, 2013. On August 23, 2013, Applicant submitted ten exhibits that I marked as AE AA through JJ and admitted into the record without objection.

Findings of Fact

In his Answer to the SOR, Applicant denied both allegations and offered explanations.

Applicant is 39 years old and married since December 2008 to his second wife. He and his first wife divorced in October 2007. They had been married for eight years and have two children, ages 18 and 23. Applicant has a bachelor's degree in business management and certifications in information technology. From about 2000 to 2011, he was self-employed, working for various businesses and contractors. In 2009 he held a Secret security clearance for several months while working on a project for a defense contractor. He is seeking a Top Secret clearance for a position as a Windows administrator. (Tr. 22.)

Financial Considerations

In 2005 Applicant and his ex-wife obtained a mortgage and purchased a home. About a year and a half later, they separated and he moved out of the home. His ex-wife continued residing there with their two children. (Tr. 26.)

On October 3, 2007, the circuit court entered a Judgment for Dissolution Order (Order) that incorporated a Marital Settlement Agreement executed by Applicant and his ex-wife. Both parties agreed that the marital home, held jointly, would be placed on the real estate market for sale in June 2009 after their son graduated from high school. That Order also required Applicant to pay \$1,674 in child support for both children, which amount was to be reduced when his son graduated from high school in 2009. (AE JJ.) Applicant and his ex-wife verbally agreed to extend the deadline for the sale of the property until their younger daughter graduated in May 2013. (Tr. 37.) In June 2013 he filed a Motion to Terminate Child Support with the circuit court. (AE CC.)

The Order further stated that "Title to the marital home shall remain in both parties until such time as the house is sold. . . . Wife shall pay and shall and does (sic) hereby indemnify Husband and hold him harmless for all expenses associated with the marital home, including but not limited to mortgages, taxes, and insurance." (AE JJ at Sec. 5.8.) The Order does not contain language requiring Applicant to pay a portion of the mortgage.

Applicant testified that he and his former wife agreed to split the mortgage payments. (Tr. 36.) He stated that he consistently made child support and mortgage payments to her after the divorce was final, up to June 2011 when he stopped as explained below. He submitted copies of numerous checks verifying payments. (Tr. 47; AE EE to AE II.)

In February 2011 Applicant's ex-wife stopped making payments on their jointly held mortgage.¹ (GE 4 at 8.) In April 2011 the mortgagor filed a Summons for a Foreclosure in the local circuit court and served it on someone residing in the marital home. Applicant is a named defendant, along with his ex-wife. (AE I.) A credit bureau report (CBR), dated September 17, 2011, indicated that the mortgage was 180 days delinquent and noted that foreclosure proceedings had started. (GE 2 at 10.) According to a CBR, dated February 7, 2013, the residential mortgage was reported as a loan modification in December 2012. (GE 3.)

Applicant's ex-wife hired a lawyer to represent her in the foreclosure suit. (GE 4.) In a March 4, 2013 letter, the lawyer informed DOHA that he was working with the borrowers (Applicant and his ex-wife) to resolve the litigation. (Answer.) On May 19, 2013, the court entered an Order setting the foreclosure matter for a Case Management call on August 22, 2013. Applicant remains a named defendant. (AE I.) He believes that his ex-wife, who continues to reside in the property, is attempting to delay the foreclosure and subsequent eviction because she has been living in the home for the past couple of years and not making mortgage payments. He acknowledged that he remains a title holder of the property, but is not participating in the lawsuit. (Tr. 49-51.) He submitted Docket Sheets relating to the mortgage foreclosure that recorded action on the case, beginning on April 20, 2011, and continuing through May 9, 2013. (Answer.) The case remains unresolved.

On June 13, 2013, Applicant completed a credit counseling course required by the U.S. Bankruptcy Court for people filing bankruptcy. (AE G.) On June 15, 2013, Applicant filed a Chapter 13 Voluntary Petition (Petition). (AE A.) The bankruptcy Petition listed two credit card companies holding unsecured claims, which totaled \$9,859. It listed three creditors holding secured claims, which totaled \$473,317. Those creditors are Applicant's previous residential mortgage company with a claim for \$315,234 on the home he purchased with his ex-wife; a mortgage company for an

¹ A credit bureau report (CBR), dated September 17, 2011, noted that the last payment on the mortgage was in October 2010. (GE 2 at 10.)

investment property with a claim for \$155,989, which appears to be in a current status;² and an automobile loan company with a claim for \$2,094. (AE B.)

On June 13, 2013, Applicant also filed a Chapter 13 Payment Plan (Plan). (AE F.) According to the Plan, he will resolve \$15,000 of debt with monthly payments of \$500 for 29 months. That Plan will resolve the \$9,859 of credit card debt and \$5,000 of fees. The Plan does not contain any reference to either mortgage company listed in the Petition or to the automobile loan creditor. (AE F.) Applicant asserted that the automobile debt belongs to his ex-wife, who had been paying the debt. He acknowledged that he is a co-debtor of that loan. (Tr. 52-53; AE A.) On June 24, 2013, Applicant completed a personal financial management course required by the trustee assigned to his bankruptcy case. (AE H.)

On July 15, 2013, Applicant made the required first \$500 payment to the trustee of the Plan, prior to the July 24, 2013 meeting with creditors. (Tr. 51-52; AE DD.) On August 19, 2013, the bankruptcy court entered an Order confirming the Chapter 13 Payment Plan filed in June 2013. (AE BB.)

It appears that Applicant has decided to allow the property he owns with his ex-wife to be foreclosed upon, since it is not mentioned in his confirmed plan. He has been maintaining the payments on his investment property outside of the bankruptcy, which is appropriate.

According to the budget Applicant submitted to the bankruptcy court, he and his wife have a net monthly income of \$9,444 and expenses of \$2,930, leaving about \$6,500 remaining to make the monthly payments to the trustee. (AE B.) A review of the February 2013 CBR listed the two mortgages noted above, and the two credit cards, now in the Plan, as Applicant's only ongoing debts. (GE 3.)

Applicant asserted that the mortgage problems arose because his ex-wife failed to make monthly payments to the bank. He denied that he was responsible for that problem because he made payments to her with the expectation that she would pay the mortgage. (Tr. 53.)

Personal Conduct

On September 2, 2011, Applicant submitted a SF 86. In response to "*Section 26: Financial Record: Delinquency Involving Routine Accounts,*" which inquired as to whether he had ever defaulted on any type of loan or whether he was "*currently over 120 days delinquent on any debt? (Include financial obligations for which you are the sole debtor, as well as those for which you are a cosigner or guarantor),*" Applicant answered, "No."

² Both the September 2011 CBR and the February 2013 CBR indicate that this March 2007 mortgage is current and not delinquent. It was transferred from a previous lender to the current lender in 2011. Applicant disclosed it as a monthly expense of \$861 on his March 2013 budget. (GE 2, 3, and 4.)

On November 14, 2011, a government investigator interviewed Applicant about his answers in the SF 86, including those related to financial matters, his delinquent mortgage, and other debts. When confronted by the investigator that his mortgage on his previous marital home was over 120 days delinquent, he indicated that he was aware that payments on the mortgage had become late in the last four to six months. His ex-wife had told him about the problem and she had negotiated a reduced payment with the bank. After learning that from his former wife, he reduced his monthly mortgage payments to her in February 2011. He stopped making any mortgage payments to her in June 2011 because the bank told his ex-wife to stop making payments in order to qualify for a loan modification. (Tr. 48, 61.) He and his ex-wife subsequently began applying for a loan modification. (GE 4 at 7-8.)

During that same interview, Applicant told the investigator that the bank had not initiated foreclosure proceedings. He insisted that his former spouse would have informed him of that. (GE 4 at 8.) According to the file, the bank had initiated a foreclosure action in April 2011.

On November 16, 2011, two days after his interview, Applicant telephoned the investigator and told him he just spoke to his ex-wife about the mortgage problems. She told him that she received a letter in July 2011 from the bank, indicating that they were defendants in a foreclosure proceeding. He was unaware of the foreclosure proceeding until that conversation. (GE 4 at 2.)

In his Answer to the SOR regarding the failure to disclose information about the delinquent mortgage, he denied that he intentionally attempted to conceal the debt. He explained that he misunderstood the question and thought that because he and his ex-wife were applying for a homeowner's assistance program and a loan modification, he did not need to disclose it as a delinquent debt. (Tr. 55; Answer.)

Applicant reiterated in his testimony that because he was working on a resolution to the mortgage problem in September 2011, he did not think the mortgage was delinquent or in default, and required disclosure. (Tr. 58.) He said he had no intention to deceive the government. (Tr. 34.) He also did not think that a mortgage was considered a "Delinquency Involving Routine Account" as captioned for Section 26. He thought routine accounts related to credit card accounts. (Tr. 56-58.)

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, those 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 AG ¶ 2(a), describing 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

According to 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." 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."

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.

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. An individual who is financially over-extended is at risk of having to engage in illegal acts to generate funds.

AG ¶ 19 describes a condition that could raise a security concern and may be disqualifying in this case:

(c) a history of not meeting financial obligations.

There is evidence that in February 2011 Applicant learned that the mortgage for which he remained a title-holder was not being adequately managed by his ex-wife. Although he believes that he is resolving his financial problem by filing Chapter 13 bankruptcy, he has not yet been discharged with an explicit order absolving him of his mortgage obligation.

AG ¶ 20 provides four conditions that could mitigate security concerns raised under this guideline:

(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.

There is sufficient evidence for the application of AG ¶ 20(a). Applicant's financial problems occurred as the result of his ex-wife's failure to pay a jointly held mortgage beginning sometime in early 2011, and after their October 2007 divorce. He provided proof that he made monthly payments to her for the mortgage and child support. This situation occurred under circumstances unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment, as he made payments to her in anticipation that she would pay the mortgage. For similar reasons, AG ¶ 20(b) also has application. Applicant's ex-wife's decision not to make payments was largely beyond his control. At some point, he attempted to cooperate with her to obtain a loan modification, demonstrating his intention to act responsibly under the circumstances. In addition, his former wife is obligated to indemnify him on the mortgage. Although he was helping her and his children to remain in the home, she had the primary and legal responsibility for payment of the mortgage.

Applicant obtained credit and financial counseling through the bankruptcy process. There are clear indications that two credit card debts are being resolved through a Chapter 13 Payment Plan. His mortgage on an investment property was current as of February 2013. Because the legal process addressing the foreclosure on his previous marital home is not completed, AG ¶ 20(c) is partially applicable. His recent action to pay his outstanding debts through a Chapter 13 bankruptcy demonstrates a good-faith effort to resolve his debts, and warrants the application of AG ¶ 20(d).

Guideline E, Personal Conduct

The security concerns pertaining to the personal conduct guideline are set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The Government alleged in SOR ¶ 2.a that Applicant deliberately falsified answers to a question on his September 2011 SF 86, by failing to disclose information relevant to a mortgage that was delinquent and in foreclosure at the time he completed it. The Government contended that that falsification constituted potential disqualifying conditions under AG ¶ 16:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant acknowledged that he did not disclose the adverse information about the mortgage, but denied that he intentionally misled the Government regarding it. When a falsification allegation is controverted or denied, as in this case, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Applicant's explanation that he did not intentionally fail to disclose negative information about the delinquent status of the mortgage on his previous marital house is credible. It is clear that he was aware that his ex-wife had failed to make payments for several months prior to completing the SF 86. However, it is also apparent that he and his ex-wife were in a loan modification process with the bank, leading him to believe that

the mortgage was not delinquent. That and his confusion about whether the mortgage was a “routine account” lend sufficient credence to his misunderstanding or misinterpretation of the questions set out in Section 26. Based on the record evidence, he did not have knowledge of the foreclosure proceeding in September 2011.

After listening to Applicant testify and observing his demeanor, I find that his explanations for failing to disclose specific information as alleged in SOR ¶ 2.a are adequate and credible. SOR ¶ 2.a is found in his favor. As a consequence, a discussion of the applicability of mitigating conditions is not warranted.

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). They include the following:

- (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 include 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 pertinent facts and circumstances surrounding this case, including Applicant’s age, and candid testimony. Applicant is a 39-year-old man, who began encountering a financial problem in early 2011, related to his 2007 divorce. Over-all, his finances and financial obligations appear to be solid and under control. He is resolving about \$10,000 of credit card debt through a Chapter 13 bankruptcy plan, and is current on his payments on a piece of investment property. According to file documents, he remains a borrower-defendant in the ongoing foreclosure case with his ex-wife, and may be liable for a mortgage deficiency in the future by the mortgagor. That possibility, though remote, has been considered. At this time, he has attempted to address his responsibilities. Should he become responsible for additional monies in the future as a consequence of the foreclosure proceeding, which his former wife cannot pay, there is little doubt that he will pay his portion of a judgment or mortgage deficiency.

In DOHA cases, allegations of falsification are considered seriously and carefully. Based on the circumstances surrounding this case, including Applicant’s ex-wife’s

failure to promptly disclose the foreclosing proceedings, his attempts to work out a loan modification after June 2011 with her, and his misinterpretation of the scope of the pertinent question in Section 26, his testimony is sufficiently credible to conclude he did not intentionally attempt to defraud the Government. In the future, he will undoubtedly be more diligent in reading applications and opt for “over” disclosure, rather than non-disclosure.

Overall, the record evidence leaves me without questions as to Applicant’s eligibility and suitability for a security clearance at this time. For all these reasons, I conclude Applicant mitigated the security concerns arising under the guidelines for financial considerations and personal conduct.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR Applicant
Subparagraph 2.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 interests to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

SHARI DAM
Administrative Judge