



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



In the matter of:)	
)	
)	ISCR Case No. 12-01476
)	
Applicant for Security Clearance)	

Appearances

For Government: Philip Katauskas, Esq., Department Counsel
For Applicant: *Pro se.*

09/16/2013

Decision

O'BRIEN, Rita C., Administrative Judge:

Applicant has mitigated the security concerns raised under the guidelines for Financial Considerations and Personal Conduct. His request for a security clearance is granted.

Statement of the Case

On May 20, 2013, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) that cited security concerns under Guidelines F (Financial Considerations) and E (Personal Conduct). This action was taken 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; and the Adjudicative Guidelines (AG) implemented by the DOD on September 1, 2006.

In his June 8, 2013 Answer to the SOR, Applicant admitted the two financial allegations, and denied the falsification allegation. He also requested a hearing before an administrative judge. I received the case on July 11, 2013, and the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on July 16, 2013. At the August 7, 2013 hearing, I admitted into evidence four Government Exhibits (GE 1-4) and two Applicant Exhibits (AE A-B). I held the record open after the hearing, and Applicant timely submitted two documents, which I admitted without objection (AE C-D). DOHA received the transcript (Tr.) on August 15, 2013.

Findings of Fact

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

Applicant is a 46-year-old high school graduate who also completed training as a barber. He married in 1995 and divorced in 1998. Applicant had lived with his fiancée since 2006, and they married in July 2013. He has two teenage sons, one with his first wife and one with his second wife. (GE 1, 2; Tr. 16-22, 26-27, 36)

Guideline F, Financial Considerations

Applicant and a partner have owned and operated a successful barber shop since 1993, and at times employed as many as three other barbers. When the economy declined, many of his clients lost their jobs, and his business suffered, starting in about 2009. He cut staff, and at one point he and his partner were the only barbers. He decided to seek other employment. He attended a class for security officers, and found work in October 2011. He continues to work at the barber shop, but on a much-reduced level. He estimates the shop provides about 30% of his current income. This is his first application for a security clearance. (GE 1, 2; Tr. 16-22, 24-27, 36, 51-54)

Applicant and his ex-wife share custody of their son. After his divorce in 1998, Applicant paid child support. His credit report shows that he was past due on his payments. Applicant testified that his ex-wife and son moved frequently, so in about 2007, he bought them a house, so that his son would have a stable environment (House A). Applicant and his ex-wife agreed that he would pay toward the mortgage on the house instead of child support payments. He and his ex-wife shared the \$2,700 monthly mortgage payments. Applicant's ex-wife wanted their son to attend a different school, and in 2010, she and their son moved out of House A. Applicant continues to provide funds for his son's clothes, food, and half of his school costs. (GE 2, 3; Tr. 23-24, 28-35)

After Applicant's business declined, he maintained the House A mortgage payments. In about 2010, he applied to refinance, but the request was not approved. In 2011, he was unable to keep up his payments. His credit report shows that the two mortgage loans on House A became delinquent in July and August 2011. The first and second mortgage loans on House A are \$9,201 and \$4,404 past due, respectively. They are the only delinquent debts in Applicant's April 2013 credit report. (GE 3, 4; Tr. 31-33, 58-65)

Applicant has been working with a realtor to short-sell House A. As of April 2013, his realtor had obtained an offer to purchase at a price of \$195,000. Applicant provided a copy of the sales contract, signed by the buyer. That same month, the original lender sold the loan, and the new lender increased the acceptable price to \$215,000. All parties have agreed to the higher price. Applicant is awaiting approval of the sale. He

stays in touch weekly with his realtor. As of May 2013, Applicant had completed and submitted a form from the new lender authorizing his agent to handle the short sale on House A. (Answer attachment; AE A - D; Tr. 37-49, 66-67)

Applicant owns several properties: House A, discussed previously; his residence (House B); a property he and his ex-wife purchased during their marriage (House C); and a property he inherited from his parents (House D). The loan on House B is current. Applicant has paid off the mortgage loans on Houses C and D. Applicant rents Houses C and D. (Tr. 58-65)

Applicant's interrogatory response included a 2013 personal financial statement (PFS), showing net monthly income of \$6,938. His monthly expenses and debt payments total \$7,555, leaving a negative monthly remainder of \$617. At the hearing, Applicant stated his tenant in House C had left within the previous few days. Although he lost the tenant, the mortgage loan is paid in full. In addition, Applicant receives rental income from House D; that mortgage loan is also paid in full. Applicant's current credit report shows no delinquencies other than House A. (GE 2 - 4; Tr. 55-65)

Guideline E, Personal Conduct

Applicant completed a security clearance application in October 2011. He answered "No" when asked whether, within the previous seven years, he had defaulted on any loan or been more than 120 days past due on a debt. Applicant denies the Government's allegation that he intentionally falsified these answers. (Answer; GE 1)

In his Answer to the SOR, Applicant stated that when he was completing the application in October 2011, he thought about the House A mortgage, and knew that he had missed payments in 2011. However, he did not believe that this constituted a default, or that he had been 120 days delinquent then or within the past seven years.

Applicant's October 2011 credit report shows the primary loan on House A (allegation 1.a) became delinquent in July 2011, about 90 days before the Applicant completed his application. The secondary loan on House A (allegation 1.b) became delinquent in August 2011, about 60 days before the application. However, the October 2011 credit report also states "late over 120 days" in relation to the primary loan. The report contains contradictory information by stating that the loans were 60 to 90 days past due, but also stating that one loan was over 120 days past due. (Answer; GE 3)

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 Adjudicative

Guidelines (AG).¹ Decisions must also reflect consideration of the “whole-person” factors listed in ¶ 2(a) of the Guidelines.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever 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 Guidelines F (Financial Considerations) and E (Personal Conduct).

A security clearance decision is intended only to resolve the questions of whether it is clearly consistent with the national interest² 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 the 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.³ 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.⁴

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

¹ Directive. 6.3.

² See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

³ See *Egan*, 484 U.S. at 528, 531.

⁴ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

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

Applicant experienced a number of financial setbacks starting in 2009. By 2011, he could no longer meet the mortgage payments on House A. The record contains no indication of financial problems related to alcoholism, gambling, drug abuse, or other issues of security concern. The following disqualifying conditions apply under AG ¶ 19:

- (a) an inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

The following mitigating conditions, listed at AG ¶ 20, are relevant:

- (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; and
- (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.

Applicant's mortgage debt is recent, because, as of the hearing date, the short-sale of the house had not yet been approved. However, Applicant's credit reports show that he has had a stable financial history. He has kept his residential mortgage loan current, and the mortgage loans on his two rental properties are paid off. Applicant's House A delinquency is isolated, unlikely to recur, and does not reflect poorly on his current trustworthiness. AG ¶ 20 (a) applies.

AG ¶ 20(b) concerns situations where an applicant is faced with unexpected events that are beyond his control. Here, Applicant ran a successful barber shop for 16 years, and he had no financial problems. However, unforeseen events negatively affected Applicant's finances. When the U.S. recession hit, Applicant's business was affected. In response to the decline in his shop's revenue in 2009, he acted responsibly by cutting staff, and ultimately, by seeking other sources of income. In 2010, Applicant absorbed other financial blows. His lender refused to refinance the House A loan, and his ex-wife, who had been sharing the cost of the mortgage, decided to leave House A. Applicant maintained the payments until about August 2011, when he could no longer

continue. He missed payments, but brought the mortgage current again until 2012, when his tenant left. Applicant has been working with a realtor since 2012 in an effort to sell House A. He now has a signed contract of sale for the price the new lender requires, and is awaiting only the lender's approval. AG ¶ 20(b) applies.

Applicant did not seek financial counseling while dealing with the House A mortgage. However, the record shows that the debt is under control. His realtor has obtained a buyer, who not only agreed to the original price of \$195,000, but also to the increased price of \$215,000 required by the current lender. Once the sale is complete, Applicant will owe only the mortgage on his personal residence, which he maintained in a current status throughout the financial crises. His financial situation is under control. AG ¶ 20(c) applies.

Guideline E, Personal Conduct

The security concern under the personal conduct guideline is that

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. (AG ¶ 15)

The SOR alleges that Applicant deliberately falsified information about the status of his mortgage loans when he completed his security clearance application, which implicates disqualifying condition 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.

Disqualifying condition AG ¶ 16(a) requires deliberate and knowing concealment: the applicant must have answered the question with an intent to deceive the Government. When a falsification allegation is controverted, the Government has the burden of proving it.⁵ An omission, standing alone, does not 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 of the omission.⁶

⁵ DOD Directive 5220.6, Additional Procedural Guidance, Item E3.1.14.

⁶ ISCR Case No. 02-23133 at 4 (App. Bd. June 9, 2004). See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004); ISCR Case No. 05-16743 at 2 (App. Bd. Apr. 11, 2007).

Here, the Government presented sufficient evidence to establish a *prima facie* case under Guideline E. However, Applicant denies he deliberately falsified his application. In his Answer to the SOR, he stated that when he completed the application, he thought about the length of time his House A mortgage was delinquent in mid-2011. Although he knew he missed some payments, he believed he had not defaulted on the loan or been delinquent more than four months.

Applicant completed the security clearance application in October 2011. His October 2011 credit report shows that the first mortgage loan on House A became delinquent in July 2011, about 90 days before the application. The second mortgage loan became delinquent in August 2011, about 60 days before he completed his application. This record evidence supports Applicant's belief that his loans were not more than 120 days past due. However, the October 2011 credit report also states "late over 120 days" in relation to the first loan. The credit report contains contradictory information: it lists the first loan as 90 days past due, but also states it was over 120 days past due. I find that, because Applicant's last payments were in July and August 2011, he could have reasonably believed he had not been more than 120 days late when he completed the application in October 2011.

I conclude Applicant's negative answer about delinquent loans stemmed from his honest belief that his mortgage loan had not been in default or more than 120 days past due in 2011. Based on the record evidence, including his credit report, I find his explanation credible, and conclude that Applicant did not intend to mislead the Government about his finances. As Applicant did not intentionally falsify his response, no mitigation is required.

Whole-Person Analysis

Under the whole-person concept, an administrative judge must evaluate the Applicant's security eligibility by considering the totality of an applicant's conduct and the circumstances. An 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 that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited

guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

The file contains no evidence of untrustworthy behavior by Applicant. He credibly stated that he did not believe his mortgage on House A was more than 120 days past due when he completed his security clearance application. Moreover, for 16 years, his business was successful, and his financial situation was sound. After he bought a house to help stabilize his son's life, the U.S. economic crisis occurred, and his income decreased substantially. Nevertheless, he maintained payments on House A even after the economic downturn affected his income in 2009, and after losing his ex-wife's contribution to the mortgage in 2010. He reacted to these problems by seeking and obtaining employment in a new field. He was able to pay the mortgage until mid-2011, when he missed several payments. He maintained contact with his lender, and at various points sought ways to resolve the debt. Applicant's efforts to refinance the loan failed. He hired a realtor in 2012, and sought a short sale. He has obtained a signed offer from a willing buyer, at the price requested by his new lender, and is awaiting final approval of the sale. Although Applicant currently has a negative cash flow, he has no outstanding debts other than House A, which is pending sale. His residential mortgage is current, and his two other rental properties are paid off. Based on this history, I am confident that he will resolve the mortgage and maintain a sound financial status.

Overall, the record evidence satisfies the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from the cited adjudicative guidelines.

Formal Findings

Paragraph 1, Guideline F	FOR Applicant
Subparagraphs 1.a – 1.b	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 interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is granted.

RITA C. O'BRIEN
Administrative Judge