



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



In the matter of:)	
)	
)	ISCR Case No. 12-01701
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace L. Garcia, Esq., Department Counsel
For Applicant: *Pro se*

06/28/2013

Decision

HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense’s (DoD) intent to deny her eligibility for a security clearance to work in the defense industry. Applicant was the victim of a Ponzi-type scheme. She has mitigated the financial considerations security concerns. Clearance is granted.

History of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on November 14, 2012, the DoD issued an SOR detailing security concerns. DoD adjudicators could not find that it is clearly consistent with the national interest to grant or continue Applicant’s security clearance. On December 21, 2012, Applicant answered the SOR and requested a hearing. On April 5, 2013, I was assigned the case. On April 22, 2013, the

¹ 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) effective within the DoD on September 1, 2006.

Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing for the hearing convened on May 3, 2013. I admitted Government's Exhibits (Ex) 1 through 9 and Applicant's Exhibits A1 through A11, without objection. Applicant testified at the hearing. The record was held open to allow Applicant to submit additional information. Additional materials (Ex. B through G) were submitted and admitted into the record without objection. On May 10, 2013, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, she admitted the factual allegations in the SOR, and her admissions are incorporated herein. After a thorough review of the pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 42-year-old quality inspection manager who has worked for a defense contractor since October 2000, and seeks to maintain a security clearance. (Tr. 19) Applicant's coworkers, supervisors, and friends state Applicant is hard-working, intelligent, dedicated, compassionate, honest, and trustworthy. (Ex. A9) She is well respected, has a strong work ethic, is a mentor, and an invaluable member of the company. (Ex. A9) Her performance summaries describes her overall work performance as "Far Exceeds Requirements" and indicates she has "High Potential." (Ex. A11, Tr. 86)

Applicant and her husband became involved with an investment firm that was involved in a \$142 million mortgage and securities fraud that bilked funds from more than 800 victims. (Ex. D, Ex. 6) The SOR lists three mortgage loans of concern. Applicant was 90 days or more past due on the first and second mortgage on her home and she was \$26,000 past due on an investment property when it went to foreclosure.

Part of the investment firm's services was to purchase real estate, sell it to investors, and then secure renters for the property. The investment firm claimed to have long lists of renters waiting to move into the properties. The investment firm, in collusion with sellers, would purchase property at inflated prices and sell them to investors. Investment home values were inflated by 20% to 30%. (Ex. 6) The real estate appraisers who inflated the homes' value would be paid a larger than normal fee, sometimes ten times the normal fee, for the inflated appraisal. (Ex. 6)

As an example, the investment firm would find a house selling for \$500,000 that could appraise at \$600,000. The investment firm would then approach the homeowner, purchase the home, pay the seller a fee² for services, and keep the difference in sales price when the investment firm sold the property to one of their investors at the inflated price. (Ex. D) The investment firm would later refinance the homes and keep the proceeds from second trust deed loans to be invested in the management firm. (Ex. 6)

² This kickback to the seller of the home at an inflated price would appear in the escrow documents as a "commission." (Ex. 6)

The investment firm started obtaining investors in 2003 and was run by a professional scam artist accustomed to making false representations. (Ex. 6) In the spring of 2006, Applicant and her husband attended a seminar by the investment firm. (SOR Answer) Prior to investing, Applicant researched the investment firm. (Tr. 22) However, the investment firm used the name of, but was not associated with, a reputable, legitimate investment company. (Ex. 6) In December 2006, the legitimate wealth management firm brought suit for trademark infringement and unfair business practices against the investment firm. (Ex. A2) In July 2007, a class action was brought against the owners and managers of the fraudulent investment firm for unfair business practices, investment fraud, and fraudulent conveyance. (Ex. 6) In September 2007, a Corporation Commission brought a cease-and-desist action against the firm. (Ex. A1) The civil suits were on hold pending the outcome of the federal and state criminal actions. (Tr. 44)

In January 2011, the mastermind entered into plea bargain agreeing to a prison sentence of 19 years and 8 months. The firm's chief lieutenant also entered into a plea agreement agreeing to six years in prison. (Ex. A8) In November 2009, the state filed criminal charges against other employees of the fraudulent investment firm. The trial stated in November 2012 on charges of grand theft, illegally selling securities and commodities, providing false information, and destruction of evidence during a federal probe. (Ex. H) One employee was convicted of 304 felony charges and another was convicted of 54 felony charges. Additional company employees were found guilty of felonies and received probation. The company's assets were frozen, but Applicant has not received any compensation from those assets. (Tr. 27, 45)

In October 2006, Applicant submitted a loan application on the investment house to be purchased through the fraudulent investment firm. (Tr. 89) The house went to closing three months later in January 2007. (Ex. C, Tr. 43, Tr. 89) She later discovered the documents she signed and submitted on the loan applicant and the information submitted to the underwriter for approval were not the same. (Tr. 80) The investment firm's employees changed the documents and provided false information when the loan application was submitted. (Tr. 49) Months later, when she was able to review the submitted documents, she discovered her income was reported to be \$17,000 a month, which was untrue. (Tr. 81) At the time she signed the closing documents, she was told the monthly mortgage payment would be \$1,250, which would be offset by the amount of rent received. (Tr. 81, 82) The investment company told her they already had a renter waiting to occupy the property who had signed a 12-month lease supposedly paying \$1,500 monthly. (Tr. 82) When she received her monthly mortgage payment letter, the amount of the monthly payment was \$3,800. (Tr. 37, 83)

Unknown to Applicant, the seller was an employee of the investment firm and had purchased the property for \$424,900 and sold it to her through the firm for \$569,000 with a \$455,000 mortgage. (Ex. C, Tr. 43) In February 2007, Applicant learned of the lawsuits filed against the investment firm and retained the services of the attorney who had filed a class action suit against the investment firm. (SOR Answer, Ex 6) The property was \$26,000 past due when it went to foreclosure later the same year. (Tr. 50)

Her credit report reflects the \$26,000 as past due. (Tr. 48) Applicant had written to inform the lender of the Ponzi-type scheme and provided her attorney's contact information. (Tr. 38) Having discovered the fraud, no payments were made on the investment property. (Tr. 38)

On October 31, 2006, the Applicant refinanced her primary residence that she had purchased in 2002. (Tr.33) The investment firm steered her to the mortgage lender used in the refinance because they had individuals working with them at that mortgage company. Applicant intended to use some of the net equity to make home improvements and to invest some of the funds in the investment company. The closing documents directed the \$57,000 in equity funds to be sent to Applicant's personal bank account. (Ex. A4, Tr. 29) Upon receipt of the funds, she would choose how much to invest with the investment firm. (Tr. 31) Following the closing, the mortgage company handling the escrow sent all the equity funds to the fraudulent management firm. Starting in November 2006, Applicant made numerous requests asking the mortgage company to provide copies of the closing documents and mortgage documents. (Ex. A4, Tr. 30) To date, she has never received any of the equity funds from the refinance. (Tr. 87)

In December 2006, Applicant was injured in a motor vehicle accident that required three back surgeries and 99 stitches to her head. The last surgery involved fusion of her lower spine. (Tr. 63) At that time, her primary focus was on her health and recovery. (Tr. 30)

Applicant received a copy of the requested closing documents and her review of those documents revealed a forged letter directing the funds be sent to the investment firm. (Ex. A5, Tr. 30) In March 2007, after learning the equity funds were sent to an investment company, Applicant asked the company about the transferred funds and asked the funds be sent to her. The investment company stated, "Unfortunately, I can not give you any information on this account as you are not a signer on the account." (Ex. G) The investment company was an alter-ego of the defendants charged in the Ponzi-type scheme. (Ex. 6)

In September 2008, the mortgage lender who refinanced the property was sued by numerous victims of the fraud for unfair, false, and misleading business practices and negligence. (Ex. A3) Applicant was a party to this suit. (Ex. A3) A branch manager of the mortgage company had placed false information and other misleading information on loan applications to secure approval of the loans. (Ex. A3) The employees caused forged or false real property deeds to be executed and made false statements to those obtaining the loans as to the monthly payments on the loan. Additionally, the employees allowed the proceeds of the mortgages to be "invested" in unlicensed securities. (Ex. A3)

In October 2007, following an auction, the home transferred to the new owner for \$421,691. (Ex. C) In November 2007, that purchaser sold it for \$440,000. (Ex. C, O) Applicant made numerous telephone calls to the collection department of the initial

mortgage company asking for the balance owed on the property. (Ex. E) Having received no response, Applicant sent a letter certified return receipt requesting the same information. (Ex. F)

In November 2007, Applicant informed her company's program security officer of the Ponzi-type scheme. (Ex. A6, Tr. 86) Also in 2007, she sought the assistance of a credit consolidation company. (Tr. 66) The plan was not to reduce what was owed, but to consolidate all of the various monthly debt payments into a single, payment. The consolidation plan required a monthly \$1,290 payment. (Tr. 79) She was current on all her debts, except for the investment property, when she entered into the consolidation plan. (Tr. 67) Between 2007 and early 2012, Applicant paid all of her other obligations in a timely manner. Through the plan, she was able to pay \$60,000 in debt. (Tr. 67)

In May 2012, Applicant realized she could no longer make the monthly mortgage payment and pay her other debts. Also in May 2012, the mortgage company informed her of an increase in her adjustable rate mortgage. The interest rate on the first mortgage increased to 10.3% and on the second mortgage to 13.77%. (Ex. 5, Tr. 36-37, 52) The monthly mortgage payment increased from \$1,700 to \$2,462. (Tr. 54)

In June 2012, Applicant applied for a loan modification and assistance under a federal program to assist home owners, which was denied in July 2012. In July 2012, she requested a loan modification from the mortgage company, which was denied in August 2012. In April 2013, Applicant was notified that she did not qualify for the U.S. Treasury's home Affordable Modification Program because the monthly payment would not be between 10% and 55% of her gross monthly income. (Ex. A5)

In September or October 2012, Applicant moved out of the home because she was not making monthly payments on the home. (Tr. 84) She wants to keep the home. (Tr. 34) Currently, she owes approximately \$195,000 on the first mortgage and \$49,000 on the second mortgage. (Ex. 5, Tr. 36-37) Applicant estimates the fair market value of the house is \$120,000. (Tr. 37) As of April 2013, her annual salary is \$100,000. (Ex. A10)

In late 2006, Applicant's husband retired from the U.S. Air Force as an E-6. His monthly service retirement is approximately \$1,500. (Tr. 62) Following retirement, he started a printing business. Initially, the company had monthly income of \$500 to \$2,000. (Tr. 60) The business was dissolved the end of 2007 or in 2008. (Tr. 59) He sought full-time employment, went to truck-driving school for six weeks, and was employed for a year with a trucking firm before resigning following a vehicle accident in 2009 or 2010. (Tr. 60, 61) He was unemployed until two months prior to the hearing when he secured a part-time job making \$11 per hour and working 20 to 25 hours per week. (Tr. 61)

As of October 2012, Applicant and her husband earn approximately \$8,000 monthly. They have a \$2,500 mortgage payment, pay \$1,200 in rent, and make \$1,100 in vehicle payments. (Ex. 5) She purchased her vehicle because her back pain required

a vehicle with high seats allowing her to sit upright to ease the pain. (Tr. 63) Her husband purchased a motorcycle to replace his truck that was in need of repairs. (Tr. 65) Their net monthly remainder (net monthly income less monthly expenses and debt payment) was approximately \$1,000. (Ex. 5) Applicant obtains a copy of her credit report every three or four months to review it. (Tr. 44) She maintains three small department store credit cards. (Tr. 68) She also had a line of credit used to meet medical expenses. (Tr. 70) She is current on her monthly payments. (Tr. 66, 73)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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. 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.

Under 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 applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain a favorable security 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 of 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

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

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.

Additionally, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts under agreed upon terms. Absent evidence of strong extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage his finances to meet his financial obligations.

Applicant has a history of financial problems due to being a victim of a Ponzi scheme. The first and second mortgage on her residence are past due and the mortgage was past due on her investment property when it went to foreclosure. Disqualifying Conditions AG ¶ 19(a), “inability or unwillingness to satisfy debts” and AG ¶ 19(c), “a history of not meeting financial obligations,” apply.

Four Financial Considerations Mitigating Conditions under AG ¶¶ 20 are potentially applicable:

(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;

(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.

Before investing any money, Applicant did her due diligence in researching the company. However, the fraudulent investment company chose a name so similar to a reputable, legitimate investment company which made her research meaningless due to researching the wrong company. The scam artist running the fraud counted on a normal investor not recognizing the slight difference in names. In 2006, the legitimate wealth management firm brought suit for trademark infringement and unfair business practices against the fraudulent investment firm because of the similarity of names.

Applicant entered into the investment property purchase before becoming aware of the fraud. She submitted closing documents that were later fraudulent by altered by the investment firm to secure the mortgage on the investment property. She had been told the monthly mortgage would be \$1,250, and there was a signed 12-month lease with a renter paying \$1,500 monthly. After closing, she learned the monthly mortgage was \$3,800, which was three times what she anticipated. She also learned there was no renter and the investment firm had inflated the purchase price of the house.

In 2007, Applicant became past due on the mortgage on the investment property and the property went to foreclosure that same year. In 2012, the adjustable rate on the mortgage of her residence greatly increased. Her monthly mortgage payments increased by more than \$750, which was a 45% increase in the monthly payment amount. Although the debts were incurred some time ago, they are considered recent because they remain unpaid. The debts were infrequent in that the only SOR debts relate to the mortgages on two properties. The debts arose under unusual circumstances. She refinanced her primary residence and all the equity from the refinance was stolen by an investment firm. The investment property was the result of fraud by the same investment firm. Having addressed all other debt, these mortgages do not cast doubt on Applicant's current reliability, trustworthiness or good judgment. The evidence establishes AG ¶ 20(a).

Under AG ¶ 20(b), financial concerns may be mitigating where the conditions that resulted in the financial problem were largely beyond the person's control and the

individual acted responsibly under the circumstances. As noted above, Applicant and more than 800 other individuals were the victims of a \$143 million Ponzi scheme. The principal individuals involved have been convicted of numerous felonies and many are serving prison sentences. Once Applicant was aware of the Ponzi scheme, she acted responsibly. She immediately hired an attorney, immediately informed the investment property mortgage holder of the scheme, and informed her employer of the problem. She is a party to lawsuits against both her mortgage company and the investment company.

When Applicant's monthly mortgage payment increased by 45% she immediately attempted to correct the problem by asking for a loan modification and applying for assistance under a federal program to assist homeowners. Applicant owes the mortgage on the residence, but \$57,000 of the refinanced proceeds was wrongfully taken by the investment firm. The fraud was assisted by a mortgage company employee of the same mortgage company currently holding the mortgage. The mortgage company has been sued by not only Applicant, but by a large number of similarly situated victims of the fraud.

In addition to the Ponzi scheme, Applicant and her husband incurred other conditions that contributed to their financial problem that were largely beyond their control. There was a business downturn. After her husband retired from the Air Force, he started a printing business which failed. There were periods of unemployment following the business failure. He is now employed, but has only a part-time job. There was also an unexpected medical emergency. In December 2006, Applicant was involved in a vehicle accident that resulted in 99 stitches to her head and three back surgeries, the last of which resulted in fusion of her lower spine. The evidence establishes AG ¶ 20(b).

In addition to the mortgages, Applicant had a number of other debts. In 2007, she not only learned of the fraud, but also entered into a debt consolidation program allowing her to pay all her other debt with a single payment. Through that program she made monthly payments of approximately \$1,300 and paid off \$60,000 in debt. Having paid that significant amount of debt, I am confident she will continue with her actions to address the remaining mortgage issues. She has maintained continuous contact with the mortgage company on her residence. The investment property mortgage was \$445,000 and in October 2007, the house sold for \$421,691, which was \$23,000 less than what she owed on the property. Applicant has made numerous attempts to contact the mortgage company to determine the status of this debt. Keeping in contact with the two mortgage companies and her efforts to modify the loan or get approved for a federal homeowners' assistance program are efforts to resolve the debt. The mitigating condition in AG ¶ 20(d) is established.

Applicant has disputed the legitimacy of the debts. She and numerous others have filed lawsuits against the mortgage company and the investment company. She was the victim of a Ponzi scheme. I find AG ¶ 20(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” is established.

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):

- (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) 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 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. The debts incurred were not the type that indicates poor self-control, lack of judgment, or unwillingness to abide by rules and regulations. Applicant did her due diligence in attempting to research the investment company before making any investment. However, this was defeated by the fraudulent investment company using the name of a legitimate wealth management firm. The investment property mortgage loan was secured by fraudulent actions of the investment firm altering the closing documents submitted to the underwriter to qualify her for the loan.

Money was not spent frivolously. The fraudulent investment company steered Applicant to the mortgage lender which refinanced her primary residence. Suit has been commenced against that lender in addition to the investment company. The proceeds of the refinance were wrongfully taken from her. She never received any of the proceeds of the refinancing.

There has been no misconduct or irresponsible behavior by Applicant. Her debts arose in large part from factors beyond her control. When these problems first began she hired an attorney, notified the mortgage companies, and notified her employer. She acted reasonably. She hired a debt consolidation firm, which is a reasonable, responsible way to resolve her debts and improve her current finances. She is not living beyond her means. She is paying all her debts except for the mortgages. She is a mature, responsible adult who has exhibited reliability and sound judgment in her job.

The letters written on Applicant's behalf indicate she is honest, straightforward, and trustworthy. Applicant exhibited a candid approach to her responsibilities and is acting to ensure her past financial difficulties will not recur. Since 2007, she was able to pay off \$60,000 in debt other than the mortgages. She understands what she must do to maintain her financial responsibility.

I considered Applicant's favorable character evidence. I also considered the circumstances that led to her financial problems and the steps she has taken to address her issues. An applicant is not required to establish that she has paid every debt listed in the SOR. However, an applicant must demonstrate that she has a plan to resolve her financial problems and taken significant actions to implement that plan. Through the lawsuits and contact with the two mortgage lenders, she is trying to resolve her obligations. I am confident she will keep her promise to avoid future delinquent debt.

The facts and circumstances presented do not pose an unacceptable risk to the interests of national security. Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from her financial considerations.

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, Financial Considerations:	FOR APPLICANT
Subparagraphs 1.a – 1.c:	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 a security clearance. Eligibility for access to classified information is granted.

CLAUDE R. HEINY II
Administrative Judge