



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 12-02859 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

02/25/2014

Decision

O’BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised under the guideline for financial considerations. His request for a security clearance is denied.

Statement of the Case

On September 10, 2013, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) that detailed security concerns under Guideline F (financial considerations). 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 Department of Defense on September 1, 2006.

In his Answer to the SOR, Applicant denied both allegations under Guideline F. The case was assigned to me on October 31, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on November 5, 2013, setting the hearing date for November 21, 2013. At the hearing, I admitted five Government exhibits into evidence (GE 1-5). Applicant testified and also presented 11 exhibits,

admitted into evidence as AE A-K. DOHA received the transcript of the hearing (Tr.) on December 2, 2013.

Findings of Fact

After reviewing the pleadings and the evidence, I make the following additional findings of fact.

Applicant is 33 years old. He married in 2004, and has one six-year-old child. He earned bachelor's and master's degrees in electrical engineering. He joined his current employer, a federal defense contractor, in 2008. He is a quality assurance engineer. He received a secret security clearance in 2008 and an interim top secret security clearance in 2011. He has held a security clearance without incident for more than five years. (GE 1; AE K; Tr. 26-29, 48, 50)

In 2006, Applicant and his wife purchased a residence in State A for \$299,000. They did not make a down payment, but financed 100% of the purchase price with an 80% primary loan of \$240,000 and a 20% secondary loan of \$60,000. Applicant estimated his income at the time was \$70,000, plus about \$9,000 annual gross income from his wife's retail sales position. She was pregnant at the time of the purchase, and their daughter was born in March 2007. Complications during the pregnancy required hospital care that resulted in approximately \$7,000 in medical expenses. In May 2008, when Applicant began employment with his current company, his annual income increased to \$81,000. (GE 2; AE A; Tr. 29-35, 48)

In his 2011 security clearance application, Applicant noted that his financial situation was affected by the medical debts from his wife's pregnancy, his daughter's premature birth in 2007, and the resulting complications. It was also affected by his wife's unemployment for four years after the birth, although he testified that this was a family decision. He described difficulty in making mortgage payments:

When the housing market crashed, it was no longer feasible for us to continue struggling to make payments when the house had lost more than half of it's [sic] value. . ." (GE 1)

However, in his Answer to the SOR and at the hearing, Applicant stated he had no difficulty meeting his financial obligations. He stated in his Answer that his mortgage payments were "100% on time" and that the funds in his savings and 401(k) at the time would have covered approximately 18 months of mortgage payments. He noted, "This was not an issue of being incapable of satisfying debt or being overextended financially." (Answer; GE 1; Tr.35)

State A was particularly hard-hit during the economic downturn that began in 2008. The real estate crisis had a significant negative impact on the market value of Applicant's residence. At the time, Applicant and his wife were considering a move to

another state to be near family. Applicant testified, “. . . keeping the house would have made that tremendously difficult because I couldn't have sold it, and it wasn't financially viable to rent it.” Applicant testified he was in constant communication with the lender to request loan modifications. He applied for a modification program in 2009, but the lender denied the request because “. . . the amount realized by sale of your property following foreclosure exceeds the amount that would be obtained through a modification of your mortgage.” In fall 2009, the lender offered Applicant a forbearance plan agreement, but it would have increased his monthly mortgage payment by approximately \$250. Applicant declined. In December 2010, Applicant received a letter from the primary lender stating that he did not qualify for the Home Affordable Foreclosure Alternative (HAFA) program because “. . . this option is not available at this time.” (Answer; GE 2; AE B; Tr. 22, 35-39, 48, 51-52)

Applicant considered other options, including sale and rental. He decided not to sell the house because he would have lost approximately \$100,000. He did not try to rent it because the monthly rent would have been \$500 to \$700 less than his mortgage payment. In July 2010, he consulted an attorney. They discussed a short sale, but his attorney advised that, because of “. . . certain loopholes associated with short sales. . .” the lender might pursue the deficiency that resulted from a short sale. He also advised that other options might be available from the lender if Applicant stopped making his mortgage payments. Applicant also sought counsel from a tax advisor. Applicant also did “. . . extensive research on a site called youwalkaway.com that helps assists [sic] borrowers through the strategic default process.” The website “. . . describe[d] ‘Strategic Default’ as an alternative option for those who are drastically under water on their mortgages, at no fault of their own.” Both his tax advisor and his attorney advised him to “‘walk away’ and allow the house to foreclose (strategic default).”¹ In his Answer, Applicant stated, “All advice pointed to foreclosure as the best option, as opposed to a short sale or waiting for the housing market to come back, which could take decades.” Applicant made what he described as a “very difficult decision” to follow his attorney’s advice, and allow the loan to become delinquent and go to foreclosure. He stopped making his monthly mortgage payments of approximately \$2,100 after July 2010. Applicant believed that foreclosure was the best financial decision for his family. (GE 2; AE D, J; Tr. 35-41, 48-49)

The attorney advised Applicant to consider foreclosure because under State A law, the lender could not seek repayment of any deficiency balance following foreclosure.² The attorney helped to “. . . ensure that it would not be possible for the lender to attempt to collect the debt after the foreclosure. . .” (AE C, D; Answer; Tr. 31, 38-41, 44, 49)

¹ Strategic default is a financial strategy. It occurs when a borrower chooses to stop paying on a debt or obligation even though he or she has the financial means to make the agreed-upon payments.

² Applicant's attorney submitted a letter citing the State A statutes that would, in his opinion, “not permit a lawsuit against [Applicant] for any deficiency on the property. . .” noting that Applicant's property and loans met the requirements of the statute. (AE D)

Applicant and his family moved from the home in November 2010 and rented an apartment in State A. The home was foreclosed in December 2010. Applicant testified that he reported the foreclosure to his security officer when it occurred. The house sold in March 2011 for \$157,500. He moved to State B in November 2011, and his wife and child followed in February 2012. He has not made any further payments on the State A mortgage loans since the foreclosure. He testified he has no intention to pay the debts. He has not received an Internal Revenue Service (IRS) form 1099-C showing the balance on the loans was forgiven. (GE 2, 5; Answer; Tr. 37-41, 43-46)

The only delinquent debts in Applicant's 2011 and 2013 credit reports are the two mortgage loans listed in the SOR, which total \$300,000. In 2011, he and his wife earned a gross annual income of \$103,000, and he had a monthly net remainder (MNR) of \$2,700. Currently, he earns \$106,000 annually. His 2013 personal financial statement (PFS) shows \$5,506 in net monthly income; he described his spouse's income as "negligible." His expenses and debt payments totaled \$4,506, leaving a MNR of \$1,000. His only listed monthly debt payment was \$306 on an automobile loan. His retirement account, college fund, and savings total approximately \$130,000. He updated these figures in his October 2013 Answer to the SOR, and stated he was debt-free. He paid off the car loan. He pays his one credit card in full each month. His retirement account, college fund, and savings now total approximately \$150,000. (GE 2-4; Answer; AE E; Tr. 27, 48)

Applicant's rental managers since 2012 provided character references. Both noted that Applicant paid his rent timely, and has been responsible in his care of the property. His current manager described him as a responsible person with solid judgment. A colleague, who is a counterintelligence professional, has worked with Applicant daily for two years. He described Applicant as "very respectful of privacy, classified information, rules and restrictions." He considers him to be professional and trustworthy. Applicant's industrial security representative, who has known him for almost three years, described him as exceptionally focused and hard-working, as well as honest and trustworthy. (AE F-I)

Policies

Each security clearance decision must be a fair and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the AG.³ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the "whole-person" concept. The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed 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

³ Directive. 6.3.

information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline F (financial considerations).

A security clearance decision is intended only to resolve the question of whether it is clearly consistent with the national interest⁴ 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.⁵ 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 her or his 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.⁶

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. . .

Applicant purchased a home for \$300,000 in 2006, when real estate values were rising. He financed 100% of the purchase price. The record contains conflicting information about his finances at the time of foreclosure: in his 2011 security clearance application, he described himself as struggling to pay the mortgage, but in his 2013 Answer, he stated he was financially sound, had 18 months of cash reserves, and was fully capable of meeting his financial obligations.

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ See *Egan*, 484 U.S. at 528, 531.

⁶ See *Egan*; AG ¶ 2(b).

The real estate market crashed in 2008, and Applicant's home value dropped by about 50%. Applicant and his wife wished to move to another state, and keeping up the payments on the house in State A would have made it financially difficult to move. After researching his options and seeking legal advice, he decided in 2010 to pursue a strategic default: to stop making payments, even though he was capable of paying, and allow the loans to go to foreclosure. The loan was foreclosed in December 2010. The following disqualifying conditions under AG ¶19 apply:

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

The Financial Considerations guideline also contains factors that can mitigate security concerns. I have considered the mitigating factors under AG ¶ 20, especially the following:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;
- (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control; and
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant's financial issues are recent and ongoing, because substantial mortgage debts remain delinquent. He held a security clearance at the time he decided to default on his mortgage loans. His decision to leave a \$300,000 debt unpaid raises questions about his reliability and judgment. AG ¶ 20(a) does not apply.

Unexpected events affected Applicant's finances. He could not predict the difficulties with his wife's pregnancy, or his child's premature birth, and the resulting medical expenses. However, it appears that these unexpected expenses did not severely disrupt Applicant's finances. Moreover, Applicant and his wife decided that she would not work outside the home for four years, so it does not fall within AG ¶ 20(b). The most significant negative event was the 2008 real estate market crash.

Applicant could not have foreseen that his property would lose 50% of its value. For AG ¶ 20(b) to fully apply, an applicant must act responsibly in response to the unforeseen circumstances. Applicant did try to obtain modifications through his lender. He also consulted a tax professional and an attorney for advice. Applicant receives mitigation under AG ¶ 20(b). Applicant receives only partial mitigation under AG ¶ 20(c), because although he sought professional guidance, the \$300,000 is still unpaid, and he has no intent to pay it.

Applicant's ultimate decision to "walk away" from his debt does not demonstrate a good-faith effort to repay creditors. His attorney advised him that, under State A law, the lenders could not demand payment of a deficiency balance after sale of the property through foreclosure. Based on that advice, Applicant decided to proceed to foreclosure through a strategic default, *i.e.*, to stop making payments on his mortgage even though he had the funds to meet his obligation. The Appeal Board has held that, even if a delinquent debt is legally unenforceable under state law, the federal government is entitled to consider the facts and circumstances surrounding an applicant's conduct in failing to satisfy the debt.⁷ Under AG ¶ 20(d), "good faith" means acting in a way that shows, *inter alia*, an adherence to duty or obligation.⁸ Applicant's conscious and deliberate decision not to pay his legitimate financial obligations to his lenders does not demonstrate good faith. AG ¶ 20(d) does not apply.

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 all 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.

⁷ See e.g., ISCR Case No. 01-09691 at 3 (App. Bd. Mar. 27, 2003).

⁸ ISCR Case No. 99-0201, 1999 WL 1442346 at *4 (App. Bd. Oct. 12, 1999).

In assessing Applicant's request for security clearance eligibility under the whole-person concept, I considered the positive evidence: his education, his strong work performance, and—other than the foreclosure—his good financial record. Applicant was responsible in working with the lenders and seeking professional financial guidance.

However, Applicant provided contradictory statements about his financial situation during the market crash. In 2011, he described himself as struggling to make mortgage payments, but in 2013 he denied having problems and stated he had no problem with making the payments and had a large reserve of funds. The contradiction raises questions about his credibility.

As to his mortgage, Applicant chose to deliberately stop paying, despite being able to afford it, and he has no intention to pay the \$300,000 debt. The lenders' inability to pursue a deficiency balance under state law does not negate the security significance of Applicant's decision to ignore a legitimate debt for his own interests. He wished to avoid making payments on a property that was underwater. He wished to move his family to another state, which would be difficult to finance if he continued to pay the mortgage. He wished to move his family to another state, which would be difficult to finance if he continued to pay the mortgage. Security clearance holders are held to a high standard. Applicant has held a security clearance for more than five years, and was aware of such duties. He was required to consider other factors besides whether a strategic default would be financially beneficial. He had an obligation to pay his debts, even in hard times. He placed his own interests ahead of his duty to honor his financial obligations.

The evidence at this time fails to satisfy the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude he has not mitigated the security concerns raised by the cited adjudicative guideline.

Formal Findings

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| Paragraph 1, Guideline F | AGAINST APPLICANT |
| Subparagraphs 1.a – 1.b | Against Applicant |

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge