



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



In the matter of:)	
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Applicant for Security Clearance)	ISCR Case No. 12-03354

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: Thomas P. Hartnett, Esq.

08/18/2014

Decision

LYNCH, Noreen, A., Administrative Judge:

On March 27, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) alleging security concerns arising under Guideline F (Financial Considerations). The 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 (Directive); and the Adjudicative Guidelines (AG) implemented in September 2006.

Applicant timely answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on June 3, 2014. A notice of hearing was issued on June 9, 2014, scheduling the hearing for July 24, 2014. Government Exhibits (GX) 1-9 were admitted into evidence without objection. Applicant testified, and presented the testimony of two witnesses. He submitted Applicant Exhibits (AX) A-B, which were admitted into the record without objection. The transcript (Tr.) was received on August 4, 2014. Based on a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

In his answer to the SOR, Applicant admitted SOR allegations ¶¶1. a and 1.b, and denied the other allegations under Guideline F (Financial Considerations).

Applicant is a 44-year-old software engineer for a defense contractor who obtained his undergraduate degree in 1992 and his graduate degree in 1996. Applicant is married and has two children. Applicant has been with his employer since April 2012. (GX 1) However, he has worked in the information technology (IT) field for about 12 years. (Tr. 22) Applicant has held a security clearance since 2004 or 2005. (GX 2). He believes it became inactive in 2011. (Tr. 54)¹

The SOR alleges indebtedness for a number of investment properties that Applicant purchased from 2004 until 2007 that were foreclosed upon in 2009; a 2009 filing of a petition for a chapter 11 bankruptcy; and 12 state tax liens from 2010 until 2012 for a total of approximately \$5,300.

In 2005, Applicant was approached by a friend who is in the real estate field² to purchase homes in another state to rehabilitate and rent to tenants as an investment opportunity. (Tr. 28) The first home was purchased in 2005 for about \$40,000. Applicant obtained a mortgage for each home and took approximately \$10,000 at closing so that he could use the money to make the home habitable.³ Some of the homes were approved for FHA Section 8A housing, but the others were open market. He recalls that in 2005, he purchased about eleven homes.⁴ (Tr. 70) Applicant stated that the total number of properties purchased was about 25. (Tr. 38)

Applicant remained in his home state and did not have a property manager on site where the homes were located. However, he maintained that during the first few years, he would travel once or twice a month to view the properties. (Tr. 64) Applicant stated that theft and vandalism occurred and this created financial problems for him. Such items as copper, air conditioning units and miscellaneous things would disappear. (Tr. 30) The replacements became costly for Applicant, and he had difficulty paying for the business operating expenses. In spite of his difficulty in paying operating expenses, he continued to purchase homes. (Tr. 216) The homes were initially covered by insurance, but Applicant never made any claims. (Tr. 68)

In about 2008, with a faltering economy and escalating costs, Applicant decided he could no longer maintain the mortgages on the properties. He made a personal choice that he did not want his family impacted. He became delinquent with the

¹Applicant discussed a "suspension" but at the hearing stated the clearance was inactive.

²Later in the hearing when questioned, Applicant stated that his friend did not have any experience.

³At the time, Applicant earned about \$95,000 per year.

⁴Applicant's wife purchased some properties in her name, but she could not recall the number of properties.

mortgages on the investment properties. In 2009, foreclosures started and Applicant decided that he would file a chapter 13 bankruptcy. However, due to the large amount of secured debt from the these properties, he had to file a chapter 11 reorganization petition. The plan was filed on November 3, 2009 and confirmed on August 5, 2010. (GX 9) He was aware that financial issues could create a problem for his security clearance. (Tr. 34) Applicant claimed that he was advised by his attorney that everything connected with the properties would be resolved by the chapter 11 bankruptcy, including taxes. (Tr. 34)

The facts outlined in the chapter 11 filing present a somewhat different story. Applicant does not reference a friend who suggested the properties to him but rather that Applicant decided, after market research, to purchase homes in a particular state. He maintained that his goal was to purchase properties, refurbish them in the hope of leasing to lower income families. It notes that Applicant established several corporations which would regularly borrow against the equity and use funds to purchase other homes in that state. At the end of 2008, Applicant and his wife owned 11 houses. They were owned individually, as husband and wife, or with other investors. Other properties were owned by corporations whose principal was Applicant. It states that most of the properties were occupied by tenants leasing under the United States Department of Housing Section 8 program. Applicant conceded that a major problem with the investments arose because of the debtor's absentee ownership and management.

Applicant believes he and his wife or other family members owned 25 residential properties by 2009. In about 2008, Applicant decided to also develop a mixed use property (apartments) in his home state. He hired an architect and conducted preliminary environmental studies. (Tr. 39) Applicant applied for funding and was told by that the project would be funded. However, the project was not funded. The architect sued Applicant for \$100,000. This was included in the bankruptcy. (Tr.41 and 194)

During the same time frame, Applicant believed that he might be able to develop a tract of land in his home state. He sought money from private investors but deals failed to settle and a lawsuit commenced against Applicant for payment of professional fees in connection with the project. As a result of the lawsuit, Applicant elected to commence a proceeding under Chapter 11. Due to the combined nature of the parties' assets, his wife also elected to file under chapter 11.

Applicant's plan of reorganization under the bankruptcy requires that he pay a quarterly fee and an annual payment to the trustee who monitors the plan. (GX 9) This plan enables approved secured creditors to receive their money. The plan requires payment of \$60,000 over a five year period. As of the fourth quarter of 2013, only \$17,098 had been paid. (GX 9) Applicant is current with the payment plan. (AX B) The plan is projected to be discharged in August 2015. (GX 9)

Applicant denied that he has state tax liens. He claimed that there are no liens listed on his 2014 credit report. He contacted the state tax department concerning the tax liens and stated that he did not receive a response (Tr. 51) There is nothing in the record to indicate that the state tax liens have been resolved. There are 2012 tax bills for one of the out of state properties that do not reflect any payments, and they were mailed to Applicant's correct address. (GX 4) He claims that he has no information about the tax indebtedness and the taxing authorities did not file a proof of claim, and Applicant asserts, but provided no documentation supporting his assertion, that as a result they are barred as a matter of law from seeking payment.

Applicant is no longer involved in any business ventures. He believed he was helping people in a low income area, using Section 8 funds, to rent a rehabilitated home. He is proud of the work that he did. He could not recall how many homes were subsidized by the Government under Section 8A and how many were open market. (See GX 4) He believed that all properties from 2008 were open market. Applicant did not sell any of the homes.

Applicant's wife testified that she earns approximately \$147,00 per annum and that she invested in about seven properties between 2005 and 2009. (Tr. 93) The homes were 100% financed. (Tr. 102) She claimed that the tenants stole some of the equipment and appliances, contrary to what Applicant states. (Tr. 93) She blamed the Section 8A rental properties for the problems. She believes that she and Applicant need to pay about \$60,000 within five years to satisfy the requirements of the bankruptcy plan. Applicant's wife confirmed that she and her husband file quarterly reports and fees. (Tr. 95)

Applicant's neighbor testified that he has known Applicant since 2007- 2008. The witness explained that he and Applicant discussed the problems of rental properties. Applicant explained the issues of theft and how some renters abused the government subsidy homes by not taking care of the properties. (Tr. 116) He knows about Applicant's bankruptcy. He recommends Applicant for a security clearance. He believes he is a responsible and honest man.

Applicant's personal financial statement, dated March 2012, details that he owns other personal property in two other states. (GX 2 He listed a total monthly income of \$12,200, He has a net remainder of \$5,559. (GX 2) At the hearing, Applicant explained that he does not handle the household financial affairs.

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision.

Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” An 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.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”⁵ The burden of proof is something less than a preponderance of evidence.⁶ The ultimate burden of persuasion is on the applicant.⁷

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 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 as to the loyalty of the applicant concerned.”⁸ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁹ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.¹⁰ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is

⁵ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

⁶ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁷ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁸ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁹ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

¹⁰ *Id.*

merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

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. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

AG ¶ 19 describes conditions that could raise a security concern and may be disqualifying:

- (a) inability or unwillingness to satisfy debts;
- (b) indebtedness caused by frivolous or irresponsible spending and the absence of any evidence of willingness or intent to pay the debt or establish a realistic plan to pay the debt;
- (c) a history of not meeting financial obligations;
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust;
- (e) consistent spending beyond one's means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis;
- (f) financial problems that are linked to drug abuse, alcoholism, gambling problems, or other issues of security concern;
- (g) failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same;

(h) unexplained affluence, as shown by a lifestyle or standard of living, increase in net worth, or money transfers that cannot be explained by subject's known legal sources of income; and

(i) compulsive or addictive gambling as indicated by an unsuccessful attempt to stop gambling, "chasing losses" (i.e. increasing the bets or returning another day in an effort to get even), concealment of gambling losses, borrowing money to fund gambling or pay gambling debts, family conflict or other problems caused by gambling.

Applicant acquired delinquent debt on mortgages following the purchase of numerous investment properties. He filed a chapter 11 bankruptcy in 2009, which is due to be discharged in 2015. His admissions and his credit report confirm his debts. He also had state tax liens in the state where the properties were located. Consequently, the evidence is sufficient to raise disqualifying conditions in ¶¶ 19(a) and 19(c).

AG ¶ 20 provides conditions that could mitigate security concerns. The following are potentially 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;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant purchased investment properties from about 2005 until about 2007. He purchased almost eleven out of state investment properties in one year without having real estate experience, or having done market research. Applicant financed the properties and used about \$10,000 from each mortgage loan to rehabilitate the homes. He had no contingency plan in place if some of the properties were not fully rented or

excessive costs occurred to keep the properties in good shape. He continued to buy the homes and eventually about 25 properties were under his name. He made no down payments on any of the homes. At a time when he started having financial difficulties with the out of state homes, he decided to develop an in-state commercial enterprise. Applicant did not provide documentation that he no longer owes state tax liens. The faltering economy was a contributing factor and circumstance beyond his control. However, given the submitted information, I do not find that he acted responsibly under the circumstances. He filed for chapter 11 bankruptcy, which is a legal means of resolving debt, but I question his judgment and have doubts about his reliability. None of the mitigating conditions fully apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all 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) 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 be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case as well as the whole-person factors. Applicant is 44 years old. He is married and has two children. He has held a security clearance and has worked in the IT field for about twelve years. He is current on a chapter 11 bankruptcy payment plan, which is projected to be discharged in 2015. He has paid \$17,000 of the projected \$60,000 repayment. He asserted, but failed to document that he is no longer liable on the 12 tax liens entered against him.

Applicant was not knowledgeable in the real estate field. Yet he decided on a friend's suggestion to purchase not one but many houses in another state. He stopped payments when he could no longer afford the escalating costs. Yet, he decided to try a commercial venture in his own state. I do not find that he used good judgment. He was not responsible with the property management. The faltering economy exacerbated the financial situation, but he did not have a contingency plan. It appears that after being sued by the architect in the commercial venture, that he looked to bankruptcy as a

