



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



In the matter of:)	
)	
Redacted)	ISCR Case No. 12-09582
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: Michael M. Goldberg, Esq.

03/07/2017

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant trusted his ex-wife to pay the joint mortgage on their marital residence after he left the area. She defaulted without his knowledge in July 2013 because of her gambling problem and loss of income after an injury. After the lender initiated foreclosure in 2015, Applicant and his ex-wife refinanced their loan, which was current as of August 2016. He has set aside money to ensure that payments will continue. Clearance is granted.

Statement of the Case

On September 28, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline F, financial considerations, and explaining why it was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action under Executive Order (EO) 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 for Determining Eligibility for Access to Classified Information* (AG) effective within the DOD on September 1, 2006.

On October 14, 2015, Applicant answered the SOR allegations and requested a decision on the record without a hearing. On January 21, 2016, Applicant requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). Counsel for Applicant entered his appearance on February 22, 2016. On April 22, 2016, the case was assigned to a DOHA administrative judge to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On May 23, 2016, the case was transferred to me. On May 31, 2016, I scheduled a hearing for July 15, 2016.

I convened the hearing as scheduled. Seven Government exhibits (GEs 1-7) and 17 Applicant exhibits (AEs A-Q) were admitted into evidence without objection. Applicant and his ex-wife testified, as reflected in a transcript (Tr.) received on July 25, 2016. I held the record open until August 15, 2016, for Applicant to supplement the record. On August 4, 2016, Applicant submitted through his counsel AEs R, S, and T. On August 5, 2016, I gave Department Counsel a deadline of August 15, 2016, for any comments. The deadline passed without any objection from the Government. AEs R, S, and T were admitted into the record. The record closed on August 15, 2016, without any further evidentiary submissions.

Findings of Fact

The SOR alleges that, as of September 28, 2015, Applicant was past due \$20,908 on a mortgage loan that was in foreclosure status (SOR ¶ 1.a) and that he owed an unpaid tax lien of \$196 (SOR ¶ 1.b). In his *pro se* response to the SOR allegations, Applicant admitted the delinquent mortgage, which he attributed to his ex-wife's inability to make payments after surgery. He also admitted the tax lien and added that he would pay the debt. After considering the pleadings, exhibits, and transcript, I find that the tax lien in SOR ¶ 1.b was satisfied in December 1997. See AE M. Additional findings of fact are as follows.

Applicant is a 62-year-old high school graduate, who has held his current employment with a defense contractor since September 2012. (GE 6; Tr. 45.) He first worked for the company from 1975 to 1977 before he entered the U.S. military in March 1977. In September 1987, he was rehired by his employer. In October 1988, Applicant returned to active duty. After serving in Operation Desert Storm, he retired from the military in April 1998 and receives a net military pension of \$716 each month. (GEs 1, 6; AEs C, F, I, O, Q; Tr. 41-42.)

Applicant and his ex-wife married in July 1976. They had a son in January 1980 and a daughter in September 1986. (GEs 1, 5; Tr. 42-43.) In September 1994, Applicant and his ex-wife bought a home, obtaining a joint 15-year mortgage of \$49,470 (SOR ¶ 1.a). (GEs 2-4; AE J.) In September 1996, a tax lien was issued against them for \$196 (SOR ¶ 1.b), which was satisfied in December 1997. (GE 6; AE M.)

In August 2005, Applicant and his ex-wife separated in part over her gambling issues. (Tr. 49-50.) She had attended an in-house rehabilitation to address her gambling issues. (Tr. 90-91.) They jointly filed for divorce, citing irreconcilable differences. In October

2005, they entered into a property settlement giving her 50% of his military retirement starting January 1, 2006. They agreed to joint legal and physical custody of their daughter, who was then in college. Both Applicant and his ex-wife had the right to use, possess, and enjoy their marital home, with Applicant being responsible for the indebtedness on the house. They agreed to split any equity on the sale of the home. In December 2005, they were granted a divorce. In the divorce decree, Applicant's ex-wife was granted 50% of his disposable military retirement to cease only on her or Applicant's death and not on a change in her marital status. (AE O.)

Applicant was employed as a driver for a military retirement home from May 1998 until March 2006. He lost his job after a hurricane destroyed the home. (GE 1; Tr. 44.) He was unemployed for a year before working part-time in construction and then as a groundskeeper. From October 2007 to March 2008, he worked as a limousine driver. In March 2008, he found full-time employment as an assistant safety officer, but he was fired after one week because he had misrepresented his job skills on his resume and did not meet the qualifications for the position. In April 2008, he relocated to his present area to care for his elderly mother and look for employment. His ex-wife indicated that she would make the mortgage and real estate tax payments on their marital home from her income as a nurse. (GEs 1, 5, 6; Tr. 34, 81.) Unbeknownst to Applicant, she had resumed gambling activities. (Tr. 82, 92.) She fell behind on the mortgage payments, but no more than three months and managed to catch up. (AE Q; Tr. 94.)

Applicant was unemployed in his new area from April 2008 to September 2008 while caring for his mother. He worked for a tree service from September 2008 to March 2009, when he was laid off. He held part-time work as a driver or was otherwise unemployed until September 2012, when he was rehired by his current employer. (GE 1.)

Sometime before 2012, Applicant's ex-wife had vacated the marital home. She and Applicant agreed to subsidize their daughter's living expenses by allowing their daughter to live in the home while she pursued further education. (AE Q; Tr. 35, 80.) On occasion, their daughter paid Applicant's ex-wife something toward the mortgage. (Tr. 82.)

For his defense contractor employment, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86) on May 15, 2012. He disclosed no financial issues. (GE 1.) A check of Applicant's credit on May 22, 2012, revealed that the joint mortgage on his marital home was \$1,693 past due with a balance of \$17,873. Apart from a \$99 collection debt from July 2011 for wireless phone service and the old tax lien of "unknown" disposition, Applicant had no other adverse credit information on his record. He was making timely payments on a motorcycle loan obtained in June 2009 and on a credit card with a \$4,193 balance. (GE 4.)

Applicant was interviewed in June 2012 by an authorized investigator for the Office of Personnel Management (OPM). Applicant attributed his divorce to his ex-wife's severe gambling problem and him being away from home for extensive periods when he was in the military. Applicant denied any in-person contact with his ex-wife since 2009, but he indicated that they were in contact monthly by telephone. Concerning any financial issues,

Applicant volunteered that he owed a collection debt for disputed over-usage charges, but he would pay it by August 2012. Equifax reports that the wireless phone debt was paid on June 20, 2012. (GE 3.) When confronted about the mortgage delinquency on his credit record, Applicant indicated that his ex-wife is responsible for paying the loan. He denied knowing when or why the account became delinquent, but he indicated that his daughter had informed him in June 2012 that she had received correspondence indicating that his ex-wife was not making the mortgage payments. Applicant expressed his intention to take over the mortgage from his ex-wife to ensure that it is paid on time each month. (GE 5.)

Applicant started his current job in September 2012 at \$18 an hour. (Tr. 45-46.) In April 2013, Applicant's ex-wife incurred an injury that left her unable to work. Her employer did not have short-term disability insurance. She took seven weeks of sick leave and returned to work 16 hours a week in September 2013. She was living with her boyfriend. (Tr. 100.) In December 2013, she increased her work hours to 24 hours a week, but she made no mortgage payments after August 2013. (GE 3; AE Q; Tr. 83.) She fell too far behind that the mortgage lender would no longer accept payments. (Tr. 94-95.) Applicant's ex-wife stayed in contact with Applicant after September 2013, but she did not let on to him that she was seriously behind on the mortgage. She was ashamed because she had resumed excessive gambling. (AE Q; Tr. 36, 84.) She tried to obtain a loan modification on her own in 2014. (Tr. 95-96.)

Applicant's spouse continued to work part time on and off until April 2015, when she had surgery. She has been working full time since September 8, 2015. (AE Q; Tr. 83.) By that time, the mortgage was over \$20,908 past due on a principal balance of \$13,129. (GE 3.) After the lender initiated foreclosure proceedings in 2015, she informed Applicant about the delinquency. (AE Q; Tr. 36, 51, 86.) Through the Department of Veterans Affairs (VA), Applicant contacted their mortgage servicer about refinancing. (Tr. 36.) Applicant does not now recall whether he learned about the mortgage default before he received the SOR. (Tr. 52.) Correspondence from the mortgage servicer of December 2015 references their hardship application and financial form being over 180 days old (AE 6.) Either Applicant knew about the mortgage default before June 2015 or the loan servicer was referencing documents Applicant's ex-wife submitted on her own. The evidence is inconclusive.

Applicant's ex-wife testified that the lender was initially scheduled to foreclose in September 2015. (Tr. 97.) Documentation shows that in December 2015, the mortgage lender notified Applicant and his ex-wife by letter to the marital home address that it intended to conduct a foreclosure sale in mid-January 2016. (GE 6.) Their home loan was \$33,196 past due. (GE 7.) The foreclosure sale was suspended in January 2016 pending modification of their home loan. (AE L.)

In February 2016, Applicant and his ex-wife signed a home loan modification agreement for \$26,864 payable monthly from March 1, 2016, through April 1, 2042. The mortgage servicer modified the loan in April 2016. Their initial monthly payment under the loan was \$505. (AE J.) Transaction records for the loan show that their old loan was paid off on April 11, 2016. Two payments of \$505 that were received on May 28, 2016, were

applied to their payments due for May and June 2016.¹ (AEs K, L.) Effective July 1, 2016, their monthly payment obligation became \$497. On July 12, 2016, they made a payment of \$332. (AE S.) In late July 2016, they made a payment of \$505 for August 2016. (AE T.) Applicant's ex-wife and their daughter contribute \$170 each toward the mortgage each month and he makes the mortgage payment to ensure that it is paid. (Tr. 37.) Applicant has set aside some of his military retirement income so that he can cover the full mortgage payment should his ex-wife or daughter fail to pay her share. (Tr. 38.) Applicant also arranged to have the monthly billing statements for the mortgage to be mailed to his address, which was effective in July 2016. (AE S; Tr. 39.) Applicant's ex-wife has agreed to sign over her share of the house so that Applicant and his daughter will become co-owners. Applicant intends to eventually put the home in his daughter's and her spouse's names. (Tr. 39-40.) Applicant's daughter and her husband work as bartenders at a casino in their area. (Tr. 55.)

Applicant has rented his present housing since mid-October 2013. His initial rent was \$850 per month. (AE P.) It is now \$865 per month. (AE N.) His current hourly wage with the defense contractor is \$25.47 (Tr. 45), and he nets \$716 per month from his military retirement. Applicant's current budget shows that his monthly income exceeds his expenses by \$971 per month, although he did not include his charitable contributions, which total approximately \$150 a month. (AE N; Tr. 65, 73.) Applicant's adjusted gross income was \$50,395 for 2013 (AE A), \$56,073 for 2014 (AE D), and \$65,261 for 2015. (AE G.)

Applicant's ex-wife has not gambled since December 31, 2015. She started attending self-help meetings on a daily basis. She now attends one or two meetings a week to address her gambling problem. She has a sponsor, whom she contacts three or four times a week. (Tr. 89-94.)

Character and Work References

During his first six months on the job, Applicant failed to meet his employer's expectations in staying focused and working independently, but he otherwise met expectations. By the end of his first year, he had improved in those aspects but fallen short with respect to the quality and proficiency of his work while continuing to be a cooperative employee. Applicant continued to improve his performance, and he either met or exceeded expectations when rated in April 2014. He was beginning to feel more confident in fulfilling his job duties. Particularly noted for his attention to safety, Applicant's manager noted that Applicant "probably saved not only the team, but the department from possible injuries." Applicant continued to meet his employer's expectations in 2015. (AE S.)

Family members attest to Applicant's loyalty to country and family. Applicant expressed to his son a sense of duty and honor at having served his country. Applicant has always been supportive of his son and other family members, including his mother, who is in a nursing home. The financial challenges Applicant has had are attributed to him giving

¹ Applicant's ex-wife testified that they made timely payments, but there was a glitch in the loan servicer's system that did not accurately record the payments. (Tr. 103.)

priority to others' needs, such as providing a home for his daughter and her husband. (AE Q.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 are required to 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 overall 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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Section 7 of EO 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." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concerns about financial considerations are set forth in AG ¶ 18:

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.

Applicant's and his ex-wife's mortgage on their marital home was past due for \$20,908 as of May 2015 due to no payments after August 2013. While the evidence shows that the mortgage delinquency was largely incurred by Applicant's ex-wife without his knowledge, Applicant was contractually liable to the creditor on the loan. Disqualifying conditions AG ¶ 19(a), "inability or unwillingness to satisfy debts," and AG ¶ 19(c), "a history of not meeting financial obligations," apply because of the mortgage delinquency. The SOR also alleges a \$196 tax lien from September 1996, which was still on Applicant's credit record as of May 2012. The Appeal Board has indicated that adverse information from a credit report can normally meet the substantial evidence standard for the Government's burden of alleging delinquent debt. See ISCR Case No. 14-03612 at 3 (App. Bd. Aug. 25, 2015). However, the tax lien was satisfied in December 1997. That debt was resolved well before the SOR was issued in 2015 and does not raise current security concern.

Financial delinquency may be mitigated under AG ¶ 20 by one or more of the following conditions:

- (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 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.

AG ¶ 20(a) applies in that the mortgage delinquency was aberrational and occurred under such circumstances that it is unlikely to recur. Applicant was held responsible for the debt on the marital home after his divorce. When he moved to his present locale to care for his mother and look for a job in 2008, he and his ex-wife agreed that she would make the mortgage payments. She was living in the home at the time, and her income as a nurse was enough to cover the monthly payment. In hindsight, Applicant exercised questionable judgment in trusting his ex-wife to handle the mortgage payments, given her gambling issues during their marriage. Even so, there is no evidence showing that his ex-wife was actively gambling when she agreed to pay the mortgage, and he has taken steps to preclude a recurrence by taking on the payments on their modified loan.

AG ¶ 20(b) is implicated in some aspects. In March 2006, Applicant was laid off from his longtime employment as a driver for a veterans' home after a hurricane destroyed the facility. His inability to find stable, full-time work led him to relocate to his home state and to turn over payment of the mortgage to his ex-wife. The delinquency was incurred by his ex-wife. Even if Applicant's financial problem arose in whole or in part to circumstances outside of his control, I must still consider whether Applicant has since acted in a reasonable manner when dealing with the financial issue. See e.g., ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan 12, 2007). During his June 2012 interview with the OPM investigator, Applicant indicated that his daughter had recently informed him that she had received a letter about the mortgage being past due. Applicant explained that his ex-wife was responsible for repayment and that her gambling was a likely cause of the delinquency. There is no evidence that Applicant took any steps at that time to ensure that the loan was not only brought current but stayed current. His ex-wife may not have told him before 2015 that she had ceased making payments in 2013, but he knew that she had fallen behind in 2012. Applicant had a legal responsibility to his creditor, and he did not act fully responsibly.

Applicant has a stronger case for mitigation under AG ¶ 20(c) and AG ¶ 20(d) in that he and his ex-wife obtained a loan modification in 2016. Recurrence of delinquency is unlikely because Applicant has taken responsibility for repayment of the modified loan. As of July 2016, billing statements for the modified mortgage were being sent to Applicant's address. While Applicant does not have a long track record of payments, he has adequate income to cover the mortgage payment without falling behind on his other obligations, even if his ex-wife or his daughter do not contribute their monthly share of the mortgage. Applicant does not have a record of overreliance on consumer credit that could compromise his financial situation going forward. The financial considerations security concerns are adequately mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(a).² The analysis under Guideline F is incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

A determination of eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern. Applicant is a military retiree, who has worked for his present employer most recently since September 2012. His work performance has been at an acceptable level. There is no evidence of excessive spending on his part. The mortgage of concern had a principal balance of only \$13,129 when it went into default. He is now paying for the misplaced trust in his ex-wife by having to pay on a mortgage with a principal balance of \$26,864. He testified credibly that he intends to continue to make the monthly payments because he wants to turn over the house to his daughter and her husband. For the reasons noted above, I find that it is clearly consistent with the national interest to grant Applicant security clearance eligibility.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant

² The factors under AG ¶ 2(a) are as follows:

(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.

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 eligibility for a security clearance. Eligibility for access to classified information is granted.

Elizabeth M. Matchinski
Administrative Judge