



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



In the matter of:

[NAME REDACTED]

Applicant for Security Clearance

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ISCR Case No. 15-06266

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: *Pro se*

04/11/2017

Decision

MALONE, Matthew E., Administrative Judge:

Applicant's financial problems arose from circumstances beyond his control and he has acted responsibly in addressing them. Applicant's request for a security clearance is granted.

Statement of the Case

On April 30, 2014, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain or renew a security clearance required for his employment with a defense contractor. Based on the results of the ensuing background investigation, Department of Defense (DOD) adjudicators could not determine that it is clearly consistent with the national interest for Applicant to have a security clearance.¹

¹ Required by Executive Order 10865, as amended, and by DOD Directive 5220.6 (Directive), as amended.

On February 24, 2016, DOD issued a Statement of Reasons (SOR) alleging facts that raise security concerns addressed under the adjudicative guideline² for financial considerations (Guideline F). Applicant timely responded to the SOR (Answer) and requested a hearing.

I received this case on September 26, 2016, and convened the requested hearing on November 15, 2016. The parties appeared as scheduled. Department Counsel presented Government Exhibits (Gx.) 1 - 4.³ Applicant testified in his own behalf and submitted Applicant's Exhibits (Ax.) A - F. I also left the record open after the hearing to receive additional relevant information from Applicant. The record closed on December 1, 2016, when I received Applicant's timely post-hearing submission, which is included in the record as Ax. G – W.⁴ All exhibits were admitted without objection. DOHA received a transcript of the hearing (Tr.) on November 22, 2016.

Findings of Fact

Under Guideline F, the Government alleged that Applicant owed \$88,600 to Creditor A for a debt that was charged off as a business loss (SOR 1.a); and that he owes \$27,141 to Creditor B for a debt that was charged off as a business loss (SOR 1.b). In response to the SOR, Applicant denied, with explanations, both allegations. In addition to the facts established by the pleadings, I make the following additional findings of fact.

Applicant is 36 years old. He has a bachelor's degree in computer engineering and he has worked for his current employer in an information technology (IT) position since March 2011. He held a similar position for a previous employer between June 2000 and February 2011. Applicant has held a security clearance since 2005. (Gx. 1)

In late 2012, Applicant agreed to accept a new job with his current employer at a remote site outside the United States. He and his family moved there in March 2013. Applicant returned to the United States in May 2015. He and his wife were married from April 2011 until divorcing in May 2015. Applicant has two children, ages 10 and 4, for whom he pays about \$515 in monthly child support. (Gx. 1; Gx. 2; Tr. 31, 48 – 49)

In 2007, Applicant bought a house for \$130,000. He financed the purchase through a first mortgage for 80 percent of the cost and a second mortgage for the remaining 20 percent. The same lender held both notes. As alleged in SOR 1.a (first mortgage) and 1.b (second mortgage), Applicant eventually defaulted on both loans. Before Applicant actually moved in 2013, he knew his house had lost value because of the national housing crisis, and that it was worth only about \$80,000 in late 2012. In November 2012, Applicant

² The Department of Defense implemented the adjudicative guidelines on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

³ A copy of Department Counsel's letter forwarding Gx. 1- 4 to Applicant in advance of hearing is included as Hearing Exhibit (Hx.) 1.

⁴ Emails identifying Ax. G – W and waiving the Government's objections to their admissibility are included in the record as Hx. 2.

retained a real estate agent and submitted a hardship letter to the lender seeking approval to convey the house through a short sale. Applicant was approved because he qualified under the Federal National Mortgage Association's (Fannie Mae's) Home Affordable Foreclosures Alternative (HAFA) program.⁵ (Answer; Gx. 1 - 4; Ax. M – W; Tr. 32 – 32)

Applicant put his house on the market in January 2013. Applicant received a contract for a short sale dated April 9, 2013. The price of the house was \$80,000. That contract fell through because of the delay in processing that resulted from the change of lenders on the first mortgage. A second contract for sale, dated April 23, 2013, for the same price, also fell through.⁶ Applicant continued to pay his mortgages until about August 2013. In October 2013, Applicant learned that the original lender had sold the first mortgage to the lender referenced in SOR 1.a. This meant Applicant had to re-apply for permission to seek a short sale of the house. The new lender for the first mortgage then demanded, in exchange for resolving the mortgage through a short sale, that Applicant also pay the difference between any sale price and the remaining balance on the mortgage. This effectively defeated the purpose of short sale as an option. Applicant was unable to meet those terms and then tried to negotiate a deed in lieu of foreclosure conveyance. That effort also failed and the mortgage went into foreclosure. On April 3, 2014, the new lender conveyed the property to Fannie Mae for \$94,704. Credit reports show the remaining balance on the first mortgage was, at most, about \$96,985. Applicant averred he has not been contacted by the creditor regarding collection of any remaining balance on the first mortgage. All available information shows that Applicant no longer owes the SOR 1.a debt. (Answer; Gx. 1; Gx. 2; Ax. H; Ax. J – M; Tr. 32 – 35, 45 – 46)

The original creditor retained the second mortgage alleged in SOR 1.b. That creditor forgave the debt in August 2015 and issued an IRS Form 1099-C (Cancellation of Debt) reflecting that a debt of \$26,684 was forgiven. It is possible that all or part of the forgiven debt was attributed to Applicant as income for the 2015 tax year. This record does not show that Applicant owes any tax debt because of the forgiven second mortgage. (Answer; Gx. 1; Gx. 2; Ax. A; Ax. C; Ax. G; Tr. 27)

Applicant disclosed the debts alleged in SOR 1.a and 1.b when he submitted his e-QIP in April 2014. By that time, he had been working with a real estate agent for at least 16 months to resolve his mortgage debts. Emails and other records he produced show he had close and continuing contact with his creditors as he tried to execute, first a short sale, then a deed in lieu of foreclosure through a federal mortgage relief program. Applicant worked through all of this while working at a remote work site abroad. (Gx. 1; Ax. I; Ax. M – W)

Applicant is meeting all of his current obligations. After his divorce, he was ordered to pay child support and has done so as required. After paying this and his other monthly expenses, Applicant has about \$700 remaining. He currently has no new delinquent or past-due debts. His credit history, as reflected in multiple credit reports submitted by both

⁵ https://www.hmpadmin.com/portal/programs/foreclosure_alternatives.jsp.

⁶ Both offers included letters indicating the purchasers had qualified for the necessary financing.

parties, shows the debts at SOR 1.a and 1.b constitute the only adverse financial information in his background. (Gx. 3; Gx. 4; Ax. A; Ax. C – E; Tr. 30 – 31)

Applicant has an excellent reputation in the workplace. His performance evaluations since 2011 reflect superior marks for his work. His supervisor of five years holds Applicant in high regard for his reliability, integrity, and professionalism. He feels Applicant also is a good father and that he is respected in both the workplace and the community. (Ax. B; Ax. F)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁷ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the guidelines. Commonly referred to as the “whole-person” concept, those factors are:

(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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interests⁸ 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.⁹ A person who has access to classified information enters into a fiduciary relationship with

⁷ See Directive. 6.3.

⁸ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁹ See *Egan*, 484 U.S. at 528, 531.

the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government.¹⁰

Analysis

Financial Considerations

The Government presented sufficient information to support the SOR allegations under this guideline. The facts thus established reasonably raise a security concern about Applicant’s finances that is addressed, in relevant part, at AG ¶ 18, as follows:

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. 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.

More specifically, the record as a whole requires application of the disqualifying conditions at AG ¶¶ 19(a) (*inability or unwillingness to satisfy debts*); and 19(c) (*a history of not meeting financial obligations*). Applicant lost his house to foreclosure in April 2014. He also defaulted on a second mortgage for the same house. At the time of the SOR, the debts at SOR 1.a and 1.b were still being reported as delinquent.

I have also considered the following pertinent AG ¶ 20 mitigating 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; and

¹⁰ See *Egan*; AG ¶ 2(b).

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

Applicant established that he incurred the SOR 1.a and 1.b debts because his house had lost almost 40 percent of its value during the housing market crisis. Applicant accepted a transfer to a remote site and had to sell his home. At that time, he knew the value of his home was far less than the amount remaining on his mortgages. Applicant acted reasonably by retaining a real estate agent and qualified under a federal program to help homeowners avoid foreclosure. He made those arrangements in November 2012, two months before he put his house up for sale. Two qualified offers to buy the house fell through because the lender took too long to accept the terms of sale. Further, the creditor to whom the first mortgage was transferred effectively obstructed Applicant's efforts. Otherwise, it is reasonable to conclude, his mortgage may not have gone to foreclosure.

Applicant's acceptance of a job transfer was within his control. The loss of his home's value was beyond his control, and the inaction and unresponsiveness of the lenders involved was not reasonably foreseeable. Available information shows Applicant did not seek to avoid responsibility for his mortgage obligations and that he acted responsibly under the circumstances starting well over a year before he submitted his e-QIP. AG ¶¶ 20(a) and 20(b) apply.

The debts alleged in the SOR are no longer due. Fannie Mae paid almost full value for the house during foreclosure. No creditor has taken action against Applicant to collect any remaining balance. The first mortgage has a zero balance according to the most recent credit reports. The original creditor has forgiven the second mortgage. Applicant's only remaining obligation for the second mortgage may have been to report the amount forgiven on his 2015 income taxes. There is no indication in this record that he failed to comply with his income tax obligations in this regard. Applicant's finances are otherwise sound. The debts alleged in the SOR constitute the only adverse financial information in Applicant's background, and he is meeting all of his current financial obligations. AG ¶ 20(c) applies, and on balance, Applicant has mitigated the security concerns presented in the SOR.

I also have evaluated this record in the context of the whole-person factors listed in AG ¶ 2(a). Applicant has held a security clearance since 2005. He has an excellent record in the workplace and his supervisor holds him in high regard. He was candid and forthright about his debts, which he had been trying to resolve since about November 2012. Applicant did not incur his debts through misconduct or poor judgment, and he did not try to shirk responsibility for them. A fair and commonsense assessment of the record evidence as a whole shows that Applicant's financial problems are not reflective of poor judgment or a lack of trustworthiness. The security concerns raised by the Government's information are mitigated.

Formal Findings

Formal findings 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

Subparagraphs 1.a – 1.b: For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest for Applicant to have access to classified information. Applicant's request for a security clearance is granted.

MATTHEW E. MALONE
Administrative Judge