



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



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| In the matter of: |) | |
| |) | |
| (Redacted) |) | ISCR Case No. 15-08522 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

07/26/2017

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant and his ex-wife intentionally defaulted on a mortgage loan so the mortgage lender would foreclose on their marital home. He did not disclose the delinquency on his September 2015 security clearance application. While he denies any intentional concealment, he presented little evidence to rebut the reasonable inference of deliberate falsification. Clearance is denied.

Statement of the Case

On June 10, 2016, 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 Guideline E, personal conduct, 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 June 22, 2016, Applicant answered the SOR allegations and requested a decision on the written record. On August 30, 2016, the Government submitted a File of Relevant Material (FORM), consisting of four exhibits (Items 1 through 4). On August 31, 2016, the Defense Office of Hearings and Appeals (DOHA) forwarded a copy of the FORM to Applicant and instructed him to respond within 30 days of receipt. Applicant received the FORM on September 6, 2016. He submitted no response by the October 6, 2016 deadline. On June 1, 2017, I was assigned the case to determine whether it is clearly consistent with national security to grant or continue a security clearance for Applicant.

While this case was pending a decision, Security Executive Agent Directive 4 was issued establishing the National Security Adjudicative Guidelines (AG) applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The AG supersede the adjudicative guidelines implemented in September 2006 and are effective for any adjudication made on or after June 8, 2017. Accordingly, I have adjudicated Applicant's security clearance eligibility under the new AG.¹

Findings of Fact

The SOR alleges under Guideline F that, as of June 10, 2016, Applicant was \$17,735 past due on a mortgage loan in foreclosure proceedings (SOR ¶ 1.a). Under Guideline E, Applicant is alleged to have deliberately falsified a September 18, 2015 security clearance application (SF 86) in that he failed to disclose the delinquent mortgage (SOR ¶ 2.b). (Item 1.) When he responded to the SOR, Applicant admitted that he and his ex-wife decided on a "strategic default" of their mortgage loan because their home was worth less than the balance of their mortgage. However, he indicated that he was not liable for any mortgage deficiency because his state is "a non-recourse mortgage state." Applicant denied that he intentionally falsified his SF 86. (Item 2.)

Applicant's admission to the mortgage default is incorporated as a finding of fact. After considering the pleadings and evidence in the FORM, including Applicant's response (Item 2), I make the following findings of fact.

Applicant is a 33-year-old college graduate with an associate's degree from a community college in December 2008 and two bachelor's degrees awarded in December 2012 and in February 2014. He has been employed as a manufacturing engineer with a defense contractor since June 2004 and holds a secret clearance. (Item 3.)

Applicant was married from May 2004 to February 2014. He and his ex-wife had no children together. As of September 2015, Applicant was in a cohabitant relationship. (Item 3.)

¹ Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case.

During their marriage, Applicant and his ex-wife purchased a home in June 2007. They obtained a \$219,154 FHA mortgage loan on which they made timely monthly payments of \$1,603 through January 2013 when Applicant and his ex-wife decided to stop paying on their home loan. According to Applicant, the property was worth less than what they owed on their mortgage loan. Marital discord may well have been a factor, as in March 2013 Applicant moved into an apartment. As of October 2013, the mortgage loan was \$17,735 past due on a balance of \$215,013 and in foreclosure proceedings. (Items 2-4.)

On September 18, 2015, Applicant certified to the accuracy of a Questionnaire for National Security Positions (SF 86) to renew his security clearance eligibility. He responded negatively to all the financial record inquiries, including those concerning whether he had any possessions or property voluntarily or involuntarily repossessed or foreclosed in the past seven years; whether he had defaulted on any type of loan in the past seven years; and whether he had been over 120 days delinquent in the past seven years on any debt not previously listed. (Item 3.) Applicant claims that he accidentally answered “no” and did not intend to withhold or falsify information, asserting that “it was the result of misunderstanding or error.” (Item 2.)

As of October 8, 2015, Applicant had only one delinquent account on his credit record: the mortgage debt in foreclosure. (Item 3.) As of April 20, 2016, Applicant was making timely payments on \$9,355 in outstanding credit card debt, and on federal student loan debts of \$14,856 and \$15,690 at \$85 and \$90 a month. The foreclosed mortgage loan was listed as \$17,735 past due as of October 2013, so there had been no update about the loan. (Item 4.)

Applicant related without corroboration that the property has been resold and that he owes no deficiency balance on the loan because his state is a “non-recourse mortgage state.” (Item 2.) As of October 2013, the credit bureaus were reporting that the credit grantor “reclaimed” the collateral. (Item 3.) The FORM contains no evidence that Applicant is being pursued for a deficiency balance after the foreclosure.

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(a), 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 national security eligibility will be resolved in favor of the 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 articulated in AG ¶ 18:

Failure 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds. Affluence that cannot be explained by known sources of income is also a security concern insofar as it may result from criminal activity, including espionage.

The Government met its burden of establishing a *prima facie* case for disqualification because Applicant intentionally defaulted on his mortgage loan in 2013. AG ¶ 19(b), “unwillingness to satisfy debts regardless of the ability to do so,” is implicated.

Mitigating condition AG ¶ 20(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,” applies in that Applicant’s handling of the mortgage loan is an isolated instance of delinquency and not characteristic of Applicant’s handling of his personal financial affairs. According to Applicant, he and his ex-wife made a “strategic default” because the value of the home was “vastly lower than the mortgage balance.” A devaluation due to local real estate market conditions would be a circumstance outside of his control under AG ¶ 20(b), which provides:

(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, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances.

Applicant presented no market valuation or other evidence to substantiate his assertion. His move to an apartment in March 2013 and divorce in February 2014 suggest that the breakup of his marriage may well have been a factor in his and his ex-wife’s decision to walk away from the house. Whatever the reason for Applicant’s and his spouse’s loan default, there is no evidence that Applicant contacted his lender about a possible modification of the home loan or a short sale or that he took another responsible action to address the mortgage. AG ¶ 20(b) has limited applicability.

Neither AG ¶ 20(c), “the person has received or is receiving counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control,” nor AG ¶ 20(d), “the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts,” is satisfied. There is no evidence that Applicant is being pursued for a deficiency balance on the mortgage. Applicant maintains that he cannot be held legally liable under state law for the remaining balance on his loan.

After reviewing the pertinent state’s statutes, it does appear that the state has a non-recourse purchase money anti-deficiency statute designed to protect certain borrowers against deficiency judgments arising from purchase money mortgage and purchase money deeds of trust that have been judicially foreclosed. Section 33-729(A) provides as follows:

Except as provided in subsections B and C of this section, if a mortgage is given to secure the payment of the balance of the purchase price, of a parcel of real property of two and one-half acres of land or less which is limited to and utilized for either a single one-family or single two-family dwelling, the line of judgment in an action to foreclose such mortgage shall not extend to

any other property of the judgment debtor, nor may general executive be issued against the judgment debtor to enforce such judgment, and if the proceeds of the mortgaged real property sold under special execution are insufficient to satisfy the judgment, the judgment may not otherwise be satisfied out of other property of the judgment debtor, notwithstanding any agreement to the contrary.

Apparently, where the mortgagee elects to proceed by foreclosure of a purchase money mortgage, the debt may be satisfied only from the proceeds of the sale of the mortgaged property unless the mortgagee has committed waste.² Applicant understands that the foreclosed property has been sold. While Applicant's delinquent mortgage loan may have been resolved by the foreclosure and sale, AG ¶ 20(c) does not address the security concerns raised by Applicant's deliberate disregard of this contractual obligation.

Strictly from a financial standpoint, Applicant does not appear to be in any financial stress presently. He is paying his consumer credit obligations on time. Nevertheless, he exercised poor financial judgment regarding the mortgage, and it is not enough in reform to indicate that he "will begin looking into the process of getting the mortgage account sufficiently closed." See Item 2.

Guideline E: Personal Conduct

The concerns for personal conduct are articulated in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The undisputed evidence is that Applicant certified to the accuracy of a September 2015 SF 86 on which he responded negatively to all the financial record inquiries, including whether he had any possessions or property voluntarily or involuntarily repossessed or foreclosed in the past seven years; whether he had defaulted on any type of loan in the past seven years; and whether he had been over 120 days delinquent in the past seven years on any debt not previously listed. As his credit record shows, Applicant and his ex-wife defaulted on their mortgage loan in 2013. Their account was \$17,735 past due when their lender foreclosed on the property. In ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010), the Appeal Board explained:

² See Ariz. Rev. Stat. §§ 33-729(A) and 33-729(B). The state provides for execution of a judgment lien against other property of the debtor if the sale price was less than the amount of the judgment in a case of diminution in the value of the real property because of voluntary waste committed or permitted by the judgment debtor.

It is well-settled that adverse information from a credit report can normally meet the substantial evidence standard and the government's obligations under [Directive] ¶ E3.1.14 for pertinent allegations. At that point, the burden shifts to applicant to establish either that [he or] she is not responsible for the debt or that matters in mitigation apply.

A reasonable inference of deliberate falsification could be inferred based on this evidence of delinquency. Applicant denies any intention to deceive, claiming that he answered "no" accidentally as "the result of misunderstanding or error." AG ¶ 16(a) is not established when omissions are due to misunderstanding, inadvertent mistake, or other cause that could negate the willful intent. That disqualifying condition provides:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

The DOHA Appeal Board has explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

The information omitted concerns a delinquent home loan that went to foreclosure well within the seven-year scope of the financial record inquiries. Applicant and his ex-wife intentionally defaulted on their payments because the home was worth less than the balance of the mortgage. Appellant clearly knew about the delinquency. He did not explain the nature of his claimed misunderstanding or error in completing the SF 86. The SF 86 financial questions are straightforward. A college graduate, Applicant can reasonably be held to have understood that he had to list the debt. He did not offer a persuasive explanation to overcome the reasonable inference of falsification. AG ¶ 16(a) applies.

Application of the aforesaid disqualifying condition triggers consideration of the potentially mitigating conditions under AG ¶ 17. Concerning AG ¶ 17(a), "the individual

made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts,” there is no evidence that Applicant made any effort to notify the DOD about the defaulted mortgage before the credit report of October 8, 2015, was obtained by the OPM. (Item 3.)

Moreover, Applicant’s deliberate falsification may have been infrequent under AG ¶ 17(c), but it continues to reflect adversely on his judgment. AG ¶ 17(c) provides:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.

Applicant certified to the accuracy of his SF 86 statements after being informed in writing that a knowing and willful false statement could be punished by a fine or imprisonment or both under Title 18, Section 1001 of the United States Code. His false responses to the financial record inquiries concerning delinquency on routine accounts constituted criminal conduct that raises serious concerns about his judgment and trustworthiness.

Finally, Applicant does not show adequate reform by discrepantly claiming that his negative response to the SF 86 inquiries concerning routine delinquencies was due to misunderstanding, which implies that, for some reason, he thought the questions did not apply to him, or that his negative response was due to inadvertent error, which suggests that he intended to respond yes and made an innocent mistake. AG ¶ 17(d) was not shown to apply. It provides:

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

The government must be able to rely on the representations of those persons with security clearance eligibility. Applicant’s lack of candor about his mortgage default is inconsistent with the behavior that must be expected of persons with access. The personal conduct security concern is not mitigated.

Whole-Person Concept

In assessing the whole person, 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(d).³ The analyses under Guideline F and Guideline E are

³ The factors under AG ¶ 2(d) 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

incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment.

Applicant acted in self-interest when he stopped paying his mortgage loan and by concealing his loan default when he applied to renew his security clearance eligibility. He presented little to dispel the concerns. He was given an opportunity to respond to the Government's FORM and elected not to respond. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990.) Concerns that Applicant may not comply with government rules are not allayed. I conclude that it is not clearly consistent with the national interest to continue Applicant's 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:

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| Paragraph 1, Financial Considerations: | Against Applicant |
| Subparagraph 1.a: | Against Applicant |
| Paragraph 2, Personal Conduct: | Against Applicant |
| Subparagraph 2.a: | Against Applicant |

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge

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.