



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



In the matter of:

ISCR Case No. 15-05863

Applicant for Security Clearance

Appearances

For Government: Mary Margaret Foreman, Esq., Department Counsel
For Applicant: *Pro se*

09/01/2017

Decision

MASON Paul J., Administrative Judge:

In 2005, Applicant became a silent partner by investing in his brother-in-law's partnership of buying and renting properties. After discovering in 2008 that his brother-in-law pilfered five months of rental income from five properties, Applicant took control of the properties and continued collecting rent until the properties were vacated. Then, he found realtors experienced in short-sales; he sold three of the five properties, and settled the mortgage account on a fourth parcel. Applicant found willing buyers to purchase the rental at issue, but the lender always backed out before the sale was finalized. On balance, Applicant acted responsibly under the circumstances to resolve the charged-off mortgage account. Eligibility for access to classified information is granted.

Statement of the Case

Applicant completed and signed an Electronic Questionnaire for Investigations Processing (e-QIP) on September 5, 2014. On April 5, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under the financial considerations guideline (Guideline F). The action was taken pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20,

1960), as amended; DOD 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG).¹

On May 18, 2016, Applicant provided a notarized answer to the SOR. He chose to have his case decided on the administrative record. A copy of the Government's File of Relevant Material (FORM), the Government's evidence in support of the allegations of the SOR, was sent to Applicant on June 29, 2016. Applicant received the FORM on July 14, 2016. His undated response was received by the Defense Office of Hearings and Appeals (DOHA) on September 9, 2016, and forwarded to me without objection. The response contains a copy of a state statute, a Chapter 7 Bankruptcy petition of Applicant's former business partner, and the July 2012 bankruptcy discharge of the partner. The case was assigned to me on June 1, 2017.

Evidentiary Rulings

Regarding his interview (PSI) (Item 4) with an investigator for the Office Personnel Management (OPM), Applicant was advised that in his response to the FORM he could make changes to the PSI to improve its accuracy. Alternatively, he could object to the entire interview because it was unauthenticated by the OPM investigator or custodian of records for OPM, and it would not be admitted in evidence. Since he registered no objection to the PSI, it will be considered evidence in this case.

Findings of Fact

The one allegation in the SOR is that Applicant is indebted on a conventional mortgage account that was charged off (December 2009) in the amount of \$25,979. (SOR ¶ 1.a) Applicant denied he owed the account, averring that a state statute (57-1-32 - Sale of trust property, action to recover balance due upon obligation for which trust deed was given as security) indicates that a lender has three months to recover the deficiency balance after sale of the real property under a trust deed. In consulting an attorney, Applicant learned that the lender (SOR ¶ 1.a) never attempted to recover the balance of the mortgage. (Item 4 at 5; response to FORM)

Applicant is 47 years. He has been married since August 1998, and has a son 16 years old. He has twin sons who are 11 years old. He also has two daughters, ages 17 and 14. He received a bachelor's in science and mechanical engineering degree in May 1995. In January 2005, Applicant began working as a senior consultant for a company that was purchased by another company in April 2008. Applicant is renting his current home while his new home is under construction. He owned his previous home for almost 13 years. This is his first security clearance application. (Item 1 at 7-8, 31)

In 2005, Applicant became a silent partner with his brother-in-law to buy and sell homes. He used his good credit and personal savings to invest in this partnership to help his relative "get his business up and running." Shortly after investing in the business, his

¹ This case was decided using the new guidelines which became effective on June 8, 2017. These guidelines superseded the former guidelines which had been in effect since September 1, 2006. My decision in this case would be the same under either group of guidelines.

brother-in-law changed the business objective from buying and selling homes to buying and renting homes. The brother-in-law's responsibility was to manage the rentals and collect the rent until some future date of sale. (Response to FORM)

In 2008, the real estate market became depressed. Instead of turning over the rent payments to Applicant to pay the mortgages on the five properties, the brother-in-law kept the rent for five months. Applicant stated that, "[the brother-in-law] retaining the rental income for personal use may have also been caused by the 4+ Million of debt that his partners passed on to him." (Item 3 at 34; Response to FORM, statement)

Applicant indicated he was able to take control of the homes and collect rent from the renters until they vacated the rentals. Then, he found realtors familiar with short-sales and refurbished the rentals for prospective buyers. He sold three of the five homes, and settled a mortgage account on the fourth property. The lender initially cooperated in the preliminary steps for sale of the home identified at SOR ¶ 1.a, and one other property, on multiple occasions.² However, the lender always backed out before the sale could be finalized. Applicant surmised that banks in general, and this lender (SOR ¶ 1.a) by implication, believed that it was better to proceed with the foreclosure so they could recover their losses from the federal government bank bail out. Applicant's attorney advised him not to take legal action against his former partner or the banks to correctly report the status of the mortgage loans. (Item 3 at 34; Response to SOR)

Applicant's brother-in-law filed a Chapter 7 bankruptcy petition declaring almost \$6,000,000 in liabilities. Included in the Schedule F (creditors holding unsecured nonpriority claims) portion of his brother-in-law's petition was the \$24,951 in rent he stole from Applicant.³ The bankruptcy was discharged in July 2012. (Response to FORM, attachment)

Applicant realizes the mistake he made in trusting a relative with his investment, then having the relative betray that trust. He has always paid his bills. The 2014 and 2016 credit reports listed in the FORM show that Applicant's only delinquent debt is the charged-off mortgage account identified at SOR ¶ 1.a. Applicant has never had financial counseling. (Item 1 at 32; Item 4; Item 5; response to FORM)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the potentially disqualifying and mitigating conditions of the AG. These conditions should be evaluated in the context of nine general factors known as the whole-person concept to bring together all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision regarding security clearance eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such

² Applicant settled the other rental property. (Item 3 at 5)

³ The claim, which is based on the brother-in-law's theft of rental income between February and July 2008, is located on page 41 of the brother-in-law's bankruptcy petition. (Response to FORM, attachment)

decisions entail a certain degree of legally permissible extrapolation as to the potential, rather than actual, risk of compromise of classified information.

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. . . ." An applicant has the ultimate burden of persuasion of establishing that it is clearly consistent with the national interest to grant him a security clearance.

Analysis

Financial Considerations

The security concern for financial considerations is set forth 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 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 risk of having to engage in illegal 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.

A person who applies for security clearance eligibility seeks a fiduciary position with the Government predicated on trust and confidence. In addition to his duty to faithfully comply with all rules and regulations associated with handling classified information, an applicant is obligated to manage his finances in a responsible manner by paying voluntarily incurred debts as they become due.

Though he knew his brother-in-law had difficulty keeping a job, in 2005, Applicant invested in an existing partnership with him to buy and sell houses. Shortly after Applicant's entry into the partnership, his brother-in-law decided to buy and rent houses rather than buy and sell houses. In 2008, during the real estate market downturn, the brother-in-law began keeping the rental income for himself instead of turning the money over to Applicant to pay the mortgages. This theft occurred for a five-month period when Applicant was able to get control of the five rentals and collect the rent. He prepared the properties for sale and sold three, and settled an account for the fourth property. Even though he located willing buyers, he was unable to sell the home identified at SOR ¶ 1.a because the lender would not agree to at the final stage of the sale. The property became delinquent (\$25,979) and was charged off in December 2009. The foregoing facts support the following disqualifying conditions under AG ¶ 19:

(a) inability to satisfy debts; and

(c) a history of not meeting financial obligations.

The burden shifts to Applicant to mitigate the delinquent financial delinquencies. Four mitigating conditions under AG ¶ 20 are potentially pertinent:

(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 reliability, trustworthiness, and good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control and the individual acted responsibly under the circumstances;

(c) the person has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a nonprofit credit counseling service, and there are clear indications that the problem is being resolved or is under control; and

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

The mortgage account at SOR ¶ 1.a was charged off in December 2009 and is still delinquent. However, the credit reports establish that Applicant has no other delinquent debts. His credible statements regarding his finances convince me that he will not get involved in this type of business venture in the future. AG ¶ 20(a) provides some mitigation.

Even though he knew his brother-in-law had trouble maintaining employment, Applicant could not have anticipated that his brother-in-law would steal the rental income for five months to prevent Applicant from paying the mortgages. The fact that his brother-in-law continued to receive rent suggests that he was motivated by some other factor not fully developed in this record. Applicant acted responsibly by collecting the income until the renters vacated the properties. He then located realtors who were familiar with short-sales, prepared the rentals for sale, and sold three of the five properties, and settled this mortgage account of the fourth property. Applicant receives substantial mitigation under AG ¶ 20(b) based on his resolution of four of five rentals.

While the record shows that Applicant has never had financial or credit counseling, the credit reports show SOR ¶ 1.a as Applicant's only delinquent account. His satisfaction of three of the five properties through short sales and settlement of the fourth mortgage account entitle him to mitigation under AG ¶¶ 20(c) and 20(d).

Whole-Person Concept

I have examined the evidence under the disqualifying and mitigating conditions of the guideline for financial considerations. I have also weighed the circumstances within the context of nine variables known as the whole-person concept. (AG ¶ 2(c)) In evaluating the relevance of an individual's conduct, the administrative judge should consider the following factors:

AG ¶ 2(d) (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 the participation was 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.

Applicant is 47 years old. He has been married since 1998 and has five children whose ages range from 17 to 11. He has been employed as a senior consultant since January 2005. In the same year, he became a silent partner and invested money in his brother-in-law's partnership. In 2008, his brother-in-law illegally converted five months of rental income (which Applicant used to pay the mortgages) for his own use. The July 2012 bankruptcy discharge of that rental income money (\$24,951) shows that the brother-in-law has no intention of providing restitution to Applicant.

The circumstances of this case, read in conjunction with the state statute (57-1-32), indicate that the lender (SOR ¶ 1.a) had three months after sale of the property to recover the balance due on the obligation. Assuming that the property was sold, which is not apparent from in the record, the lender had three months to collect the deficiency balance from Applicant. He did not act within the three-month period. The DOHA Appeal Board has held that although a delinquent debt is unenforceable under state law, the federal government must still carefully evaluate the totality of circumstances surrounding an applicant's conduct in failing to satisfy the debt.⁴ Applicant acted responsibly when he discovered his brother-in-law converted the rental income. He prepared the rentals for sale. He sold three of the five properties in short-sales. He settled the fourth mortgage. He found willing buyers for the SOR ¶ 1.a account, but the lender always withdrew during the final phase of sale.

Applicant has no history of financial problems. His 2014 and 2016 credit reports list no other delinquent debts, demonstrating that he is financially responsible. After making a common-sense evaluation of the evidence in the context of the general factors of the whole-person concept, I conclude that Applicant has mitigated the security concerns arising from the guidelines for financial considerations. See AG ¶ 2(a)(1) through 2(a)(9).

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

⁴ See *e.g.*, ISCR Case No. 01-09691 at 3 (App. Bd. March 27, 2003).

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Paul J. Mason
Administrative Judge