



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



In the matter of:)
)
) ISCR Case No. 16-02610
)
Applicant for Security Clearance)

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: *Pro se*

02/28/2018

Decision

KATAUSKAS, Philip J., Administrative Judge:

Applicant contests the Defense Department's intent to revoke his eligibility for access to classified information. He presented sufficient evidence to explain, extenuate, and mitigate the security concern stemming from his problematic financial history and his past alcohol-related criminal conduct. Accordingly, this case is decided for Applicant.

Statement of the Case

On October 3, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) sent Applicant a Statement of Reasons (SOR) alleging that her circumstances raised security concerns under the financial considerations and criminal conduct guidelines.¹ Applicant answered the SOR on December 23, 2016, and requested a hearing to establish his eligibility for continued access to classified information.

¹ The DOD CAF took this action under Executive Order (E.O.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive).

On January 11, 2018, a date mutually agreed to by the parties, a hearing was held. Applicant testified at the hearing. The Government offered seven exhibits, which were marked for identification as GE 1 through 7, and which were admitted without objection. Applicant offered 18 exhibits (AE), which were marked for identification as AE A through R, and which were admitted without objection. The record was left open until January 25, 2018. Applicant timely submitted three additional exhibits, which were marked for identification as AE S through U, and which were admitted without objection. The transcript of the hearing (Tr.) was received on January 23, 2018.

Procedural Issue

On December 10, 2016, the Security Executive Agent issued Directive 4 (SEAD-4), establishing a “single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position.”² The National Security Adjudicative Guidelines (hereinafter “new adjudicative guidelines” or “AG”), which are found in Appendix A to SEAD-4, are to be used in all security clearance cases decisions issued on or after June 8, 2017.³ In light of this explicit direction (and absent lawful authority to the contrary), I have applied the new adjudicative guidelines. ISCR Case No. 02-00305 at 3 (App. Bd. Feb. 12, 2003) (security clearance decisions must be based on current DoD policy and standards).⁴ DOD CAF adjudicators reviewed this case using the previous version of the adjudicative guidelines, dated September 1, 2006, which were in effect at the time. My decision and formal findings under the revised Guidelines F and J would not be different under the 2006 Guidelines F and J.

Findings of Fact

Applicant is 43 years old, a high school graduate with three years of college. He is divorced with two sons, ages 7 and 11. Applicant and his now ex-wife were married in September 2009. They separated in May 2013, when his ex-wife moved out.⁵ They were divorced in July 2017.⁶ Applicant and his ex-spouse have split custody of their sons, with a week on/week off arrangement. Because Applicant and his ex-spouse support their sons every other week, respectively, Applicant has no child support obligation. Since 1995 Applicant has worked for defense contractors.⁷

² SEAD-4, ¶ B, *Purpose*.

³ SEAD-4, ¶ C, *Applicability*.

⁴ See also ISCR Case No. 07-00029 at 3 (App. Bd. Dec. 7, 2007) (when the guidelines were last revised, the Board stated: “Quasi-judicial adjudications must be made within the bounds of applicable law and agency policy, not without regard to them.”)

⁵ Tr. 38-39.

⁶ AE M.

⁷ Tr. 7-8, 27-28, 30, 62.

Under Guideline F, the SOR alleged four delinquent mortgage accounts with past due amounts totaling \$60,516, and a delinquent medical account for \$50. Applicant admitted the first two delinquent mortgage accounts, and explained that he was pursuing loan modifications for those two accounts. He denied that the latter two mortgage accounts were delinquent.⁸ Under Guideline J, the SOR alleges a driving under the influence (DUI) arrest and conviction in November 2015. Applicant admitted that allegation.⁹

At hearing Applicant testified about the four delinquent mortgage accounts. SOR ¶¶ 1.a and 1.c. are first and second mortgages on the home that was his primary residence. He purchased this primary residence in January 2006. They were both adjustable rate mortgages (ARM). The second mortgage was part of the purchase financing; it was not a home equity loan. His plan was to get some equity built up in his primary residence before selling it. He lived in his primary residence from January 2006 until March 2017. He now rents.

SOR ¶¶ 1.b and 1d. are first and second mortgages on a rental property he bought when he was 24 years old (about 1998). Like the mortgages on his primary residence, the second mortgage was part of the purchase financing, not a home equity loan. Also like the mortgages on his primary residence, these mortgages were ARM. He had the same plan for the rental property, to let it build some equity and then sell his primary residence and the rental property to buy a much larger primary residence with a cheaper mortgage.¹⁰

As noted, Applicant's then spouse moved out of the primary residence in May 2013. Applicant's annual salary with his defense contractor now is \$80,000. He also works sometimes as a disc jockey (DJ), which might earn him \$1,500 a month, on-and-off but not consistently. His ex-spouse earns in the high \$70,000 annually. When his then spouse moved out, Applicant lost almost half of his household income.¹¹ Applicant was able to stay current on his primary residence mortgage payments for about a year by doing odd jobs such as cutting grass and washing cars.

By June 2016, he had fallen behind on his mortgage payments. Applicant foresaw what would happen. The two ARMs on his primary residence together were \$2,500 per month, but in 2016, they were scheduled to go up to \$3,100 per month total, which he could not afford. Therefore, in 2015, before he fell behind, Applicant contacted the lender to start a refinancing process. Because he was still current on the mortgages, the loan officer told Applicant that he had to stop making his payments in order to start the

⁸ SOR ¶¶ 1.a. through 1.d; Answer ¶¶ 1.a. through 1.d. Applicant paid the \$50 debt before he filed his answer. Answer ¶ 1.e.

⁹ SOR ¶ 2; Answer ¶ 2.a.

¹⁰ Tr. 29-30, 33-37, 47.

¹¹ Tr. 31-32, 64-65.

refinancing process, which Applicant did in May 2015. The lender, however, delayed the refinancing and instead began the foreclosure process. Applicant did not have the funds to save his home from foreclosure, which took place in October 2016. He was told by the lender that there was no balance due after foreclosure.¹² Applicant vacated the home after foreclosure.¹³

As noted, SOR ¶¶ 1.b and 1.d are two ARMs on Applicant's rental property. He managed to stay current on the rental property until his renters moved out. Until then, the rent covered all but \$300 of the mortgage payment. When the renters vacated, Applicant contacted the lender to start a refinancing process. He was, again, told that in order to refinance, he would need to stop payments first, which he did in January 2017. Applicant then applied for a deed-in-lieu-of-foreclosure (DILOF) in March 2017. He is awaiting the completion of the DILOF process.¹⁴

Applicant next testified about his November 2015 arrest for DUI. He was on his way home after working as a DJ. The car in front of him stopped abruptly to avoid hitting a deer. Applicant tried to stop, but he was driving a large truck with a trailer carrying thousands of pounds of DJ equipment. He was unable to come to a complete stop and rear-ended the other car. Applicant had been drinking, so he was booked for DUI.¹⁵ He pled guilty, was sentenced to one year in jail, which was suspended except for the first 30 days, and he served that time on a work release program. That allowed him to continue to work, but he spent nights and weekends in jail. Although Applicant was originally sentenced to three years of probation (which would run until January 2019), his lawyer succeeded in getting Applicant released a year early. His probation was terminated by the court in November 2017, because Applicant had completed all conditions of probation satisfactorily.¹⁶ Applicant successfully completed a 12-week substance abuse treatment program and attended AA meetings for one year (and still does occasionally). He remains abstinent.¹⁷ The record does not indicate that Applicant has had any other DUIs or other alcohol-related offenses.

¹² Tr. 40-45, 73-75. AE S. AE P shows no balances due on the primary residence mortgages as of January 10, 2018.

¹³ Tr. 30, 33.

¹⁴ Tr. 66-74. AE P shows no balances due on the rental property mortgages as of January 10, 2018. AE U shows Applicant's March 2017 application for a DILOF, and that the mortgage company is still processing that application as of January 19, 2018. AE S shows that Applicant has paid SOR ¶ 1.e.

¹⁵ Tr. 54-55; Answer ¶ 2.a.

¹⁶ Tr. 55-56; SOR ¶ 2.a; Answer ¶ 2.a. AE Q.

¹⁷ Tr. 78-79; AE Q; GE 2.

Applicant submitted numerous letters of reference and other documents reflecting on his personal and professional attributes.¹⁸ He is uniformly complimented for his “dedication and professionalism,” his “commitment and unsurpassed performance,” and his responsiveness to security requirements.¹⁹ The record shows Applicant to be an individual with salutary personal and professional qualities.

Law and Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individuals are eligible for access to classified information “only upon a finding that it is clearly consistent with the national interest” to authorize such access. E.O. 10865 § 2; SEAD-4, ¶ E.4.

When evaluating an applicant’s eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. SEAD-4, Appendix A, ¶¶ 2(c), 2(d).

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15.

Administrative Judges are responsible for ensuring that an applicant receives fair notice of the issues raised, has a reasonable opportunity to litigate those issues, and is not subjected to unfair surprise. ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014). In resolving the ultimate question regarding an applicant’s eligibility, “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” SEAD-4, Appendix A, ¶ 2(b). See *also* SEAD-4, ¶ E.4. Moreover, the Supreme Court has held that officials making “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. 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 an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain

¹⁸ AE A through J and L.

¹⁹ See, e.g., AE A, E, and J.

degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Discussion

Guideline F, Financial Considerations

The SOR alleges that Applicant has a number of delinquent debts, which purportedly raise a security concern under Guideline F. The financial considerations security concern is explained at AG ¶ 18, which in pertinent part, states:

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.

Guideline F is not limited to a consideration of whether a person with financial issues might be tempted to compromise classified information or engage in other illegality to pay their debts. It also addresses the extent to which the circumstances giving rise to delinquent debt and other security-significant financial issues cast doubt upon a person's self-control, judgment, and other qualities essential to protecting classified information.²⁰

In assessing Applicant's case, I considered the following potentially disqualifying and mitigating conditions:

AG ¶ 19(a): inability to satisfy debts;

AG ¶ 19(c): a history of not meeting financial obligations;

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;

AG ¶ 20(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; and

²⁰ ISCR Case No. 11-05365 at 3 (App. Bd. May. 1, 2012).

AG ¶ 20(d): the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

A security clearance adjudication is not a debt-collection process. Rather, an administrative judge examines the way an applicant handles his or her personal financial obligations to assess how they may handle their security obligations.²¹ Here, Applicant's security clearance eligibility was called into question by his past financial problems. I conclude that disqualifying conditions AG ¶ 19(a) and (c) apply. The next inquiry is whether any mitigating conditions apply.

Applicant's financial woes began when his wife moved out to pursue a divorce. That event caused Applicant to lose almost half of his household income. It was an event largely, if not wholly, beyond his control. Separation and divorce are specifically contemplated by AG ¶ 20(b).

The next question is whether Applicant acted responsibly under the adverse circumstances caused by his spouse's separation. Applicant managed to stay current on his primary residence mortgages for about a year by taking odd jobs. Knowing that he could not stay current indefinitely and knowing that his mortgage payment was due to increase from \$2,500 a month to \$3,100, he contacted his lender about a refinancing before he fell behind. Because at that time he was still current on his payments, his lender told him that he would need to stop making payments in order to do a refinance. Applicant followed the lender's advice and stopped making payments. For whatever reason, Applicant's mortgage lender decided to do a foreclosure instead of a refinance. Because Applicant lacked the money to stave off foreclosure, he lost his home. He had, however, no deficiency due after the foreclosure.

Given the choices, or lack thereof, Applicant faced, I find that he acted responsibly. The Government argued in closing that this was a strategic default, that Applicant voluntarily walked away from his financial responsibilities. I do not see it that way. A strategic default is when an applicant defaults on a mortgage loan when he has the financial means to stay current.²² Here, Applicant had lost almost half of his annual household income when his wife left, and he was only able to stay current for about a year, relying on odd jobs. He knew his mortgage payment was due to increase significantly, which he could not afford. So, Applicant did not have the means to stay current on his mortgage. He applied for a refinancing, but the lender decided to do a foreclosure. It was the lender who walked away from this mortgage. This is not a case of a strategic default. AG ¶ 20(b) applies fully and mitigates SOR ¶¶ 1.a and 1.c.

A similar analysis applies to SOR ¶¶ 1.b and 1.d. Applicant was able to stay current on his rental property mortgage payments, because the rent he charged covered all but

²¹ See generally ISCR Case No. ISCR Case No. 12-09719 at 2-3 (App. Bd. Apr. 6, 2016).

²² Compare ISCR Case No. 10-10627 (Jan. 20, 2012) (an applicant defaulted on two mortgage loans that he had the financial means to pay after deciding it was in his financial interest to do so) with ISCR Case No. 12-04806 (Jul. 3, 2014) (applicant did everything he could to avoid foreclosure).

\$300 of those payments. When the tenants vacated the premises, however, Applicant faced covering the mortgage payments himself, which he knew he could not do. Losing his tenants was largely beyond his control. Therefore, he contacted his lender to seek a refinancing. He was instructed that he would need to stop making payments in order to refinance. He later decided to seek a DILOF, which he applied for and which is currently in progress. Seeking to refinance or do a DILOF are responsible ways to address mortgages in danger of default. AG ¶ 20(b) applies fully and mitigates SOR ¶¶ 1.b and 1.d.

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30 as follows:

Criminal activity creates doubt about an Applicant's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

The guideline notes conditions that could raise security concerns under AG ¶ 31. The disqualifying condition potentially applicable in this case is:

31(b): evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant admitted to his November 2015 arrest for DUI. Therefore, the above disqualifying condition applies.

AG ¶ 32 provides conditions that could mitigate security concerns. The following are potentially applicable:

32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

32(d): there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant explained that he was on his way home from a DJ event, and the car in front of him stopped suddenly to avoid a deer. Applicant braked too, but his truck and its trailer of DJ gear could not make a complete stop, hence he rear-ended the car in front of him. He had been drinking and, therefore, was arrested for DUI. He served his sentence and successfully completed all conditions of probation, which included a 12-week

substance abuse counseling program and a year of attending AA meetings. He still attends AA meetings and has remained abstinent. The arrest was over two years ago and was Applicant's only alcohol-related offense. I conclude that the lapse of time since the offense and Applicant's successful completion of all terms and conditions of his sentence bring both AG ¶ 32(a) and AG ¶ 32(d) into play. SOR ¶ 2.a has been mitigated.

The record does not raise doubts about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also gave due consideration to the whole-person concept.²³ Accordingly, I conclude that Applicant met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant his eligibility for access to classified information.

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 (Financial Considerations):	For Applicant
Subparagraphs 1.a-e:	For Applicant
Paragraph 2, Guideline J (Criminal Conduct)	For Applicant
Subparagraph 2.a:	For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant access to classified information.

Philip J. Katauskas
Administrative Judge

²³ AG ¶ 2(a)(1)-(9).