



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 16-03658

Appearances

For Government: Jeff Nagel, Esq., Department Counsel

For Applicant: *Pro se*

10/09/2018

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, I conclude that Applicant failed to mitigate the security concerns regarding his financial considerations. Eligibility for access to classified information is denied.

Statement of Case

On February 10, 2017, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DoD adjudicators could not make the affirmative determination of eligibility for a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 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 (AGs) implemented by DoD on September 1, 2006.

The Security Executive Agent, by Directive 4, *National Security Adjudicative Guidelines* (SEAD 4), dated December 10, 2016, superceded and replaced the September 2006 adjudicative guidelines (AGs). They apply to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. Procedures for administrative due process for contractor personnel continue to be governed by DOD Directive 5220.6, subject to the updated substantive changes in the AGs, effective June 8, 2017. Application of the AGs that were in effect when the SOR was issued would not affect my decision in this case.

Applicant responded to the SOR on March 2, 2017, and requested a hearing. The case was assigned to me on February 8, 2018, and scheduled for hearing on April 17, 2018. The Government's case consisted of seven exhibits (GEs 1-7). Applicant relied on one witness (himself) and 10 exhibits. (AEs A-J) The transcript was received on May 4, 2018.

Procedural Issues

Before the close of the hearing, Applicant requested the record be kept open to permit him the opportunity to supplement the record with copies of (a) his revised loan application, updates on the progress of his application, and the latest complaint he filed against his lender. For good cause shown, Applicant was granted 14 days to supplement the record. Department Counsel was afforded three days to respond.

Within the time permitted, Applicant supplemented the record with copies of (a) docket sheets covering the history of his first and second complaints filed against his lender, (b) his revised loan modification application of January 2018, and (c) his most recently filed complaint against his lender. Applicant's submissions were admitted without objection as AEs K-M.

Summary of Pleadings

Under Guideline F, Applicant allegedly accumulated delinquent mortgage and consumer debts exceeding \$520,000. Allegedly, Applicant's delinquent debts remain unresolved and outstanding.

In his response to the SOR, Applicant admitted two of the alleged delinquent debts in the SOR with explanations. He claimed the SOR debts covered by ¶¶ 1.a and 1.c are included in his revised loan modification of January 2018, remain in dispute, and are covered in his pending federal law suit. He further claimed that due to his wife's experiencing serious business losses attributable to the 2008 recession, he applied for a loan modification with his mortgage lender, only to be told that he needed to cease making monthly payments, so as to facilitate his creating a delinquent balance. Applicant claimed that he followed his lender's advice and ceased making monthly mortgage payments, beginning in May 2009. He further claimed that he continued to withhold payments on his mortgage secured loan while he unsuccessfully pursued loan modification approvals with the lender. He claimed to have filed a second lawsuit in state

court (this one against the loan assignee referenced in SOR ¶ 1.c) to enable the lender to modify his loan.

Addressing SOR debt ¶ 1.b, Applicant denied the allegations and claimed that the alleged debt is barred by his state's statute of limitations and no longer appears in any of his credit reports. He further claimed that the debts alleged in SOR ¶¶ 1.a and 1.c were originated by SOR creditor 1.b, who committed fraud against him.

Findings of Fact

Applicant is a 55-year-old manager of a defense contractor who seeks a security clearance. The allegations covered in the SOR were not admitted by Applicant and are reserved for fact-finding based on the developed evidence at hearing.

Background

Applicant married in September 2004 and has one adult stepchild from this marriage. (GE 1) He earned a bachelor's degree in electrical and computer engineering in June 1985. (GEs 1 and 6) He reported no military service.

Since June 2012, Applicant has worked for his current defense contractor. (GEs 1-2) Between April 1987 and April 2012, he was employed by a laboratory operated by the Department of Energy (DoE). (GEs 1 and 6) Applicant's wife, a music educator, opened her business in 2005. (Tr. 65, 77-78)

Applicant's finances

In July 2004, Applicant purchased a home for about \$1.2 million and financed the purchase with a 90-10 loan package that consisted of a first mortgage with SOR creditor 1.c (\$958,400) and a purchase money mortgage to cover the required 10% down payment on the home with SOR creditor 1.a (\$120,829). (GEs 2-5 and 7 and AEs B-C and M; Tr. 42-43, 57-58) The interest rate agreed to by Applicant on the promissory note and first trust deed was an adjustable rate of 4.8% for five years after which the rate would be adjusted upwards by 2.5%. (AE M) At the time of his purchase, Applicant was netting a little over \$80,000 a year and reported a net worth of \$23,000, but still claimed he could afford the combined mortgage payments of \$4,300 a month (\$51,600 annually) on the two mortgages. (Tr. 57-58, 79)

With over 60 per cent of his annual income committed to his mortgages, Applicant left little margin for covering his other expenses with his home financing and willingly assumed the heavy mortgage debts with the hope of gaining asset value with expected appreciation of the property. (Tr. 79-81) From the beginning, he relied on high-risk financing instruments that with his limited resources left him acutely vulnerable to major shifts in market conditions.

Shortly after their purchase, Applicant's current wife sold her townhouse for about \$470,000, making a profit of around \$200,000 on the sale. (Tr. 75) She and Applicant used \$100,000 of the sale proceeds to buy expensive furniture for their home. (Tr. 61-62,75-76)

Beginning in January 2009, Applicant experienced financial hardships when his wife's business incurred business losses attributable to the widespread economic downturn. (GE 6; Tr. 77-78) Her income losses impacted Applicant's finances. Compounding his financial problems was the loss of his mother and related anxiety associated over both his mother's loss and employment termination. (GE 6; Tr. 82-83)

Despite their losses, Applicant and his wife continued to make payments on their mortgages in the face of rising interest rates on the strength of Applicant's income. (Tr. 79-80) While they continue to reside in the home, they have made no payments since 2009. (Tr. 67-68)

In an effort to reduce the interest rates on their first mortgage, Applicant and his wife applied for a loan modification on their first mortgage in early 2009. (AE D; Tr. 66-69) Before making their application, they were told by a lender representative to cease making their monthly mortgage payments during the application process until they receive their modification approval.

By letter of July 3, 2009, the first lender acknowledged Applicant's loan modification application and laid out steps to follow in the process. The lender cautioned Applicant that while his loan modification application was pending, he would continue to receive collection letters or notices, which could include notice of foreclosure commencement. (AE D) Eventually, the lender then holding Applicant's first denied Applicant's loan modification request. In 2014, Applicant's first mortgagee assigned its loan to SOR creditor 1.c. (GE 3) SOR creditor 1.c has continued to decline Applicant's loan modification requests and has yet to affirmatively approve Applicant's latest request. (AE D)

Between 2009 and 2018, Applicant continued to withhold due mortgage payments from both his first and second mortgagees. (Tr. 67-68, 72) Aggregate delinquent mortgage payments due the first mortgagee (SOR creditor 1.c) exceed \$450,000.

On the advice of counsel, Applicant filed suit in federal court in July 2013, seeking damages for fraud and other acts of wrongdoing against the first lender, in addition to asking for injunctive relief. (AE E) Records confirm that this complaint was dismissed in 2016 on jurisdictional grounds. (GE 6 and AE F; Tr. 45)

Credit reports confirm that Applicant's first mortgage holder sold and assigned its first mortgage-backed loan to Applicant's current first mortgagee in November 2015. (SOR creditor 1.c in 2014. (GE 3 and AE M)) Shortly thereafter, SOR creditor 1.c issued a notice of default and election to sell under deed of trust to Applicant. (AE M) Records do

not reflect whether creditor 1.c ever followed through with its non-judicial foreclosure election.

In November 2016, Applicant filed a complaint against SOR creditor 1.c in state court for fraud, state statutory violations, and negligence, in addition to seeking injunctive relief. (AE F) Docket records for this case confirm that Applicant removed the case to federal court in December 2016. Proceedings in federal court on Applicant's complaint were centered on SOR creditor's motion to dismiss throughout 2017. (AE L) Applicant's case was dismissed by the court on September 22, 2017, and judgment was entered by the court on the same day. Whether the judgment was entered with prejudice to Applicant is not clear from the docket sheet. (AE L)

Applicant formally reapplied for loan modification relief with creditor 1.c in January 2018. (AE K) In his loan application, Applicant listed gross monthly income of \$16,666 and no current residence-related expenses. (AE K) While he noted his first and second monthly mortgage payments due, he was not paying these expenses out-of-pocket, and accordingly, left the space for listing total debt expenses blank. (AE K) Under questioning from Department Counsel at hearing, Applicant acknowledged that he has neither paid nor escrowed monthly payments due on both of his mortgages since he ceased paying on them in 2009. (Tr. 68-69) By saving over \$4,000 a month from withholding his mortgage payments for the past eight and one-half years without escrowing, Applicant has saved over \$400,000 that he has been able to apply to his wife's business and other needs. (Tr. 68-70)

By letter of February 1, 2018, the assignee of Applicant's first trust deed holder (SOR creditor 1.c) notified Applicant of its denial of Applicant's application for loan modification relief. (AE M) Following up on Applicant's request for explanations for its loan modification denial, SOR creditor 1.c advised Applicant's attorney that their denial of a standard loan modification for Applicant was due to insufficient payment reduction. (AE M) Creditor 1.c, in turn, offered Applicant three options: reinstatement upon returning the account to current status; deed-in-lieu of foreclosure; and pre-foreclosure sale/short sale. (AE M) Applicant provided no documentary evidence of his acceptance of any of these furnished options, or of any error in the lender's calculations.

In April 2018, Applicant filed a new complaint against SOR creditor 1.c in state court seeking damages for fraud, negligence, and statutory violations, in addition to seeking an historical accounting. Docket records confirm that this latest suit remains pending with no projections of outcome.

Besides Applicant's first mortgage debt with SOR creditor 1.c, he has an outstanding second mortgage with SOR creditor 1.a in default and unresolved. He has made no payments on this loan since 2009 and currently owes over \$120,000 on this purchase money loan. (GEs 3-4) Although the debt no longer appears on Applicant's credit reports (AEs G-J) and is the result of a non-recourse loan, now dead for lack of equity according to Applicant's information received from SOR creditor 1.a, it remains

delinquent behind the first mortgagee's interest and unresolved. (GEs 2-3 and 6; Tr. 40-43, 72-74)

By Applicant's estimates, his property is worth in excess of \$1.335 million and on paper is quite likely to support the satisfaction of both his first and second mortgage debts should either creditor elect to foreclose. (GEs 2-7 and AE M; Tr. 103) Whether charged off for statute of limitations reasons, for the lack of projected security interest in the property, or for other technical reasons not involving payment, the debt remains outstanding and a legal obligation (past or present) that Applicant has declined to address since 2009. Notwithstanding his withholding monthly payments on this debt, he continues to live in the house while saving over \$50,000 in annual payments on this purchase money mortgage.

Applicant has a third debt listed in the SOR (SOR debt ¶ 1.b) that he has failed to address to date. This debt is a credit card debt with the same lender that initially financed Applicant's home purchase with a first mortgage. This admitted debt remains outstanding and unresolved.

Applicant currently earns \$200,000 a year as a base salary, with an annual 20 per cent bonus of \$40,000, for a total annual compensation of \$240,000. (AE K). It is unclear what additional income his wife earns.

Character references

Applicant is well-regarded by his facility clearance officer (FSO) (AE A) His FSO who works daily with Applicant credited him with service as his employer's assistant FSO. She expressed understanding of the legal issues related to Applicant's loan modifications regarding the mortgages on his residence and the legal steps he has taken to address his mortgages. (AE A) She characterized Applicant as trustworthy and a person who would recommend for a position of trust and confidence.

Policies

The SEAD 4, App. A lists guidelines to be used by administrative judges in the decision-making process covering security clearance cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and many of the conditions that could mitigate security concerns.

These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with App. A. AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in App. A, AG ¶ 2(d) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person.

The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk. The following App A, AG ¶ 2(d) factors are pertinent: (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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

Financial Considerations

The Concern: 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 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 acts or otherwise questionable acts to generate funds. . . . AG ¶ 18.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995).

As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Security concerns are raised over Applicant's accumulation of two delinquent mortgage debts exceeding \$520,000 in the aggregate and a credit card debt approximating \$11,972. Applicant's two mortgage debts relate to a defaulted first mortgage listed in his credit reports as a past-due \$978,400 debt and a charged-off second mortgage debt totaling \$120,829. His first mortgage is the subject of a series of complaints brought in state and federal courts over denied loan modification, the last of which remains pending.

Financial Concerns

Applicant's failure to address his two mortgage loans (SOR debts ¶¶ 1.a and 1.c) over a nine-year period while he pursues loan modification relief on his first mortgage and his lack of payment initiatives taken with respect to his consumer debt (SOR debt ¶ 1.b) warrant the application of three of the disqualifying conditions (DC) of the Guidelines: DC ¶¶ 19(a), "inability to satisfy debts"; 19(b), "unwillingness to satisfy debts regardless of the ability to do so"; and 19(c), "a history of not meeting financial obligations."

Financial stability in a person cleared to protect classified information is required precisely to inspire trust and confidence in the holder of a security clearance that entitles him to access classified information. While the principal concern of a security clearance holder's demonstrated financial difficulties is vulnerability to coercion and

influence, judgment and trust concerns are implicit in cases involving debt delinquencies.

Historically, the addressing of delinquent debts are critical to an assessment of an applicant's trustworthiness, reliability, and good judgment in following rules and guidelines necessary for those seeking access to classified information or to holding a sensitive position. Applicant's cited extenuating circumstances (i.e., medical issues requiring his time commitments for caring for his mother, his wife's erosion of income during the economic downturn that impacted her business in 2008-2010, and his mortgagee's failure to approve his loan modification request) provide some mitigation credit for his initial withholding of mortgage payments on both mortgages. Based on his cited circumstances, MC ¶ 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, or a death, divorce or separation), and the individual acted responsibly under the circumstances," has some application to Applicant's situation.

However, Applicant has continued to withhold mortgage payments from both mortgagees for over nine years without escrowing any of the withheld mortgage payments, saving over \$400,000 in the process while continuing to reside in the house and benefit from increased appreciation in the property. Offered options by SOR creditor 1.c to Applicant following the creditor's denial of Applicant's application for loan modification in January 2018 were never accepted by Applicant.

Rather, Applicant opted to file suit against the assigned loan service creditor for fraud and other relief. Based on Applicant's cited circumstances and steps he has taken to date to avoid payments to SOR creditors 1.a and 1.c over an extended period, the "acting responsibly" prong of MC ¶ 20(b) has only limited application and cannot excuse his past failures to pay on his mortgages while he continues to litigate his claims against creditor 1.c and avoid addressing his SOR ¶¶ 1.a and 1.b debts.

Applicant's failure or inability to furnish persuasive evidence of his addressing all three of his listed SOR debts while litigating his claimed wrongful withholding of loan modification relief by SOR creditor 1.c prevents him from demonstrating a good track record of maintaining his payment obligations with his listed creditors and fully availing himself of the benefits of MC ¶ 20(b). See ISCR Case No. 15-06440 at 3-5 (App. Bd. Dec. 26, 2017); ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. Nov. 29, 2005)). For similar reasons, MC ¶ 20(d), "the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts," is not available to mitigate any his accumulated delinquent debts.

Whether Applicant is entitled to the full mitigating benefits of MC ¶ 20(e), “the individual has a reasonable basis to dispute the legitimacy of the past-due debt[s] 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,” is still unclear at this time. That Applicant’s listed debts no longer appear on his credit reports debts are not dispositive of a successful or even reasonable dispute of the debts. For as a general rule, debts may be dropped from a credit report when creditors believe the debt is not going to be paid, a creditor fails to timely respond to a credit reporting company’s request for information, or when the debt has been charged off.

Mere evidence that debts no longer appear on credit reports is not reason to believe that they are not legitimate or that they have been satisfactorily resolved.” ISCR Case No. 16-02941 at 2 (App. Bd. Dec. 29, 2017)(citing ISCR Case No. 14-03747 at 2-3 (App. Bd. Nov. 13, 2015). Under this analysis, neither his disputes with SOR creditor 1.c or creditor 1.b (a creditor whose listed consumer debt has not been addressed) can be mitigated.

Applicant’s previous complaints against creditor 1.c and its predecessor were dismissed, and his most recent suit was only recently filed in April 2018 has not had the time to permit the substantive legal issues raised by Applicant in his complaint to be fully aired and resolved. Based on the legal issues raised by Applicant to date, it is premature to ascertain whether his dispute with creditor 1.c and its predecessor have a reasonable basis to dispute. Keeping in mind that Applicant has the ultimate burden of establishing the applicability of a mitigating condition, Applicant by his produced evidence has not met that burden. See ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002)

Turning to the security issues related to creditor 1.a’s purchase money mortgage, Applicant’s second mortgage is a non-recourse loan that limits the creditor’s recovery option to the security only in the event of a foreclosure under his state’s anti-deficiency law. See CCP § 580b. This does not mean that Applicant may simply refuse to make his monthly payments under the loan’s terms in the expectation of a first mortgagee foreclosure that leaves the second mortgagee’s interest sold out and satisfy his good-faith responsibilities as a borrower. While SOR debt ¶ 1.a might be barred by his state’s statute of limitations, taking advantage of an enforcement bar due to the passage of time can not be equated with the establishment of a strong track record of payments. See ISCR Case No. 08-12184 at 10 (App. Bd. Jan. 7, 2010).

Moreover, the rising value of his property (now estimated to be worth \$1.35 million) makes it increasingly likely that in the event of a foreclosure sale there will be enough equity in the property to cover the loan balances of both creditor 1.c and creditor 1.a. At the very least, it is premature to conclude that Applicant’s purchase money lender has no interest in the property. At this point at least, Applicant has not

made the case that SOR creditor 1.a's interest in Applicant's real estate has no equity value.

In evaluating Guideline F cases, the Appeal Board has stressed the importance of a "meaningful track record" that includes evidence of actual debt reduction through voluntary payment of debts, and implicitly where applicable the timely filing of tax returns. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008) In Applicant's case, his failure to make more concerted efforts to satisfy or resolve any of his three listed SOR debts are not enough to warrant favorable findings and conclusions with respect to raised security concerns.

Whole-Person Assessment

Whole-person assessment is unfavorable to Applicant. He has shown insufficient progress to date in addressing his mortgage-backed debts and consumer debt to warrant favorable whole-person assessment. Applicant's general contributions to the U.S. defense effort through his work with his current defense contractor and his work in general in the defense industry merit considerable respect and appreciation. His positive credits are insufficient, though, to surmount historical trust and judgment issues associated with his failure to maintain a better track record with his mortgage and consumer debts.

Overall, Applicant's actions to date in addressing his finances reflect too little evidence of restored financial responsibility and judgment to overcome reasonable doubts about his trustworthiness, reliability, and ability to protect classified information or occupy a sensitive position. See AG ¶ 18.

Conclusions are warranted that his finances are insufficiently stabilized at this time to meet minimum eligibility requirements for holding a security clearance. Unfavorable conclusions are entered with respect to the allegations covered by SOR ¶¶ 1.a-1.c. Eligibility to hold a security clearance under the facts and circumstances of this case is inconsistent with the national interest.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE F (FINANCIAL CONSIDERATIONS): AGAINST APPLICANT

Subparagraphs 1.a-1.c:

Against Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility to hold a security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

