



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



In the matter of:)
)
) ISCR Case No. 17-00535
)
Applicant for Security Clearance)

Appearances

For Government: Gatha Manns, Esq., Department Counsel
For Applicant: Craig A. Butler, Esq.

11/16/2018

Decision

Curry, Marc E., Administrative Judge:

The steps that Applicant took to rehabilitate his mortgages, thus far, were insufficient to outweigh the poor judgment he demonstrated when he failed to make payments for six years. Applicant failed to mitigate the security concern. Clearance is denied.

Statement of the Case

On March 10, 2017, 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, explaining why it was unable to find it clearly consistent with the national interest to grant security clearance eligibility. The DOD CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; and DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive).

On April 22, 2017, Applicant answered the SOR, admitting subparagraphs 1.a and 1.b, and denying subparagraphs 1.c and 1.d. He requested a hearing, whereupon the case

was assigned to me on March 15, 2018. On July 10, 2018, the Defense Office of Hearings and Appeals issued a notice of hearing, scheduling Applicant's case for September 12, 2018. The hearing was held as scheduled. I received six Government exhibits (GE 1 – GE 6) and six Applicant exhibits (AE A - AE F). I also received the Government's Exhibit list (Hearing Exhibit (HE) I), and a copy of the discovery letter that Department Counsel mailed to Applicant (HE II). At the close of the hearing, I left the record open until September 28, 2018, for Applicant to submit additional documents. Within the time allotted, he submitted 16 additional exhibits that I incorporated into the record as AE G through AE V. The transcript (Tr.) was received on September 20, 2018.

While this case was pending a decision, Security Executive Agent Directive 4 was issued establishing 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.

Preliminary Ruling

Applicant provided evidence that he does not owe any money for delinquent traffic citations, as alleged in subparagraphs 1.c and 1.d. (AE F) I resolve these allegations in his favor.

Findings of Fact

Applicant is a 41-year-old single man. He graduated from college in 1999 with a degree in financial management. After graduation, he entered the U.S. Air Force, where he served for five years. He was discharged honorably. In 2010, he earned an MBA in financial management. Currently, he works for a defense contractor as a budget analyst. He has worked in the fields of budget analysis or financial management since graduating from college, including during his stint in the U.S. Air Force. (Tr. 19, 36)

Applicant purchased a home in 2006. (AE Q) He financed the purchase with the combination of two mortgages. (Tr. 65) The primary mortgage was an adjustable rate mortgage (ARM) with a \$346,000 balance. Under the terms of the ARM, he was to satisfy the balance through monthly payments through 2036. (AE Q) He was only required to make interest payments on the principal balance for the first five years of the loan at a lower-than-market, fixed rate. In August 2011, he was required to begin making monthly payments that included both the principal and the interest. The adjusted interested rate was variable and subject to change each month. Under the terms of the second mortgage, Applicant was required to repay \$86,600 of principal and interest in monthly increments between 2006 and 2021. (AE S)

In April 2011, approximately four months before the monthly payment was set to increase on the primary mortgage, Applicant stopped making the monthly payments. Also,

at that time, he stopped making monthly payments on the second mortgage. (AE T; AE Q at 23) Applicant, in his answer, attributed his decision to stop paying the mortgages to “a large reduction in pay, and loss of employment.” (Answer at 1) He elaborated at the hearing, testifying that his salary decreased from \$125,000 to \$100,000 annually, between late 2011 and May 2013, and that he was unemployed from June 2013 to November 2013. (Tr. 29, 37) He tried to obtain a loan modification, but the fair market value of the home was less than the principal balance on the mortgages. (Tr. 29)

On cross-examination, Applicant testified that his salary was not reduced until November 2011, approximately seven months after he stopped making mortgage payments, and that he could have made payments, but “it would have been tight.” (Tr. 56) Also, his testimony on cross-examination revealed that between April 2011, when Applicant stopped making mortgage payments, and June 2013, when Applicant was laid off, he took four Caribbean vacations, two overseas trips, and a trip to South America. (Tr. 42-43)

After Applicant acknowledged during cross-examination that he could have continued making the mortgage payments, his explanation for stopping the payments changed. Specifically, he contended that the mortgagee who had purchased the loan in 2009 was not the legitimate holder of the loan, and alternatively, that the loan was voidable because its terms were negotiated in an unscrupulous fashion. (Tr. 90, 93) Applicant made payments without interruption between 2009 and 2011, not questioning the mortgage’s validity until shortly before the monthly payments were set to balloon. (Tr. 53)

Applicant gained another job in November 2013. Although he continued to negotiate a loan modification, he still made no payments on the then-existing mortgage. Also, while negotiations were pending, Applicant resumed his traveling, going to the Caribbean three times between January and October of 2014. (Tr. 43) In December 2014, the bank moved to foreclose the property, prompting Applicant to retain an attorney. (GE 1 at 51) After two years of unsuccessful efforts to negotiate a loan modification, Applicant filed for Chapter 13 bankruptcy protection in 2017, in an effort to forestall a foreclosure. (Tr. 24, 80)

By March 2017, Applicant was delinquent on the primary mortgage in the amount of \$137,758, and \$31,507 on the second mortgage, as alleged in subparagraphs 1.a and 1.b.¹ In June 2017, Applicant began making monthly mortgage payments, composed of principal and interest, of \$3,051, as part of a tentative loan modification. (AE C; Tr. 60) Applicant, through his attorney, finalized a loan modification agreement with the primary mortgagee in September 2017. (AE A) The balance by the agreement date totaled \$437,294. (AE A at 1) After executing the loan modification, he decided not to pursue the Chapter 13 bankruptcy, whereupon, the court dismissed it. (GE 5 at 7; Tr. 81) Applicant has been making the primary mortgage payments, as agreed, since June 2017. (AE C) Per the new mortgagee, the account is current. (AE D)

Applicant is now focused upon resolving the second mortgage. The negotiations are on hold pending the resolution of Applicant’s appeal of the mortgagee’s property appraisal. Specifically, he asserts that the mortgagee’s appraisal is approximately \$200,000 too high.

¹ Applicant continued to pay his property taxes. (Tr. 76)

(AE E at 2) He obtained a professional appraisal which the mortgagee is reviewing. (Tr. 71) When Applicant and the mortgagee agree on the fair-market value of the home, he will satisfy the balance either with a lump-sum payment, or a short-term repayment plan. Applicant plans to pay the balance using his savings, which total \$174,000. (AE H and AE I) He keeps a budget and has \$931 in monthly disposable income. (AE J)

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(c), 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.

Analysis

Guideline F: Financial Considerations

The security concerns about financial considerations are set forth in AG ¶ 18:

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.

Applicant did not make any mortgage payments on his home for six years. With the exception of a six-month unemployment period in 2013, Applicant failed to make his mortgage payments not because he could not afford to do so, but because he wanted to compel the mortgage companies to renegotiate the loans. AG ¶ 19(c), "a history of not meeting financial obligations," and AG ¶ 19(b), "unwillingness to satisfy debts regardless of the ability to do so," apply.

The bad judgment Applicant demonstrated by stopping his mortgage payments and lavishing money on exotic trips while he was negotiating a loan modification, together with the length of time that he failed to make mortgage payments on his home render 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," inapplicable. Applicant's decision not to pay his mortgage payments, despite an ability to do so, also renders the mitigating condition set forth in 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," inapplicable.

Applicant retained an attorney and successfully obtained a loan modification of his primary mortgages. He has been making mortgage payments, without interruption, since June 2017. He is in the process of negotiating a modification of the second mortgage. He has more than double the amount of the loan either invested or deposited in savings accounts. He keeps a budget and has \$931 in disposable income. AG ¶ 20(c), "there are clear indications that the problem is being resolved or is under control," applies.

Applicant strategically defaulted on his mortgage to compel the mortgagee to agree to a loan modification, and did not resume payments until June 2017, two months after the issuance of the SOR. AG ¶ 20(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts," does not apply.

Whole-Person Concept

Applicant appears to have his finances under control, as he has been making mortgage payments on his primary mortgage, and he has ample savings in reserve to resolve the second mortgage, which he is working towards resolving. However, whether his finances are stable is only part of the security clearance analysis. Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors under AG ¶ 2(d), as set forth below:

(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.

Applicant did not make any mortgage payments for six years. He did not default on his legal obligation to pay his mortgages because of financial hardship. Rather, he defaulted as a strategy to coerce the mortgagees into negotiating home loans with more favorable terms that were more congruent with his lifestyle. Compounding the bad judgment demonstrated by this decision, he went on multiple exotic vacations while the loan was in default, and at hearing, offered conflicting explanations about why he stopped making the mortgage payments. Given the nature and seriousness of this conduct, his current financial stability is insufficient to mitigate the security concern.

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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant
Subparagraphs 1.c – 1.d:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Marc E. Curry
Administrative Judge