



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-03822

Appearances

For Government: Chris Morin, Esquire, Department Counsel

For Applicant: *Pro se*

04/07/2015

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant has mitigated the security concerns regarding financial considerations. Eligibility for a security clearance and access to classified information is granted.

Statement of the Case

On December 12, 2013, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application.¹ On September 27, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guideline F (Financial

¹ Item 5 (e-QIP, dated December 12, 2013).

Considerations), and detailed reasons why the DOD CAF was unable to make an affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant received the SOR on December 2, 2014. In a statement, notarized December 16, 2014, Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing.² A complete copy of the Government's file of relevant material (FORM) was provided to Applicant on January 20, 2015, and he was afforded an opportunity, within a period of 30 days after receipt of the FORM, to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the FORM on February 10, 2015. A response was due by March 12, 2015, but as of March 25, 2015, he had not submitted any response. The case was assigned to me on March 30, 2015. As of the date of this decision, no response had been received.

Findings of Fact

In his Answer to the SOR, Applicant admitted both of the factual allegations pertaining to financial considerations in the SOR (¶¶ 1.a. and 1.b.). Applicant's admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 40-year-old employee of a defense contractor. He has been serving as an associate with his current employer since March 2004.³ A 1994 high school graduate, Applicant received a bachelor's degree in 1999 and a master's degree in 2002.⁴ He has never served with the U.S. military.⁵ Applicant has never held a security clearance.⁶ He has never been married, but he has resided with a cohabitant since April 2002.⁷

Financial Considerations

There was nothing unusual about Applicant's finances until about 2009, when the national economic crisis negatively affected his business industry resulting in massive layoffs in his field. In December 2005, while he was working in his hometown on a

² Item 4 (Applicant's Answer to the SOR, dated December 16, 2014).

³ Item 5, *supra* note 1, at 12-13.

⁴ Item 5, *supra* note 1, at 11-12; Item 6 (Personal Subject Interview, dated January 30, 2014), at 4.

⁵ Item 5, *supra* note 1, at 15.

⁶ Item 5, *supra* note 1, at 44.

⁷ Item 5, *supra* note 1, at 17.

temporary assignment, which he thought would become long-term, Applicant had purchased a residence for \$114,900, with 80 percent or \$91,920 for the first mortgage. He did so in anticipation of relocating to the area approximately 345 miles from where he was permanently located with his employer. Applicant's sister moved into the residence and made the mortgage payments after his temporary assignment ended. In 2011, Applicant's sister moved to a smaller, less expensive residence, and Applicant unsuccessfully sought other renters. Applicant continued paying the mortgage for that residence in addition to his primary residence, and he started experiencing tremendous financial strain. He decided to sell the property. In 2012, he placed it on the market hoping for a short-sale. He received three offers, all of which were rejected by the first mortgage holder. The residence remained vacant for nearly eight months.⁸

With no rental activity, little interest from any other prospective buyers, and unable to continue making his \$850 monthly mortgage payments, Applicant stopped making those payments. By January 2014, he had an unpaid balance of \$83,386 of which \$14,742 was past due.⁹ The mortgage holder foreclosed on the mortgage, and in May 2014, the property was sold at public auction for \$20,100.¹⁰ Applicant contended that the mortgage holder agreed not to seek a deficiency judgment against him, releasing him from any deficiency balance.¹¹ Department Counsel argued that Applicant failed to submit any documentary evidence to support that contention,¹² but that position is not necessarily accurate.

The court record in evidence reflects that the property in question was described as a homestead residential foreclosure.¹³ The docket listing reflects, among other relevant actions, the foreclosure, the affidavit as to amounts due and owing, the final judgment, the certificate of sale, the certificate of title, the memorandum to disburse \$20,100, and the issuance of the writ of possession.¹⁴ In the state in which the foreclosure and auction sale took place, the entry of a deficiency decree for any portion of a purported deficiency, should one exist, is within the sound discretion of the court, and must be reflected in the foreclosure order.¹⁵ Since the mortgage lender's right to sue at common law to recover a deficiency was not addressed by the court in the foreclosure action, a potential deficiency action no longer exists, and Applicant's contention is supported. The account has been resolved.

⁸ Item 4, *supra* note 2; Item 6, *supra* note 4, at 3, 6; Item 1, *supra* note 1, at 45; Item 8 (Foreclosure File, various dates), at 8.

⁹ Item 4, *supra* note 2; Item 6, *supra* note 4, at 6; Item 1, *supra* note 1, at 45; Item 7 (Combined Experian, TransUnion, and Equifax Credit Report, dated January 9, 2014), at 5.

¹⁰ Item 8, *supra* note 8, at 7.

¹¹ Item 4, *supra* note 2.

¹² FORM, at 5-6.

¹³ Item 8, *supra* note 8, at 4.

¹⁴ Item 8, *supra* note 8, at 1-7.

¹⁵ Fla. Stat. ch. 702.06 (2014).

In addition to the first mortgage on the residence, Applicant also financed the remaining 20 percent with a second mortgage or home equity loan.¹⁶ When he was unable to continue making his monthly mortgage payments, Applicant also stopped making his second mortgage payments. By January 2014, he was past due \$1,252.¹⁷ When the mortgage holder of the first mortgage foreclosed on the mortgage and the property was sold at public auction, the second mortgage holder was a named party.¹⁸ A second mortgage is generally subordinate to a first mortgage, and the interests of the second mortgage holder normally become a lien on the property. When Applicant's property was acquired by the first mortgage holder and sold, the second mortgage holder might receive repayments if the first mortgage is paid off. Since the second mortgage holder did not receive enough money from the first mortgage holder's foreclosure to satisfy the debt, it can sue Applicant for the difference based on the second mortgage promissory note. Applicant concedes that there is still a remaining unpaid balance, but indicated his attorney is in negotiations with the second mortgage holder in an effort to settle the account.¹⁹ Under these circumstances, and in the absence of any documentation related to either negotiations or payments, I conclude the account has not been resolved.

Applicant has no other delinquent debts.²⁰ His financial situation is stable, and he is able to meet all of his monthly financial obligations. Applicant's financial problems appear to be under control.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."²¹ As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."²²

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations

¹⁶ Item 6, *supra* note 4, at 6-7.

¹⁷ Item 7, *supra* note 9, at 8.

¹⁸ Item 8, *supra* note 8, at 1-2.

¹⁹ Item 4, *supra* note 2; Item 6, *supra* note 4, at 7.

²⁰ Item 7, *supra* note 9.

²¹ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

²² Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."²³ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.²⁴

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Furthermore, "security clearance determinations should err, if they must, on the side of denials."²⁵

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."²⁶ Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty,

²³ "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

²⁴ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

²⁵ *Egan*, 484 U.S. at 531.

²⁶ See Exec. Or. 10865 § 7.

or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out 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 information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. . . .

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly, under AG ¶ 19(c), "a history of not meeting financial obligations" may raise security concerns. Applicant's financial problems initially arose in 2009 and continued for several years thereafter. In 2012, he was unable to continue making his routine monthly mortgage payments, and both his first and second mortgage accounts became delinquent. The first mortgage was eventually foreclosed upon, and the residence was sold at public auction. AG ¶¶ 19(a) and 19(c) apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where "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." Also, under AG ¶ 20(b), financial security concerns may be mitigated where "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." Evidence that "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control" is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."²⁷

²⁷ The Appeal Board has previously explained what constitutes a good-faith effort to repay overdue creditors or otherwise resolve debts:

AG ¶¶ 20(a), 20(b), 20(c), and 20(d) all partially apply. The nature, frequency, and relative recency of Applicant's continuing financial difficulties since 2012 make it difficult to conclude that it occurred "so long ago" or "was so infrequent." Applicant's financial problems were not caused by frivolous or irresponsible spending, and he did not spend beyond his means. Instead, Applicant's financial problems were largely beyond his control. The initial period of financial difficulty arose in 2009 when the national economy was plummeting, and there were massive layoffs in his field. His anticipated relocation to his hometown failed to materialize, and when his sister vacated the residence in 2011, he was unable to find renters. He attempted to sell the residence, but aside from three short sale offers, all of which were rejected by the first mortgage holder, there were no other potential purchasers.

While the national economy has not fully rebounded from the depths of that earlier period, Applicant's financial problems occurred under such rare circumstances that it is unlikely to recur and does not cast doubt on his current reliability, trustworthiness, or good judgment. Maintaining two residences for a lengthy period was more than his salary could sustain. With insufficient money to maintain his monthly payments, the first mortgage was eventually foreclosed upon and the residence was sold at public auction.

Applicant's attorney is attempting to work with his second mortgage creditor in an effort to settle the outstanding balance.²⁸ With the first mortgage deficiency issue resolved, there are clear indications that Applicant's remaining financial problem is under control, especially since he is current on all his other accounts. Applicant's actions under the circumstances confronting him, do not cast doubt on his current reliability, trustworthiness, or good judgment.²⁹

Whole-Person Concept

In order to qualify for application of [the "good-faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy) in order to claim the benefit of [the "good-faith" mitigating condition].

(internal citation and footnote omitted) ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

²⁸ "Even if Applicant's financial difficulties initially arose, in whole or in part, due to circumstances outside his [or her] control, the Judge could still consider whether Applicant has since acted in a reasonable manner when dealing with those financial difficulties." ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999); ISCR Case No. 03-13096 at 4 (App. Bd. Nov. 29, 2005)). A component is whether he or she maintained contact with creditors and attempted to negotiate partial payments to keep debts current.

²⁹ See ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.³⁰

There is some evidence against mitigating Applicant's conduct. In December 2005, while he was working on a temporary assignment without any assurances that the assignment would become long-term, Applicant purchased a residence in his hometown for \$114,900. He was subsequently unable to maintain making his monthly payments for his first and second mortgages on the property and stopped making his payments. By January 2014, he had an unpaid balance on the first mortgage of \$83,386, of which \$14,742 was past due. The mortgage holder foreclosed on the mortgage, and in May 2014, the property was sold at public auction for \$20,100. He still owes the second mortgage holder the unpaid balance of that mortgage.

The mitigating evidence under the whole-person concept is more substantial. Applicant's financial problems were not caused by frivolous or irresponsible spending, and he did not spend beyond his means. Rather, Applicant's problems were largely beyond his control. The financial problems associated with the national economic crisis resulted in massive layoffs in his field. It also terminated his anticipated relocation to his residence. Applicant was able to sustain his two mortgages while his sister resided in the residence. Once she moved out and he was unable to locate renters, the financial burden began as he was required to make his monthly mortgage payments in addition to his rent payments. The burden was simply too great. Applicant tried selling the residence, but three short-sales fell through when the first mortgage lender refused to agree to the sales. The residence remained vacant for nearly eight months. Applicant worked with the mortgage lenders, and when he was no longer able to continue making payments, the first mortgage holder foreclosed on the mortgage and eventually sold the property at public auction. No deficiency judgment was pursued, and Applicant no

³⁰ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

longer owes the first mortgage holder any money. He still owes the second mortgage holder the unpaid balance of that mortgage, but Applicant's attorney is attempting to work with his second mortgage creditor in an effort to settle the outstanding balance.

Since he has no other delinquent accounts, there are clear indications that Applicant's financial problems are under control. His actions, under the circumstances confronting him, do not cast doubt on his current reliability, trustworthiness, or good judgment. The entire situation occurred under such circumstances that it is unlikely to recur.

This decision should serve as a warning that Applicant's failure to continue his debt resolution efforts pertaining to the second mortgage or the actual accrual of new delinquent debts will adversely affect his future eligibility for a security clearance.³¹ Overall, the evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has mitigated the security concerns arising from his financial considerations. See AG ¶ 2(a)(1) through AG ¶ 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
Subparagraph 1.b:	For Applicant

³¹ While this decision should serve as a warning to Applicant, the decision, including the warning, should not be interpreted as being contingent on future monitoring of Applicant's financial condition. The Defense Office of Hearings and Appeals (DOHA) has no authority to attach conditions to an applicant's security clearance. See, e.g., ISCR Case No. 10-06943 at 4 (App. Bd. Feb. 17, 2012) (citing ISCR Case No. 10-03646 at 2 (App. Bd. Dec. 28, 2011)). See also ISCR Case No. 06-26686 at 2 (App. Bd. Mar. 21, 2008); ISCR Case No. 04-03907 at 2 (App. Bd. Sep. 18, 2006); ISCR Case No. 04-04302 at 5 (App. Bd. Jun. 30, 2005); ISCR Case No. 03-17410 at 4 (App. Bd. Apr. 12, 2005); ISCR Case No. 99-0109 at 2 (App. Bd. Mar. 1, 2000).

Conclusion

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

ROBERT ROBINSON GALES
Administrative Judge