

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

In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 12-02336
)
Applicant for Security Clearance)

Appearances

For Government: Daniel Crowley, Esq., Department Counsel
For Applicant: David P. Price, Esq.

APR 30 2014

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on July 15, 2011. On November 26, 2013, the Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline F. The DOD acted under Executive Order 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 (AG) implemented by DOD on September 1, 2006.

Applicant received the SOR on December 9, 2013; answered it on December 13, 2013; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on January 2, 2014, and the case was assigned to me on

January 10, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 13, 2014, scheduling the hearing for February 20, 2014. I

convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified, presented the testimony of four witnesses, and submitted Applicant's Exhibits (AX) A through E,¹ which were admitted without objection. I kept the record open until March 7, 2014, to enable Applicant to submit additional documentary evidence. He timely submitted AX A.1.a(2) and AX E.12, which were admitted without objection. Department Counsel's comments regarding AX A.1.a(2) and AX E.12 are attached to the record as Hearing Exhibit I. DOHA received the transcript (Tr.) on March 4, 2014.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations, with explanations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 60-year-old project manager employed by a defense contractor since August 1983. He married in August 1972. He and his wife have three adult children.

Applicant served as an officer on active duty in the U.S. Navy from May 1975 to August 1983, and he retired from the Ready Reserve as a lieutenant commander in 1992. His fitness reports while on active duty and in the Ready Reserve were outstanding. As a lieutenant commander, he received fitness reports that uniformly recommended early promotion. (AX C.) He held a security clearance in the Navy, and he continued to hold it as an employee of a defense contractor. (Tr. 79-80.)

When Applicant submitted his most recent security clearance application in July 2011, he disclosed that the loans had been foreclosed on three investment properties and a judgment entered against him by the lender for one of the properties. (GX 1 at 29-31.) The foreclosures and judgment were reported in the Joint Personnel Adjudication System (JPAS). (GX 3.)

Applicant and his wife began looking for investment opportunities around 2005 or 2006. Applicant and his wife consider themselves financial conservatives, and they researched their options carefully and discussed them fully. (Tr. 70-71.) They attended seminars, attended real estate training courses, and received individual mentoring from licensed realtors. They were looking for a safe, conservative investment that would generate about \$1,000 per month. In November 2006, they attended a seminar on capital leases. The concept of the capital lease was that a developer would build

houses, sell them to investors, lease the properties back from the investors, rent the properties, make the mortgage payments, and pay a fee equal to ten percent of the rental income to each investor. The leaseback to the developer was for 30 years, but

1 Applicant's Exhibit A is subdivided into three groups corresponding to the three debts alleged in the SOR, and each group contains multiple numbered documents. Exhibits B through E also contain multiple documents.

the understanding of the parties was that the property would be sold in about a year at a profit. Applicant and his wife made a 20% down payment on each property. They believed that a 20% cushion was sufficient in the event that the real estate market declined. (Tr. 83-88.)

Applicant and his wife purchased the first investment property (alleged in SOR Para 1.b(i) in October 2007. (AX A.1.b.i(1).) After receiving the monthly fees from the developer for six or seven months, they purchased a second property (alleged in SOR Para 1.b (ii)) from the same developer in March 2008 (AX A.1.b.ii(1) and a third property (alleged in SOR Para 1.a) from a different developer in October 2008. (AX A.1.a(1).) After receiving fees from the first developer for another month or two, Applicant began receiving late notices from the mortgage lender. He contacted the developer, who told him they were having "cash flow problems." (Tr. 92.) For four months, the developer received the rent money but did not make the mortgage payments or pay Applicant his percentage of the rental income. Applicant used his own assets to make the mortgage payments. The mortgage lender would not discuss any modification of the payments because they were not in default. Applicant and his wife intentionally stopped making payments so that the lender would talk to them. (Tr. 69, 95-96.)

At the same time, Applicant began using his own property management company to find tenants, but the rental market declined, and he found it impossible to charge enough rent to pay the mortgages. He offered short sales to the tenants in the first two properties, without success. (AX A.1.b.i(4)-(6) and AX A.1.b.ii(4)-(5).) He offered the lender a deed in lieu of foreclosure, but the lender declined the offer. (Tr. 97.) The loans on both properties were foreclosed. In September 2008, the first property was sold for \$377,832, more than the balance due on the loan, which was \$352,024. (AX A.1.b.i(8).) In September 2010, the second property was sold for \$206,100, less than the balance of \$355,685. (AX A.1.b.ii(7).) Under the law of the jurisdiction where the second property was located, an action to recover the deficiency must be commenced within three months of the foreclosure sale. (AX A.1.b.ii(10).) The lender took no action to recover the deficiency. (Tr. 102-03.)

Applicant hired a lawyer, sued the first developer for breach of contract, and obtained a judgment for \$206,000, but the developer filed for bankruptcy. (AX A.1.b.i(10).) Applicant's lawyer advised against further collection efforts, because the developer had virtually no assets. (Tr. 99-101.) Applicant filed a claim against the developer's assets as an unsecured creditor but has not received anything. (Tr. 103.) Applicant also encountered financial problems with the third property, alleged in SOR Para 1.a, which was purchased from another developer. This developer represented that he already had a renter for this property, which was untrue, leaving Applicant with no rental income. In June 2010, Applicant received a short-sale offer \$330,000. (AX A.1.a(5).) The lender approved the offer, on the condition that Applicant pay the \$222,000 difference between the sale price and the balance on the loan. (Tr. 106.) After Applicant informed the lender that he could not pay the \$222,000 in full and offered to pay it in installments, the lender obtained a judgment against him in January 2011. (AX

A.1.a(10)-(12).) In February 2014, after protracted negotiations and legal maneuvering, Applicant and the lender reached a settlement for \$90,000, in which Applicant agreed to pay \$60,000 not later than February 26, 2014, and \$500 per month for 60 months. (AX A.1.a(13).) Applicant liquidated some investments, withdrew IRA funds, and withdrew funds from his company retirement account to generate the \$60,000. (AX A.1.a(15) (19); Tr. 115-16.) On February 26, 2014, he paid the initial \$60,000 and made the first \$500 monthly payment. (AX A.1.a(20).)

Even after withdrawing \$60,000 from various retirement income sources, Applicant still has retirement accounts totaling about \$502,000. (AX B.19-20; Tr. 130.) His net monthly income is about \$10,690, and his net monthly remainder after paying all expenses and legal obligations is about \$4,349. (AX B.3) He owns his home and a rental property that he acquired for his daughter. His daughter decided to move to a larger home, and Applicant has found a renter to replace her. He receives about \$1,200 in monthly rental income, and his monthly mortgage payments on the rental home are \$950. (Tr. 119-21.)

Applicant's supervisor testified and submitted a letter on his behalf. She has held a security clearance since 1979, and she has worked with Applicant since about 1983. Applicant initially was her supervisor, until he shifted his focus to technical requirements and she moved into management. They have daily, almost continuous contact and have traveled together on company business. Applicant's supervisor describes him as fiscally frugal both at work and at home, devoted to his family, security conscious, and compassionate. Applicant informed her of his financial problems with his investment properties, and she has reviewed the statement of reasons. She has no hesitation about recommending that Applicant be allowed to keep his security clearance. (AX E.8; Tr. 27-37.)

Applicant's facility security officer (FSO) also testified and submitted a letter on his behalf. She became Applicant's FSO in 2009, and she has daily contact with him. At some time before 2012, Applicant notified her that he was having problems with some of his investment properties. He knew that she would be required to submit an adverse incident report. The FSO considers Applicant trustworthy, candid, and a person who can be trusted to safeguard classified information. (AX E.7; Tr. 42-48.)

Applicant's performance appraisals for the past 30 years have consistently rated him between outstanding (the highest rating) and exceeding performance requirements (the next highest rating). Throughout his civilian career, he has received numerous commendations, letters of appreciation, and monetary awards. (AX D.)

Applicant's sister-in-law testified and submitted a letter on his behalf. She met Applicant when she was four years old. Applicant became her guardian when she was 14 years old, after her parents divorced and her alcoholic father asked Applicant to take care of her. She has been inspired by Applicant's dedication to his country and his family. Applicant was her role model regarding fiscal responsibility. She owes her

current success and happiness to Applicant's compassion, support, and good example. (AX E.3; Tr. 51-58.)

Applicant's daughter, the president and chief executive officer of a medical services company, submitted a statement describing Applicant as conservative, dependable, and a person of integrity. She considers him very honest, and she remembers being taught that "honesty is not an option." (AX E.2.) Applicant's son, a successful software engineer, also describes his father as trustworthy, dependable, reliable, and honest. (AX E.4.) A personal friend for ten years describes Applicant as honest, trustworthy, involved with the community, and devoted to his family. (AX E.5) Five professional colleagues, who have known Applicant for periods ranging from five years to 30 years, submitted statements describing Applicant as financially conservative, honest, trustworthy, calm, thoughtful, reliable, and a man of good judgment. (AX E.5; AX E.6; AX E.9; AX E.10; AX E.11; AX E.12.)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the

applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See ISCR Case No. 92-1106* at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive 11 E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See ISCR Case No. 02-31154* at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." *ISCR Case No. 01-20700* at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG 112(b).

Analysis

Guideline F, Financial Considerations

The SOR alleges that Applicant's mortgage loan for \$520,000 was foreclosed and that he owes a deficiency balance of about \$222,000 (SOR Para 1.a). It also alleges that two other mortgage loans were foreclosed for about \$355,000 and \$358,000, but no deficiency balances are alleged (SOR Paras 1.b(i) and 1.b(ii)).

The concern under this guideline is set out in AG Para 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.

This concern is broader than the possibility that an individual might knowingly compromise classified information in order to raise money. It encompasses concerns

about an individual's self-control, judgment, and other qualities essential to protecting

classified information. An individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information. *See* ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

Applicant's admissions and the evidence of his three defaulted mortgage loans that were foreclosed establish two disqualifying conditions under this guideline: AG Para 19(a) ("inability or unwillingness to satisfy debts") and AG Para 19(c) ("a history of not meeting financial obligations").

The following mitigation conditions are potentially relevant:

AG Para 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 Para 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;

AG Para 20(c): 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; and

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

AG Para 20(a) is established. The resolution of debt alleged in SOR Para 1.a was not finalized until February 2014 and will take five years. However, the debt in SOR Para 1.b(i) was resolved by foreclosure and sale in September 2008, more than five years ago; and the debt in SOR Para 1.b(ii) was resolved when the deadline for collecting a deficiency expired in December 2010, more than three years ago. Applicant's delinquent debts occurred under circumstances making them unlikely to recur, and they do not cast doubt on his current reliability, trustworthiness, and good judgment. Applicant's entire military and civilian careers were served in an environment where honesty and integrity are the norm. His delinquent debts occurred when he ventured into three complex real estate investments that were dependent on the reliability and trustworthiness of two developers. He was not prepared for the reality that the morals of the marketplace may not be the same as those for government service. I am confident that he has learned his lesson and will not make the same or similar mistakes again.

AG Para 20(b) is established. Applicant encountered two circumstances beyond his control: unscrupulous real estate developers and a drastic downturn in the real estate market. He acted responsibly by negotiating with the lenders, using his personal assets

in an effort to make his mortgage loan payments, seeking short sales, seeking

modification of his loans, offering a deed in lieu of foreclosure, and making a good-faith effort to resolve the deficiency on the mortgage loan alleged in SOR Para 1.a.

AG Para 20(c) is established. Applicant sought legal advice when he became unable to pay the mortgage loans, and the defaulted loans are resolved. The loan alleged in SOR Para 1.b(i) was satisfied by the foreclosure sale. Applicant is paying the deficiency on the loan in SOR 111.a through a payment plan. The lender for the loan alleged in SOR Para 1.b(ii) was required by the law of the local jurisdiction to act promptly to recover the deficiency, but did not, apparently abandoning efforts to collect it.

AG Para 20(d) is established for the mortgage loans alleged in SOR Para 1.a and 1.b(ii). The loan in SOR Para 1.b(i) was fully satisfied by the foreclosure sale, and Applicant has negotiated a payment plan and commenced payments on the deficiency after the foreclosure in SOR Para 1.a. AG Para 20(d) is not established for the deficiency on the defaulted mortgage loan alleged in SOR Para 1.b(ii), because Applicant allowed the statute of limitations to run on the deficiency after foreclosure. "Even assuming that judicial enforcement of the debt has been precluded by the statute of limitations, we have consistently held that reliance upon such a remedy is not normally a substitute for good-faith efforts to payoff debt." ISCR Case No. 07-16427 (App. Bd. Feb. 4,2010.)

Whole-Person Concept

Under AG Para 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. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG Para 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.

I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG Para 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant has spent all his professional life in support of national defense, holding a security clearance the entire time. He enjoys a reputation for being fiscally

conservative, honest, trustworthy, and devoted to his family. He acted responsibly after

wandering into unfamiliar financial territory and finding himself in difficulty. Although he allowed the statute of limitations to run on the deficiency judgment after the foreclosure of the loan alleged in SOR Para 1.b(ii), his failure to volunteer payment to the lender, who did not exercise due diligence to collect the deficiency, does not cast doubt on his current reliability, trustworthiness, or good judgment.

After weighing the disqualifying and mitigating conditions under Guideline F, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on financial considerations. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline F (Financial Considerations): FOR APPLICANT

Subparagraphs 1.a, 1.b(i), and 1.b(ii): For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge

