



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



In the matter of:)
)
) ISCR Case No. 14-03778
)
Applicant for Security Clearance)

Appearances

For Government: Stephanie C. Hess, Esq., Department Counsel
For Applicant: *Pro se*

05/22/2015

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Department of Defense’s (DOD) intent to deny him eligibility for a security clearance to work in the defense industry. Applicant’s decision to strategically default on mortgage and home equity line of credit loans on his home occurred under unusual circumstances caused by an issue with the home’s title, which are not likely to recur. Clearance is granted.

Statement of the Case

On August 15, 2014, the DOD issued a Statement of Reasons (SOR) detailing security concerns under the financial considerations guideline.¹ DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue Applicant’s security clearance and recommended that the case be submitted to an

¹ This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

administrative judge for a determination whether to revoke or deny Applicant's security clearance.

Applicant timely answered the SOR and requested a hearing.² At the hearing convened on February 11, 2015, I admitted Government's Exhibits (GE) 1 through 3 and Applicant's Exhibit (AE) A, without objection. After the hearing, Applicant timely submitted AEs B through K, which I admitted without objection.³ I received the transcript (Tr.) on February 23, 2015.

Findings of Fact

Applicant, 54, is the co-founder and chief operating officer (COO) of a technology firm that works on contracts for the federal government. He is designated a key management personnel. Applicant has held a security clearance since approximately 1990. On his most recent security clearance application, submitted in October 2013, Applicant disclosed that he was attempting a short sale of his primary residence. The resulting investigation revealed that Applicant was more than 180 days past due on a mortgage loan (SOR ¶1.a) and a home equity line of credit (HELOC) (SOR ¶ 1.b). The SOR also alleges two additional debts (SOR ¶¶ 1.c – 1.d) totaling \$472. Applicant denies owing these two debts.⁴

Applicant purchased his home in 2003 for \$307,000, financed with a traditional 30-year fixed-rate mortgage. He refinanced in 2006 and opened a HELOC with \$160,000 available in credit. Between 2006 and 2008, Applicant withdrew \$157,000 from the HELOC, using it as an income source. Using the available credit on the HELOC caused Applicant to become upside down on the house. In 2012, Applicant decided to refinance the home again to secure a lower interest rate on his mortgage loan.⁵ The refinance would have saved him approximately \$1,000 each month. The mortgage lender approved Applicant's refinance application in December 2012. Before closing, the mortgage company learned that during the 2006 refinance, the HELOC lender did not sign or file a subordination agreement. Applicant was not responsible for the error. As a result, the HELOC lender was the primary lien holder on the property. The mortgage lender refused to close the refinanced loan until the subordination issue was resolved.⁶

² The Government's discovery letter, dated October 29, 2014, is appended to the record as Hearing Exhibit (HE) I.

³ The correspondence related to the Applicant's post-hearing submissions is appended to the record as HE II.

⁴ Tr. 16-19; GE 1-3; AE C.

⁵ Applicant sought to refinance his home under a federal program that allowed qualified borrowers to refinance even if they owed more on the home than its market value.

⁶ Tr. 19-20, 25-26, 31-33; AE B.

Applicant filed a claim with his title insurance company. However, the claim did not provide any relief as title insurance is meant to protect the lenders not the borrower. In February 2013, Applicant consulted a real estate attorney. The attorney advised Applicant to stop paying the mortgage loan and the HELOC in hopes of spurring the two lenders into resolving the subordination issue. Applicant stopped paying the mortgage loan that month. He tried to work with the lenders to resolve the subordination issue from February to May 2013. Applicant soon found himself fed up. He did not believe that he should be stuck with a higher interest rate loan because of a clerical issue that he had no control over repairing. Between May and December 2013, Applicant twice tried to short sale the home. On both occasions, the lenders rejected the sales contract because of the unresolved subordination issue. After again seeking the advice of a real estate attorney and a family member who was an experienced real estate agent, Applicant decided to strategically default on the home. In doing so, he availed himself of the protection offered by his state's antideficiency statute.⁷

In January 2014, the mortgage lender sued the HELOC lender to correct the subordination issue, also naming Applicant and his wife as defendants. Applicant hired an attorney to represent him in the case. However, the two banks settled the dispute in August 2014. Applicant was not made privy to the details of the settlement. The mortgage lender foreclosed on the home and it was sold. Applicant is not sure of the sales price. He testified that he received IRS Form 1099s from the lenders regarding the property, but the record does not indicate whether the forms were for the acquisition of the debt or cancellation of any deficiency balance. One month after the foreclosure, Applicant was pre-qualified for a new mortgage loan. Now unencumbered by the title issue, Applicant considered re-purchasing the house. However, his attorney advised him against doing so as it might cause Applicant to lose any protection, if any, afforded by the state's antideficiency statute.⁸

At hearing, Applicant testified that his decision to strategically default on his mortgage was not one born of financial hardship. Even though he was upside down on the home at the time of the refinance, he liked his home and did not have a desire to move. Applicant earns approximately \$200,000 in annual income and has a household income of approximately \$225,000. His net worth is approximately \$1.6 million. Applicant recognizes that he could have paid off the \$157,000 HELOC balance entirely negating the subordination issue. However, to do so would have required him to sell shares of the company he co-founded or liquidate his retirement savings. He did not believe that either option was in the best interest of his long-term financial health as each option came with significant financial penalties.⁹

⁷ Tr. 20-21, 35-41; AE B, E-J.

⁸ Tr. 22-24, 27, 42-43.

⁹ Tr. 24, 29-31, 40-41, 43-45; AE K.

Policies

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 to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching 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 access to classified information will be resolved in favor of 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 the 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

Unresolved delinquent debt is a serious security concern because failure to “satisfy debts [or] 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.”¹⁰ Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, or negligent in handling and safeguarding classified information within the defense industry.

The SOR alleges Applicant is indebted to four creditors for approximately \$57,700. Applicant denies the two collection accounts alleged in SOR ¶¶ 1.c (\$397) and 1.d (\$75) as being erroneous entries on his credit report. Although he has not done anything to resolve or dispute them, the amount owed on the two accounts is nominal and does not reflect negatively on his current security worthiness. The SOR also alleges that at the time of its issuance, Applicant was over 180 days past due on his mortgage (SOR ¶ 1.a) and HELOC (SOR ¶ 1.b) loans in the amount of \$57,200. The SOR does not allege that Applicant is responsible for a deficiency balance on either loan, and it is not clear from the record if any deficiency balances exists. As a result, the analysis of the financial considerations disqualifying and mitigating conditions will focus on the security significance of Applicant’s decision to strategically default on his mortgage and HELOC loans.

Applicant’s admission that he decided to strategically default on his mortgage shows an unwillingness to pay his creditors¹¹ and establishes the Government’s *prima facie* case. However, the record contains sufficient evidence to mitigate the underlying security concerns. This is not a typical strategic default case.¹² In this case, a strategic default provided Applicant with a reasonable method of extricating himself from a dispute between two large banks. The fact that this decision resulted in significant financial benefit to Applicant, specifically the forgiveness of his HELOC loan, does not make his decision more nefarious or indicative of irresponsible financial practices. Applicant’s situation is similar to those who seek relief from excessive debt through bankruptcy protection. In those cases, the Appeal Board has long held that bankruptcy is a legal and legitimate way for an applicant to handle financial problems. Although the debt is forgiven, the Appeal Board requires that the administrative judge examine the possible security implications of an applicant’s history of indebtedness and the financial problems that led him to file bankruptcy. This evaluation of an applicant’s circumstances recognizes that a discharge or forgiveness of debt alone, does not establish that an applicant has demonstrated financial reform or that his financial problems are unlikely to recur.

¹⁰ AG ¶ 18.

¹¹ AG ¶ 19(a).

¹² See e.g., ISCR Case No. 10-10627 (Jan. 20, 2012).

Here, the record supports a conclusion the Applicant strategically defaulted on the loans securing his home as a last resort. Applicant obtained the mortgage loan on his primary residence and the HELOC, with every intention to comply with the terms of the loans. He did so, without issue, for many years. Applicant's decision to strategically default on the home was not caused by his inability to meet his obligations on either loan, rather the unusual circumstance of being caught in a dispute between his two lenders that he neither created nor had any ability to resolve. However, the financial consequences of the dispute to Applicant, while not unaffordable, were significant, costly, and not to be taken lightly. Even though Applicant held sufficient illiquid assets to pay off the \$157,000 HELOC balance, liquidating them to satisfy the debt would have provided a short-term solution to one problem while potentially creating financial problems in the future. While an applicant is expected to honor his legal obligations, he is not expected to absorb the collateral damage of a corporate dispute to maintain his eligibility to access classified information.

Ultimately, the circumstances surrounding Applicant's decision to strategically default on a mortgage and HELOC were unusual and unlikely to recur. These particular circumstances do not reflect negatively on Applicant's current reliability, trustworthiness, or good judgment. Applicant does not have a history of financial problems. His finances are otherwise under control. Furthermore, he has held a security clearance for 25 years, without incident. Because Applicant currently holds a security clearance, I have also considered the adjudication factors listed at AG ¶ 2(e)(1-3), in addition to the financial considerations mitigating conditions. Applicant disclosed derogatory information regarding the status of his home on his security clearance application. During this adjudication he has truthfully and completely answered questions about his finances, motives, and decision-making process. Applicant approached the resolution of his financial problems in a measured fashion by seeking advice from real estate and legal professionals.¹³

Accordingly, I have no doubts or reservations about Applicant's current reliability, trustworthiness, and ability to protect classified information. In reaching this conclusion, I have also considered the whole-person factors at AG ¶ 2(a). The purpose of a security clearance case is not aimed at collecting debts. Rather the purpose is to make "an examination of a sufficient period of a person's life to make an affirmative determination that the personal is an acceptable security risk."¹⁴ Applicant found himself in a difficult position, the resolution of which had significant consequences; in the end, he chose the one with the least potential for long-term financial harm. He did not act impulsively or with disregard of his legal obligations.

¹³ See AG ¶¶ 20 (a).

¹⁴ AG ¶ 2(a).

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
Subparagraphs 1.a – 1.d:	For Applicant

Conclusion

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

Nichole L. Noel
Administrative Judge