



## **SYNOPSIS**

Applicant has a history of delinquent debts that stem from employment losses he experienced while residing in another state and more recently attributable to employment setbacks involving himself and his wife, and to a more limited extent due to his brief hospitalization. While Applicant has committed to a repayment plan with one of his creditors, he is unable to document progress with any of his other creditors despite hearing and post-hearing opportunities to do so. Based on the limited repayment efforts he has demonstrated to date, he is unable to mitigate security concerns associated with his past history of delinquent debts. Applicant successfully refuted allegations that he falsified his security clearance application. Clearance is denied.

## **STATEMENT OF THE CASE**

On February 28, 2007, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on March 28, 2007, and requested a hearing. The case was assigned to me on April 30, 2007, and was scheduled for hearing on July 24, 2007. A hearing was held on July 24, 2007, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of three exhibits; Applicant relied on one witness (himself) and five exhibits. The transcript (R.T.) was received on August 3, 2007.

## **PROCEDURAL ISSUES**

Prior to the hearing, Department Counsel moved to amend the SOR to strike subparagraph 1.h and amend subparagraph 2.a to substitute the words security clearance application of February 21, 2006 for the words public trust application of May 3, 2004, and substitute incorporated references to subparagraphs 1.a and 1.c through 1.g under Guideline E. There being no objection from Applicant, and good cause being demonstrated, Department Counsel's motion was granted. Applicant did not indicate any intention to change his responses based on the Government's amendments.

Before the close of the hearing, Applicant requested leave to keep the record open to afford him the opportunity to check on the status of the deficiency debts covered by subparagraphs 1.f and 1.g., which arose out of a home foreclosure. For good cause shown, Applicant was afforded 30 days to check on his debts and supplement the record if he wished to. The Government was granted seven days to respond. Applicant did not supplement the record.

## SUMMARY OF PLEADINGS

\_\_\_\_\_ Under Guideline F, Applicant is alleged to have accumulated seven delinquent debts exceeding \$25,000.00 and to have completed a personal financial statement indicating a net monthly remainder of \$896.00. Under Guideline E, Applicant was alleged to have falsified his February 2006 security clearance application (as amended) by omitting his delinquent debts listed in subparagraphs 1.a and 1.c through 1.g (as amended).

For his answer to the SOR, Applicant admitted each of the allegations covering his delinquent debts, but denied falsifying his security clearance application. Applicant did not provide any explanations for his responses.

## FINDINGS OF FACT

\_\_\_\_\_ Applicant is a 49-year-old civilian who provides storage services for a defense contractor and seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant accumulated a number of delinquent debts (seven altogether) after he lost his job in 2001 while living in State 1. Out of work for almost a year, he couldn't continue paying on a number of his debts, including his split mortgage loan that he used to finance his home purchase in August 2000 (R.T., at 41-46, 64-68). Creditor 1.f and creditor 1.g loaned Applicant the money to buy his home in State 1 on the basis of an 80-20 split between the two lenders (R.T., at 66-68). Together, they loaned Applicant approximately \$100,000.00, secured by Applicant's home, with creditor 1.f taking an 80 per cent position in the loan, and creditor 1.g taking the remaining 20 per cent (*see* exs. 2 and 3; R.T., at 66-68). How the respective loan positions of creditors 1.f and 1.g were covered in the mortgage instruments covering the loan is neither documented nor clarified by Applicant.

When Applicant could no longer make his mortgage payments on his house (following his job loss in 2001), one of his mortgagees (or both) notified Applicant (in September 2001) of its intention to foreclose. Creditor 1.f (the lender with the largest loan position) proceeded to foreclose on Applicant's State 1 home in September 2002 (R.T., at 69). Whether creditor 1.g participated in the foreclosure or not is not clear. Following the public sale of the property for less than the amount then owed on the split mortgage, both creditors, however, claimed deficiencies (based on a perceived 80-20 split on the total mortgage debt). Applicant believes the creditors used non-judicial procedures to foreclose on his home, but he couldn't be sure (R.T., at 70-74). Afforded an opportunity to check on the procedures and validate whether creditors 1.f and 1.g were entitled to deficiencies under the foreclosure procedures they utilized in State 1, Applicant failed to provide any post-hearing documentation.

Whether or not creditors 1.f and 1.g have legally sustainable debts at this time remains unclear. Without the loan origination and debt instruments to peruse, it is factually impossible to know whether the debts qualify as first and purchase money mortgages, or whether one of the debts was secured by a second mortgage on Applicant's State 1 home. Depending on the type of mortgage instrument the underlying debts attached to, the legal consequences of a non-judicial foreclosure

could be considerable. Ensuing actions taken by Applicant and the creditors to affirm these debts, in turn, could effect the enforcement of these debts under the statutes of limitations in force in either or both of the states he has resided in.

Having admitted the creditor 1.f and 1.g debts in his answer without any explanations, Applicant assumed a heavy proof burden to nullify their status as valid, subsisting debts. While his creditor 1.f debt has since been removed from his credit report (*see ex. A*), the reasons for the deletion of this debt are not provided in the credit report. Whether the debt's removal from Applicant's credit report was the result of a reporting decision that the creditor 1.f debt was not a valid debt, or was simply no longer enforceable due to the running of an applicable State 1 or State 2 statute of limitation, is at this point unknown. Without any more in the record to discern the nature and status of these creditor 1.f and 1.g debts, they must be treated as likely valid and enforceable debts for purposes of these evidentiary proceedings.

After losing his home and finding no work in State 1, Applicant and his wife moved to State 2 in 2002. Once relocated in State 2, he was able to find work. He held jobs with two different employers before joining his current employer in 2006 (R.T., at 50). Applicant's wife lost her own job, however, in July 2006 (R.T., at 33). Applicant accumulated a number of delinquent debts (seven altogether) after she lost her job and couldn't continue to help in paying their marital debts. To date, he has made not contact with these creditors (R.T., at 41-47).

In December 2006, his wife's son, daughter and granddaughter from another marriage came to reside with him. This produced still additional financial burdens on Applicant who was responsible for caring for his family on just his personal income. With his disposable income further reduced, Applicant has made no attempt to contact most of his listed creditors (R.T., at 41-43). These creditors include creditors 1.a through 1.c and creditor 1.e. Each of these debts is small and in the aggregate do not exceed \$600.00. Applicant acknowledges the creditor 1.d debt and has taken steps to discharge this debt.

In March 2007, Applicant's wife's daughter and granddaughter moved out of his home in State 2 and to a place of their own in State 1 (R.T., at 33). Not long after their move (in April 2007), Applicant became ill and requested a three-week leave of absence to address issues related to his security clearance, marital status, physical and mental health, and job performance (*see ex. C*). Two weeks later, he voluntarily admitted himself to a hospital for treatment of a stress-related illness (*see ex. D*; R.T., at 27, 33). After a short release from the hospital, he was hospitalized again one month later for a stress-related ulcer (R.T., at 2, 33). After a brief hospital stay, he returned to work the same month. While his hospitalizations were mostly covered by his health insurance, he remains responsible for subscriber cost-shares (*see ex. A*), which could exceed \$1,500.00.

Applicant's wife found employment in July 2007, which Applicant believes will help him to address his delinquent debts (R.T., at 34). He is able to document paying on only one of the listed creditors. Pursuant to a payment arrangement he completed with the creditor (creditor 1.d) he has made three payments (ranging from \$50.00 to \$150.00) and has reduced the principal balance from \$1,637.00 to around \$1,300.00 with this creditor (*see ex. B*; R.T., at 22-26, 44-46).

Applicant currently takes home approximately \$500.00 a week from his work (R.T., at 51-52). Between his wife and himself, he estimates to have a net monthly remainder that ranges

between \$60.00 and \$200.00 (R.T., at 59). With his mounting medical debts (not covered in the SOR) that could exceed \$1,500.00 (R.T., at 58), and with such a small remainder to work with, he has not been able to make any headway with his remaining creditors, including the two largest creditors (creditors 1.f and 1.g) that hold deficiency claims that survived Applicant's 2002 foreclosure.

Asked to complete a security clearance application (e-Qip) in June 2006, Applicant answered **no** to question 28 which inquired about his having any debts over 180 and 90 days delinquent, respectively. Applicant assures he did not know about any delinquent debts when he completed the e-Qip (R.T., at 62-64). At the time, he was aware he had stopped paying on his creditor 1.d Visa account, and he was certainly aware of the foreclosure on his house in 2002. Applicant never received any deficiency notices from either of the foreclosing creditors until just recently (R.T., at 62). He remains confused over whether either creditor was legally entitled to deficiencies under the non-judicial foreclosure procedures they reportedly utilized (R.T., at 68-75). While aware of his delinquent Visa account, he states he just did not think about this creditor when he completed the application (R.T., at 62-64).

Without any more information available on the source of Applicant's two largest debts (*i.e.*, his deficiency debts resulting from his split creditor 1.f and 1.g home loans that ended in foreclosure) and information available to him about the other debts attributable to him, his claims of confusion over whether he owed either of these creditors any deficiencies are difficult to corroborate. Afforded an opportunity to acknowledge his 2002 foreclosure (less than seven years removed from his completed SF-86), he answered in the negative to question 27 (a) and (b) of his June 2006 e-Qip. This omission involved a foreclosure he was clearly aware of and affects credibility assessments on his question 28 omissions as well. Still, enough uncertainty remains over the legality of any deficiency claims from creditors 1.f and 1.g to negate any inferences of knowing and wilful omission of these claims in his question 27 response.

Applicant's overall credibility is sufficient also to entitle him to the benefit of the doubt on his denials of any knowledge about delinquency balances with creditors 1.a through 1.c and 1.e, his inadvertent failure to recall his delinquent creditor 1.d Visa debt, and his creditor 1.f and 1.g omissions. Favorable inferences warrant that Applicant did not knowingly and wilfully falsify his June 2006 e-Qip.

## **POLICIES**

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

### **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 information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

### **Personal Conduct**

*The Concern:* Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

### **Burden of Proof**

By virtue of the precepts framed by the revised Adjudicative Guidelines, 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 common sense 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. As with all adversary 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 any controverted fact[s] alleged in the Statement of Reasons 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 showing of material bearing, 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, consideration must take account of 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 burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

## **CONCLUSIONS**

Applicant is a storage service provider for a defense contractor who accumulated a number of delinquent debts while residing in States 1 and 2 over a five-year period spanning 2001 and 2006. When completing his e-Qip in February 2006, he omitted all of his delinquent debts when answering question 28 about debts over 180 days and 90 days delinquent, respectively.

### **Applicant's finances**

Security concerns are raised under the financial considerations guideline of the Regulation where the individual applicant is so financially overextended that he or she is at risk of having to engage in illegal acts to generate funds. Applicant's accumulation of delinquent debts and his failure to document payments on most of them (including his two largest debts) warrant the application of two of the disqualifying conditions (DC) of the revised Adjudicative Guidelines for financial considerations: DC 19(a) (*inability or unwillingness to satisfy debts*) and DC 19(c) (*a history of not meeting financial obligations*).

To be sure, Applicant has experienced a number of financial setbacks due to his loss of employment in State 1 and his wife's layoff in State 2. His home foreclosures in State 1 are directly linked to his employment lay off and ensuing income deficits that prevented him from keeping up with his mortgage payments. His recent hospitalization promises, too, to have some adverse impact on his repayment efforts. Medical bills covering these hospital admissions are considerable and include some subscriber responsibility. These bills are not covered by the SOR and have not yet reached delinquent status according to Applicant.

Applicant's accrued debts, as such, merit extenuation credit by virtue of his employment circumstances (both his own job losses and his wife's) and his more recent health complications. 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)*) of the mitigating conditions (MC) of the guidelines for financial considerations has application to Applicant's circumstances.

Since receiving the SOR, Applicant has made some effort to address his delinquent debts and documents his repayment arrangement with creditor 1.d and his three payments made to the creditor in accordance with a payment arrangement. However, he has failed to provide any follow-up payment documentation with any of his other creditors or reasons for disputing the claimed deficiencies with his two foreclosing creditors (creditors 1.f and 1.g). Based on his very limited repayment efforts to date, and his absence of financial counseling, he may take little advantage of any of the mitigating conditions (MC) of the financial considerations guideline. MC 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*) has no application; while MC 20(d) (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*) has only limited application.

Holding a security clearance involves the exercise of important fiducial responsibilities, among which is the expectancy of good judgment, reliability and trustworthiness. Financial

stability in a person cleared to access classified information is required precisely to inspire trust and confidence in the holder of the clearance.

Documentation covering his loan packages with creditors 1.f 1.g and the foreclosure measures they reportedly utilized to reclaim their security in Applicant's home conceivably could confirm the absence of any deficiency owed to either of the creditors. Without any prior statements or documentation from Applicant to establish (a) the nature of his mortgage secured loan obligations with creditors 1.f and 1.g and (b) the procedures the creditors used to recover their loan security and repay their loans, the evidentiary burden fell to Applicant to recreate the loan and recovery process utilized by each secured creditor. This Applicant has failed to do with the additional time afforded him. All that is known about his creditor 1.f and 1.g loans is his characterization of the loans as an 80-20 mortgage loan allocated between the two creditors and their likely use of non-judicial foreclosure procedures in State 1 to foreclose their loans.

Whether or not Applicant's home produced enough sale proceeds at any scheduled foreclosure sale is unclear. Under their respective statutory regimes, both State 1 and State 2 do provide for an action to recover a deficiency for any foreclosed security (by either judicial or non-judicial sale procedures) that does not cover the loan balance at the time of the sale. *Compare* §51.002 of T Property Code (2007) with §33-814 of A.R.S. (2007). Both deficiency statutes are time sensitive, however, and require independent legal actions by the claiming creditor within specified periods of time. There is no evidence that either creditor has initiated any legal action to recover a claimed deficiency in either State 1 or State 2 to date. Still, without any documentation from Applicant, it is still not feasible to piece together all of the events associated with his State 1 foreclosure. Having admitted to owing monies to creditors 1.f and 1.g, it became incumbent on Applicant to provide the relevant background information on these two major debts listed in his prior creditor reports to facilitate firm assessments of the validity and enforceability of these listed debts.

While Applicant is credited with taking some restorative efforts with his finances through an initiated repayment arrangement with creditor 1.d, his failure to document any further payments of his delinquent debts and/or furnish sound legal reasons for disclaiming any deficiency responsibilities with creditors 1.f and 1.g are puzzling. While one or both of these latter creditors may not be entitled to a deficiency, each could have a valid claim depending its individual circumstances. Creditor 1.f's removal from Applicant's latest credit report could mean that the reporting agency determined that the reported debt had no merit. It could also signify no more than that the agency removed the debt because of a discovered statute of limitations enforcement bar in one or both of the relevant states of Applicant residence.

Legal problems associated with the creditor 1.f and 1.g debts are twofold. The first problem concerns debt validity; while the second involves the separate issue of enforceability. Were either debt to have been secured by a second mortgage instrument, the holder of the second mortgage in a default situation would have been faced with the decision of either foreclosing itself to protect its security, bidding up the sale price to protect its second position, or relinquishing its security altogether to the foreclosing first mortgage holder and retaining its entitlement as a sold-out junior lien holder to pursue a deficiency against the borrower. Based only on the information contained in Applicant's credit reports, the nature of the mortgage instruments held by creditors 1.f and 1.g cannot be clearly determined. Applicant provides no documentation and leaves to doubt the



validity of these two debts arising out of his foreclosure. His admissions standing alone raise at least some possibility of the validity of these two debts and preclude uncorroborated Applicant denials of these debts *ab initio*.

Enforceability of the creditor 1.f and 1.g debts (the second problem) raises a potential collection bar. This potential defense was never pursued by Applicant and for different reasons does not appear to be available to negate the legal force of these subsisting debts. First of all, it is less than clear whose statute of limitations would apply in a hypothetical case situation: State 1's (where the debt arose) or State 2 (where Applicant has resided since 2002).

Were State 1's statute of limitations to apply to these 2002 debts, both debts conceivably could have expired in 2006 based on State 1's 4-year statute of limitations for both claims on a written contract (*see* 16.004(a)(3) of T Civ. Practice and Remedies Code) and claims not otherwise provided for (*see* 16.051 of T Civ. Practice and Remedies Code). State 2, by contrast, has a 6-year statute of limitations on debts arising out of a written contract, but just 90 days for a creditor to institute an action based on a deficiency following a foreclosure sale (*see* § 33-814 (A.R.S. 2007)). Application of the latter time requirement would appear to depend on whether the particular creditor actually benefitted from the sale of the underlying security. By implication, this much shorter 90-day limitations bar would appear to have no application to a sold-out junior lienor.

So, depending on what security (if any) the creditor 1.f and 1.g creditors elected to avail themselves of, what deficiencies each may have incurred, which state's statute of limitations were to be applied, and whether Applicant ever took any actions to publicly reaffirm the creditor 1.f and 1g debts as validly subsisting ones, the debts could hypothetically be considered binding enforceable debts, or legally expired ones. None of these issues can be sorted out in this record without considerable briefing and loan documentation from Applicant.

Moreover, potentially applicable statutes of limitation have not been recognized by our Appeal Board to absorb security risks associated with unresolved delinquent debts. While statutes of limitation in general are considered important policy tools for discouraging plaintiffs from pursuing stale claims and promoting finality in litigation, they have never been equated with good-faith efforts to repay overdue creditors. *See, e.g.*, ISCR Case No. 02-30304, at 3 (App. Bd. April 2004)(quoting ISCR Case No. 99-9020, at 5-6 (App. Bd. June 2001)).

Taking into account all of the facts and circumstances surrounding Applicant's debt accumulations and minimal documented steps he has taken to resolve most of them under both a guideline analysis and a whole person assessment, Applicant fails to mitigate security concerns related to his longstanding debt delinquencies. Unfavorable conclusions are drawn with respect to the allegations covered by subparagraphs 1.a through 1.c and 1.e through 1.g of the financial consideration guideline. Applicant warrants favorable conclusions with respect to subparagraph 1.d.

### **Personal Conduct issues associated with Applicant's clearance application**

Security concerns over Applicant's judgment, reliability and trustworthiness are raised under the personal conduct guideline, too, as the result of his omissions of his debts in the e-Qip he completed in February 2006. By omitting debts attributable to him over 180 and 90 days

delinquent, respectively, Applicant failed to furnish materially important background information about his debts that was needed for the Government to properly process and evaluate his security clearance application.

Applicant's e-Qip omissions are attributable to his confusion over whether he owed any money deficiencies to creditors 1.f and 1.g, and to his mistaken belief at the time that he had no debts over 180 and 90 days delinquent with creditors 1.a through 1.e. Applicant's impressions at the time, about his non-real estate debts, while potentially mistaken (based on the absence of furnished documentation in the record), were made in good faith, without any indicated intent to mislead. Applicant's explanations, considering the circumstances surrounding the furnished information at the time, enable him to refute the falsification allegations. Considering all of the evidence produced in this record, favorable conclusions warrant with respect to the personal conduct guideline allegations that Applicant knowingly and wilfully omitted debts more than 180 and 90 days delinquent, respectively, when completing his June 2006 security clearance application.

In reaching my decision, I have considered the evidence as a whole, including each of the E2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

### **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, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE F: (FINANCIAL CONSIDERATIONS):	AGAINST APPLICANT
Sub-para. 1.a:	AGAINST APPLICANT
Sub-para. 1.b:	AGAINST APPLICANT
Sub-para. 1.c:	AGAINST APPLICANT
Sub-para. 1.d:	FOR APPLICANT
Sub-para. 1.e:	AGAINST APPLICANT
Sub-para. 1.f:	AGAINST APPLICANT
Sub-para. 1.g:	AGAINST APPLICANT
GUIDELINE E: (PERSONAL CONDUCT):	FOR APPLICANT
Sub-para. 2.a:	FOR APPLICANT

### **DECISION**

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 security clearance. Clearance is denied.

Roger C. Wesley  
Administrative Judge