



Applicant for Security Clearance

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: David K. Lovelace, Esq.

08/21/2014

Applicant has not mitigated the financial considerations security concerns.
Eligibility for access to classified information is denied.

Applicant answered the SOR on April 16, 2014, and requested a hearing before an administrative judge. The case was assigned to me on May 14, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 14, 2014, and the hearing was convened as scheduled on June 5, 2014. The Government offered

exhibits (GE) 1 through 5, which were admitted into evidence (Applicant objected to GE 4 and 5, and those objections were overruled¹). Department Counsel's exhibit index was marked as Hearing Exhibit (HE) I and a demonstrative exhibit was marked as HE II. Applicant testified, presented the testimony of one witness, and offered exhibits (AE) 1 through 11, which were admitted into evidence without objection. Applicant's exhibit list was marked as HE III and his counsel's written closing argument was marked as HE IV. The record was held open for Applicant to submit additional information, and he submitted AE 12 through 15, which were admitted into evidence without objection. Post-hearing e-mail correspondence was marked HE V and VI. DOHA received the hearing transcript (Tr.) on June 13, 2014.

Findings of Fact

Applicant admitted SOR allegations ¶¶ 1.a, 1.b and 1.hh (he admitted a civil lawsuit was filed, but denied the efficacy of the case), but denied the remaining allegations. The admissions are incorporated as findings of fact. After a review of the pleadings and evidence, I make the following additional findings of fact.

Applicant is a 48-year-old employee of a government contractor. He works as a research scientist. He received his Ph.D. in physics in 1993. In April 2014, he married for the fourth time and has two children, one each from his second and third marriages. He currently pays \$2,400 monthly in child support for both children. He has worked as a federal contractor or consultant for over 20 years and has held a security clearance since 1993.²

The SOR alleges 35 delinquent debts for a total of approximately \$398,620 and the failure to file federal tax returns for tax years 2008 and 2009. The debts, exclusive of the tax debts discussed in GE 1 and 3, were listed in credit reports from March 2013 and February 2014.³

Applicant points to a business failure in 2009 and his third divorce, which occurred in December 2010, as the main causes for his financial delinquencies. In October 2002, he and his then-third wife started a partnership engaging in research and development work for government contractors and providing consulting services. They made a business decision to form as a partnership rather than a corporation because a partnership was cheaper. Before this venture, he had no previous experience managing any type of business. With the help of a bookkeeper and an agent from a defense accounting agency, he was able to set up an accounting system that was compliant with federal requirements, which allowed the partnership to compete for government contracts. Because the business was a partnership, the profits and losses of the business were passed through to the individual partners who reported that on their

¹ Tr. at 26, 28.

² Tr. at 48, 51, 55, 60, 62, 64, 65, 67; GE 1.

³ GE 1-4.

personal federal tax returns. Applicant filed his federal tax returns for years 2003 through 2007. Tax year 2004 was a profitable year for the business and Applicant owed about \$53,000 to the Internal Revenue Service (IRS). He was unable to pay this amount at the time. Later, in about 2007, he contacted the IRS about setting up a payment plan and he claims he made irregular payments to the IRS through about March 2009. This is the debt that is listed in SOR ¶ 1.a. As of June 2014, Applicant still owes \$8,284 on this tax debt. He does not have a current payment plan for this debt, relying instead on the IRS seizing any yearly tax refund that he might accrue.⁴

Applicant's business suffered a downturn in about 2005 when the government contracts were not obtained when expected. He used personal credit lines and credit cards to keep the business operating until the contracts came through. He was able to keep the company operating through this financial crisis. In 2008, the partnership did not receive an expected government contract and was financially unable to stay in business. Applicant had used all of his personal financial resources to keep the company running between 2005 and 2007 and he felt that he had no remaining options. The company went out of business in March 2009. He did not file federal tax returns for 2008 and 2009. Because he was then separated from his wife, he did not have the paperwork available to him to file the tax returns for those years. He also claimed that he was not legally required to file returns for 2008 because his income was below the threshold amount of \$17,900. The Government did not provide any evidence about Applicant's 2008 income level. Applicant admitted he was required to file a return for 2009 because he received W-2 income from an employer, which put him above the filing threshold amount. His 2009 business and personal federal returns remain unfilled. He claims he has paid the required taxes that are due for that year, but he provided no supporting documentation.⁵

During the course of Applicant's security clearance investigation interview in September 2013, he agreed that the following SOR-related debts were his either personally or related to his failed business: ¶¶ 1.c - 1.s, 1.x – 1.ff. All the accounts went to collection status. In his answer, Applicant asserts that all these debts (exclusive of the tax debt) are unenforceable because they are beyond the applicable state's statute of limitations for the collection of debts. He also asserts that all the debts were incurred during the course of his second marriage so that his second ex-wife is responsible for half the debts. He denied the SOR debt at SOR ¶ 1.t, stating that he has a current account with this telecommunications company and he provided supporting documentation. He admitted that he was sued for the debt listed in SOR ¶ 1.hh, but denied the validity of the lawsuit. The lawsuit is pending. He also asserts the debts listed in SOR ¶¶ 1.r, 1.s, and 1.gg were debts owed by his ex-wife. He did not provide any supporting documentation. Applicant's divorce decree from his second wife provided that each party was responsible for their own debts and they were jointly

⁴ Tr. at 54, 71, 73, 85, 87, 117, 123; GE 3; AE 13.

⁵ Tr. at 77, 78, 80, 89-92, 124, 126, 128; GE 3 AE 12.

responsible for marital debts. No debts were specifically set forth in any of these categories in the divorce decree.⁶

Applicant has not sought out any formal credit counseling. He did seek the assistance of a tax relief company concerning his 2004 tax liability, but after paying them \$3,600, he determined the company had done nothing to assist him. He then communicated directly with the IRS. He also explored using a credit counseling service, but decided against using it. He consulted with an attorney about his bankruptcy options and was told he was not eligible for either a Chapter 7 or 13 bankruptcy and he determined a Chapter 11 action was too expensive so he did not pursue that option. In October of 2012, he was advised by a consumer attorney not to pay any of his delinquent debts because they were or soon would be unenforceable because of the running of the state's statute of limitations for the collection of debts. He has not received any IRS Forms 1099-C indicating a cancellation of the debt by the creditors. He has no current payment plans for any of the listed debts.⁷

Applicant's gross income for 2013 was about \$126,000 per year. His wife is a nurse who recently became employed. He does not know the amount of her salary. He is renting his home. He has two credit cards with small limits. On the day of the hearing he reported that he had \$146 in his checking account and \$15 in his savings account. He has a retirement account with his employer with a balance of about \$46,000.⁸

Applicant's current supervisor (the president of the company), who has known him since 1993, testified and provided a written statement indicating that Applicant has very strong technical and analytical skills. He is a leader, mentor, and a professional who is reliable, dependable, trustworthy, and truthful. Two coworkers provided similar statements and recommended that Applicant maintain his security clearance. Applicant also presented several awards and certificates of appreciation to show his past outstanding service.⁹

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 that 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

⁶ Tr. at 138, 140, 141, 143-145; GE 3; AE 11; Answer.

⁷ Tr. at 82-84, 86, 95, 133, 142, 148; GE 3; Answer.

⁸ Tr. at 119-121, 149.

⁹ Tr. at 159, 161, 164-167; AE 2-10.

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 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 about 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* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18 as follows:

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.¹⁰

The guideline notes several conditions that could raise security concerns under AG ¶ 19. Three are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (g) failure to file annual Federal income tax returns as required.

Applicant has numerous delinquent debts that remain unpaid and he has made a conscious decision not to pay the debts. The Government failed to prove he was required to file a return for 2008, but he admitted that he was required to file a return for 2009 and failed to do so. The evidence is sufficient to raise the above disqualifying conditions.

Applicant argued that all the listed SOR debts, exclusive of the tax liability, are unenforceable under state law because the creditors or collection agents are barred by respective statute of limitations from collecting on these accounts. The DOHA Appeal Board has clearly stated in security clearance determinations, the Government is entitled to consider facts and circumstances surrounding an applicant's conduct, regardless if the debts considered are unenforceable under state law.¹¹ Additionally, Applicant argued that the sale or "charge off" of the debt accounts operated to discharge him from further liability. Again, the Appeal Board has ruled otherwise.¹² Applicant's legal arguments are not persuasive.

Applicant admitted that a civil action had been filed against him, but he denied the validity of the cause of action. The case is pending and there is no disposition. At this point in time, the allegation does not meet any disqualifying condition. SOR ¶ 1.hh is concluded in favor of Applicant.

Several financial considerations mitigating conditions under AG ¶ 20 are potentially applicable:

- (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

¹⁰ See ISCR Case No. 11-05365 at 3 (App. Bd. May 1, 2012).

¹¹ See ISCR Case No. 07-09966 at 2-3 (App. Bd. June 25, 2008).

¹² See ISCR Case No. 11-08274 at 3 (App. Bd. May 2, 2013).

doubt on the individual's current reliability, trustworthiness, or good judgment;

(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;

(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;

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and

(e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant's debts are recent, in the sense that they remain outstanding, they are multiple, and they cast doubt on his reliability, trustworthiness, and good judgment. He does not have an established payment plan for his 2004 federal tax debt and he presented no evidence showing that he filed his 2008 and 2009 federal tax returns. AG ¶ 20(a) is not applicable.

Although Applicant's business failure and divorce are events beyond his control, he failed to show he acted responsibly under the circumstances to resolve his debts. Rather, he decided to rely on advice not to pay the debts and let them become unenforceable through operation of the state's statute of limitations. While he is entitled to rely on this legal defense to void the debts, such reliance does not indicate good judgment in terms of his security clearance worthiness. This does not reflect responsible action, which is required by the second prong of this mitigating condition. AG ¶ 20(b) is partially applicable.

There is no evidence of financial counseling, but he consulted attorneys about his possible bankruptcy options. He does not have a plan to resolve the debts except for relying on the running of the statute of limitations to resolve the debts. His action in this regard does not constitute a good-faith effort to repay creditors.¹³ AG ¶ 20(c) partially applies, but AG ¶ 20(d) does not apply.

¹³ The Appeal Board has previously explained what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

In order to qualify for application of [the predecessor mitigating condition to AG ¶ 20(d)], 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

Applicant provided sufficient documentation to show that he is current on a telecommunications debt to the same creditor that holds the debt at SOR ¶ 1.t. That debt is resolved in favor of Applicant. However, there is insufficient documentation to support other disputed debts that Applicant attributes to his ex-wife. AG ¶ 20(e) partially applies. Applicant's finances remain a concern despite the presence of some mitigation.

Whole-Person Concept

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 relevant 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.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

I considered the circumstances by which Applicant's financial situation was affected by his divorce and business failure. I also considered his previous contractor service and his positive character evidence. However, I also considered that despite these factors he failed to file his federal tax returns for two years, he failed to establish a payment plan to pay his 2004 federal taxes, and he failed to resolve any of his other debts, choosing instead to allow them to be resolved by operation of the state's statute of limitations. His past track record reflects a troublesome financial history that causes me to question his judgment and determination to resolve his debts.

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 [AG ¶ 20(d)].

(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. Jun. 4, 2001)).

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the financial considerations security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline F:	AGAINST APPLICANT
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Subparagraphs: 1.a – 1.s:	Against Applicant
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Subparagraph: 1.t:	For Applicant
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Subparagraphs: 1.u – 1.gg:	Against Applicant
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Subparagraph: 1.hh:	For Applicant
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Conclusion

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

Robert E. Coacher
Administrative Judge