

KEYWORD: Financial

DIGEST: Applicant's delay in resolving debts to several creditors from a business failure poses security concerns. To his credit he demonstrated his consistent, good-faith efforts to resolve his federal and state tax debts as soon as he found stable employment in a new field in 1998. He resolved his tax debts in full and also resolved a debt to one creditor for office supplies. He has reduced his overall debt substantially. On the other hand, he failed to establish how he intends in the future to resolve the remaining six debts totaling approximately \$20,000 which raise security concerns even though he argued under the statute of limitations he has no legal obligation to creditors who did not file timely claims. Clearance is denied.CASENO: 02-27133.h2

DATE: 04/06/2005

DATE: April 6, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-27133

**REMAND DECISION OF ADMINISTRATIVE JUDGE**

**KATHRYN MOEN BRAEMAN**

**APPEARANCES**

**FOR GOVERNMENT**

Erin C. Hogan, Esquire, Department Counsel

Peregrine D. Russell-Hunter, Esquire, Chief Department Counsel

## **FOR APPLICANT**

Joseph R. Whaley, Esquire

### **SYNOPSIS**

Applicant's delay in resolving debts to several creditors from a business failure poses security concerns. To his credit he demonstrated his consistent, good-faith efforts to resolve his federal and state tax debts as soon as he found stable employment in a new field in 1998. He resolved his tax debts in full and also resolved a debt to one creditor for office supplies. He has reduced his overall debt substantially. On the other hand, he failed to establish how he intends in the future to resolve the remaining six debts totaling approximately \$20,000 which raise security concerns even though he argued under the statute of limitations he has no legal obligation to creditors who did not file timely claims. Clearance is denied.

### **APPEAL AND REMAND ORDER**

On March 3, 2005, the Director of the Defense Office of Hearings and Appeals (DOHA) forwarded the Case Record and the Appeal Board Decision and Remand Order of March 3, 2005, concerning a favorable security clearance decision issued September 30, 2004. The Statement of Reasons (SOR) issued to the Applicant on October 20, 2003, alleged specific concerns over finances (Guideline F) and personal conduct (Guideline E). On appeal Department Counsel challenged only the Guideline F issues: whether the application of Guideline F mitigating conditions <sup>(1)</sup> 4 and 6 are supported by the record evidence. The Board concluded that since six of Applicant's debts were unresolved, it was error to conclude that Mitigating Condition 4 applied to Applicant's situation even though all six unresolved debts were not enforceable because of the running of a state's statute of limitations. The Board also concluded that since six of his debts were unresolved, it was error to conclude that Mitigating Condition 6 applied to Applicant's situation as Applicant paid only those debts which he had legal pressure to pay. The case was remanded to address the issue of "whether the evidence falling under the remaining mitigating conditions is sufficient to overcome the security concerns raised by the Department Counsel." (Appeal Board Decision and Remand Order (March 3, 2005) at 3-4.

### **STATEMENT OF THE CASE**

DOHA issued a SOR to the Applicant on October 20, 2003. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security

clearance for the Applicant. (2) The SOR alleged specific concerns over finances (Guideline F) and personal conduct (Guideline E). Applicant received the SOR on October 27, 2003, and responded to these SOR allegations in an undated, notarized Answer received on December 23, 2003. He requested a hearing which was held on April 1, 2004, where Applicant was represented by counsel.

At the hearing the Department Counsel introduced the Government's seven exhibits (Exhibits 1-7). I excluded Exhibit 6 after Applicant's counsel objected (3) to it as hearsay. Exhibits 1-5 and 7 were admitted into evidence. Applicant testified himself and offered ten exhibits, which were admitted into evidence (Exhibits A-J). His counsel offered for Official Notice a Memorandum on the Effect of the Running of the Statute of Limitations on Outstanding Claims. The transcript (TR) was received on April 14, 2004.

### **FINDINGS OF FACT**

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following findings of fact:

Applicant, 54 years old, has been employed as a senior network engineer by a defense contractor in State #1 since 1998. He completed a Security Clearance Application (SF86) in 2002. Previously, he was a lawyer in private practice in State #2 from 1992 to 1998. (Exhibit 1; TR 28-

29) Applicant received a J.D. degree in 1975 and was admitted to practice in 1975 in State #3 where he worked in a firm from 1975-1980 when he formed his own firm. He left the practice of law and did IT work for a federal agency from 1988 to 1992. (Exhibit 1; TR 29-30, 36-37) From June 1997 to December Applicant studied independently to become a Microsoft certified system engineer; he was certified in December 1997. (TR 36)

### **Finances**

Applicant's financial problems started in 1994 and worsened in the 1997 when his bankruptcy practice failed which led to instability in his income. From February 1997 to February 1998 he essentially had no income and "scraped by with just barely covering" his mortgage and car payment. Although he considered filing for personal bankruptcy himself, Applicant was reluctant to file when he was representing consumers with multi-year plans before the same bankruptcy court in State #2 as he did not want his personal financial situation to adversely affect his clients. Later, he concluded that he had no need to file for bankruptcy as the claims of the commercial creditors were largely barred by the statute of limitations and bankruptcy would not discharge his tax obligations he was already in the process of paying. Further he would have had to pay the bankruptcy court a 10% fee to administer the debt payments. Only two creditors filed collection lawsuits. He settled the first case in April 2000 with a credit card company. A second case was brought by Creditor #1 in 1998 for \$5,509; as he was traveling overseas on business, he was initially not properly served. Applicant himself noticed in 2000 that Creditor #1 had filed a lawsuit against him when he checked the Court #2 index when he

settled this lawsuit with another creditor. (SOR 1.d.) (Exhibit 2; TR 30-32, 35-36, 40-41; 81, 93-94)

In addition, he and his partner in the law firm faced a \$75,000 judgment in 1995 which took a tremendous toll on him and the firm as the firm paid \$50,000 in legal fees and he personally paid \$19,000 in legal fees from 1998 to 2000; the judgment was reversed by a court of appeals in 1998. (Exhibit 2; Exhibits H, I; TR 32-35, 43, 61-62)

His financial problems developed from business, not personal, expenses as he used credit to "level-out the peaks and valleys that come with being in business." (TR 38) In March 1997 he stopped using any credit when he realized his income and law practice was "going to fall apart." (TR 38-39) Before he got his income from his corporate job in 1998, he borrowed \$1,000 from his brother to meet his living expenses. Even after he started earning a salary, he had little disposable income to pay his creditors. (TR 42-43)

In July 2002 his net income was \$4,400 per month; he had monthly expenses of \$2,270 and in addition was making a \$1,100 mortgage payment. After his federal tax problems developed he agreed in 1999 to pay the IRS a \$250 monthly payment to resolve a tax debt of \$2,750. (SOR 1.a.) He also made a \$621 monthly payment to State #1 to resolve \$7,750 in state taxes (SOR 1.b., 1.c.). He had assets of \$171,000, including his home worth approximately \$150,000; his mortgage balance was then \$114,000. His strategy was to first resolve the tax debts and then resolve the debt to Creditor #1. (SOR 1.d.)

Applicant then planned to resolve the other debts. (Exhibits 2, 4, 5, 7; Exhibits B, C, D, H, I; TR 38-40, 59-64) In 2002 he had only \$105 remaining on a monthly basis to resolve his debts. (SOR 1.l) In April 2004 Applicant testified he has a monthly surplus of \$1,000 per month as he has completed his back tax payment plans. (Exhibit 2; TR 64, 89-90)

Applicant acquired no new unsecured credit since 1997 except for a commitment at a health club; he purchased another car in February 2003. Both his car and mortgage payments have always been timely. (TR 78-79) In 2003 his income was approximately \$75,000. (TR 89)

SOR 1.a. His debt to the IRS is fully paid for tax year 1998 which was paid under a payment plan which began in 1999. His taxes from 1999-2002 were covered by withholding from his corporate position. The IRS documents a zero balance owing for tax years from 1994 to 2002. For 1994 he had an adjusted gross income of \$21,640 and paid his taxes by monthly payments of \$250 from 1999 to 2000; in 1995 he had an adjusted gross income of \$19,047 and paid his taxes with his return; in 1996 he had an adjusted gross income of \$34,323 and paid his taxes by monthly payments of \$250 from 2000 to 2001; in 1997 he had an adjusted gross income of \$29,090 and paid his taxes by monthly payments of \$250 from 2001 to 2002; in 1998 he had an adjusted gross income of \$61,207 and paid his taxes by monthly payments of \$250 from 2002 to 2003; in 1999 he had an adjusted gross income of \$64,027 and timely paid his taxes with his return; in 2000 he had an adjusted gross income of \$67,349 and paid his taxes fully from his withholding; in 2001 he had an adjusted gross income of \$75,744 and timely paid his taxes with his return; in 2002 he had an adjusted gross

income of \$75,885 and timely paid his taxes with his return. (Exhibit 5; Exhibit B; TR 46-50, 80, 87-89)

SOR 1.b., 1.c. In 2000 he developed a payment plan to pay his tax debts to State #2 by monthly payments of \$602 from 2001 to 2003; they were paid in full and the tax liens were released in January 2003 and September 2003. (Exhibits C, D; TR 51-54, 62, 80-81)

SOR 1.d. After he resolved his tax debts, he turned to resolve his debt to Creditor #1 for \$5,509 and negotiated and paid a settlement amount of \$4,084. The final payment was confirmed in January 2004; the case was dismissed by the State #2 court in January 2004. The debt was for office supplies secured through a credit card at an office supply store. (Exhibit 7; Exhibits E, F, G; TR 54-58, 62, 81, 96-97)

SOR 1.e. In his SF 86, he disclosed his debt to Creditor #2 for \$7,355 was charged off as a bad debt in November 1996. It remained unresolved at the time of the hearing. Under the State #2 three year statute of limitations<sup>(4)</sup> this debt is not enforceable as the creditor failed to file a claim against Applicant before 2000. (Exhibits 1, 3; TR 76-78; 82-83, 85, 90-91)

SOR 1.f. His debt to Creditor #3 for \$675 was charged off as a bad debt in December 1996. It remained unresolved at the time of the hearing. Under the State #2 three year statute of limitations this debt is not enforceable as the creditor failed to file a claim against Applicant before 2000. (Exhibit 3; TR 76-78, 82-85, 91)

SOR 1.g. His debt to Creditor # 4 for \$2,114 was placed for collection by a collection agency in February 1997. He is not sure who the creditor originally was. It remained unresolved at the time of the hearing. Under the State #2 three year statute of limitations this debt is not enforceable as the creditor failed to file a claim against Applicant before 2001. (Exhibit 3; TR 76-78; 83-84, 91)

SOR 1.h. His debt to Creditor #5 for \$5,500 was identical to the Creditor #1 debt and has been resolved as discussed above. (Exhibit 3; TR 76-78; 83-84, 91)

SOR 1.i. His debt to Creditor #6 was placed for collection for \$496 in July 1997. It remained unresolved at the time of the hearing. Under the State #2 three year statute of limitations this debt is not enforceable as the creditor failed to file a claim against Applicant. (Exhibit 3; TR 76-78; 83-84, 91)

SOR 1.j.. His debt to Creditor #7 for \$8,401 was placed for collection by a collection agency in January 1998. He does not remember the original creditor. It remained unresolved at the time of the hearing. Under the State #2 three year

statute of limitations this debt is not enforceable as the creditor failed to file a claim against Applicant. (Exhibit 3; TR 76-78; 84, 91)

SOR 1.k.. His debt to Creditor #8 of \$98 was placed for collection in November 1998 for long distance service. It remained unresolved at the time of the hearing. Under the State #2 three year statute of limitations this debt is not enforceable as the creditor failed to file a claim against Applicant. (Exhibit 3; TR 76-78, 84, 91)

Although he argued that these unresolved debts are not now legally enforceable, Applicant stated his plan to accumulate \$10,000 that he would offer to these creditors for whom he has unresolved debts and who have not pursued their legal remedies in a timely manner and give them a proportionate payment for a release. In essence he would approach it as if he might have done a Chapter 13 bankruptcy filing. (TR 92) However, he submitted no timetable for this plan.

### **References**

Applicant received a favorable evaluation in 2003. He was given the highest rating ("exceeds expectations") in all of his performance elements. His supervisor in summary commented, Appellant "has established himself as a valued team member." "Ask him once and forget about it; the job will get done." (Exhibit A; TR 44-45)

### **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole in evaluating this case, I weighed relevant Adjudication Guidelines as set forth below:

#### **Guideline F - Financial Considerations**

**An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.**

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance.

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

## **CONCLUSIONS**

### **Financial Considerations**

During the 1996-1997 period when his law practice was foundering, Applicant's financial conduct raised security concerns<sup>(5)</sup>

as he developed (1) a history of financial problems and subsequently showed (3) an inability or unwillingness to satisfy all of his debts. At the time of the DSS investigation in July 2002 he had various debts that totaled approximately \$30,000 that were unresolved except for his plan to pay his federal and state tax debts. Notably these debts were acquired from his failing business, not from his overspending on consumer items. In addition, he had unusually large legal fees to resolve a matter that had been resolved against his firm that the firm appealed. Although he considered filing for personal bankruptcy, Applicant, a bankruptcy lawyer at the time, chose not to file as he was representing consumers with multi-year plans before the same bankruptcy court in State #2. He did not want his personal financial situation to adversely affect his clients. Later, after he left his bankruptcy practice, he again made a judgment that he had no need to file for bankruptcy as the claims of the commercial creditors were largely barred by the statute of limitations and bankruptcy would not discharge his tax obligations he was already in the process of paying. Also, he did not want to

pay the bankruptcy court a 10% fee to administer the debt payments. Although he had concluded that his six unresolved debts were not legally enforceable, he planned to accumulate \$10,000 that he would offer to these creditors with unresolved debts and who had not pursued their legal remedies in a timely manner and give them a proportionate payment for a release at some time in the future. In essence he would approach it as if he might have done a Chapter 13 bankruptcy filing

To his credit Appellant developed expertise in a new field and made the transition successfully to work as a senior network engineer for a defense contractor since February 1998. As he had more stable income, he made it a priority to resolve his federal and state tax debts by making consistent payments over several years. He reached agreements both with the federal and state tax authorities and then made consistent monthly payments over several years until the tax debts were resolved in full; he did not try to negotiate partial payments. When those debts were resolved, he turned to the debt owed to Creditor #1, resolved that debt in January 2004, and the litigation was dismissed. Applicant demonstrated his financially responsible when he followed through on his payment plan to resolve all these tax debts and then resolved the debt to Creditor #1 in January 2004.

After Applicant chose not to file for bankruptcy to resolve his financial problems even though he surely could have discharged his business debts by that route, he resolved only some of his other debts himself in a step by step fashion. The remaining debts to Creditors #2, #3, #4, #6, #7, and #8 which total approximately \$20,000 remain unresolved. Even though those creditors chose not to pursue any timely legal action against enforcing their claims against him and are now barred from doing so by the statute of limitations, he acknowledged his intent to resolve even those debts in the future by paying them a proportionate amount as if he had filed for Chapter 13. However, Applicant submitted no plan or timetable to do so even though he has enough income to handle his current financial obligations, including the payments for his house and his car, with \$1,000 remainder. Even though these six creditors are barred from collecting them by the statute of limitations, the Appeal Board concluded in its March 3, 2005, Appeal Board Decision and Remand Order that in the context of a security clearance assessment, Applicant nevertheless had a duty to resolve these debts which total approximately \$20,000. While Appellant was knowledgeable about his legal options and made a reasonable choice to prioritize his tax debts in the light of his limited income and then to prioritize claims from creditors who pursued their legal claims against him, he still has a duty to resolve these other debts in order to counter security concerns. In short, he had a rational, but incomplete, plan to resolve his debts.

In an earlier case the DOHA Appeal Board<sup>(6)</sup> has stated that even if debts are uncollectible, the judge should consider the facts and circumstances under which the debt was incurred and also decide whether the applicant took reasonable steps to address or otherwise resolve those debts before the statute of limitations expired. On appeal in this case the Appeal Board concluded, in essence, that Applicant had not taken reasonable steps to resolve these six debts alleged in SOR 1.e. through 1. k. before the statute of limitations expired.

Thus, Applicant has only partially mitigated<sup>(7)</sup> these financial concerns. To his credit, the incurring of this debt was not recent and originated during an unstable period in his law practice which he concluded in 1997. Second, these inauspicious financial problems were isolated to this period of his failing law practice. He has not incurred any new debts and has been able to maintain timely mortgage and car payments. Third, the conditions that resulted in the behavior were largely beyond the person's control (e.g., a business downturn). The debts were business related and not the result of uncontrolled consumer spending. However, he failed to establish that he met mitigating condition 4 that he

has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control; in addition he failed to meet mitigating condition 6 as there are not yet clear indications that the problem is being resolved or is under control.

After considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant under SOR Paragraph 1; I conclude that he has mitigated the allegations in SOR subparagraphs 1.a. through 1.d., 1.h.; but he failed to mitigate 1.e., 1.f., 1.g., 1.i. through 1.l.

### **FORMAL FINDINGS**

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline F: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: Against Applicant

Subparagraph 1.j.: Against Applicant

Subparagraph 1.k.: Against 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 a security clearance for the Applicant. Clearance is denied.

Kathryn Moen Braeman

Administrative Judge

1. **Conditions that could mitigate security concerns include:** E2.A6.1.3.4. . . . there are clear indications that the problem is being resolved or is under control; E2.A6.1.3.6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.
2. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.
3. Applicant's counsel argued against admitting Exhibit 6, an Affidavit of Evasion filed in May 1999 with the State #2 court; he stated it was hearsay and not a court document as it was submitted by a party in the lawsuit; further, it was a collective affidavit of a group of people and was unsigned. (TR 16-19, 21-22) The Government countered that under Appeal Board Decision in ISCR Case No. 96-0575, the document was acquired by the Defense Security Service (DSS) in the regular course of business and was a court record and fell within the public records exception. (TR 19-20, 22-23) I excluded Exhibit 6 after Applicant testified to the underlying facts; I was persuaded by Applicant's counsel's objections that the unsigned document was hearsay and not an official record of the court kept in the regular course of business.  
(70-76)
4. A State #2 statute requires that a civil action be filed within three years from the date of accrual. (TR 98; Memorandum on the Effect of the Running of the Statue of Limitations on Outstanding Claims)
5. **Conditions that could raise a security concern and may be disqualifying include:** E2.A6.1.2.1. A history of not meeting financial obligations; E2.A6.1.2.3. Inability or unwillingness to satisfy debts;
6. See Appeal Board ISCR Case No. 01-06776 (July 24, 2003) cited in Applicant's Hearing memorandum on the Effect of the Running of the Statue of Limitations on an Outstanding Claim: even if debts are uncollectible, the judge should consider the facts and circumstances under which the debt was incurred and also decide whether the applicant took reasonable steps to address or otherwise resolve those debts before the statute of limitations expired. In this case, The only example of a questionable expenditure is his decision to add personal travel destinations to his overseas business travel. But that is an isolated example.

**7. Conditions that could mitigate security concerns include:** E2.A6.1.3.1. The behavior was not recent; E2.A6.1.3.2. It was an isolated incident; E2.A6.1.3.3. The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation); E2.A6.1.3.4. The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control; E2.A6.1.3.5. The affluence resulted from a legal source; and E2.A6.1.3.6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.