

KEYWORD: Financial

DIGEST: Applicant has a history of business-related delinquent debts associated with an unsuccessful business enterprise he founded and struggled to keep operational, before selling it in 2001 and petitioning for Chapter 7 bankruptcy relief. Because his 2002 bankruptcy discharge excepted from protection the considerable federal and state tax debts he accumulated, he has borne continuing liability for these debts. These debts have not been sufficiently addressed with the respective taxing authorities with the resources he has had at his disposal in the more than two years that have since elapsed and remain a work in progress. Applicant fails to mitigate security concerns at this time relative to his delinquent tax debts. Clearance is denied.

CASENO: 02-28041.h1

DATE: 02/14/2005

DATE: February 14, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28041

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of business-related delinquent debts associated with an unsuccessful business enterprise he founded and struggled to keep operational, before selling it in 2001 and petitioning for Chapter 7 bankruptcy relief. Because his 2002 bankruptcy discharge excepted from protection the considerable federal and state tax debts he accumulated, he has borne continuing liability for these debts. These debts have not been sufficiently addressed with the respective taxing authorities with the resources he has had at his disposal in the more than two years that have since elapsed and remain a work in progress. Applicant fails to mitigate security concerns at this time relative to his delinquent tax debts. Clearance is denied.

STATEMENT OF CASE

On April 16, 2004, 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 April 30, 2004 and requested a hearing. The case was assigned to me on August 18, 2004, and was scheduled for hearing on September 16, 2004. A hearing was convened on September 16, 2004, for the purpose of considering whether it is clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of seven exhibits; Applicant relied on two witnesses (including himself) and 13 exhibits. The transcript (R.T.) of the proceedings was received on September 22, 2004.

SUMMARY OF PLEADINGS.

Under Guideline F, Applicant is alleged to have (a) petitioned for Chapter 7 bankruptcy relief in November 2001 and received a discharge in April 2002, (b) accumulated delinquent federal tax debts that resulted in an unsatisfied tax lien for tax years 2000 and 2001 in the amount of \$13,239.55, (c) accumulated a delinquent state tax debt that resulted in an unsatisfied tax lien for tax year 2000 in the amount of \$3,837.10, and (d) had his wages garnished by a state agency.

For his response to the SOR, Applicant admitted one of the allegations (his Chapter 7 bankruptcy petition) but denied the balance of the allegations, with explanations. Applicant claimed his IRS debt has increased due to accruing interest and that he has a pending compromise offer with the agency and is continuing to work with them. He claimed the state tax debt has increased due to added interest and the number of quarters covered. He claimed to have stipulated with the state on wage garnishment as a means of satisfying his domicile state's assessed withholding taxes (not another state's). Applicant claimed his debts were business-related that could have been avoided by charging them to his credit cards and then including them in his bankruptcy. He claimed he has initiated good-faith efforts to resolve his tax debts and filed for bankruptcy only after exhausting his payment efforts. He claimed he has compromise offers currently pending with both the IRS and the state taxing authority. And he claimed to have kept his own security manager, the IRS, the state, and DOHA informed of each and every step of his progress toward resolving his debts.

FINDINGS OF FACT

Applicant is a 40-year-old intel writer for a defense contractor who seeks a security clearance. The allegations covered in the SOR, and admitted to by Applicant, are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Following his honorable discharge from the military in 1995, Applicant started his own residential maid service in the state of his current domicile. His service provided the cars, employees and cleaning supplies for residential cleaning assignments his business was engaged to provide. For the first three years, his business prospered, prompting him to add employees and vehicles. However, his business began a steep decline in 1998, following a general downturn in the national economy (*see ex. J*), and by Spring 1999 his business barely produced a profit.

Struggling to keep his business going, Applicant took on a second job. As profits in the business continued to decline in 1999, he first tried using his own profits to sustain the business. When this failed to revive the business, he put the business up for sale. Receiving no sale offers, he closed the business in May 2001 and began selling off the assets in piecemeal. After selling four of the cars, losing one to repossession, and keeping two others, he was left with first and second mortgages on his home and tax debts with the IRS and the state. After selling his home and paying off his two mortgages, he had insufficient funds to make ends meet and filed for Chapter 7 bankruptcy in November 2001. Applicant's bankruptcy schedules report \$109,156.83 in secured claims, \$20,367.86 in unsecured priority claims (*viz.*, federal and state tax claims), and \$75,888.28 in unsecured non-priority claims against reported assets of \$102,500.00 in

real property and \$10,342.55 in personal assets (*see ex. 5*)

All of Applicant's personal and business debts were discharged in his bankruptcy, which was court-discharged in April 2002. Excepted from discharge were his federal taxes generated from the operation of his business, which currently exceed \$34,000.00, inclusive of penalties and interest. After levying approximately \$580.00 on Applicants' bank account in 2001, the IRS released its levy in July 2001 (*see ex. L; R.T., at 97-98*). Six months later (in November 2001, after receiving no further payments from Applicant on his federal tax debt, the IRS filed a notice of tax lien (*see ex. 7*) to cover owed back federal taxes for tax years 2000 and 2001. In May 2002, the IRS filed a revised notice of lien that added interest owing for an additional quarter in 2001, for a total unpaid balance of \$18,206.15 (*see ex. A*).

Besides the business-related taxes he owes to the IRS, Applicant is indebted to his state for business-generated taxes generated from the operation of his business in 2000 and 2001. These accrued taxes, which likewise survived his personal bankruptcy, currently exceed \$8,000.00, inclusive of penalties and interest (R.T., at 85-86, 96).

Applicant's personal wages were garnished by his domicile state's employment security division in July 2001 at the rate of \$50.00 a week to satisfy the assessed \$6,000.00 in underfunded withholding for employees who worked for him throughout the year 2000 and the first quarters of 2001 (R.T., at 81-83, 89-90). The state's garnishment actions against Applicant produced about \$300.00 in garnished proceeds before he left the company's employ (R.T., at 90).

Despite a stated monthly remainder of \$1,016.00 in June 2002, Applicant made no tangible attempts to settle his federal or state tax debts between June 2002 and June 2003 (*see ex. 2; R.T., at 101-02*). Based on what he could afford with his available resources at the time, Applicant transmitted a \$500.00 money order along with a compromise offer to the state in February 2004 in an effort to settle the more than \$8,000.00 owed in business-related unemployment taxes to the state (*see ex. B*). To date, he has received neither a response to his offer nor return of his \$500.00 money order (*see ex. B; R.T., at 87-91*). Presumably the check was cashed by the state; albeit Applicant cannot be certain.

On the advice of his lawyer, Applicant submitted a series of compromise offers to the IRS and state to settle their respective tax debts. His initial IRS offer in 2001 was rejected by the Service in April 2002. Due to limited resources, he didn't make another compromise offer with the IRS for almost two years. Acting on his lawyer's recommendation in late 2003 to make a revised settlement offer to the IRS, Applicant submitted another offer to the IRS to settle his entire tax debt (then about \$34,500.00, of which only \$13,000.00 represents principal) in April 2004 (*see exs. 3 and A; R.T., at 5796*). Applicant's April 2004 offer of \$2,500.00 was based on his detailed assets, income sources and special circumstances (*see ex. A*). The IRS rejected Applicant's compromise offer in August 2004, reasoning that his offered amount was considered less than his collection potential, and offered to take \$308.00 a month until the entire amount of the owed tax was paid (*see ex. A; R.T., at 54-56*). Applicant has appealed IRS' rejection of his compromise offer (disputing the amount of his monthly income), which remains pending. The IRS has yet to respond to this appeal, and Applicant cannot speculate whether or when the IRS will approve or reject his offer.

Pending action on his latest compromise offer with the IRS, Applicant has not submitted any recent offers to the state on its accrued tax debt. Applicant remains willing, though, to complete both of the offers he has submitted to the IRS and the state, respectively.

Applicant currently grosses over \$45,000.00 a year (R.T., at 79). With his wife's added income of about \$1,700.00 a year from substitute teaching, he has a gross family income of approximately \$47,000.00. This income stream essentially enables him to keep up with his family's living needs, with little left to pay on his surviving tax obligations.

Applicant is well regarded by his managers and coworkers who describe him as a loyal, honest, dedicated and trustworthy professional who can always be counted on to support his team's mission. His DoD customer interface who has worked closely with him for the past 14 months describes him as very conscientious about his tasked mission and one who has always exhibited the highest moral standards and courage to do what is right (*see ex. G*). Besides the excellent performance evaluations he has consistently received, he is the recipient of numerous commendations from his employer in recognition of his many team contributions, hard work and positive attitude (*see exs. G and H*).

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) 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: 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.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's for 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 an intel writer for a defense contractor with many years of meritorious military service. For most of his military career he held a security clearance. Issues raising security concerns comprise his accumulated delinquent debts dating to 1998.

Applicant accrued considerable delinquent debt between 1998 and 2001, some personal, but mostly business related to his struggling residential maid service that ultimately failed following a series of marketing and operational setbacks. Altogether, Applicant accumulated over \$19,000.00 of medical and business debts.

Applicant attributes his debt accruals to his unsuccessful attempts to save his struggling business. While he was able to discharge his secured and unsecured debts through his successful Chapter 7 bankruptcy that he concluded in April 2002, he could not abate his business-related federal and state tax debts, which survived his bankruptcy. Applicant's federal tax accruals currently exceed \$30,000.00, inclusive of penalties and interest; while his accrued state tax debts exceed \$10,000.00, inclusive of penalties and interest. While he has made several compromise offers in the past to the IRS, none have produced any positive responses from the Service. Only after he resolves his federal tax debt will he be in a position to address his delinquent state tax debt. Still pending is his appeal of his latest compromise offer rejection from the IRS. Compounding his federal and state tax delinquencies is his past garnishment by state employment division officials to enforce collection of delinquent payroll taxes on employees employed by his former business.

Based on Applicant's considerable accumulation of delinquent debt, two of the Disqualifying Conditions (DC) of the Adjudicative Guidelines for Guideline F apply: DC E2.A6.1.2.1 (*A history of not meeting financial obligations*) and DC E2.A6.1.2.3 (*Inability or unwillingness to satisfy debts*). While his accrued debts are accompanied by some extenuating circumstances (*viz.*, unsuccessful operation of a business that ultimately failed and was sold), for the most part his finances have permitted modest attempts to pay on his old tax creditors following his emergence from Chapter 7 bankruptcy in 2002 and employment by his current employer.

Applicant's earlier unemployment experiences, while problematic, do not appear to have hampered his ability to address his debts once he obtained gainful employment with his current employer. Significant delinquent debt attributable to an applicant that is neither extenuated nor mitigated by good-faith resolution raises implicit security risks over the potential for needed funds and recurrent judgment lapses. The government does not have to wait until an individual mishandles or fails to safeguard classified information before it can make an unfavorable security clearance decision. *Cf. Adams v. Laird*, 420 F.2d 230, 238-39 (DC Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).

Resolution of Applicant's delinquent tax debts is uncertain at this time. His past efforts to settle his tax debts with the IRS with modest compromise proposals of his own have been rejected by the Service. Whether his appeal of his latest compromise rejection will fare any better is conjectural at this time. And without any resolution of his federal tax debts, he is not in a financial position to address his delinquent state tax debt. So, while his accrued tax debts are extenuated to a considerable extent by the business failure, enough to enable him to invoke MC E2.A6.1.3.6 (*The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*) of the Guideline, he experienced with his former business, he has made too little tangible progress with resolution of his tax debts following his bankruptcy discharge to mitigate financial concerns sufficiently to enable him to invoke MC E2.A6.1.3.1 (*The behavior was not recent*) of the Guideline.

Where (as here) there is insufficient evidence of repayment efforts after the conditions that contributed to an applicant's delinquent debts have passed, the Appeal Board has cautioned against crediting the applicant with either non-recent financial difficulties or excusing him from addressing his delinquent debts (even those accrued because of extenuating circumstances). *See* ISCR Case No. 03-01059 (September 2004).

Taking into account all of the circumstances surrounding Applicant's extenuating circumstances during the 1998 to 2001 time period and his claimed difficulties in settling with the IRS and state on the business-related tax debts that survived his bankruptcy, Applicant fails to mitigate the Government's security concerns at this time. Unfavorable conclusions warrant, accordingly, with respect to subparagraphs 1.a through 1.d of the allegations governed by the Adjudicative Guidelines pertinent to Guideline F.

In reaching my decision, I have considered the evidence as a whole, including each of the E 2.2 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): AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

Sub-para. 1.d: 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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge