

KEYWORD: Financial; Personal Conduct

DIGEST: Applicant was alleged to owe approximately \$18, 323.00 in past due payments on nine debts. He admitted one debt and mitigated it by showing that payment was tendered and declined. He rebutted five debts and part of a sixth. He denied but could not rebut or mitigate past due debts totaling approximately \$6,236.00 on a credit card account, a home improvement loan, and unpaid federal taxes. Clearance is denied.

CASENO: 02-31809.h1

DATE: 09/30/2004

DATE: September 30, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-31809

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was alleged to owe approximately \$18,323.00 in past due payments on nine debts. He admitted one debt and mitigated it by showing that payment was tendered and declined. He rebutted five debts and part of a sixth. He denied but could not rebut or mitigate past due debts totaling approximately \$6,236.00 on a credit card account, a home improvement loan, and unpaid federal taxes. Clearance is denied.

STATEMENT OF THE CASE

Applicant applied for a security clearance on September 1, 2003. On November 13, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleges security concerns under Guidelines F (Financial Considerations) and E (Personal Conduct) of the Directive. Under Guideline F, the SOR alleges that Applicant has nine delinquent debts totaling approximately \$18,323.00. Under Guideline E, the SOR alleges that he falsified a material fact on his security application by answering "no" to the question whether he had debts more than 90 days past due at the time he signed his security application.

Applicant answered the SOR in writing on January 10, 2004, and elected to have the case decided on the written record in lieu of a hearing. Applicant admitted one of the debts but either denied that he owed the other debts or claimed that they had been paid. He admitted incorrectly answering "no" to Question 28b, but he disclosed the past due debts in his answer to Question 28a. Department Counsel submitted the Government's written case on June 18, 2004. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on July 9, 2004. He did not respond or submit any additional material. The case was assigned to me on September 7, 2004.

FINDINGS OF FACT

Applicant's admissions are incorporated into my findings of fact. I also make the following findings:

Applicant is a 51-year-old systems engineer for a defense contractor. He has worked for his present employer since July 1996. (FORM, Item 4, p. 3)

Applicant has been married to his current spouse since December 30, 1996. He was married twice before, and he was divorced in 1989 and 1996. Several of the alleged debts were incurred during his second marriage.

As of July 7, 2003, Applicant's monthly income was \$5,288.00, with monthly expenses of \$3,010.00 and debt payments of \$1,078.00, leaving a net remainder of \$1,200.00 available to pay debts. (FORM, Item 6, p. 4) Applicant has paid the debts alleged in the SOR, paras. 1.a., 1.e., and 1.f. (FORM, Item 3, pp. 2-3, 7-8, 11-13) These debts were already past due when Applicant paid them. Applicant tendered payment of the \$8.00 credit card debt alleged in the SOR, para. 1.c., but the payment was not accepted. (FORM, Item 3, p. 5) The credit card debt of \$3,111.00 alleged in the SOR, para. 1.b. and the revolving charge account debt of \$2,878.00 alleged in para. 1.h. were removed from Applicant's credit record after he disputed them. (FORM, Item 3, p. 15; Item 7, p. 4; Item 8, p. 1)

A federal tax levy was placed on Applicant's pay in 1998 for \$4,886.42. This levy was satisfied in 2001. A second federal tax levy for \$4,616.99 was placed on Applicant's pay in November 2002. (FORM, Item 3, pp. 16-19; Item 10, p. 1)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander-in-Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use,

handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶¶ 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline F (Financial Considerations)

Under Guideline F (Financial Considerations), "[a]n individual who is financially overextended is at risk of having to engage in illegal acts to generate funds." Directive ¶ E2.A6.1.1. A disqualifying condition (DC 1) under Guideline F applies where an applicant has a history of not meeting his or her financial obligations. Directive ¶ E2.A6.1.2.1. DC 3 applies where an applicant has exhibited inability or unwillingness to satisfy debts. Directive ¶ E2.A6.1.2.3.

A mitigating condition (MC 6) applies when an applicant has initiated a good-faith effort to pay his debts or otherwise resolve them. Directive ¶ E2.A6.1.3.6. No other mitigating conditions are relevant to this case.

Applicant has provided documentary evidence that he has paid the debts alleged in the SOR, paras. 1.a., 1.e., and 1.f. He has not disputed that the debts were already past due when he paid them.

Applicant denied owing the credit card debt of \$3,111.00 alleged in the SOR, para. 1.b. The debt is reflected on his credit report dated June 16, 2003 (FORM, Item 8, p. 2), but is not listed on an earlier credit report dated March 19, 2002 (FORM, Item 7). In his response to the FORM, Applicant asserted that the account was transferred to another company and paid off in 1998. He did not retain a copy of the payoff letter. He asserts that the credit reporting company removed the debt from his credit report after he contested it.⁽¹⁾ (FORM, Item 3, p. 4) The debt is not listed on a credit report dated December 8, 2003, lending credence to Applicant's assertion. The burden of proving controverted facts falls on Department Counsel. ISCR Case No. 02-24452 at 4 (App. Bd. Aug. 4, 2004). I conclude that Department Counsel has not carried his burden of proving the existence of this debt.

Applicant admitted that he owes the \$8.00 credit card debt alleged in the SOR, para. 1.c. In his response to the FORM, Applicant stated that he contacted the creditor and tendered payment, but he was informed that the account was archived and that a payment could not be accepted on an archived account. (FORM, Item 3, p. 5) His admission establishes the debt. His offer to pay it mitigates it under MC 6.

Applicant denied that he owes the \$5,168.00 credit card debt alleged in the SOR, para. 1.d. In an interview with a Defense Security Service (DSS) investigator on May 24, 2002, Applicant asserted that he contacted the creditor and was informed that the two accounts listed on the credit report are the same account even though they have different account numbers. Applicant stated that he had been making payments on the account for four years, and he admitted that he owed a balance of approximately \$300.00. A credit report dated March 19, 2002 reflects two credit card accounts, both opened at the same time and carrying identical balances of \$5,168.00. (FORM, Item 7, p. 3) This credit report supports Applicant's claim that his debt was listed twice. A credit report dated June 16, 2003 reflects two credit card accounts, one with no entry in the balance column and a second with a balance of \$5,168.00, the amount alleged in the SOR. (FORM, Item 8, p. 2) A credit report dated December 8, 2003 reflects two credit card accounts, one with a zero balance and the other with a balance of \$5,168.00. (FORM, Item 6, pp. 23, 24) Applicant's admission established a past due debt of approximately \$300.00. I conclude, however, that the Department Counsel has not carried his burden of proving a debt greater than \$300.00. Because Applicant has not shown any effort to pay the undisputed amount, I conclude that C 6 has not been established with regard to the \$300.00 debt.

In his answer to the SOR, Applicant denied the debt on the home improvement loan alleged in the SOR, para. 1.g. The debt was incurred some time before April 1996. (FORM Item 5, p. 3) Applicant asserted that the debt was paid in 1998, but that he did not retain a copy of the payoff letter. He states that the debt was removed from his credit report after he contested it. (FORM, Item 3, p. 14) The debt is reflected on the credit report dated March 19, 2002 (FORM, Item 7, p. 4), but it does not appear on the June 2003 credit report. (FORM, Item 8) Applicant's denial of this debt in his answer to the SOR is inconsistent with his admission to a DSS investigator in May 2002 that the debt was incurred for home improvements and that it was not fully paid off. (FORM, Item 5, p. 3) Based on the record, I cannot determine whether the credit reporting agency removed this debt for Applicant's credit report because it was erroneous or because it was more than seven years old⁽²⁾. Based on Applicant's admission to the DSS investigator, I conclude that he has not rebutted this allegation. No mitigating conditions have been established regarding this debt.

Applicant denied the revolving charge account debt alleged in the SOR, para. 1.h. He asserted that his ex-wife opened the account using his name, but that his signature was never on the account. He asked the creditor to produce something with his signature on it, and the creditor never contacted him again. He contested the debt with the credit reporting company and they removed it from his credit report. (FORM, Item 3, p. 15) The debt appears on the March 2002 credit report (FORM, Item 7, p. 4), but it does not appear on the June 2003 credit report. (FORM, Item 8) I conclude that Applicant has rebutted this allegation.

Applicant denied the \$4,616.99 federal tax debt alleged in the SOR, para. 1.i. The SOR allegation is based on a letter dated November 12, 2002 from Applicant's employer reciting that the Internal Revenue Service had issued a levy on Applicant's pay in the amount of \$4,616.99. (FORM, Item 10, p. 1) Applicant admits that a tax levy was placed on his pay 1998 for \$4,886.42 in delinquent 1997 taxes and penalties. He states that he was telephonically advised by an Internal Revenue Service representative that the only levy was in 1998 and that he is in good standing regarding federal taxes. Applicant submitted pay stubs showing the 1998 levy and 2001-2002 W-2 forms showing no levy. (FORM, Item 3, pp. 16-19) However, based on the date of the letter from Applicant's employer and the difference in amount from the 1998 levy, I conclude that two separate levies are involved. Applicant has submitted no evidence regarding tax year 2003, when the second levy would have been in effect. Accordingly, I conclude that Applicant has not rebutted this allegation. No mitigating conditions have been established regarding this debt.

The SOR, para. 1.j., alleges that Applicant has refused to pay the \$5,168.00 debt alleged in the SOR, para. 1.d. In his DSS interview, Applicant stated that he contacted the creditor's customer service department about the duplicate account and was referred through a succession of collection agencies. Applicant then disputed the account in writing. He told the DSS investigator:

I will not pay this account. I feel the account has gotten mixed up since two separate account numbers were assigned to the same account and I do not intend to pay them any additional money. I feel I am being ripped off over this matter and will only pay the account if they can determine what happened to the money I paid them and they can provide me with a reasonable amount owed, with which I can agree.

Applicant's statement, "I will not pay this account," is alleged in the SOR, para. 1.j., as an act of financial irresponsibility. (FORM, Item 5, p. 2) Out of context, Applicant's remark appears on its face to be a refusal to pay a just debt; however, in context it appears to be an assertion of his legal right to dispute a debt and a statement that he is willing to pay the amount not in dispute. I conclude that Applicant has rebutted the allegation in SOR, para. 1.j.

All of Applicant's un rebutted and unpaid debts are past due. Even the debts that have been paid were past due when Applicant eventually paid them. The debts alleged in the SOR, paras. 1.c. (\$8.00 credit card debt), 1.d. (\$300.00 credit card debt), 1.g (home improvement loan), and 1.j. (federal tax), remain unresolved. Applicant's latest financial statement shows that he has about a net remainder of about \$1,200.00 each month that could be used to pay off his past due debts. Based on this record, I conclude that DC 1 (a history of not meeting financial obligations) and DC 3 (inability or unwillingness to pay or resolve debts) are established. No mitigating conditions have been established regarding these debts, except for the \$8.00 credit card debt .

Guideline E (Personal Conduct-Falsification)

Applicant answered "no" to Question 28(b) of his security clearance application, which asks if he was currently more than 90 days delinquent on any debts. Applicant admits that he incorrectly answered Question 28, but states that he listed his delinquent debts under Question 28(a). Department Counsel concedes that Applicant listed his delinquent accounts, albeit in the wrong place on the form, and that there is no further security concern under Guideline E. I conclude that Applicant has rebutted the allegation of falsification in the SOR, para. 2.a.

General Adjudicative Guidelines

Applicant's financial problems began before his divorce in 1996. He has resolved a number of debts not listed on the SOR. He has disputed a number of the debts listed on his credit reports, as he is entitled by law to do. He is a mature individual and gainfully employed. On the other hand, he has provided inconsistent information regarding the home improvement loan, admitting it to a DSS investigator and denying it in response to the SOR. He has not tendered payment on the undisputed amount of his credit card account. His answer regarding the federal tax indebtedness was not responsive, and the evidence indicates that there have been two federal tax levies on his wages. Applicant's financial situation has been in disarray for many years, and the likelihood that Applicant will resolve the security concerns arising from his debts remains uncertain. Applicant has the ultimate burden of persuasion on the ultimate question whether it is clearly consistent with the national interest to grant him a security clearance. I conclude that Applicant has not carried his burden of persuasion.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1, Guideline F AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: Against Applicant

Subparagraph 1.j.: For Applicant

Paragraph 2, Guideline E FOR APPLICANT

Subparagraph 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 a security clearance to Applicant. Clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. Congress enacted the Fair Credit Reporting Act to protect consumers from inaccurate adverse information. *See Williams v. Equifax Credit Information Services*, 892 F. Supp. 951 (E.D.Mich. 1995); *Wiggins v. District Cablevision, Inc.*, 853 F. Supp. 484 (D.C. 1994). When a consumer disputes the accuracy of information in a credit report, the consumer reporting agency must reinvestigate the information. If the information is found to be inaccurate or incomplete or cannot be verified, it must be modified or deleted. 15 U.S.C. §1681i (a)(1) and (5).

2. 15 U.S.C. § 1681c prohibits, with certain exceptions not applicable to this case, a credit reporting agency from reporting "accounts placed for collection or charged to profit and loss which antedate the report by more than seven years."