

KEYWORD: Financial; Personal Conduct

DIGEST: Applicant has a history of delinquent debts he accrued in connection with medical care he received and was initially assumed to be covered by his medical insurance and debts incurred with a business he started in 1998 and failed financially despite all of his funding support. Unable to address his debts for the ensuing three years due to the unanticipated medical complications of his spouse (whose short term medical disability expired), he has since paid all but two of his debts with the aid of a loan from his father-in-law, who he is repaying at an agreed monthly rate. Applicant by his good-faith payment efforts mitigates security concerns associated with his delinquent debts, and he successfully refutes allegations of falsification of his security clearance application (SF-86) by a demonstrated misunderstanding of the age of his debts. Clearance is granted.

CASENO: 02-25465.h1

DATE: 07/16/2004

DATE: July 16, 2004

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-25465

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Department Counsel

FOR APPLICANT

David S. Wood, Esq.

SYNOPSIS

Applicant has a history of delinquent debts he accrued in connection with medical care he received and was initially assumed to be covered by his medical insurance and debts incurred with a business he started in 1998 and failed financially despite all of his funding support. Unable to address his debts for the ensuing three years due to the unanticipated medical complications of his spouse (whose short term medical disability expired), he has since paid all but two of his debts with the aid of a loan from his father-in-law, who he is repaying at an agreed monthly rate. Applicant by his good-faith payment efforts mitigates security concerns associated with his delinquent debts, and he successfully refutes allegations of falsification of his security clearance application (SF-86) by a demonstrated misunderstanding of the age of his debts. Clearance is granted.

STATEMENT OF THE CASE

On June 27, 2003, 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 August 12, 2003, and requested a hearing. The case was assigned to me on February 2, 2004, and after a granted continuance of the first scheduled hearing, was rescheduled for hearing on April 28, 2004. A hearing was convened on April 28, 2004, 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 nine exhibits; Applicant relied on two witnesses (including himself) and 18 exhibits. The transcript (R.T.) was received on ay 13, 2004.

SUMMARY OF PLEADINGS

Under Guideline F, Applicant is alleged to have incurred numerous delinquent debts which he is unable to pay based on his reported negative monthly income: He is alleged to have incurred 11 delinquent debts which exceed \$18,000.00 in total and currently reports a \$430.00 negative monthly remainder.

Under Guidelines E and J, Applicant is alleged to have falsified his security clearance application (SF-86) of November 20, 2000 by omitting his delinquent debts over 90 days delinquent.

For his response to the SOR, Applicant admitted each of the allegations covered by Guideline F. He claimed the debts were the result of business losses incurred in connection with his financial support of a small business he operated between June 1998 and early 1999. He claimed he continued to operate the business even after it began to experience small losses in the hope he could make it a success like his other small businesses. Applicant claimed to have enrolled in a credit-counseling-program, which he expected to use to satisfy his delinquent debts. Applicant attributed his mushrooming debts to both his increasing business losses and his wife's illness, which was followed by loss of her short-term disability insurance and income loss attributable to her disability. Applicant denied any intentional falsification of his February 1999 SF-86, claiming he was not aware of his having debts at the time that were more than 90 days delinquent; even though he admitted to having severe economic difficulties resulting from his emerging business failure.

FINDINGS OF FACT

Applicant is a 48-year-old industrial security specialist for a defense contractor who seeks an upgrade of his security clearance to top secret status. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

Applicant has held a security clearance with the same firm since 1986 through a series of corporate mergers and acquisitions. In June 1998, he established a business on the side that specialized in comedy entertainment in his local community. For the year and a half he operated his comedy business he struggled financially with it to keep it operational before succumbing to poor business attendance and finally closing it in January 2000. During the months he operated the business in 1998 and 1999, he covered fixed overhead, staffing and entertainers expenses with his own money. Most of the incurred expenses he covered with credit cards.

Applicant had operated his comedy business for only 18 weeks when he was notified on short notice by the hotel he was renting space from that it wished to use the space for other purposes. Because Applicant had already booked performers for scheduled performances, he was stuck paying their agreed fees. Over the course of the ensuing year, he changed local hotels once more before settling in with his last one. After successfully negotiating with his landlord in late 1999 to hold a New Years eve show (in December 1999), Applicant's show enticed much fewer patrons than he had anticipated and failed to break even with his expense outlays.

Most of Applicant's delinquent debts covered in the SOR involved credit card accounts he ran up during his ill fated comedy business. Three were unrelated and involved medical services he contracted for in 1995 and 1996 in the belief they would be covered by his medical insurance (creditors 1.g and 1.h). When his expected health insurance carrier did not cover these medical debts (approximating \$1,764.00 and \$102.00, respectively), he resisted paying them himself.

Besides his comedy business-related and earlier medical debts, Applicant incurred a major loan indebtedness in 1999 on a new car lease (*compare* exs. 4 and I). When he could no longer afford to stay up with the monthly lease payments following his business failure, he told the leasing company he was returning their vehicle. This he did around June 2000. After the leasing company sold the vehicle it advised Applicant there could be a deficiency for as much as \$7,000.00, maybe less.

Applicant has also been responsible for child support for his daughter from his former marriage. His ex-wife claimed arrearage at one time. Disputing the amount of his arrearage and the length of time he would be responsible for her, he, nonetheless, accepted paycheck deductions to defray the arrearage. Applicant continues to be responsible for arrearage but not current child support any longer: She is 22 years of age. Paycheck deductions for his arrearage are deducted at the rate of \$160.00 a month.

Applicant met his current spouse (W) at his employment where she was also employed in 2002. W had begun to experience unknown medical symptoms by April 2002, which could not be immediately diagnosed. In June 2002, Applicant married W. Four days after their marriage, W experienced intestinal blockage and almost died. Shortly thereafter, she went into surgery and was diagnosed with Crohn's disease: a digestive tract disorder that is accompanied by symptoms of intestinal blockage, vomiting and aches in the joints (R.T., at 72-73). Over the course of the year, W's symptoms became so debilitating she could no longer hold down her job. She was placed on short term disability status, which entitled her to receive 60 per cent of her pay benefits.

With W's benefits reduced, Applicant assumed greater responsibility for taking care of his family's financial needs. By August 2002, her condition has stabilized to the point where she was able to return to work. About this time Applicant's sister died suddenly. This required Applicant's financial assistance with the funeral expenses.

In January 2003, W developed medical complications which required her taking leave from work again. With W still receiving her short term disability payments, Applicant and W for the first two months were able to keep up with their current debts without incurring any monthly deficits.

In March 2003, Applicant and W received notice from W's short term disability carrier that it would no longer fund her short term disability. With no supplemental income whatsoever from W, Applicant was forced to assume all of the financial responsibility for running his household. Because he was running a monthly remainder deficit of around \$430.00 as the result of W's inability to work, he could not do any more at the time but keep his new debts current, which he did, even while incurring a \$430.00 a month remainder deficit. With the existing uncertainty about W, he could not be more specific with the DSS agent who interviewed him in March 2003 about paying on his old debts (then in excess of \$19,000.00).

After considering consumer credit counseling (CCC) in July 2003, Applicant declined it, in part due to the \$500.00 up-front charge CCC required to administer his creditor payments (ex. 33). Applicant turned to his father-in-law who offered to loan him money to pay off his old debts. Applicant accepted a \$20,000.00 loan from his father-in-law (\$1,500.00 of which was held back for emergency) in August 2003 to pay off his old debts (R.T., at 97-98). With the loan funds, he paid off all but a few of his delinquent debts. He documents paying off the following creditors in August and September 2003: creditors 1.a (in an agreed lump sum payment of \$1,300.00), 1.b (in full) 1.c (in an agreed lump sum payment of \$993.00), 1.d (in an agreed lump sum payment of \$1,440.92), 1.e (in an agreed lump sum payment of \$1,169.49), 1.f (in full), 1.h (in full), and 1.i (in full). Applicant, in turn, has been paying off the father-in-law's loan at the rate of \$424.00 a month (R.T., at 98-99).

Applicant reached a compromise settlement in July 2003 with the leasing company (creditor 1.j) that took back his leased vehicle in June 2000. After being surprised to receive a \$7,365.00 deficiency notice he called the collection agent for creditor 1.j and worked out a \$3,000.00 cash settlement with them. With the benefit of his father-in-law's \$20,000.00 loan (several days later), he called the collection agent back to implement his settlement, the agent declined to accept it (R.T., at 93). Applicant then called creditor in 1.j August 2003 and worked out a \$4,700.00 settlement with them, with \$3,000.00 to be wired immediately, and the remaining \$1,700.00 to be worked out later. Applicant wired the \$3,000.00 as promised only to be later confronted with a larger demand from creditor 1.j: first in November 2003 for the entire \$4,365.00 balance (reflecting Applicant's \$3,000.00 payment), and later (in February 2004) for \$2,200.00 (*see ex. I*; R.T., at 93). Applicant has continued to work with creditor 1.j on persuading them to stick to this original settlement arrangement, but has not as yet made his final payment on the debt (R.T., at 134).

Besides the money he still owes to creditor 1.j for services provided in 1992 (R.T., at 89). Applicant is still in debt to creditor 1.g for the \$1,764.00 balance that the insurance company declined to cover (R.T., at 134). Applicant continues to dispute this amount and provides no time table as to when he might pay this debt that still appears on his credit report. He has been in touch with the creditor's collection agent recently and asked them to resubmit their medical claim to the responsible insurance company (R.T., at 90). At present, he is still waiting to hear back from the collection agent for creditor 1.g. If the carrier will not cover this claim, he is committed to somehow paying it himself.

Applicant's most recent financial statement reflects slight improvement in his net monthly disposable income: from

\$3,284.00 in March 2003 to \$3,359.00 in April 2004 (*compare* exs. 2 with J). While he continues to have his child support arrearage deducted from his paycheck (around \$160.00 a month), his overall deductions have been reduced by a little over a \$100.00 a month (R.T., at 103-04). He now can count on a net positive monthly remainder of \$1,080.00. This should enable him to take care of the balance owing on his deficiency with the leasing agency he returned his car to. The extra monthly disposable money should also enable him to continue to repay his father-in-law's \$20,000.00 loan at the rate of the agreed on \$424 a month, which he does not list as a monthly debt on his April 2004 financial statement.

Asked to complete an SF-86 in February 1999, Applicant answered in the negative to question 39's inquiry whether he had any delinquencies over 90 days. Applicant attributed his omissions to uncertainty over any of his debts had reached the level of 90 days delinquent by February 1999. While he admits to being aware of accumulating debts from his fledgling comedy business, he did not know they were as yet 90 days late when he answered his security questionnaire. Because he was continuing to pay on these business-related debts that accounted for most of his bad debts, he considered them to be still in non-delinquent status in February 1999. As for his earlier medical debts (creditors 1.g through 1.i), Applicant assures that creditors 1.h and 1.i were not reported on the 1997 credit report he looked at in anticipation of purchasing his motorcycle. Were they he would have paid them at the time, given their small amounts (R.T., at 138). While he did note the creditor 1.g hospital debt on his 1997 credit report, he didn't think he was responsible for the debt, and still doesn't. He believed his medical insurance carrier was both responsible for the debt and the party taking care of the debt (R.T., at 139). Applicant's explanations reflect credible interpretations of the facts and circumstances available to him at the time and are accepted.

While Applicant did not use appropriate due diligence in looking into the status of his debts before providing an unqualified negative answer to question 39 of his SF-86, it is less than clear when Applicant's business related debts actually went into delinquent status. Only two of the consumer debts (represented by creditors 1.a. and 1.b) are listed as being charged off before February 1999, and Applicant's credit report does not provide ready answers as to when the remaining debts first became delinquent. Considering that Applicant only started his business in June 1998, it remains conceivable that his remaining consumer debts did not reach 90 day delinquent status before December 1998, or later. Neither the timing of his business-related debts nor the circumstances surrounding his omission are clear enough to draw inferences he knowingly and willfully falsified his SF-86 in omitting his business related debts declared. As for those two consumer debts that were charged off in 1998 (creditors 1.a and 1.b), Applicant also attributes uncertainty over whether they were actually considered delinquent by the creditors, given his continuing payments on these accounts. Applicant's explanations for omitting both his consumer debts and his medical debts (the latter based on his claimed understanding they were being handled by his insurance carrier) are accepted as truthful, even if they do not reflect due diligence actions on his part.

Applicant is highly regarded by past and present facility security managers of his company. His immediate supervisor credits him with reliable and conscientious contributions. Coworkers past and present who have worked with him commend him for his professionalism, solid contributions to the many security-related missions he has been assigned to, and honesty about keeping his promises and maintaining his professional and family commitments (*see* exs. 28 and 29). A former associate (B) of his in his unsuccessful comedy business praises Applicant for his determination and continued funding of the business during its ongoing struggles, before finally exhausting his own resources and closing the business by financial necessity (*see* ex. 27). B stresses Applicant's steadfast commitment to providing for his wife's medical needs (providing around the clock care while carrying out his security responsibilities with his company), even after her insurance was canceled and he was forced to assume more of the financial burdens.

Applicant's performance appraisals credit him generally with either meeting or exceeding expectations in the established criteria. (*see* exs. 18 through 20). In recent years he has received both monetary and performance awards in recognition of his performance and contributions to his company's security mission (*see* exs. 15 through 17).

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 at having to engage in illegal acts to generate funds. Unexplained influence is often linked to proceeds from financially profitable criminal acts.

Disqualifying Conditions

DC 1. A history of not meeting financial obligations.

DC 3. Inability or unwillingness to satisfy debts.

Mitigating Conditions

MC 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).

MC 6. The individual initiated good-faith efforts to repay overdue creditors or otherwise resolve debts.

Personal Conduct

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

Disqualifying Conditions: None.

Mitigating conditions: None.

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness

Disqualifying Conditions: None.

Mitigating Conditions: None.

Burden of Proof

By virtue of the precepts framed by the Directive, 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.

CONCLUSION

Applicant accrued considerable delinquent debt between 1995 and 1999: some medically related which his insurance carried has not covered, but most related to his struggling comedy business that ultimately failed following a series of operational and audience setbacks. Altogether, Applicant accumulated over \$19,000.00 of medical and business debts. The Government's security concerns center on the amount of delinquent debt he compiled between 1995 and 1999 and his ensuing omissions of these debts from his pertinent answers to his SF-86.

Financial Issues

Relying on his medical insurance to pay his medical bills from creditors 1.h and 1.i, Applicant did not address these debts for many years. Most of his other debts arose out of his financial support of his struggling comedy business. His only covered debt represents a deficiency due and owing on a leased car he returned to the leasing agency in 2000. Each of these debts became delinquent and were ultimately charged off by the creditors. On this record, , two of the Disqualifying Conditions (DC) of the Adjudicative Guidelines for financial considerations apply: DC 1 (history of not meeting financial obligations) and DC 3 (inability or unwillingness to satisfy debts).

Applicant's debts are attributable to a variety of extenuating circumstances. His covered medical debts that were written off between 1995 and 1999 involve debts for medical services provided by Applicant and assumed wrongly by the latter to be covered by his medical insurance. Most of his other debts involve credit card debts associated with his failed comedy business. While the deficiency on his leased car arose from a deficiency that survived the leasing company's public sale of the vehicle.

Extenuation of Applicant's debts is not enough in and of itself to overcome the adverse trust implications associated with his accumulating so many delinquent debts without any evidence of addressing them until he received the SOR. After failing with a counseling service to complete a payment plan, he turned to his father-in-law for assistance. His father-in-law responded positively with a \$20,000.00 loan to pay off his old debts. Applicant used the money to pay off all but his car lease deficiency and old medical debt: Negotiations with these creditors continue.

Applicant mitigates active security concerns associated with his debt problems by his payment of most of his covered debts. Excepted is creditor 1.g, which he still claims is the insurance company's responsibility, and on which he is waiting to hear back from the creditor's collection agent on its re-submission of the claim to the insurance agency. Applicant is also working on resolving the balance of his deficiency debt with creditor 1.j. On this debt, he is working on persuading the creditor to honor their earlier \$4,700.00 settlement, which includes Applicant's credited \$3,000.00 payment made in reliance on his version of the settlement.

That Applicant is responsible for paying back his father-in-law is not indicative of any continuing security concern, so long as the debt does not become delinquent (which it currently is not). Applicant has the demonstrated resources to pay off this debt with his current circumstances and persuades he will continue to satisfy this debt in the regular course of business according to the loose terms he arranged with his father-in-law.

Appraising Applicant's extenuating circumstances with respect to all of his covered debts, Applicant may take advantage of MC 3 (conditions largely beyond the person's control) of the Adjudicative Guidelines to extenuate his debt

delinquencies. He may also avail himself of the mitigation benefits of MC 6 (initiated good-faith effort to repay overdue creditors) based on his repayment efforts.

Taking into account all of the circumstances of Applicant's accumulated debts and the good-faith efforts he demonstrated in satisfying his debts when he and his wife were able to with the aid of his father-in-law, favorable conclusions warrant with respect to subparagraphs 1.a through 1.k as to the allegations governed by the Adjudicative Guidelines pertinent to Guideline F.

Falsification Concerns

Posing potential security concerns, too, are Applicant's documented omissions of his covered delinquent debts from the SF-86 he completed in February 1999. His omissions are, however, attributable to his mistaken uncertainty over whether his debts (which he had been paying on) were actually 90 days delinquent at the time of his completing his SF-86. While Applicant with his experience in industrial security could certainly have been more diligent about checking on the status of his debts (knowing as he did he was in financial trouble), his judgment lapses are not enough to impute knowing and wilful falsification under either Guideline E or Guideline J.

Were the standard for knowing and wilful falsification in a Guideline E case a reasonable man test (as the Government urges in its closing summation), falsification might well be attributed to Applicant. For as a security professional who has filled out many SF-86 forms before and knows the importance of candor, he could have been expected to use more due diligence in checking the status of his debts before answering no to a question that asks him about his debts over 90 days delinquent. But while the Appeal Board has questioned an applicant's explanations at times as either contradictory, unsupported by the evidence, or just plain untenable (a variation of unreasonableness), it has not adopted a reasonable man test as the standard for determining falsification. A reasonable man test is essentially a standard of care designed to determine whether negligence or departures of good judgment occurred. Falsification, by contrast, involves knowing and wilful conduct that tests a person's honesty and requires evidence of specific intent, and generally motive. Proof of falsification requires more than poor judgment or unreasonable assumptions. *Cf. United States v. Chapin*, 515 F.2d 1274, 1283-84 (DC Cir. 1975); *United States v. Steinhilber*, 484 F.2d 386, 389-90 (8th Cir. 1973); *United States v. Diogo*, 320 F.2d 898, 905 (2d Cir. 1963).

Applicant's explanations of his omissions (misunderstanding the age of his debts and his obligations to his earlier medical creditors) are persuasive enough to avert inferences of knowing and wilful omission. There being no misconduct substantiated, no need to show extenuation or mitigation arises. *Cf. ISCR Case No. 02-13568* (February 13, 2004). While Applicant's efforts lack due diligences inquiries of the state of his debts, his efforts reveal enough mistaken reliance on the unknown state of his debts to enable him to refute the allegations of falsification of his SF-86 covered in subparagraphs 2.a and 3.a (governed by Guidelines E and J, respectively).

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): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

Sub-para. 1.d: FOR APPLICANT

Sub-para. 1.e: FOR APPLICANT

Sub-para. 1.f: FOR APPLICANT

Sub-para. 1.g: FOR APPLICANT

Sub-para. 1.h: FOR APPLICANT

Sub-para. 1.i: FOR APPLICANT

Sub-para. 1.j: FOR APPLICANT

Sub-para. 1.k: FOR APPLICANT

GUIDELINE E (PERSONAL CONDUCT): FOR APPLICANT

Sub-para. 2.a: FOR APPLICANT

GUIDELINE J (CRIMINAL CONDUCT): FOR APPLICANT

Sub-para. 3.a: FOR APPLICANT

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is granted.

Roger C. Wesley

Administrative Judge