

KEYWORD: Financial

DIGEST: While Applicant's failure to succeed in his sports business can be attributed to business inexperience, lack of capital, and being precluded from providing monogram services, there was also unforeseen external competition from the Nation's leading department store and the internet. Even though less than one year has passed since his Chapter 7 discharge, he has made major changes in his financial habits. Clearance is granted.

CASENO: 03-21934.h1

DATE: 10/31/2005

DATE: October 31, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-21934

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Ronald C. Systus, Esq.

SYNOPSIS

While Applicant's failure to succeed in his sports business can be attributed to business inexperience, lack of capital, and being precluded from providing monogram services, there was also unforeseen external competition from the nation's leading discount store and the internet. Even though less than one year has passed since his Chapter 7 discharge, he has made major changes in his financial habits. His promotion to cable manager four months ago validates his good job performance. I am satisfied Applicant has learned a painful lesson and will not pursue such an ill-advised venture in the future. Clearance is granted.

STATEMENT OF CASE

On August 17, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6, dated January 2, 1992, as reissued through Change 4 thereto, dated April 20, 1999, issued a Statement of Reasons (SOR) to the 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. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. On September 15, 2004, Applicant responded to the SOR and requested a hearing before an Administrative Judge.

The case was assigned to me on January 3, 2005. On February 28, 2005, this case was set for hearing on March 17, 2005. The Government submitted seven exhibits and Applicant submitted seven exhibits. Testimony was taken from Applicant. The transcript (Tr.) was received on March 25, 2005.

FINDINGS OF FACT

The SOR alleges financial considerations (Guideline F).⁽¹⁾ Applicant admitted all debts and confirmed a Chapter 7 discharge in October 2004. Applicant is 48 years old. He has been married 26 years, and has two children; he has been employed by his present employer for the past eight years. About four months before the hearing, he was promoted to a management position as a cable shop manager.

In November 1998, Applicant was given a chance to buy a sports supply business. Having coached a number of youth teams, and feeling knowledgeable about the business, Applicant decided to take advantage of the buying opportunity. He put \$30,000.00 down by refinancing his house; the owner of the sports business financed the remaining value of the business, estimated to be approximately \$176,000.00. Applicant employed his wife and one of his children to service the business during the day while he provided afternoon relief after completing his daily shift. He devoted about four and one-half years to the business.

Next door to the sports business was a trophy/monogram store that the owner's son owned. A condition of the sales contract Applicant agreed to when he bought the sport business was not to interfere, i.e., provide trophy/monogram services, with the son's business. Applicant quickly learned that having no monogram services lowered profit. He also discovered the sports business was cyclical with sales strongest between March through June or July. Sales of baseball gear led all other sports merchandise sales. (Tr. 24) The slowest period for the business was between November and March of every year.

In August 1999, Applicant discovered he was gradually diverting more of his employment income to cover business expenses. To reduce the amount personal income needed for the business, he used some signature loans. By 2002, Applicant found himself using credit cards, loans and his employment earnings to pay the business expenses. The schedule F portion of his bankruptcy petition (creditors holding unsecured nonpriority security claims) lists 15 delinquent credit card accounts, 5 signature loans, 20 sports manufacturers, and only two accounts not business-related. (GE 2; GE 5) Between 2002 and June 2003, Applicant spent between \$9,000.00 and 12,000.00 to keep the sport shop afloat. (GE 2)

In June 2003 (Tr. 35), Applicant sold the business due to his inability to pay and/or keep current with the family's personal debts and expenses generated by the business. In October 2003, after determining they could not keep abreast of their delinquent business and personal debt, he and his wife decided to file Chapter 7 bankruptcy. On October 13, 2004, Applicant was discharged from approximately \$106,000.00 in delinquent debt, including the \$22,218.00 owed to six creditors listed in the SOR.

The bankruptcy laws allowed Applicant to keep his house and his vehicle. Since his discharge in October 2004, Applicant made some major changes in his financial habits. He brought all bills into a current status. He stopped using

credit cards. He maintains a small savings and retirement account. (Tr. 36) He does not intend to start any kind of business venture in the future. (Tr. 37)

During his discussion of mistakes made in buying the business, Applicant's first miscue was not conducting any kind of feasibility study addressing certain critical elements of the business. For example, he failed to determine the long term effect of not being able to provide trophy/monogram services. Second, Applicant suffered from not having capital at the time he purchased the business. (Tr. 24) In late 2000 or early 2001, after Applicant opened his business, the leading, national discount store opened an outlet within two miles of Applicant's store. (Tr. 40) Also, the internet presented daunting competition to Applicant's fledgling business.

Applicant's performance evaluations for 2000, 2002 and a 10 month period of 2004 reflect above satisfactory to good performance ratings. In a character statement, Applicant's supervisor for three years believes Applicant has performed in an outstanding manner. According to the supervisor, in the four month period Applicant has been a manager, he has exhibited clear leadership qualities in supervising 13 personnel.

Having weighed and balanced all the evidence, including Applicant's manner of testifying and demeanor at the hearing, I found Applicant's testimony and generally credible even though Applicant may have incorrectly answered two of the financial questions on his SCA. (GE 1)

POLICIES

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense.

Burden of Proof

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, 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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 481 U.S. at 531; *see* Directive E2.2.2.

Financial Considerations

The security concern of this guideline is that delinquent debts can induce or pressure a person to violate the law or security regulations.

CONCLUSIONS

Failure to pay debts in a timely fashion raises security concerns under the financial considerations (FC) guideline because it usually demonstrates financial irresponsibility and places the debtor at risk of engaging in illegal acts to generate funds. The SOR lists about \$22,000.00 in delinquent debt owed to six creditors. The Government has established a case under FC disqualifying condition (DC) E2.A6.1.2.1. (*a history of not meeting financial obligations*) FC DC E2.A6.1.2.3. (*inability or unwillingness to satisfy creditors*) also is activated because Applicant was unable, though not unwilling, to pay debts he voluntarily incurred. None of the other DC apply.

There are potentially five mitigating conditions (MC) that are available for application to the circumstances of this case. FC MC E2.A6.1.3.1. (*the behavior was not recent*) applies when the underlying behavior leading to the indebtedness was in the distant past. FC MC E2.A6.1.3.1. does not apply because Applicant did not take any remedial action regarding the past due debts until June 2003. FC MC E2.A6.1.3.2. (*it was an isolated incident*) cannot be considered because there are more than one or two overdue debts.

Applicant entered the business without first doing his homework in learning the critical aspects of the business that the owner may not have told him because the owner did not want to lose a prospective buyer, particularly at a time when the country's economy was beginning to slow dramatically. ⁽²⁾ Therefore, FC MC E2.A6.1.3.3. (*the conditions that resulted in the behavior were beyond the person's control*) is applicable in that inexperience and lack of business acumen doomed Applicant's chances for success. Like most entrepreneurs who believe that given more time, the business will

rebound, Applicant stubbornly held on too long by foolishly taking out signature loans and abusing his private credit even after a national discount store opened practically next door to him. On top of his lack of business savvy and unrelenting competition of a national discount store was the fast emerging encroachment of the internet that has enabled the buyer to purchase from the comfort of his own home. In sum, the series of events, changes in the economy and advancing popularity of the internet extenuate the financial irresponsibility demonstrated by Applicant between November 1998 and when he sold the business in June 2003.

Though Applicant has had no formal financial counseling FC MC E2.A6.1.3.4. (*the person has received or is receiving counseling for the problem and there are clear indications the problem is being resolved or is under control*), Applicant has taken responsible action to regain control over his finances. First, he has returned all overdue accounts to a current status, an early objective of financial counseling. Second, he has eliminated his use of credit, another goal of financial counseling. Finally, he will not open his own business in the future. Hence, Applicant's efforts to resume his life on sound financial footing justify some mitigation under FC MC E2.A6.1.3.4., even though he received no official counseling.

FC MC E2.A6.1.3.5. (*the affluence resulted from a legal source*) does not apply to these facts. FC MC E2.A6.1.3.6. (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*) recognizes dedicated efforts to repay creditors under a public or private repayment plan. Sometimes, the debt is simply too large to repay because the individual does not earn enough to make sufficient payments and accommodate his personal expenses simultaneously. The individual's best choice then is a Chapter 7 discharge of his debts. A discharge of all debts is a legitimate alternative of resolving debts that are not repaid under a repayment plan. As a general rule, a complete discharge of debts does not replace a sustained track record of repayments to creditors because the liquidation of debts leaves unsecured creditors without recourse. However, as each case turns on its own circumstances, Applicant was fortunate to finally realize he could not pull himself out of the financial hole. Applicant's business inexperience and the powerful competition are overcome by the concrete changes in his financial habits and the favorable character evidence. I find for Applicant under the FC guideline. This finding has also included a review of this case under the general factors of the whole person concept.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 are:

Paragraph 1 (Financial Considerations, Guideline F): FOR THE APPLICANT.

subparagraph a: For the Applicant.

subparagraph b: For the Applicant.

subparagraph c: For the Applicant.

subparagraph d: For the Applicant.

subparagraph e: For the Applicant.

subparagraph f: For the Applicant.

subparagraph g: For the 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 a security clearance for Applicant.

Paul J. Mason

Administrative Judge

1. The SOR lodges no allegations under the personal conduct guideline even though Applicant's answered "NO" to all financial questions in his security clearance application (SCA). (GE 1)
2. Generally, the parties are entitled to be informed regarding the information I am relying on in making a decision. *See,*

ISCR Case No. 99-0452 at p. 4 (Ad. Bd. March 21, 2000). Though the U.S. economy was not referred to during the hearing, I am taking official notice that the Nation was in a recession in the period around November 1998 until early 2000. While there is no way to gauge the exact impact on Applicant's sports business, I am reasonably confident the economic situation did not improve his business opportunities given the other problems he was grappling with during the period.