

KEYWORD: Criminal Conduct; Financial

DIGEST: Applicant's history of not meeting financial obligations has been mitigated by his successful efforts in repaying eight of 11 creditors since February 2004. The fact that Applicant's former wife did not mail his state tax returns as promised for the tax years 1993 through 1996 does not excuse his criminal acts of omission. However, the isolated nature of his conduct and the remedial steps taken in filing/paying his taxes, and most of the other overdue debts support my conclusion Applicant will continue to satisfy the remaining, overdue debts, and is not likely repeat this conduct in the future. Clearance is granted.

CASENO: 04-10009.h1

DATE: 03/07/2006

DATE: March 7, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-10009

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's history of not meeting financial obligations has been mitigated by his successful efforts in repaying eight of 11 creditors since February 2004. The fact that Applicant's former wife did not mail his state tax returns as promised for the tax years 1993 through 1996 does not excuse his criminal acts of omission. However, the isolated nature of his conduct and the remedial steps taken in filing/paying his taxes, and most of the other overdue debts support my conclusion Applicant will continue to satisfy the remaining, overdue debts, and is not likely repeat this conduct in the future. Clearance is granted.

STATEMENT OF THE CASE

On May 20, 2005, 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 June 10, 2005, Applicant responded to the SOR and requested a hearing before an Administrative Judge.

The case was assigned to me on October 6, 2005. On October 20, 2005, this case was set for hearing on November 9, 2005. The Government submitted eight exhibits (GE 1-8), and Applicant submitted 12 exhibits (AE A-L) Testimony was taken from Applicant. The transcript was received on November 23, 2005. On November 29 and December 2, 2005, Applicant furnished AE M and AE N (updated documentation regarding accounts listed in the SOR).

FINDINGS OF FACT

The SOR alleges 11 past due debts and a Chapter 13 bankruptcy under the financial considerations guideline. The criminal conduct is based on the failure to file tax returns for 1993, 1994, 1995, and 1996. (1) Applicant denied several of the debts, asserting they had been disputed or had been paid. Curiously, when responding to some of the listed delinquent accounts, he quoted check numbers without furnishing actual copies of the checks.

Applicant is 42 years old and is employed as a program analyst with a defense contractor. He seeks a secret security clearance.

The 11 delinquent listed in the SOR are based on June 2003 credit bureau reports (CBR) (GE 4), Applicant's answers to interrogatories (GE 3), and information supplied by Applicant in his answer to the SOR. The debts became delinquent between 1995 and 2004. The table on the next page summarizes Applicant's debts and type, their current status, and record location.

Debt, Type, Original Creditor or Collection	Amount	Current Status	Record
Debt 1.a., tele., collection 7/04	\$117	Paid (2) 10/20/05	AE A; Tr. 39-40
Debt 1.b., tele., collection 5/04	\$82	Paid 11/09/05	AE M
Debt 1.c., medical, collection 5/02	\$36	Paid 7/02/05	AE B; Tr. 43
Debt 1.d., credit card, charge off 2/02	\$747	Paid \$800 11/09/05	AE M
Debt 1.e., exercise, collection 5/01	\$212	Settled \$180 7/27/04	AE C; Tr. 44-45
Debt 1.f., credit card, charged off 5/05	\$1503	Unpaid	CBR 6/03, AE M
Debt 1.g., medical, collection 9/02	\$71	Unpaid	CBR 6/03; AE M
Debt 1.h., medical, collection 9/09	\$155	Unpaid	CBR 6/03: AE M
Debt 1.i., administrative, collection	\$164	Settled \$140 7/22/05	AE D; Tr. 49
Debt 1.j., tax lien, 1998	\$6,230	Paid \$210 (3)	AE N;

Debt 1.1., child support garnishment (4)	\$1,353	Paid as of October 2005	Tr. 67; AE F
8 debts paid or settled totaling \$9902; garnishment and lien should be removed		3 debts unpaid totaling \$1729	

Applicant's financial problems began in September 1990 when he tore his Achilles tendon. He was laid off from his job because he was considered a safety hazard for job activities related to handling the space flight crew missions. He married his second wife in September 1991. He filed a Chapter 13 bankruptcy in 1992 that was successfully discharged in approximately 1995. The discharge forced him to relinquish his house and cars. After completing his rehabilitation, Applicant rejoined the workforce in March 1993, but without a college degree, he could only find jobs making about 1/3 the income he had been earning with the space organization in 1990. He worked on the west coast from 1993 to 1997.

Applicant returned to the middle part of the country in 1997 to get a better paying job; also, he entered graduate school. He has been working at his present job since 1998. When he divorced his second wife in April 2000, he was ordered to pay child support of \$1,353.00 for four children.

Applicant finished graduate school in June and began his second job as a professor in August 2004. Applicant maintains he has been trying to pay his overdue debts. The record reflects the 1.d., 1.f., 1.g., and 1.h. debts were incurred during his second marriage. The 1.d. debt was repaid after hearing on November 9, 2005; debts 1.f., 1.g., and 1.h. remain unpaid.

Applicant found out about the 1998 state tax lien (1.j.) in 2004 when he obtained a credit report, then talked with his wife and was informed she had not mailed the state returns as promised. The tax filing assumptions used by the state in reaching the amount of the December 1998 lien apparently are incorrect based on the re-computed state returns for filing "married filing separate" status, and reflecting Applicant owed only \$210.00 for tax years 1993, 1994, 1995, 1996 (AE , AE N).

Applicant is considered a principled and honest coworker on the job. Away from the job he is a devout church member and community leader. AE J reflects Applicant opened a installment loan account in June 2000 that he repaid in a timely fashion in August 2002. In March 2004, Applicant decided not to use the financial services of a religious organization when he determined they had no fresh ideas to aid in his financial recovery. Applicant's November 2005 budget reflects an extra \$2000.00 his third wife contributes to the family expenses every month. Since September 2004, Applicant has earned \$500.00 a month from his teaching job that is put in a separate account to pay the past due debt.

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 Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) "[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." *See Egan*, 481 U.S. at 531; *see* Directive E2.2.2.

Financial Considerations (Guideline F)

An individual's financial practices are a private matter between him and the creditor. However, when evidence discloses he is not paying his bills on time, then his financial practices become a government concern. Accumulated debt places the individual at risk of engaging in illegal acts to generate funds.

Criminal Conduct (Guideline J)

Criminal conduct is synonymous with poor judgment because an individual who is willing to violate the law may also be willing to violate security regulations when he chooses.

CONCLUSIONS

Financial considerations (FC) refer to debts that have not been paid in a regular and timely fashion. An individual who is not able to pay his debts on time places himself in a position of having to commit illegal acts to generate funds. Applicant's financial problems fall within FC disqualifying condition (DC) E2.A6.1.2.1. (*a history of not meeting financial obligations*) as one of the eleven debts was charged off 10 years ago. Applicant's job history at several low income jobs between 1993 and his divorce in April 2000 invokes the application of FC DC E2.A6.1.2.3. (*inability or unwillingness to satisfy debts*) by demonstrating Applicant lacked the financial wherewithal to keep all his debts current on a regular basis.

There are four mitigating conditions (MC) under the FC guideline that apply to support Applicant's security clearance application. Though FC MC E2.A6.1.3.1. (*the behavior was not recent*) and FC MC E2.A6.1.3.2. (*the behavior was an isolated incident*) are inapplicable because of the large child support arrearage and number of debts in February 2004, the absence of these two conditions does not determine the outcome of this case.

FC MC E2.A6.1.3.3. (*the conditions that resulted in the behavior were largely beyond the person's control*) applies to mitigate an extenuate Applicant's financial difficulties triggered by the unanticipated injury he sustained in September 1990. Applicant could not have known he was going to have such a incapacitating injury that would force his retirement because of safety concerns for the flight crew and his coworkers. Applicant's inability to work for over two years created debt he sought temporary protection from with his Chapter 13 petition that he filed in 1992, and which was successfully discharged in 1995. Applicant encountered additional unforeseen problems in April 2000 when he was unable to pay the child support for unexplained reasons.

FC MC 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*) does apply to the circumstances as Applicant's actions and his documentary evidence show he is regaining control over his financial house. In light of his budget showing the extra income from his wife and his teaching position, he has sufficient funds to repay the remaining creditors in an expedited manner.

Applicant's repayment of eight of 11 listed debts activates FC MC E2.A6.1.3.6. (*the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*). In addition to the child support arrearage Applicant

cleared between February 2004 and October 2005, he has satisfied seven of the other listed creditors, including the state tax authority. Having reviewed the withholding forms with the respective returns, I am confident Applicant has satisfied his tax obligations to the tax authority. Based on his actions in resolving eight creditors, I believe Applicant will continue his good-faith efforts to make the remaining creditors whole. Applicant has mitigated the financial concerns.

Applicant's failure to file tax returns for 1993 through 1996 violates the state tax code, a misdemeanor, and constitutes criminal behavior as set forth in the criminal conduct (CC) guideline. *See*, CC DC E2.A10.1.2.1. (*allegations or admission of criminal conduct, regardless of whether the person was ever charged*). The pattern of conduct creates doubt about Applicant's judgment and reliability. CC MC E2.A10.1.3.1. (*the criminal behavior was not recent*) is applicable to mitigate as the prohibited behavior ended in 1997. While the returns for four years were not filed as required, the behavior never happened before or since the years in question. Therefore, CC MC E2.A10.1.3.2. (*the crime was an isolated incident*) applies additional mitigation to the illegal conduct. Based on Applicant's filing of the right returns and payment of the required taxes, Applicant has provided essential evidence that firmly establishes CC MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*) in his favor. The good-faith efforts that have been taken by Applicant to pay his debts and resolve his tax problems convince me Applicant has regained control over his financial problems and will not experience a recurrence of similar problems in the future.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 are:

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

Subparagraph 1.a. For the Applicant.

Subparagraph 1.b. For the Applicant.

Subparagraph 1.c. For the Applicant.

Subparagraph 1.d. For the Applicant.

Subparagraph 1.e. For the Applicant.

Subparagraph 1.f. For the Applicant.

Subparagraph 1.g. For the Applicant.

Subparagraph 1.h. For the Applicant.

Subparagraph 1.i. For the Applicant.

Subparagraph 1.j. For the Applicant

Subparagraph 1.k. For the Applicant.

Subparagraph 1.l. For the Applicant.

Paragraph 2 (Criminal Conduct, Guideline J): FOR THE APPLICANT.

Subparagraph 2.a. 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. Clearance is granted.

Paul J. Mason

Administrative Judge

1. Allegation 2.a. alleges a failure to file "your [state] tax return." The tax forms requested by Applicant in October 2004 from the state tax authority, the forms he supplied at the hearing and the post-hearing show that four state tax returns were not filed for the years for 1993, 1994, 1995, and 1996. Therefore, the first clause of Subparagraph 2.a. of the SOR is amended as follows: "You failed to file your [state] State Tax Income Returns for the years 1993, 1994, 1995, and

1996." The remainder of the allegation remains the same. This amendment is undertaken *sua sponte* and pursuant to E3.1.17 of the Directive to make the SOR conform to the evidence presented.

2. GE 3 indicates Applicant tried to pay the 1.a. creditor in November 2004 and April 2005. The account was finally resolved after he paid the collection agency in October 2005.

3. Based on the documentary proof furnished to support repayment of the other delinquent debts, and the documentary evidence that shows what Applicant has obtained to resolve his tax problems, I find the unprocessed check (AE N) credible evidence of Applicant's effort to repay his state tax obligations.

4. Though not alleged in the SOR, AE F reflects that in February 2004, Applicant's child support arrearage actually exceeded \$8,000.00; by October 2005 the arrearage was eliminated.