



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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)
-----) ISCR No. 08-06567
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jennifer Goldstein, Esquire, Department Counsel
For Applicant: *Pro Se*

January 29, 2010

Remand Decision

WESLEY, Roger C., Administrative Judge:

Statement of Case

On February 24, 2009 the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, and Department of Defense (DoD) Regulation 5200.2-R, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on April 29, 2009 and requested a hearing. The case was assigned to me on May 18, 2009, and was scheduled for hearing on June 24, 2009. A hearing was held as scheduled, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, or deny, Applicant's application for a security clearance. At hearing, the Government's case consisted of five exhibits (exs. 1 through 5); Applicant relied on one witness (himself)

and four exhibits (exs. A through D). DOHA received the transcript (Tr.) on July 10, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information was denied.

On October 29, 2009, the Appeal Board remanded the case for reconsideration of the Applicant's financial circumstances since he lost his job in 2007, and whether he could have made more substantial efforts to repay his remaining three creditors with the limited resources available to him.

With the concurrence of both parties, a new hearing was scheduled for December 11, 2009. A remand hearing was convened as scheduled. At hearing, the Government relied on no witnesses and added one additional document to the record. Applicant testified on his behalf and added four additional exhibits (exs. E through H); DOHA received the transcript (Tr.) on December 22, 2009. Based upon a review of the remand decision, case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Procedural Rulings and Evidentiary Issues

Before the close of the remand hearing, Applicant asked for leave to supplement the record with an updated status report of his efforts to resolve his creditor 1.f judgment. For good cause shown, Applicant was granted to January 5, 2010 to supplement the record. Applicant subsequently asked for an extension to January 15, 2010 to supplement the record; his request was granted. He asked for a third final extension to January 22, 2010. This request was also granted. Within the time permitted, Applicant supplemented the record with documentation of his resolving two of his remaining outstanding debts, his continuing efforts to vacate creditor 1.f's judgment, and more recently, his election to pay off the creditor 1.f judgment in monthly increments. Applicant's submissions were accepted as exhibits I through K.

Summary of Pleadings

Under Guideline F, Applicant is alleged to have (a) accumulated six delinquent debts, (b) had a judgment entered against him in June 2001 for \$7,948, (c) had an IRS tax lien entered against him in January 2001 (since released) for \$25,441, and (d) had a state tax lien entered against him in September 1999 (since released) for \$6,701.

In his answer to the SOR, Applicant admitted some of the debts but denied others. He claimed most of the debts have since been paid in full (creditors 1.a, 1.d, 1.e, 1.g, 1.h and 1.i. He claimed that he is waiting for agreement on repayment plans that cover creditors 1.b, 1.c, and 1.f.

Findings of Fact

Applicant is a 52-year-old former senior field engineer for a defense contractor who seeks a security clearance. Applicant worked for the defense contractor for about

six months before he was laid off in March 2009 (R.T., at 52-53). The allegations covered in the SOR and admitted to by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Settled facts

Applicant was raised in a military family. His father was a Vietnam war veteran and a sergeant first class who spent 35 years in the U.S. Army before he passed away in 1992 (see ex. A). Applicant is divorced and has a daughter from his marriage (see ex. 1; 1 Tr. 60-61). Currently, he has joint custody of his daughter (1 Tr. 63).

Between 1999 and 2004, Applicant was employed in internet-related businesses (see ex. 1). One was a dot-com company that failed in the late 1990s "when the bubble burst" and customers stopped paying their bills (I Tr. 48-49). This business collapse caused "a lot of financial burdens that I had in 1999 to 2001" (1 Tr. 21, 56, 71).

After spending several months (between November 2004 and March 2005) with a communications firm as a communications engineering manager (see ex. 1), Applicant formed and operated his own high-tech company for a number of years (2005-2007) that contracted with foreign governments to install wireless communications (I Tr. 58-60). While his company prospered, he was current with all of his business and personal creditors. Once his business faltered in early 2007, he could not keep up with his creditors, and became delinquent with many of his accounts (I Tr. 49-50).

Applicant joined a major defense contractor in September 2007 in an engineering capacity and worked for this company for several months (see ex. 1: I Tr. 53, II Tr. 81) as a senior engineer before his layoff for his lack of a security clearance (II Tr. 82). Since November 2007, he has held a variety of jobs. He drove a taxicab to support himself and his three-year old daughter who has had major medical issues to contend with (see ex. A; I Tr. 49-50, 56). He has seen his income drop about 90 percent during this difficult period, and has struggled to keep up with his creditors.

Between 1993 and 2001, Applicant accumulated a number of delinquent debts during periods of unemployment and underemployment. Two of the largest debts involve federal and state tax liens. Records show that a federal tax lien was entered against Applicant in January 2001 for \$25,441, which covered tax years 1993 through 1997. A state tax lien was entered against Applicant in September 1999 for \$6,701. Both of these liens have since been released (ex. A). Applicant's other large debt is a judgment entered against him by creditor 1.f in June 2001 for \$7,948 to cover back rent owed to a landlord for a leased apartment unit. This judgment remains outstanding.

Applicant's remaining debts are consumer-related, small for the most part, and exceed \$3,000.00 in the aggregate. Applicant documents payment of three of these consumer debts (creditors 1.a, 1.d and 1.e). He engaged a debt counseling service in June 2009 to explore an action plan for repaying his three remaining debts: 1.b (for

\$1,775.00), 1.c (for \$8,019.00), and 1.f (the judgment creditor). All but one of these covered creditors (creditor 1.f) were located. To ascertain the whereabouts of creditor 1.f, Applicant enlisted the assistance of his debt plan counselors. Applicant hoped to find creditor 1.f and persuade him to participate in his repayment plan (see exs. C and D; I Tr. 49-50).

To date, Applicant's attempts to contact this landlord creditor to explore payment plan alternatives have not been successful (see ex. D; I Tr. 77). So far this year, he is able to document one payment to each of the two creditors identified as agreeable participants in his plan (see ex. A; I Tr. 36-37), on the strength of his very limited income. Applicant continues to wait for positive feed-back from creditor 1.f.

The financial consumer credit counseling service (CCCS) that met with Applicant in June 2009 reviewed his work history, his current layoff status, his limited monetary benefits from his unemployment insurance, and the size of his three major debts he has listed in his proposed action plan. Upon completing its evaluation of Applicant's resources, the firm devised a repayment plan that permitted monthly repayments to each of the three listed creditors (*i.e.*, creditors 1.b, 1.c and 1.f) in the amount of \$75.00 each (ex. B). His financial counselors advised that he would be able to increase his monthly payments once he returned to work. (ex. B).

Applicant attributes most of his recent debt problems to periods of unemployment and underemployment he intermittently experienced following the internet crash in 2001 (I Tr. 71). Ensuing medical complications with his daughter required surgical intervention in September 2005 to repair an intestinal blockage. Child custody obligations and other family-related expenses placed additional strains on his limited resources during periods when he struggled with low-paying jobs and work furloughs (I Tr. 60-61, 68-72).

Once on a promising course of financial recovery with a thriving internet business he owned and managed, Applicant's available resources quickly dissipated after his business failed in 2007. He found full time employment as an engineer with a defense contractor in September 2007, and worked for this contractor for a couple of months (ex. 1). Unable to retain this job, he settled for driving taxi cabs (I Tr. 53-55).

Since Applicant's layoff from his current employer, he has relied solely on his unemployment insurance to take care of his daughter and his other financial needs (I Tr. 54). Applicant currently receives about \$1,500.00 a month in unemployment benefits (see ex. 2; I Tr. 62). He estimates his current monthly expenses to exceed his current income. Child support (roughly 25 percent of his monthly income) and increased rent account for most of his monthly expenses (I Tr. 63). His child support is deducted from the monthly unemployment checks he receives (I Tr. 86-87).

Applicant has no savings and several aging vehicles that have little market value (I Tr. 64-66, 69). With only his unemployment benefits to cover his bills, he currently limits all of his payments to the "bare minimum" (I Tr. 86). To repay some creditors, he

is forced to prioritize his creditor payments. In prioritizing his debts, he pays certain creditors and makes other creditors wait until he has more money to pay them as well (I Tr. 69). Typically, he pays certain bills one month, and other bills the following month (I Tr. 68-69).

At his first hearing, he indicated that once he is able to return to work full time, though, he estimates that he will be able to repay his listed debts in a reasonably short period of time (I Tr. 69). As of the completion of the first hearing, Applicant's unsatisfied listed debts approximated around \$17,000.00 (see ex. 2; I Tr. 88-91). Since he does not have any credit cards, he uses only debit cards to pay his bills (I Tr. 83-84).

At the present time, Applicant is still limited financially to his unemployment benefits (due to be exhausted in about 17 weeks), and is doing all that he can to satisfy his three remaining debts with the income sources he has at his disposal (see exs. E through H and K; 11 Tr. 72).

Post-remand findings

Since issuance of the initial decision, Applicant ceased working with his debt consolidation firm, and has relied on his own efforts to address his remaining three debts (II Tr. 52-53). He has instituted monthly payments on these three remaining unresolved debts (creditors 1.c, 1.d, and 1.f). His one documented \$75 payment to creditor 1.b (see ex. I) still leaves him with a balance in excess of \$1,250 (see ex. E; II Tr. 24, 28-29). His two documented payments to creditor 1.c leave him with an unpaid balance exceeding \$7,500 (see ex. J). His actions do reflect material progress on these two debts with the limited income he has from his unemployment benefits (see exs. E through K).

After a number of unsuccessful efforts to contact his judgment creditor 1.f to arrange a payment schedule, Applicant filed motions to dismiss and vacate the judgment with the Superior Court with cognizant jurisdiction over the case (see exs. E and K). He based his motions on the creditor's reported failure to communicate with him about his repayment proposals to resolve the judgment balance (II Tr. 33-34, 59-69).

By the time the record had closed, Applicant's litigation efforts were still pending without a decision from the court. Applicant, however, has initiated a monthly plan of his own to repay the judgment creditor at the rate of \$100 a month pending his return to work, and with increased monthly payments after he returns to work (see ex. K).

With his anticipated federal tax refund in April 2010 and his acceptance of a job offer with a newly identified employer, Applicant is certain he can complete his repayment plan with the creditor within two years (see exs. E and K; tr. 56-58). At the present time, though, he is still limited financially to his unemployment benefits, and is doing all that he can to satisfy his three remaining debts with the income sources he has at his disposal (see exs. E through H and K).

Policies

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) 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: Failure or inability to live within one's means, satisfy debts and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts. Adjudication Guidelines (AG), ¶ 18.

Burden of Proof

By virtue of the precepts framed by the revised Adjudicative Guidelines, 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 commonsense 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 facts 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 evidentiary burden 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. Because E.O. 10865 requires that all security clearances be clearly consistent with the national interest, "security-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Applicant (currently on a leave of absence from his defense employer), accumulated a number of delinquent debts during periods of unemployment and underemployment. He is able to document payment of his federal and state tax debts and several small debts. And since the issuance of the initial decision in this case, Applicant has mounted considerable efforts to address his remaining debts and restore his finances to current status.

Applicant has made tangible headway in regaining control of his finances with the minimal resources available to him while unemployed. He has since discharged several of his debts and is currently working on his own to repay his remaining creditors. Applicant can be credited to date with mixed success in resolving all of his delinquent debts to date.

Security concerns are raised under the financial considerations guideline of the revised Adjudicative Guidelines where the individual applicant is so financially overextended as to indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, which can raise questions about the individual's reliability, trustworthiness and ability to protect classified information, and place the person at risk of having to engage in illegal acts to generate funds. Applicant's accumulation of delinquent debts and his past inability to pay or otherwise resolve many of them warrant the application of two of the disqualifying conditions (DC) of the Guidelines DC ¶ 19(a), "inability or unwillingness to satisfy debts," and ¶ 19(c) "a history of not meeting financial obligations."

Applicant's debts are attributable to recurrent periods of unemployment and underemployment between 2001 and 2009. Faced with so many pressing medical issues at home with his daughter and challenges in finding sustainable work during down periods in the high tech industry, Applicant changed career paths and re-directed his

engineering skills and experience to defense contractors who required security clearances.

For the ensuing three years (2007-2009), Applicant concentrated his energies and skills on defense-related employers. When laid off by the first defense employer, he turned to driving taxi cabs to earn enough to take care of himself and his family (including his ill daughter). Since his most recent layoff, he has had no other work and has had to rely exclusively on his unemployment insurance to meet his financial needs.

Applicant's progress to date in regaining control of his finances is promising. Although his efforts have been modest to date and still represent a considerable work in progress, he persuades that he is doing all that he can with his available resources to repay his listed debts (exceeding \$17,000.00 in the aggregate), and now provides estimates that he will complete his repayment plans within the next three years

To be sure, Applicant's unemployment benefits are quite modest and will expire altogether within the year. Based on his evidentiary showing, Applicant's proofs are sufficient to establish some extenuating circumstances associated with his debt accumulations. As a result, MC ¶ 20(b) of the financial considerations guideline, "the conditions that have 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, and the individual acted responsibly," has some application to Applicant's circumstances.

Before the Appeal Board's remand, full mitigation credit was considered to be available to Applicant based on the developed facts in the record. Neither Applicant's oral nor written evidence reflected any sustained voluntary repayment efforts on his behalf on his major debts before his hearing. His documented payments with his individual creditors were considered encouraging, but not enough at that time to warrant full application of one of the important mitigating conditions covered in the financial guideline. MC ¶ 20(d), "the individual has initiated a good-faith effort to repay overdue creditors or otherwise resolve debts," also has application to Applicant's situation.

Applicant's financial counseling with his CCCS counselors and active steps he has taken to develop a payment plan with the counseling service entitled him to partial application of MC ¶ 20(c), "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control, " has some application. Although, he had not at that time provided enough probative evidence of his taking full control of his finances to warrant full application of this mitigating condition.

Holding a security clearance involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor. Financial stability in a person cleared to access classified information is required precisely to inspire trust and confidence in the holder of the clearance. While the principal concern of

a clearance holder's demonstrated financial difficulties is vulnerability to coercion and influence, judgment and trust concerns are implicit in financial cases (as here).

In the remand hearing, Applicant was able to demonstrate more earnest repayment attention to his remaining creditors, and establish modest repayment plans with his three remaining creditors. By all accounts, he has shown considerable resolve and promising prospects to repaying these creditors with the aid of his expected federal tax refund and better paying work.

Using a whole person assessment of Applicant's judgment, reliability and trustworthiness, Applicant's financial issues may be evaluated in a broader context than the individual disqualifying and mitigating conditions permit. Many of his debts are attributable to unforeseen economic conditions that affected both his businesses and their industry as a whole. His cited business achievements and family commitments reflect positively on his career choices and professional growth. And, certainly he has taken some steps to resolve his debts and provide needed medical benefits for his young daughter, even during adverse conditions. All of this works to Applicant's favor.

Further, Applicant has shown increased tangible commitment and effort in addressing his remaining three debts (including a still outstanding judgment with creditor 1.f). His mounted efforts are sufficient to mitigate his delinquent debts enough to be able to credit him with restored control over his finances. In balance, the whole person assessment enables Applicant at this time to establish judgment and trust levels sufficient to enable him to overcome security concerns arising out his accumulation of delinquent debts.

Taking into account all of the extenuating facts and circumstances surrounding Applicant's debt accumulations developed in the initial and remand hearings, the limited resources he has had to address them with, the proactive steps he has mounted to address his old debts, safe predictive judgments about Applicant's ability to repay his debts and restore his finances to stable levels commensurate with his holding a security clearance may be reliably made. Favorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.i.

In reaching my decision, I have considered the evidence as a whole, including each of the E 2(a) 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, I make the following formal findings:

GUIDELINE F (FINANCIAL CONSIDERATIONS): FOR APPLICANT

Subparas. 1.a through 1.i

For Applicant

Conclusions

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