



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
-----) ISCR Case No. 08-07732
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin Howry, Esquire, Department Counsel
For Applicant: *Per Se*

March 13, 2009

Decision

WESLEY, Roger C., Administrative Judge:

Statement of Case

On December 15, 2008, 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 December 30, 2008, and requested a hearing. The case was assigned to me on February 2, 2008, and was scheduled for hearing on February 23, 2008. A hearing was held on February 23, 2008, 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 six exhibits; Applicant relied on one witness (himself)

and three exhibits. The transcript (R.T.) was received on March 3, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility to access classified information is denied.

Procedural Rulings and Evidentiary Issues

Before the close of the hearing, Department Counsel moved to renumber subparagraph 1.h (the second one) as subparagraph 1.j to conform to the alphabet. There being no objection from Applicant, and for good cause shown, Department counsel's motion was granted. The correction was made by inter-lineation.

Summary of Pleadings

Under Guideline F, Applicant is alleged to have (a) petitioned for Chapter 7 bankruptcy in June 2008, (b) had a judgment entered against him in January 2008 in the amount of \$89,364.00, and (c) accumulated nine debts exceeding \$1 million.

For his response to the SOR, Applicant admitted most of the allegations, but denied any debts owed to creditors 1.h, 1.j, and denied any adverse judgment entered against him by creditor 1.b. He claimed all of the debts were included in his bankruptcy petition and discharge. He explained that he was the co-signor for the listed automobiles in the SOR, which were financed for his business and were eventually repossessed. He claimed the listed credit card debt with creditor 1.f was business-related.

Findings of Fact

Applicant is a 48-year-old manufacturing engineer for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant received an engineering degree from a local college in 1990 (see ex. 1). He worked in the technical field between 1990 and 2002 (ex. 1). In 2002, he opened a real estate brokerage franchise in his local area (ex. 1). By reported accounts, the franchise was chartered by a national real estate parent firm. Applicant does not provide any information, though, on the form of the franchise (corporate, partnership, or sole proprietorship), or amount of capital he and his partners (if any) committed to the franchise. No information is furnished either concerning his franchise's revenues and expenses during the pre-2007 years of well publicized appreciation and growth in his region's real estate industry.

Between January 2002 and June 2007, Applicant operated his real estate brokerage franchise (see ex. 1). Presumably, the franchise was operated as a proprietorship or partnership, absent any documentation of its incorporation. Applicant and his franchise apparently paid annual franchise fees to the parent organization for

the privilege of using the parent's name and utilizing its marketing facilities. As his franchise's chief financial officer, he was required to co-sign for leased vehicles financed for the use and benefit of his franchise's brokers and business officials (R.T., at). He also took out a credit card in his name for business-related purposes.

When the real estate market in his region began to turn negative in 2006, Applicant's franchise fell behind with its annual franchise fees. In June 2006, the parent filed suit against Applicant and his franchise in the alleged sum of \$2,000,000.00 (see exs. 3 and B; R.T., at 33). As the real estate market continued to deteriorate in 2007, Applicant and his franchise got behind with their lease payments for the company vehicles, their credit card accounts, and their building rent. By April 2007, Applicant and his company franchise had defaulted on their lease, credit card obligations, and rent. After trying unsuccessfully to work out payment arrangements with his creditors, Applicant and his company closed the franchise in April 2007 (R.T., at 35-36,78). Acting on the advice of his counsel, he petitioned for bankruptcy of his franchise in June 2007 (R.T., at 32-33). Disposition of his franchise's bankruptcy petition is unclear.

Based on the presented proofs, neither Applicant nor his franchise made any concerted efforts to try and cure their default with the franchise parent and their other creditors after they closed their franchise offices. Between July 2007 and January 2008, the vehicle lenders/lessees repossessed the four company vehicles and held Applicant (as a personal co-signor) and his franchise liable for the deficiency balances on these repossessed cars (*i.e.*, creditors 1.d, 1.e, and 1.g) following their public sales (see exs. 3 through 5; R.T., at 41-53). The remaining balance on the repossession undertaken by creditor 1.k was waived as part of an approved short sale (R.T., at 67-69). The franchise's building lessor, in turn, sued Applicant and his franchise in 2007 for \$89,364.00 (creditor 1.b) in owed commercial rent and obtained a default against Applicant, and unspecified judgment. Applicant's credit card account (creditor 1.f) was placed in collection status.

With no income to cover his personal mortgage after closing his real estate franchise (in April 2007), Applicant was unable to cover any of the defaulted mortgage payments on his mortgages (creditors 1.h and 1.j). Creditor 1.h foreclosed on Applicant's first and junior mortgages, which had a combined note value of \$1,317,000.00 (R.T., at 64), and purchase mortgages on his principal residence in November 2007 (see exs. 3 through 5 and B; R.T., at 57-58). While it is not clear whether the first mortgage holder's (creditor 1.h) foreclosure wiped out the junior lien holders, Applicant covered himself against any deficiency risks associated with the junior holders by including them in his bankruptcy petition (see exs. 3 and B; R.T., at 57-65).

Besides his personal residence, Applicant owned another piece of realty, that depreciated considerably during the real estate down turn in his region. His property was disposed of through a short sale in October 2007 for \$1,400,000.00 (R.T., at 65-66). Creditor 1.j's \$250,000.00 deficiency is covered in Applicant's amended bankruptcy schedules (ex. B). Creditor 1.j held a third lien on the house that was sold

and received only \$55,000.00 of the more than \$300,000.00 the creditor was owed (R.T., at 67-71). Because of some uncertainty over whether this creditor's claims were covered by the terms of the short sale, Applicant included the \$250,000.00 balance in his amended bankruptcy schedules (see ex. B). The claim was reportedly discharged in Applicant's Chapter 7 bankruptcy along with his other real estate-related debts.

Applicant documents his completing the required instructional counseling over the internet to satisfy his bankruptcy requirements (see ex. C; R.T., at 96-97). His certification does not detail the contents of the course instruction.

Following the closing of his real estate franchise in April 2007, Applicant was unemployed for almost a year (R.T., at 35-36,76-77). Without a job or personal income to cover any of his personal debts, Applicant essentially lived off his credit cards. He tried to work with his creditors and his franchise parent on payment plans, but to no avail (R.T., at 32-33). In June 2008, he and his wife petitioned for Chapter 7 bankruptcy (see exs. 3, A and B), and obtained their discharge in December of 2008 (R.T., at 38). His amended bankruptcy schedules include all but one of the unsecured debts listed in the SOR that were not previously resolved (see exs. 3 and B), and total \$2,924,949.42 in the aggregate. Still, Applicant claims the parent suit remained pending when he petitioned for Chapter 7 relief, but was discharged in his bankruptcy (R.T., at 33-38). The claim is listed in Applicant's bankruptcy schedules, and was presumably discharged with his Chapter 7 discharge.

Excepted from Applicant's bankruptcy schedules is the listed judgment debt of creditor 1.b (see exs. 3 and B; R.T., at 39). Credit reports in 2008 indicate a judgment was entered against Applicant in favor of creditor 1.b (an architect who sued Applicant) in May 2008 for the amount of \$89,364.00 (see exs. 2 and 4). Applicant denied any entered adverse judgment against him in behalf of creditor 1.b (R.T., at 39). He assured that the case initiated by his franchise's landlord was dismissed in January 2008 (presumably after the building was foreclosed), but provided no documentation. Whether a default judgment was actually entered against him without his knowledge is not clear.

Applicant's most recent January 2009 credit report (ex. 5) notes the creditor 1.b judgment was satisfied and included in Applicant's bankruptcy petition in June 2008. Applicant's bankruptcy schedules (see exs. 3 and B) do not list the creditor 1.b claim, though, and Applicant does not provide any convincing explanations why the listed creditor 1.b's claim was dismissed. Whether the judgment was actually satisfied out of proceeds from the building's foreclosure and later dismissed (as Applicant claims), or is still an enforceable or potentially enforceable judgment against him is unclear. Since it was never noticed in any of Applicant's schedules, conceivably, it is alive and enforceable depending on the outcome of the building foreclosure Applicant mentions.

Nonetheless, the Government does not provide any evidence or claims to counter the proofs that the creditor 1.b judgment is no longer enforceable (either because the underlying claim was dismissed as Applicant claims, or the entered

judgment was satisfied). So, based on the documentation compiled in evidence, inferences warrant that the listed creditor 1.b's judgment was disposed of (either by dismissal of the underlying claim or judgment satisfaction).

Applicant currently owns two cars (a 1998 Lexus and an 2000 Honda) and is up to date with his current bills (R.T., at 80, 87-88). His 2008 bankruptcy was a first-time bankruptcy experience for him. He earns a monthly gross salary of about \$8,000.00 a month and nets around \$5,500.00 a month (R.T., at 84). He has a net monthly remainder that currently runs about \$300.00 a month (R.T., at 85), a figure that is somewhat lower than the \$762.10 remainder he included in his personal financial statement (*compare* ex. 3; R.T., at 85-86). He attributes the reduction to an increase in his monthly rent (R.T., at 85).

Applicant estimates he will have \$75,000.00 coming based on his expected sale of his home that his lender is marketing at a price of \$570,000.00 (see ex. 3; R.T., at 85-86). He has \$350,000.00 remaining on the first note; so, that any returned equity from the eventual sale will be allocated to his bankruptcy creditors. Applicant does not expect to see any personal proceeds from the ultimate sale of the home (R.T., at 86).

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.” See Adjudicative Guidelines (AGs), ¶ 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 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 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 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.

Analysis

Applicant is a manufacturing engineering associate for a defense contractor who accumulated a number of delinquent debts over a five-year period spanning 2004: and 2007, some disputed and some acknowledged.. Considered together, and without resolution, they raise security significant concerns.

Security concerns are raised under the financial considerations guideline of the AGs 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 exceeding \$2,900,000.00 (some business-related to his failed franchise) and his past inability to address any of these debts warrant the application of two of the disqualifying conditions

(DC) of the Guidelines for financial considerations: DC ¶19(a) “inability or unwillingness to satisfy debts” and DC ¶19(c) “a history of not meeting financial obligations.”

Applicant’s debts are attributable to several reasons: a cashed-strapped real estate franchise that was facing legal claims from its parent and other creditors that it could not address, a collapsing real estate market that imperiled both his company and himself personally, the closing of his business and his ensuing loss of employment, finally the bankruptcy of his firm and himself. Applicant’s discharged debts include both his business-related car repossessions and suits initiated by the listed judgment creditor and his franchise’s parent firm and his personal debts. All of Applicant’s scheduled debts (including those listed in the SOR) were discharged in Applicant’s completed Chapter 7 bankruptcy.

Applicant’s accumulated debts (both actual and contingent) for Chapter 7 bankruptcy were substantial: almost \$300,000.00 worth of unsecured debts that he sought to discharge in bankruptcy. Some are business-related, but much more are personal. Collapse of the real estate market in his region in 2000 doubtlessly contributed to the financial misfortunes of his company and himself. Judgment issues, though, remain over the funding he had available to start his franchise in 2002, and the profits he earned between 2002 and 2006. A capital cushion from his franchise’s profitable years during the area’s strong real estate market could have helped to shoulder losses during the ensuing downturn, when he and his company were confronted by a barrage of claims from his company’s parent and a host of other creditors that they were ill prepared to address. Historical context is especially important here, because of the imposing debt load that prompted his company to close in April 2007 and pursue bankruptcy and Applicant himself to petition for Chapter 7 bankruptcy just six months later. Additional information about his franchise start-up, his prior work experience, his counseling lessons, and the impressions of persons who work and socialize with him would have been most helpful in balancing determined judgment and trust lapses with his restorative efforts. The record, however, is lacking in information covering these important areas.

Considering Applicant’s exhibited extenuating circumstances associated with his failed franchise, the collapsing real estate market in his region, and his ensuing unemployment following the closing of his company, he may take advantage of MC ¶ 20 (b), “the conditions that resulted in the financial problem 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 under the circumstances,” of the Guidelines for financial considerations. Extenuation credit is limited, though, due to the size of his accumulated debt and the absence of any documented information about the nature and conditions that accompanied his start-up and operation of his real estate franchise.

Mitigation credit is also only partially available to Applicant based on his personal and business bankruptcy discharges. Applicant is able to demonstrate credible disputes with a couple of his listed creditors (creditors 1.b and 1.j), but no

more. Age of the debts at issue is partially covered by two of the mitigating conditions for financial considerations: MC ¶ 20(a), “the behavior happened so long ago, was so infrequent, or occurred under circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment,” and MC ¶ 20(d), “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts,” has some applicability. MC ¶ 20(e), “the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue,” has some applicability as well relative to the two listed creditors he disputed before he discharged their claims in bankruptcy. .

While the internet counseling advice Applicant relied on to complete his bankruptcy requirements does not technically fit the definition of counseling services under the Guidelines, he is to be credited with earnestly looking for sources of financial advice with the resources available to him and taking productive advantage of the internet advice he received in addressing his debts. He may take limited advantage 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.” Based on his initiated efforts to date, prospects for his gaining important insights in handling his finances in the future are somewhat promising. His efforts lack seasoning, though, and remain a work in progress.

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).

Whole person assessment of Applicant’s actions and overall demonstration of judgment and trustworthiness is limited by the absence of information about his franchise start-up, his prior work experience, his counseling lessons, and the impressions of persons who work and socialize with him. Market conditions associated with the downturn in real estate prices certainly contributed to the financial problems that resulted Applicant’s closing his business, losing his home to foreclosure, and pursuing bankruptcy protection, but these extenuating conditions alone are insufficient to enable him to overcome the financial risks associated with his large accumulations of delinquent debts that he could not address without bankruptcy protection.

Taking into account all of the facts and circumstances surrounding Applicant’s debt accumulations, his documented steps taken to resolve them, and the absence of information about his start-up history, his work with his current employer, and his personal life, it is still too soon to make safe predictive judgments about his judgment, reliability, and trustworthiness. Applicant does not mitigate security concerns related to his business and personal debts sufficiently to carry his evidentiary burden. More time is needed for Applicant to make the case that he mitigated government concerns about

his finances. Unfavorable conclusions warrant with respect to the allegations covered by sub-paragraphs 1.a through 1.k of the SOR.

In reaching my decision, I have considered the evidence as a whole, including each of the E2(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): AGAINST APPLICANT

Sub-paras. 1.a through 1.k: AGAINST APPLICANT

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge