



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



In the matter of:

-----  
SSN: -----

Applicant for Security Clearance

)  
)  
)  
)  
)  
)  
)

ISCR Case No. 09-02230

**Appearances**

For Government: Melvin A. Howry, Esquire, Department Counsel  
For Applicant: Roberta Zerkovich, Personal Representative

September 1, 2010

**Decision**

WESLEY, Roger C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

**Statement of Case**

On August 28, 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 September 25, 2009, and requested a hearing. The case was assigned to me on October 27, 2009, and was scheduled for hearing on February 25, 2010. The hearing was convened on that date. At hearing, the

Government's case consisted of nine admitted exhibits (GE). Applicant relied on two witnesses (including himself) and five admitted exhibits (AE). The transcript (Tr.) was received on March 10, 2010.

### **Procedural Rulings and Evidentiary Issues**

Before the close of the hearing, Appellant requested leave to supplement the record with an updated credit report and payments of his Ford truck and prior bankruptcy counseling certificate. For good cause shown, Applicant was granted seven days to supplement the record. The Government was afforded two days to respond. Within the time permitted, Applicant supplemented the record with documented payment of a non-scheduled Jetta vehicle (AE F), an installment agreement covering his Ford truck (AE G), a payment of the balance owing on his Ford truck (AE H), his debtor's certification of post-petition completion of a an instructional course concerning personal financial management (AE I), and an updated infile credit report. (AE J.)

### **Summary of Pleadings**

Under Guideline F, Applicant is alleged to have accumulated nine debts exceeding \$55,000. In his response to the SOR, Applicant admitted each of the listed debts. He claimed that they were uncollectible because they were included in his bankruptcy petition he filed in September 2009.

### **Findings of Fact**

Applicant is a 44-year-old special repair technician of a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

### **Background**

Applicant married his wife in 1985 and has three children from this marriage. (GE 1; Tr. 66.) They report a very strong marriage that has survived many challenges. (Tr. 56-57.) Applicant was instrumental in putting his wife through school and buying their home. They purchased their home in 1998 for about \$96,000 (Tr. 135). Since 2001, they have experienced job and real estate-related financial setbacks.

For a two-year period between May 1997 and February 1999, Applicant was unemployed and stayed home with his children to assist his wife during her working hours (see GE 1). He worked for several firms between February 1999 and May 2004 as a patient technician, and took time off in 2001 to deal with a broken foot that required multiple surgeries to repair it (see GE 1; Tr. 57-59). In 2003, his hours were slashed considerably by his employer before his job was phased out completely (Tr. 60-62).

In May 2004, Applicant was involved in a job-related all-terrain vehicle accident, in which he suffered a severed wrist tendon that disabled him for a year with full disability benefits (see GE 2; Tr. 63-64). His employer, in turn, laid him off. Unable to find work after his disability benefits expired in 2005, Applicant remained unemployed through October 2006 (Tr. 64).

Taking advantage of a growing real estate market, Applicant and his wife refinanced their first mortgage on their home on several occasions between 2003 and 2006, and used the extra loan proceeds they received from their refinancing arrangements to pay their bills (see GE 5; Tr. 135-36). With the increased appreciation their home produced during this 2003-2005 period, they were also able to obtain a \$36,000 home equity line of credit on their home in December 2005 (see GE 5; Tr. 121-23).

Beginning in October 2006, Applicant worked as a technician for a local mobile windshield installation firm (GE 1). He was laid off from this job in January 2007 and was unemployed for about seven months. He returned to work briefly for a trucking firm in August 2007 before joining his current employer in August 2008 (GE 1; Tr. 66-6).

Applicant and his wife fell behind in their credit card payments during a period spanning 2006 and 2008 when he was either unemployed or underemployed (see GE 2; Tr. 72-73, 89). They fell farther behind with their bills in 2008 and 2009 with too little net income from their jobs and a collapsing real estate market that precluded them from obtaining additional real estate financing, or downsizing (Tr. 93, 110-11, 135-38). Compounding their payment problems, his wife's hours were drastically reduced in March 2009 by the local hospital that employed her as an administrative assistant (Tr. 74-75). She was told that her employer had suffered severe revenue losses over the past year and a half (Tr. 75). As the result of their work reductions, Applicant and his wife accumulated nine delinquent credit card accounts between 2006 and 2009 in excess of \$55,000 (see GEs 2 and 5 through 8).

With combined net monthly income that did not cover their expenses, Applicant and his wife encountered difficulty keeping up with all of their creditors in 2008 and 2009. They continued paying some creditors, and sought payment arrangements with others (Tr. 110). Applicant's March 2009 credit report reflected ongoing payments, and only one charged-off account (see GE 5; Tr. 111-12). Concerned about their bills, Applicant and his wife consulted a bankruptcy attorney in November 2008 (see GE 4; Tr. 99). This bankruptcy attorney recommended Chapter 7 bankruptcy relief as the best means to resolve their debt situation, given the state of the economy in their community and their available resources (see GE 2). The lawyer conditioned any bankruptcy petition preparation on their behalf on their advance payment of a \$1,500 attorneys fee (payable in \$200 monthly installments) (GE 4). Records show that Applicant and his wife remitted all of the required \$1,300 to the bankruptcy lawyer by May 2009 (see ex. 4), the retained lawyer filed a Chapter 7 bankruptcy petition on their behalf in September 2009 (see GE 7 and AE C).

In their Chapter 7 petition, Applicant and his wife reported net monthly income of \$8,225 and monthly expenses of \$9,508 (see AE D). They scheduled creditors holding claims of \$339,325 in secured debts (AE D). These scheduled debts consisted of a \$255,458 first mortgage, a \$36,060 second mortgage they obtained in 2006 for home improvements on their residence, and two 2005 SUVs totaling \$37,000 (see AE D; Tr. 122-24). They scheduled unsecured priority claims as follows: \$2,000 for 2008 federal income taxes owed and \$2,200 for 2008 local property taxes (AE D). And they scheduled unsecured non-priority claims of \$57,266. These claims consisted mostly of credit card accounts they had used to pay their bills during their periods of unemployment and underemployment (see AE D).

In their post-hearing submissions, Applicant and his wife documented their completion of a post-petition instructional course concerning personal financial management (AE J). They filed their certificate of completion of this debtor educational course in December 2009 (AE J).

Applicant and his wife received their Chapter 7 discharge in January 2010 (AE B; Tr. 100). They claimed personal property exemptions for their scheduled Ford truck, and other personal items (see AE D; Tr. 113-14). None of the non-dischargeable tax debts are characterized as delinquent accounts in any of Applicant's credit reports or by the Government at hearing. The only place they are noted is in the priority schedule filed by Applicant and his wife in connection with their Chapter 7 petition (AE D).

When Applicant and his wife filed their Chapter 7 bankruptcy petition, they released any interest they retained in their home to the bank creditor holding their first mortgage (see AE D; Tr. 118-19). The realtor representing the bank has attempted to sell the home since they received their bankruptcy discharge, but Applicant and his wife released any interest they had in their home to the bank creditor and reserved no separate legal or equitable rights of their own following their bankruptcy discharge (see AE D; Tr. 119).

Since their bankruptcy discharge, Applicant and his wife have continued to live in their home with the approval of the legal owner of the property: either the bank or an unknown third party (Tr. 119, 138-40). When Applicant asked the listing realtor recently what they should do, the agent told Applicant to "show the house" (Tr.139). This Applicant and his wife have continued to do, while they await instructions to vacate the premises (Tr. 139-40). Applicant also keeps an apartment near his place of business (a considerable distance from his home community), where he resides during the work-week. He pays \$730 a month in rent for this small apartment (Tr. 126).

As for the value of the home itself, it is valued much less (approximately \$210,000) than the first mortgage on the property (\$255,458), and the owner of the home has not been able to sell the property to date (see AE D; Tr. 119-20). Properties in Applicant's community have all shed 50 per cent or more of their market value within the last three years, and have little current demand in the region (Tr. 140-41). His wife

assures that their house appraised for over \$300,000 in 2006, and now is appraised at about \$152,000 (Tr. 141-42).

To date, Applicant and his wife have not received a foreclosure notice, a request for a deed in lieu of foreclosure, or any kind of request for payment or abandonment of the premises (Tr. 118, 128-30,138-40). Should they be required to vacate the home, they are prepared to move into their RV (which can sleep up to ten persons) until they can find other suitable quarters (Tr. 131).

Applicant documents his pay-off of the \$1,912 balance owed on the Jetta car loan he did not schedule in his Chapter 7 petition (AE F; Tr. 115), as well as the \$5,929 balance owed on his Ford truck (AE H; Tr. 114). He is current in his monthly payments on his scheduled Blazer and Sierra 5<sup>th</sup> Wheel that he sometimes lives in (see AE D; Tr. 113-14), and documents no other outstanding debts in the updated credit report he provided after the hearing (see AE J).

Applicant also documented his filed certification of completion of a post-bankruptcy educational class, that included some financial counseling (see AE I). He and his wife report post-bankruptcy monthly net income of \$8,440, monthly expenses of \$7,950, and a net monthly remainder of \$490 (see AE A; Tr. 112). Since he did not provide any information on the status of his federal and local tax debts, it is a little unclear whether these debts have been paid or otherwise resolved. There is no documentation of any delinquent tax debts in the Government's credit reports, bankruptcy schedules, or interrogatory responses, however, and Applicant's updated credit report does not show any filed tax liens or other reports of delinquencies covering these taxes (see AE J).<sup>1</sup>

### **Endorsements**

Applicant is well-regarded by his supervisors and colleagues. He documents numerous credits for his contributions to his team's technical projects (see AE E). His immediate supervisor and coworkers, who have had considerable experience working with him, describe him as very honest, conscientious and trustworthy (AE E; Tr. 52-54).

### **Policies**

The Adjudicative Guidelines (AGs) 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

---

<sup>1</sup> Department Counsel credited Applicant with extinguishing his delinquent debts in the Chapter 7 bankruptcy (Tr. 145).

arriving at a decision. In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs of the Directive, which are intended to assist the judges in reaching a fair and impartial commonsense decision.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral chances; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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. AGs, ¶ 18.

### **Burden of Proof**

By virtue of the precepts framed by the AGs, 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.

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 respected repair technician of a defense contractor who accumulated a number of delinquent debts during periods of unemployment and underemployment, some the result of a disability resulting from a non-work-related accident. As the result of layoffs, a volatile real estate market that has experienced steep declines, and his inability to promptly find consistently good-paying work, he and his wife fell behind with their bills. A volatile real estate market that has experienced steep declines limited their ability to obtain loan modifications, or dispose of their property. They filed for Chapter 7 bankruptcy in December 2009, and received their discharge.

Applicant's accumulated debt delinquencies before he and his wife filed for bankruptcy warrant the application of two of the disqualifying conditions (DC) of the financial consideration guideline: DC ¶ 19(a), "inability or unwillingness to satisfy debts," and DC ¶19(c) "a history of not meeting financial obligations."

Holding a security clearance involves a fiduciary relationship between the Government and the clearance holder. Quite apart from any agreement the clearance holder may have signed with the Government, the nature of the clearance holder's duties and access to classified information necessarily impose important duties of trust and candor on the clearance holder that are considerably higher than those typically imposed on government employees and contractors involved in other lines of government business. See *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980). Failure of the applicant to make concerted efforts to pay or resolve his debts when able to do so raises security-significant concerns about the sufficiency of the applicant's demonstrated trust and judgment necessary to safeguard classified information.

All of Applicant's listed debts were accumulated during periods when he was out of work and collecting disability unemployment benefits, or underemployed. Based on his evidentiary showing, Applicant's proofs are sufficient to establish significant extenuating circumstances associated with his debt accumulations. As a result, MC ¶ 20(b) of the financial considerations guideline, "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, and the individual acted responsibly)," applies to Applicant's circumstances.

After obtaining a bankruptcy discharge, Applicant had very little debt left to manage. His left-over debts included three vehicle loans (including his Ford truck), and two small tax obligations that are not in any manifest delinquent status. He relinquished any interest in his home to the first mortgage holder during his bankruptcy, and was freed of any potential deficiency on his home equity line of credit through his bankruptcy discharge. Applicant and his wife made good faith attempts to pay their creditors with their limited resources before contacting a bankruptcy attorney in 2008 and arranging with the lawyer to seek Chapter 7 bankruptcy relief.

Although Applicant and his wife continue to reside in the home they relinquished, they do so with the legal owner's acquiescence, while they await instructions to vacate. And, to be fair, Applicant actually spends a very limited amount of time in the residence; since his job requires that he keep an apartment near his distant job site. So, based on the orderly way in which they have resolved their legal obligations to date, Applicant and his wife can be expected to act responsibly in addressing any remaining obligations. Their actions reflect a well-designed plan under their extenuating circumstances to free from them debt. See ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008).

While Applicant has not sought any counseling since completing his required educational course for his Chapter 7 petition, his recent efforts in addressing his post-bankruptcy debts reflect increased maturity on his part and financial lessons learned in managing his affairs. And for all practicable purposes, he is no longer at risk of having to raise large sums of money to resolve his debts. His updated credit report (AE J) reflects no outstanding debts not resolved in his bankruptcy discharge, or otherwise paid or resolved outside of his bankruptcy, with the possible exception of his first mortgage. Should the first mortgage holder decide to formalize its ownership of its acquired collateral with the completion of noticed foreclosure proceedings, the mortgagee would not be entitled to any deficiency. For the anti-deficiency statute in force in Applicant's state precludes any deficiency action against a sold-out mortgagor when the subject property has been non-judicially foreclosed. See CCP, § 580b.

Applicant has a positive remainder every month, and he has shown considerable progress in the payment of his debts since he returned to full time employment in 2008. He is current with all of his debts not listed in the SOR, and has performed in an exemplary fashion for his employer. Evaluating all of his repayment efforts contextually, and given the difficult family and unemployment issues he has had to manage the past few years, Applicant may be credited with financial counseling, making good-faith efforts to work with his creditors with his limited resources before seeking bankruptcy protection, and showing earnest post-bankruptcy efforts to repay his remaining creditors and regain control of his finances.

In a another situation where the applicant paid some debts, but not others, with his limited unemployment benefits, but claimed he had acted as responsibly as he could in his circumstances, the Appeal Board remanded the case with instructions to determine what Applicant might have done or should have done differently under his circumstances to satisfy the mitigating requirements of responsible behavior under MC ¶ 20(b). See



ISCR Case No. 08-06567 at 3-4 (Appeal Bd. Oct. 29, 2009). The remand decision that issued following the remand was not appealed.

Applicant's post-hearing repayment efforts entitle him to partial mitigation credit under MC ¶ 20(d), "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." This mitigating condition has some application to Applicant's situation, considering his recurrent unemployment circumstances, the deteriorating real estate market in his region, and his continuing post-bankruptcy efforts to resolve his existing debts with the additional remainder they are accumulating each month.

Applicant may also apply 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." The post-petition instructional course he completed was provided by an approved credit counseling firm and contains many of the features commonly included in recognized credit counseling courses. And the mitigating condition is disjunctive, in any event, in its intended reach, and permits Applicant to separately demonstrate he has regained control of his finances. This he has accomplished with hearing and post-hearing evidentiary submissions.

Based on a whole-person assessment, Applicant surmounts the judgment questions raised by his accumulation of delinquent debts during extended periods of unemployment. His positive endorsements from his supervisors and colleagues merit considerable praise and commendation. On balance, he has shown sufficient tangible effort in addressing his major debts to demonstrate his restored control over his finances and mitigate the Government's financial concerns.

Taking into account all of the extenuating facts and circumstances surrounding Applicant's debt accumulations, and the limited resources he has had to work with following his recurrent layoffs and declining real estate values in his community, safe predictive judgments can be made about his ability and intentions to maintain control of his finances for the foreseeable future. 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 factors and conditions enumerated in ¶ 2(a) of the AGs.

### **Formal Findings**

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

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

