



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



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 09-02465

Appearances

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

November 18, 2009

Decision

WESLEY, Roger C., Administrative Judge:

History of Case

On June 3, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing 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. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised Adjudicative Guidelines (AGs) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant responded to the SOR on June 25, 2009, and requested a hearing. The case was assigned to me on July 15, 2009, and was scheduled for hearing on August 17, 2009. A hearing was held on the scheduled date 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 the hearing, the Government's case consisted of seven exhibits (ex.); Applicant relied on one witness (himself) and three exhibits. The transcript (Tr.) was received on August 25, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access classified information is denied.

Summary of Pleadings

Under Guideline F, Applicant is alleged to have (a) incurred a federal tax lien in the amount of \$11,095; (b) petitioned for Chapter 7 bankruptcy in October 2005 (discharged in February 2006); (c) petitioned for Chapter 13 bankruptcy (dismissed in August 2005); and (d) accumulated 10 delinquent debts exceeding \$13,000.

In his answer to the SOR, Applicant admitted most of the allegations in the SOR. He claimed his incurred debts that caused him to petition for bankruptcy were attributable to his divorce and his desire to avoid responsibility for debts created by his ex-wife after their separation. He claimed he had worked out a payment plan with the IRS in 2007, but had to suspend his payments due to a hiring freeze imposed by his then part time employer. And he claimed he contacted the IRS and was told they would lift the lien after he filed his 2008 tax return.

Findings of Fact

Applicant is a 53-year-old hardware engineer for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Applicant married his first wife (W1) in January 1974. He has three children from this marriage. Applicant and W1 divorced in July 2008, citing irreconcilable differences (see ex. 1). He enlisted in the Army in 1974 and served five years of active duty before his discharge in March 1979 (ex. 1; Tr. 40).

Applicant earned a bachelors degree in electrical engineering from a respected university in June 1986 (see ex. 1; Tr. 30). Between January 1994 and December 1998, he worked as a design engineer for a technology company in another state. He started his own engineering firm in January 1999, and maintained this business for several years.

Beginning in 2003, Applicant's business revenues slowed considerably. With his reduced revenue flow, he could no longer keep up with his debts. He tried finding work in another state, but without much success. Unable to cover his personal and business debts, Applicant petitioned for Chapter 13 relief in September 2003. His plan was approved, and he made the required monthly payments to the court trustee for almost two years.

Sometime in 2005, Applicant and W1 separated. Pressed for income to cover all of the debts created during his marriage, Applicant stopped making mortgage payments

after his spousal separation. Applicant abandoned his Chapter 13 plan on the advice of his lawyer (Tr. 57). His plan was dismissed in August 2005 (Tr. 57).

Soon after the court dismissed his Chapter 13 plan, Applicant petitioned for Chapter 7 bankruptcy relief. He filed his Chapter 7 petition in October 2005; his petition was later approved by the court. Applicant scheduled approximately \$60,000 in personal and business debts in his Chapter 7 bankruptcy petition (Tr. 59, 63). His debts (except for non-dischargeable tax debts) were discharged in February 2006 (see exs. 2 through 7). His home was scheduled in his Chapter 7 bankruptcy as a secured debt and was foreclosed by the lender in September 2005 (Tr. 64-65). Records do not report any produced equity from the sale for inclusion in his bankrupt estate.

At the urging of one of his former customers to come and work for him, Applicant relocated to his current state of residence in July 2006 (Tr. 25). He did succeed in acquiring a one-year employment contract with his ex-customer's company. However, the company did not extend his contract; he was laid off in September 2007 (Tr. 25-26). After spending about two months in the area without any success in finding work, he relocated with his fiancée to another state in December 2007 (Tr. 26-27).

Finding no engineering work in the state he relocated to in December 2007, he returned to the state of his roots in April 2008 (Tr. 27). At this time, though, he discovered economic conditions in this state to be very depressed. After working for a company for a month (*i.e.*, March to April 2008) before being laid off, he and his fiancée returned to the state he abandoned in April 2008 (Tr. 28, 31). He found employment conditions unchanged in this state as well upon his return. Several months later (in November 2008), he found his present position and returned to his current state of residency in December 2008 to accept his new position (Tr. 28-29).

Applicant and his fiancée married in January 2009. She has one child (age 16) who resides with them (Tr. 69). His wife (W2) has a heart condition that prevents her from working.

Since his bankruptcy discharge, Applicant incurred additional personal debts that he could not satisfy with the part time jobs he held during long stretches of permanent job displacement. His debts total 10 in number and exceed \$13,000 in amount (see exs. 2 through 5). Applicant owes back taxes for tax years 2004 through 2006 that total \$11,095 and are covered by an IRS tax lien. These back taxes represent insufficient withholding for an employee of his business for the years covered by the tax lien (Tr. 41). Applicant made arrangements with the IRS in September 2007 to pay his owed taxes for these tax years. Shortly after his making this payment arrangement with the IRS, he was laid off from his job (Tr. 40). Applicant does not provide any proof of making any payments under this 2007 agreement with the IRS.

Applicant established a new repayment plan with the IRS after he went to work for his current employer in December 2008 (Tr. 44). Payment terms under his latest payment plan with the IRS are \$350 a month (Tr. 41). His claimed payments to the IRS

in April 2009, and again in July 2009, are not documented and cannot be accepted without written corroboration.

Applicant has since provided documentation of the removal of the creditor 1.h debt from his credit report (see ex. F). This account was opened by W1, who added Applicant as a user (Tr. 51-52). Applicant bears no apparent liability on the debt alleged in subparagraph 1.h.

To date, Applicant has made three payments to creditor 1.i (see ex. G; Tr. 53), and he has payment agreements with creditors 1.j and 1.k (see ex. I; Tr. 54-55). Under his agreement with creditor 1.k, he was to make two monthly payments of \$79 in August and September to satisfy the debt in full (see ex. I; Tr. 54-55, 62). So far, he has reduced this debt to \$317 (Tr. 55). Although the three medical debts covered by subparagraphs 1.d through 1.f have been consolidated, Applicant has not been able to make any recent payments on these debts (Tr. 47-48). Nor has he been able to make his promised \$25 a month payments to creditors 1.b and 1.c (Tr. 46-47).

Applicant currently makes around \$70,000 a year with his current employer (Tr. 35). He nets about \$4,200 a month and has household expenses of around \$2,100 a month (Tr. 38). He has no household budget at the current time.

Applicant received some financial counseling when he filed for Chapter 13 relief in 2003, but nothing since (Tr. 59). Today, he has no assets (except for a car he purchased in 2009) and no active credit cards or 401K plan (Tr. 60-61). He receives no financial assistance from his current spouse (W2). She wants to work but is prevented from doing so due to her heart condition. W2 had heart surgery several years ago. Applicant believes his insurance should be enough to cover whatever heart procedure she requires in the near future (Tr. 66-67).

Applicant is well regarded by his supervisors and coworkers who are familiar with his engineering design and installation work on grounding and lighting protection systems (see ex. B). His first line supervisor notes Applicant's frugal spending habits and credits him with his willingness to take actions to clear up his financial issues relative to his security clearance application (ex. B). His engineering manager describes Applicant's attitude, behavior patterns, and willingness to work as above reproach. And his senior technical manager attests to Applicant's demonstrated trustworthiness and compliance with his company's standards (ex. B).

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." These guidelines must be

considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

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 changes; (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 concerns 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. AG ¶ 18.

Burden of Proof

Under the Directive, a decision to grant or continue an Applicant's request for 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 adversarial 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 by substantial evidence any controverted facts alleged in the SOR; 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 proof shifts to the applicant for the purpose of establishing his or his security worthiness through evidence of refutation, extenuation or mitigation of the Government's case. Because Executive Order 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 is a respected employee of a defense contractor who accumulated delinquent debts during his extended periods of recurrent unemployment. He was able to discharge a good deal of his accumulated debt with a successful Chapter 7 bankruptcy discharge in February 2006. His undischarged federal tax lien, and the additional debts he has accrued since his bankruptcy discharge, raise continuing security concerns over the stability of his finances.

Applicant's pleading admissions of the debts covered in the SOR (sometimes referred to as judicial admissions) negate the need for any independent proof (see *McCormick on Evidence*, § 262 (6th ed. 2006)). All but one of his listed debts (creditor 1.k) are fully documented in his latest credit reports, and provide ample independent proof of his debts. Applicant confirmed the present status of the IRS's tax lien against his bank accounts and his most recent efforts to pay the balance owing through an approved repayment plan. Applicant's bankruptcy history, his undischarged IRS tax lien, and his accumulation of additional delinquent debts 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."

Without any documented payment history or tangible plan to resolve his major tax debt and other debts, Applicant cannot be credited with any more than minimal progress to date in regaining control of his finances. His modest repayment efforts and still inchoate repayment plan with the IRS provide no hard assurances of any reliable

commitment to resolve his IRS tax lien and other debts. To date, he has made just a few small payments to a few of his creditors, and has a considerable amount of work ahead of him to demonstrate his earnest commitments to resolving his debts and restoring control of his finances.

Applicant's progress to date in regaining control of his finances is encouraging, but it is still a considerable work in progress that has only recently been addressed. He still is working on his major IRS debt and finalizing repayment efforts with his other creditors who hold outstanding balances.

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 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 application to Applicant's circumstances.

Applicant's repayment efforts with creditors 1.h, and 1.i entitle him to some mitigation credit under both MC ¶ 20(d), "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts," and 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." These mitigating conditions have partial application to Applicant's situation, given his tight financial circumstances over the past few years.

Full mitigation credit is not available to Applicant, however, based on the facts of this case. Neither Applicant's oral nor written evidence reflect any significant voluntary repayment efforts on his major tax debt and most of his smaller debts.

Having only recently emerged from Chapter 7 bankruptcy relief, Applicant's payment history was already weakened and in need of significant strengthening to demonstrate the level of financial stability commensurate with minimum requirements of clearance eligibility. His payment receipts do reflect some modest repayment efforts in recent months, and are encouraging. They are not enough at this time, however, to warrant full application of any of the mitigating conditions covered in the financial guideline.

Moreover, even though Applicant's debt delinquencies arose in large measure due to circumstances outside of his control, he could have been reasonably expected to have exerted more responsible efforts in addressing his debts once the conditions (*i.e.*, recurrent unemployment) that contributed to the delinquencies had passed or eased, and his finances had improved. See ISCR Case 03-01059 at 3 (App. Bd. Sep. 24, 2004). Not only are his listed debt delinquencies ongoing, but he has failed to demonstrate any material payment progress since returning to full time employment.

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).

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 explicit in financial cases. 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.

Whole-person assessment does not enable Applicant to surmount the judgment questions raised by his accumulation of delinquent debts. His positive endorsement from his management team merit considerable praise and commendation. In balance, though, he has not shown enough tangible effort in addressing his major tax and other accounts to mitigate his still-delinquent debts and credit him with restored control over his finances.

While underemployment conditions clearly played a considerable role in Applicant's accumulation of so many debts over an extended period of time, Applicant failed to provide sufficient documented explanations as to why he has been unable to make more concerted efforts to repay or resolve his IRS and other outstanding balances since he returned to full time employment in December 2008. His strong endorsements are helpful to evaluating his overall trustworthiness and reliability, but not sufficient alone to establish his clearance eligibility under present Appeal Board guidelines. Based on the documented payment information available for consideration in this record, though, the evidence is insufficient to enable Applicant at this time to establish judgment and trust levels sufficient to overcome security concerns arising out of his accumulation of delinquent debts.

Taking into account all of the extenuating facts and circumstances surrounding Applicant's debt accumulations, the limited resources he has had to address them, and the modest steps he has mounted to address his old debts, it is still too soon to make safe predictive judgments about Applicant's ability to repay his accrued debts and restore his finances to stable levels commensurate with his holding a security clearance. Unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.g and 1.j through 1.m. His documented addressing of the debts alleged in subparagraphs 1.h and 1.i is sufficient to mitigate security concerns associated with these debts.

In reaching my recommended 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): AGAINST APPLICANT

| | |
|------------------------------|-------------------|
| Sub-paras: 1.a through 1.g : | Against Applicant |
| Sub-paras. 1.j through 1.m: | Against Applicant |
| Sub-paras. 1.h and 1.i: | For 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

