



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 09-05369

Appearances

For Government: Daniel Crowley, Esquire, Department Counsel
For Applicant: Spouse as Personal Representative

June 28, 2011

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant mitigated the security concerns regarding his finances. Eligibility for access to classified information is granted.

Statement of Case

On May 14, 2010, 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 DOHA 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 Adjudicative Guidelines (AGs) implemented by the Department of Defense on September 1, 2006.

Applicant responded to the SOR on July 26, 2010, and requested a hearing. The case was assigned to me on December 8, 2010, and was initially scheduled for hearing on December 13, 2010, before being rescheduled for December 14, 2010. The hearing was convened on December 14, 2010. The Government's case consisted of six exhibits (GEs 1-6). Applicant relied on two witnesses (including himself) and seven exhibits (AEs A-G). The transcript (Tr.) was received on December 29, 2010.

Procedural Rulings

Before the close of the hearing, Applicant requested leave to supplement the record with (a) documentation of his Ford Focus loan consolidation arrangements (creditor 1.g). For good cause shown, Applicant was granted seven days to supplement the record. Department Counsel was afforded six days to respond. Within the time permitted, Applicant supplemented the record with documentation of his state's anti-deficiency statute, his Ford Focus loan consolidation, and his state's assumed jurisdiction of his workers' compensation claims. Department Counsel interposed no procedural or substantive objections. Applicant's post-hearing submission is admitted as AE H.

Applicant faxed additional post-hearing documentation for consideration on December 29, 2010. His document submissions covered updated claim information from the state compensation agency handling his workers' compensation claim. Department Counsel interposed no procedural or substantive objections to any of the documents offered by Applicant for consideration. Applicant's submission is admitted as AE I.

On June 9, 2011, Applicant submitted a letter from the State Insurance Fund of Applicant's prior state of residence for admission and consideration. In the letter submission, the State Fund accepted responsibility for the charges covered by subparagraph 1.d of the SOR. Department Counsel did not object to the lateness of the submission or the substance of the letter. For good cause shown, Applicant's post-hearing submission is accepted as AE J.

Summary of Pleadings

Under Guideline F, Applicant allegedly (a) petitioned for Chapter 13 protections in September 2001 (dismissed in July 2002); (b) petitioned for Chapter 7 protections in September 2002 (discharged in December 2002); and (c) accumulated seven delinquent debts exceeding \$61,000 since his bankruptcy discharge.

In his response to the SOR, Applicant admitted his bankruptcy petitions and dispositions. He admitted two of his debts (creditors 1.d and 1.f) as being unpaid, but denied responsibility for one of the debts (creditor 1.d) and denied the full amount owing on the other debt (creditor 1.f). Applicant denied the remaining five debts, claiming lack of knowledge of debts claimed by creditors 1.c, 1.e, and 1.i. He claimed he paid the

debt covered by creditor 1.g. He also claimed the absence of any legal responsibility for any deficiency claimed by creditor 1.h, which foreclosed on his property in May 2009.

Findings of Fact

Applicant is a 46-year-old Unmanned Aerial Vehicle (UAV) crew chief for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant has a high school diploma and has worked for the same employer since December 2008. (GE 1) He married his first wife in August 1988 and divorced her in February 1991. (GE 1) He has one child from this marriage, age 22. Applicant remarried his current wife in April 1991, and divorced her in June 2002. He remarried her in August 2003 and has one child from this marriage, age 18. (GE 1; Tr. 73-76)

Applicant enlisted in the Navy in September 1988 and served three years of active duty. He received an other than honorable discharge from the Navy in August 1991. (GEs 1 and 2) He was discharged after he tested positive for marijuana in a random urinalysis test. (GE 2) He admitted to inhaling two puffs from a marijuana cigarette offered to him while he was on liberty. He did not clarify whether he appeared before an administrative board. (GE 2)

Applicant's finances

Applicant filed for Chapter 13 relief in September 2001 after he lost his full-time job with a motorcycle distributor, and his part time job as well. (GE 2) Prior to the completion of his Chapter 13 relief petition, he was offered a job in another state. (Tr. 71) Acting on the advice of his attorney, he asked for his Chapter 13 petition to be dismissed. Records document that his Chapter 13 petition was dismissed in July 2002. (GE 2 and AE G)

In September 2002 (two months following his relocation), Applicant petitioned for Chapter 7 protection. (GEs 2 and 6) In his petition, he scheduled \$500 in secured claims and \$125,000 in non-priority unsecured claims. (AE 6) Included in his schedule of unsecured claims were student loans totaling \$25,000 and an auto loan for a surrendered vehicle. (GE 6) Applicant listed net monthly income of \$1,639 a month for himself and \$2,203 for his wife for a total of \$3,842 in joint family income. He reported \$3,976 of monthly personal expenses. (GE 6) Applicant received his Chapter 7 bankruptcy discharge in December 2002. (GEs 2 and 6)

In July 2003, Applicant was involved in a motorcycle accident. (GE 2; Tr. 102-103) Applicant was en route to a work-related bike show, when his motorcycle slid out from under him during a monsoon-like rainstorm. (Tr. 37, 101-103, 103, 107-112) He

did not have health or accident insurance at the time to cover his injuries, and did not file any work-related workers' compensation claims contemporaneously with his accident. (GE 2; Tr. 108-109) His owner-manager visited him in the hospital and told him not to worry about his injuries. (Tr. 107-108) But his employer did not have any health insurance to cover Applicant and did not cover Applicant's medical bills. (Tr. 115-116). Based on the negative information his employer provided him at the time, Applicant did not initially file any workers' compensation claims with the state agency responsible for adjudicating them. (AEs H and I)

In July 2007, Applicant accepted a verbal offer of employment to be the service manager of a local motorcycle retail facility owned by the brother of his former employer in their current state of residence. (GE 2; Tr. 118-119) Based on the assurances he received from his prospective employer, Applicant expected to make more than his monthly salary from his previous employer. (GE 2) His wife, too, received a promised employment position in the same state. (Tr. 33) Both have earned considerably less money since relocating. (GE 2)

Based on the verbal assurances they received from their prospective employers, Applicant and his wife purchased a home in the area and financed it with a \$278,000 first mortgage loan with nothing down. (GE 2; Tr. 66-67) Loan terms included a monthly principal and interest payment of \$2,067 and a monthly escrow payment of \$228 to cover private mortgage insurance (PMI). (AE B)

Shortly after the loan was purchased by a new lender, Applicant's wife spoke with a lender representative about the escrow payment for mortgage insurance and was told by the representative that they qualified for a lender paid PMI that would obligate them to just a dollar a month. How they qualified, and whether they formally applied for a lender paid PMI is not clear. Shortly thereafter, their loan was transferred to another lender. (AE C) Records show that in September 2007 Applicant and his wife were billed for principal and interest charges of \$2,067 and PMI escrow charges of \$596 to cover two months. (GE 2 and AE B; Tr. 33-34)

By May 2008, Applicant and his wife received an escrow account disclosure statement that reported a \$5,660 escrow shortage and a lender intent to increase the monthly payment to \$2,287 (effective July 2008) to make up the shortage. (AE C; Tr. 34) The disclosure statement advised that if Applicant and his wife did not pay the claimed shortage in the escrow account, their monthly payment would increase to \$3,359. (GE 2; AE C) Applicant's wife's telephonic requests for lender clarification of its adjustments in the escrow charges were not heeded, and the lender continued to bill Applicant and his wife for the increased escrow charges to cover the claimed \$5,841 shortage. (Tr. 34) Further efforts of Applicant and his wife, through their retained attorney, to convince the lender to drop the increased escrow charges were not successful. (GE 2 and AE C; Tr. 79-80)

After struggling to meet their mortgage payments, Applicant and his wife defaulted on their loan in August 2008. The lender notified them of the default in

October 2008 and advised them of intended foreclosure proceedings. (AE D; Tr. 34-35), Upon receiving the notice, Applicant and his wife listed their property for sale (at a price range between \$225,000 and \$260,000) and attempted to arrange either a short sale or a deed-in-lieu of foreclosure with the lender. (GE 2; Tr. 34) They were unsuccessful in both attempts and were notified by the lender in December 2008 that it had sold the loan to another lender. (AE D; Tr. 34-35, 57-58)

Applicant's efforts to complete a deed-in-lieu of foreclosure or approved short sale with the new lender were unsuccessful, too. And in November 2008, the lender mailed them a notice of foreclosure sale to be scheduled in February 2009. (AE E) Records document that Applicant's property was sold at a public sale in May 2009 for \$248,387. (AE E; Tr. 36, 61-64) This left a deficiency balance in Applicant's outstanding loan of around \$30,000. To date, Applicant and his wife have not made any payments towards eliminating the deficiency (creditor 1.h), and claim they are not obligated to do so under their state's anti-deficiency law. (AE E; Tr. 65-66)

Besides their home loss to foreclosure, Applicant and his wife have encountered other debt delinquencies since 2003. Applicant was billed \$15,750 for medical bills following his treatment for injuries incurred in his 2003 motorcycle accident.(Tr. 37, 107-108) Applicant has since been in contact with the state's workers' compensation agency, and in June 2011 received confirmation from the state's compensation insurance fund that the state fund had accepted responsibility for the medical charges billed Applicant on July 28, 2003 for ambulance service and the university medical center of another state. In this letter, the state fund assured that the two providers referenced would be paid "as soon as possible." See AE J

Applicant's signature loan with creditor 1.g is still outstanding. However, Applicant has been able to consolidate this loan with his other car loan. (AEs H and I) His documentation confirms the consolidation of his loan payments on both loans, as well as the current status of the loan in his credit reports. (AEs H and I) The current loan balance on his consolidated creditor 1.g loan is \$17,973, and the loan is in reported good standing.

Of the remaining three listed creditors in the SOR (creditors 1.c, 1.e, and 1.i), Applicant recognized only one account as his own. He recognized creditor 1.i as a medical account covering ambulance services associated with his 2003 motorcycle accident. (GE 2) He acknowledged the creditor 1.e account as one of the consolidated debts he arranged to pay for but otherwise does not recognize the account. He also recognized the creditor 1.c account as a likely bill for ambulance services associated with his motorcycle accident. Each of these three accounts appear in Applicant's credit reports as medical accounts (inferentially associated with Applicant's 2003 motorcycle accident). Reimbursement of these medical accounts by Applicant's state's compensation insurance fund is imminent.

Endorsements

Applicant is well regarded by one of his supervisors and two of his former coworkers. (AE A) His supervisor lauded his responsible efforts as an instructor, training young enlistees in the use of unmanned aircraft systems. (AE A) This supervisor considers Applicant to be one of his most trusted and valued employees.

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." They must be considered before deciding whether or not a security clearance should be granted, continued, revoked, 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 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, ¶ 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 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 well regarded crew chief for a defense contractor who encountered financial problems associated with underemployment between 1999 and 2002 that prompted him to petition for Chapter 13 relief in 2001 in his home state, and then for Chapter 7 protections following his relocation. After a brief period of marital estrangement, and medical outlays associated with a motorcycle accident in 2003, he and his wife remarried and enjoyed renewed financial stability for several years.

Anticipating new jobs with increased compensation, Applicant and his wife relocated to their current state of residence in July 2007 and purchased a home. As the result of lower income returns, some misunderstandings about their mortgage insurance obligations, and a falling real estate market, they could not avert foreclosure of their loan. A deficiency balance following the foreclosure sale of Applicant's home is the only remaining debt of any material significance, and it is covered by his state's anti-deficiency law.

By defaulting on their home mortgage, Applicant and his wife exposed themselves to non-judicial foreclosure and potential deficiency claims by the first mortgagee. Without resolution, the approximate \$30,000 mortgage balance with creditor 1.h posed a potential deficiency liability for Applicant and his wife.

In November 2008, the first mortgagee initiated non-judicial foreclosure proceedings against Applicant and his wife. Proceeds from the public sale of the property produced \$248,000, which left an approximate \$30,000 deficiency balance. However, this balance is covered by the state's anti-deficiency statute that bars any enforcement actions for the recovery of a deficiency, unless a suit is commenced within 60 days of the public sale of the underlying property. Because the foreclosing lender never availed itself of the judicial remedy to recover its deficiency balance, Applicant and his wife do not have any legal exposure to enforcement actions to recover the deficiency. See Title 33, Chapter 6.1 of the A Rev. Stats.

At the outset, 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 and his past inability to pay these debts 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."

Based on his evidentiary showing, extenuating circumstances certainly contributed to Applicant's financial difficulties that necessitated his seeking first Chapter 13 relief, and then Chapter 7 protections in 2001 and 2002, respectively. Extenuating conditions also affected his ability to resolve his medical, vehicle, and mortgage obligations in a timely way. Available to Applicant is 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." While some judgment problems persist over Applicant's taking on so much debt under the circumstances preceding his filing for bankruptcy, and again in 2007 before he and his wife achieved a good track record of earnings in their current state of residence, his actions are considerably extenuated by unforeseen economic and marital conditions and his inability to timely cure the defaults with the resources available to him and his wife.

In recognition of the considerable good-faith efforts Applicant made to resolve his medical, vehicle, and mortgage debts, mitigation credit is available to him. Applicant's debts have been mitigated by a confluence of considerations: consolidation of his car loans that have enabled him to bring his creditor 1.g account current; reimbursement of the medical debts owed to creditors 1.c, 1.e, and 1.i; and the absence of any deficiency liability on his first mortgage debt by virtue of the state's anti-deficiency statute.

Applicant's good-faith repayment efforts to date certainly merit the application of 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. Applicant's mitigation efforts reflect responsible steps to address all of his remaining debts and restore his finances to stable levels consistent with access to classified information.

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).

From a whole-person standpoint, there is ample evidence presented that Applicant has mounted good-faith efforts to resolve his remaining debts, either through payment arrangements, or deficiency protections through his state's anti-deficiency statute. He and his wife currently live frugally and responsibly and are able to maintain a small surplus every month. In his favor are the responsible efforts he has taken to date to identify and resolve the debts of creditors holding medical, vehicle, and mortgage debts against him.

Taking into account all of the extenuating facts and circumstances surrounding Applicant's bankruptcy history, post-discharge debt accruals, and the good-faith efforts he has mounted to resolve his outstanding debts, Applicant successfully mitigates judgment, reliability and trustworthiness concerns related to his debts. Favorable conclusions warrant with respect to the allegations covered by the financial considerations guideline.

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

Subparagraphs 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