



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 09-07241

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

March 21, 2011

Decision

WESLEY, Roger C., Administrative Judge:

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

Statement of Case

On July 26, 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 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), implemented by the Department of Defense for SORs on September 1, 2006.

Applicant responded to the SOR on August 13, 2010, and elected to have his case decided on the basis of the written record. Applicant received the File of Relevant Material (FORM) on November 3, 2010, and submitted additional information for

consideration on December 3, 2010, within the 30 days permitted. Applicant's submissions were identified as AE's 1 through 9 and admitted. The case was assigned to me on December 23, 2010.

Summary of Pleadings

Under Guideline F, Applicant allegedly (a) accumulated 16 delinquent debts exceeding \$23,000; (b) failed to file federal and state tax returns for tax years 2007 and 2008; and (c) had his wages garnished in 2010 by his state's franchise tax board in the amount of \$200 a month.

In his response to the SOR, Applicant admitted most of the allegations. He failed to respond to six of the allegations (subparagraphs 1.d, 1.e, and 1.l through 1.o), and these allegations are deemed denied. Applicant claimed he never received any documented proof of any of the six debts he declined to respond to and feared theft of his credit card from a car break-in. He claimed a loss of income due to a contentious divorce, the failure of his estranged spouse to bear responsibility for her share of the community debts they accrued during their marriage.

Findings of Fact

Applicant is a 44-year-old defense market manager 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 served as an officer in the U.S. Army between April 2003 and January 2007 and received an honorable discharge. (Item 4) He married his spouse in September 1990 and initially separated in 2006. (Item 4). He has two children (ages 12 and 10) from this marriage. (Item 4)

In August 2006, Applicant's wife petitioned for divorce. (AE 4). While her petition was pending, Applicant's wife lived in their family home. Her petition was dismissed in March 2007. (AE 1) One month later (in September 2006), Applicant was involved in an auto accident and suffered back and neck injuries. His injuries limited his ability to work and earn income. In November 2006, he was ordered to pay spousal support.

Shortly after his wife's divorce petition, Applicant moved back into the family home and tried reconciling with his wife. (AE 1) He and his wife refinanced their home and paid off most of their debts with the equity withdrawals they made.

Between September 2007 and January 2008, Applicant and his spouse continued to live in their refinanced home. Still, his wife refused to help him with any of their joint debts, and declined to sign or approve any paperwork required to refinance or obtain a loan modification on their home. In March 2008, Applicant's spouse refiled for divorce. (AEs 1 and 7) The proceedings are ongoing, and the last noted entry in the furnished case docket scheduled a mandatory settlement conference for October 2010. (AE 1)

Unable to take care of all of their joint obligations while estranged and living separate lives, Applicant and his spouse accumulated a number of delinquent debts. Because his wife declined to pay her share of the debts, legal responsibility for the debts fell to Applicant. With his limited income and family support responsibilities, Applicant encountered great difficulty in simultaneously supporting his family and addressing his old debts. (AE 1). His wife remained in the home until October 2008 before vacating the premises entirely. Applicant continued to finance the mortgage and pay his heavy legal bills while struggling to stay up with his other bills. Once his divorce is finalized, he plans to petition for bankruptcy to discharge his other debts.

Between 2003 and 2007, Applicant accumulated over \$23,000 in delinquent debts (16 in all) that are listed in his credit reports. (Items 5 through 9) Applicant admitted most of these debts as marital debts. Both Applicant and his wife became jointly and severally responsible for their payment. The listed debts that Applicant did not acknowledge as marital debts are reported in his credit reports and provide presumptive proof that they belong to Applicant. Further, Applicant provided no documentation of disputes with any of the creditors he currently questions. Without any documented proof of asserted disputes against any of the creditors Applicant questioned, the validity of these debts cannot be properly assessed and verified.

Applicant attributes most of his admitted debts to the costs of his divorce and his wife's unwillingness to cover her portions of the listed marital debts. His submissions provide no details of his earnings and expenses during these reported years. Without more financial information from Applicant about himself and his spouse during the pertinent period of reported debt delinquencies, his monetary circumstances cannot be properly evaluated.

Addressing his taxes, Applicant admitted failing to file federal and state tax returns for tax years 2007 and 2008. He attributed his filing failures to his inability to obtain a court order to compel his wife to turn over necessary documents to complete his taxes. (Item 7) In his OPM interview, he admitted to having his wages garnished in 2008 for back taxes owed. (Item 7) And his wages continue to be garnished by his state's franchise tax board at the rate of \$200 a month in 2010 to cover unpaid taxes owed the state.

In his response to the SOR, Applicant cited his past contributions as an eagle scout, a U.S. Army officer, and a Master Mason. (Item 3) However, he provided no endorsements or performance evaluations on his behalf. Nor did he provide any proof of community and civic contributions, or service-related awards and commendations.

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 individual guidelines are pertinent in this case:

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

By virtue of the principles and policies 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. See *Kungys v. United States*, 485 U.S. 759, 792-800 (1988). 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 materiality showing, 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, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-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 defense market manager of a defense contractor who accumulated a number of delinquent debts during an extended period of marital estrangement and contentious divorce proceedings. He also failed to file federal and state tax returns in 2007 and 2008 and has had his wages garnished by the state taxing authority responsible for enforcing his state tax liability.

Applicant's pleading admissions of the debts, tax filing lapses, and state garnishment action covered in the SOR negate the need for any independent proof (see *McCormick on Evidence*, § 262 (6th ed. 2006)). Each of Applicant's listed debts are documented in his latest credit reports and provide corroboration of his debts. His accumulation of delinquent debts, his past inability and unwillingness to address these debts, and his failure to file pertinent federal and state tax returns warrant the application of three of the disqualifying conditions (DC) of the Guidelines: DC ¶ 19(a), "inability or unwillingness to satisfy debts," ¶ 19(c) "a history of not meeting financial obligations," and ¶ 19(g), "failure to file annual Federal, state, or local income tax returns as required . . ."

Moreover, some judgment problems persist over Applicant's unexplained delinquencies and his failure to demonstrate he acted responsibly in addressing his listed debts and filing his federal and state tax returns with the resources available to him. See ISCR Case 03-01059 at 3 (App. Bd. Sep. 24, 2004). Not only are his listed

debt delinquencies and tax filing failures still outstanding, but he has failed to address them in any good-faith manner. Resolution of a debt through garnishment (as is the case with creditor 1.u) rather than through voluntary repayment efforts carries much less mitigating force, and doesn't afford Applicant any cognizable mitigation credit for his state tax payments to date. See ISCR Case No. 04-07360 (App. Bd. Sept. 26, 2006).

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 imposes 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 and tax filing obligations when able to do so raises security-significant concerns about whether the applicant has demonstrated the trust and judgment necessary to safeguard classified information.

Applicant's debts are attributable in part to his lengthy separation and recurrent divorce proceedings which deprived him of the joint spousal income he historically relied on to satisfy his marital bills. All of the listed debts in the SOR are either unpaid or unresolved. His tax return filing lapses are in part attributable to his inability to obtain relevant financial data from his estranged spouse. His explanations do not account, however, for his failure to provide a meaningful record of communication exchanges between himself and the relevant taxing authorities. Nor did he indicate why he could not have filed separate returns with the IRS and pertinent state taxing authority.

Based on the documented materials in the FORM, some extenuating circumstances are associated with Applicant's inability to pay of or otherwise resolve his debts. Available to Applicant in part is MC ¶ 20(b), "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."

Whole-person assessment does not enable Applicant to surmount the judgment questions raised by his accumulation of delinquent debts and failure to file his 2007 and 2008 federal and state tax returns. Resolution of his delinquent accounts and filing his pertinent tax returns are critical prerequisites to his regaining control of his finances.

While ongoing divorce proceedings and the absence of spousal cooperation in addressing his debts and tax returns might have played a considerable role in his accumulation of so many debts and tax filing delays, his continuing failure to take any action on his admitted debts and tax filing obligations is a source of security concern. Endorsements and performance evaluations might have been helpful, too, in making a whole-person assessment of his overall clearance eligibility, but were not provided.

Overall, clearance eligibility assessment of Applicant based on the limited amount of information available for consideration in this record does not enable him 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 documented facts and circumstances surrounding Applicant's debt accumulations, his lack of any acceptable explanations for his dedications to address his delinquent debts and file his back tax returns long after his wife declined to help him with their debts and tax returns, it is still too soon to make safe predictive judgments about Applicant's ability to repay his debts, file his back tax returns, and restore his finances to stable levels commensurate with the minimum requirements for holding a security clearance. Unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.u.

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

Subparagraphs. 1.a through 1.u: 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

