



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 10-01388

Appearances

For Government: Daniel Crowley, Esquire, Department Counsel
For Applicant: *Pro se*

February 28, 2011

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 denied.

Statement of Case

On March 17, 2010, 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 April 13, 2010, and requested a hearing. The case was assigned to me on September 27, 2010, and was scheduled for hearing on October 26, 2010. The hearing was convened on that date. At hearing, the

Government's case consisted of seven exhibits (GE 1-7). Applicant relied on one witness (himself) and 15 exhibits (AE A-O). The transcript (R.T.) was received on November 12, 2010.

Procedural Rulings and Evidentiary Issues

Before the close of the hearing, Appellant requested leave to supplement the record with documented IRS payments pursuant to his approved installment agreement with the IRS and an updated personal financial statement. For good cause shown, Applicant was granted seven days to supplement the record. Within the time permitted, Applicant supplemented the record with an IRS transcript of installment payments through October 2010, IRS correspondence approving Applicant's installment application, an updated personal financial statement, and correspondence from his prospective defense employer making him a provisional offer, contingent upon his satisfying a number of conditions, including his securing and maintaining a security clearance. Applicant's submissions were admitted as AEs P through T.

Summary of Pleadings

Under Guideline F (Financial Considerations), Applicant allegedly petitioned for Chapter 7 bankruptcy protection in November 2007 (discharged in March 2008) and incurred federal tax liens covering federal income taxes owed for tax years 2005 and 2006 (\$22,137), tax years 2001, 2002, 2003, and 2004 (\$67,775), and tax years 1998 and 2000 (\$32,210).

In his response to the SOR, Applicant admitted each of the allegations with explanations. Applicant claimed that his divorce in 2001 caused a loss of income that adversely affected his finances. He claimed he lost a major contract in 2005 with a local university that caused him additional problems in meeting his financial obligations, and prompted him to default on the payment plan he had with the IRS to to pay his back taxes. And he claimed he filed for Chapter 7 bankruptcy in 2007 as a last ditch effort to "get back on his feet."

Findings of Fact

Applicant is a 54-year-old prospective database administrator of a defense contractor who has sponsored him for a security clearance. See AE T. The allegations covered in the SOR and admitted by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Applicant married in August 1976 and has one child from this marriage: a daughter who is over the age of 21 (GE 1). His wife was a college professor and had a steady income. (GE 5) They divorced in 2001. (GE 5)

In July 1993, Applicant earned an associate's degree in computer science from an accredited university. (GE 1) He has no military service. (GE 1; Tr. 75)

Applicant formed a partnership in 1995 to own and operate a software consulting business, and looked to his other partners to help him fund the business. (GE A; Tr. 77-78) Between 1995 and 2005, he was essentially self-employed with his consulting business, and worked part-time jobs to help cover his expenses. (GE 1; Tr. 80-81)

When his partners failed to contribute their promised capital, Applicant tried operating the business on his own. For the first few years, he was able to absorb some of the financial burdens of his business with monetary support from his wife. (see GE 2 and AE B). Still, he got behind with his federal taxes in tax years 1998-2001. When his wife filed for divorce in 2001, he lost the “steady income” his wife facilitated with her contributions. (GE 5; Tr. 46-47)

With little capital to work with after his divorce, he struggled financially with making his mortgage payments and keeping his business solvent and running until he was able to dispose of it in June 2007. (AE 7; Tr. 47-48) Financial problems associated with the operation of his business continued to escalate. Throughout the period covering November 2005 through November 2007 Applicant continued to be beset with capital shortfalls associated with his consulting business. With too little capital to operate his business during these years, he resorted to using his credit cards to finance his business and personal needs and accumulated substantial delinquent credit card and tax debts. See ex. A; Tr. 48-50.

In December 2005, he utilized the services of a tax firm to try and resolve his tax problems, but to no avail. (AEs A and B). Unable to resolve his tax debts with the IRS, he explored a possible bankruptcy option with his tax firm in December 2005. (GE 5 and AEs A and B) After considering his options, he decided he would rather try and work with his creditors alone. (AE A)

In November 2006, Applicant lost a major university client, and was not able to expand his small business and support more customers simultaneously with his taking care of his current ones. (AEs A and B). Unable to bring in additional partners over the ensuing months, he fell behind with his personal accounts and his tax debts. (AE A) In November 2006, the IRS filed a federal tax lien, covering tax years 1998 and 2000, in the amount of \$32,210. (GEs 2, 3 and 4). The IRS filed a second tax lien in August 2007 for the tax years of 2001 through 2004 in the aggregate amount of \$67,775. (GEs 2, 3, and 4) His repeated efforts to work out payment agreements with the IRS were unsuccessful. (Tr. 52)

Still hoping to save his company and address his personal debts, he delayed seeking bankruptcy protections and worked to salvage his young software business. (AE A; Tr. 47-51). He could not keep with the heavy costs of maintaining the business and finally disposed of it in June 2007. (AE B) Because he did not provide any financial details of his business or the resources available to him to service and maintain it, definitive assessments about its book and market value can not be made.

In November 2007, Applicant petitioned for Chapter 7 relief. In his bankruptcy petition, he scheduled real property assets (his home) and assigned a \$265,000 current market value to his home. (GE 2) Applicant also included federal tax liens totaling around \$100,000. (GE 2) He listed \$4,823 in personal property assets and less than a \$1,000 in claimed exempt property. (GE 2) His first mortgage holder (with a mortgage that traces to 2004) scheduled a \$183,426 secured claim (as a first mortgage-holder). He also scheduled a \$45,625 second mortgage (originated in 2004) against his home. (GE 2) Applicant listed unsecured non-priority claims in the aggregate of \$164,776 (GE 2). In his 2007 bankruptcy petition, he listed net monthly income of \$4,550, and current monthly expenditures of \$5,519, leaving a net negative monthly remainder of \$969. (GE 2)

Applicant received his order of discharge of his Chapter 7 bankruptcy petition in March 2008. (GE 2). Several months later (in August 2008), the IRS filed a third federal tax lien that covered delinquent taxes owed for the tax years of 2005 and 2006, in the approximate amount of \$22,137. See GEs. 2, 3 and 4.

Having already paid off the \$32,210 in back taxes calculated by the IRS to be owing for tax years 1998 and 2000 (AE D; Tr. 65, 82), Applicant applied to the IRS for an installment agreement in March 2010 for an approved installment agreement. (AEs R; Tr. 73-74). The IRS approved Applicant's application to pay his delinquent taxes in installments and set monthly payments of \$300 (beginning March 28, 2010) on the stated \$73,913 balance, exclusive of accrued interest and penalties. (AE N) In the meantime, interest on the remaining balance will continue to accrue at the rate of six per cent. See AEs N and D; Tr. 53-54. His most recent checking account summary includes several checks that he intends to remit in November 2010. (AE M)

Applicant documents regular 10 monthly payments (nine cashed and credited) to the IRS between April 2010 and October 2010. See AEs E through H, O, P, and R; Tr. 61-65, 83-84. His payments total \$3,000 for the six-month period and include two \$600 payments on two occasions where he doubled up on his required payments. (see AEs E through H, O, P, and R) Interest and penalties continue to accrue on his delinquent taxes (and it is difficult to make pay-off projections on the estimated \$89,000 balance due. (Tr. 110-111) The IRS still holds its three tax liens against Applicant. These liens exceed what the IRS claims he currently owes them, inclusive of interest and penalties (around \$89,000), in back tax obligations. (Tr. 66)

Besides making his monthly IRS payments in accordance with the terms of his 2010 installment agreement, Applicant documents his current status with his two mortgages. (see AEs J, K and S) He provides some documentation, too, of his staying current with his personal debts. (see AEs M and S).

Applicant has been gainfully employed by his current part-time employers since June 2009. In the personal financial statement he provided in December 2009, he listed net monthly income of \$3,650, monthly expenses of \$1,604, monthly payments on debts of \$2,046, and a zero monthly remainder. (GE 5) In the updated financial statement he

supplied, he lists net monthly income of \$3,699, monthly expenses of \$1,311, and monthly debt payments of \$2,346. (AE S) He reports a slight net remainder of \$43.

Applicant hopes to increase his income with full-time employment with the defense contractor who is sponsoring him for a clearance and retention of one of his current part-time jobs (Tr. 94-95) This contractor has provisionally offered him a full-time position as a database administrator with a starting salary of roughly \$65,000. (Tr. 98-99) Applicant's selection for this position, however, is contingent upon his obtaining a security clearance. See AE T; Tr. 98-107.

Applicant's credit reports reflect current accounts with his first and second mortgage holders and credit card issuers. (see GEs 3 through 7) Although he has had no credit counseling to date, he is working to improved his credit score. (GE 5)

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.

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 precepts framed by the revised Adjudicative Guidelines, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted facts alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

Analysis

Applicant is currently employed by two employers on a part-time basis and has been offered a full-time position by the contractor, who is sponsoring him for a security clearance, contingent upon his obtaining a security clearance. For over 12 years, he

operated a software consulting business that incurred annual losses for most of the years he maintained it. With defaulting partners and limited resources himself to work with, he began accumulating tax and credit card deficiencies in 1998.

Applicant's financial problems escalated after his wife divorced him in 2001. Over the course of an eight-year period, Applicant operated his business on very thin capital margins and failed to pay many of his owed federal taxes and his consumer creditors.

Beginning in November 2006, the IRS filed a series of tax liens covering back personal taxes and accrued interests and penalties. Altogether, the IRS filed three tax liens covering around \$122,000 in delinquent federal taxes for the tax years of 1998, 2000, and 2001 through 2006. Applicant consulted a tax attorney to try and resolve his debts, but was unsuccessful.

Applicant filed for Chapter 7 bankruptcy in November 2007 and received his discharge in March 2008. While he was able to shed over \$164,000 in unsecured, non-priority claims, he was not able to discharge his federal tax liabilities. The IRS's filed tax lien in 2006 for tax years 1998 and 2000 has been satisfied (albeit, still not released). His remaining taxes assessed for tax years 2001 through 2006 remain unsatisfied. Considered together, and without resolution, the recurrent tax liens and debts associated with Applicant personally and his still recent bankruptcy discharge, raise security-significant concerns.

Security concerns in this matter are covered by the financial considerations guideline of the AGs. This guideline applies to applicants (like Applicant) who become so financially overextended as to indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations. Such actions 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 heavy consumer debt incidental to his Chapter 7 bankruptcy discharge and federal tax liens incidental to his software consulting business he previously managed and his past inability to pay these debts warrant the application of two of the disqualifying conditions (DC) of the Guidelines for financial considerations: DC ¶ 19(a) "inability or unwillingness to satisfy debts" and DC ¶ 19(c) "a history of not meeting financial obligations."

Applicant's debts are attributable in part to recurrent income shortages following the loss of a major client, a divorce, and his restricted ability to manage his business profitably with the limited sources of income available to him. To date, he has completed an installment with the IRS to cover his remaining taxes owed, and he has established a modest track record of monthly repayments. However, his bankruptcy discharge is still relatively fresh, and he has a repayment track record with the IRS on his two unsatisfied liens of less than ten months. The IRS's tax liens (all three of them) remain in place with a total balance in excess of \$89,000 (inclusive of accrued interest and penalties). Based on his current rate of payment, and accruing interest and penalties on his outstanding tax

obligations, Applicant cannot be realistically expected to complete his installment agreement with the IRS before 2030.

Applicant does not provide adequate explanations of why he did not address his income taxes annually, or why he did not make more concerted earlier attempts to work out payment arrangements with the IRS to pay off the remaining tax balances for tax years 2001 through 2006. Nor has he provided any convincing justifications for failing to sell his failing software business before 2007. As a result, limited mitigation credit is available to him at this time. 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,” cannot be applied to Applicant’s situation. ¶ MC 20 (d), “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts,” has some applicability based on Applicant’s documented satisfaction of the 2006 federal tax lien, the installment agreement he completed with the IRS, and the modest tax repayment efforts he has documented to date.

Because Applicant has not chosen to seek any independent counseling advice outside of his bankruptcy filing relative to his identified tax debts, he may take only limited advantage of ¶ 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.” While Applicant’s repayment efforts with the IRS are encouraging, it is still too soon to make predictable judgment about his sustaining his repayment plan.

Holding a security clearance involves the exercise of important fiducial responsibilities, among which is the expectancy of consistent trust and candor. Financial stability in a person cleared to access classified information is required precisely to inspire trust and confidence in the holder of the clearance. While the principal concern of a clearance holder’s demonstrated financial difficulties is vulnerability to coercion and influence, judgment and trust concerns are implicit in financial cases (as here).

Whole-person assessment does not help Applicant to overcome the judgment lapses associated with his consumer and tax debt accumulations. The devotion and resilience he demonstrated in running his software consulting business through some difficult years with inadequate financial support is commendable. His failure, though, to more diligently monitor and ensure timely tax payments to the IRS while continuing to operate his business reflects some lapses of attention to his tax obligations over the course of the nine years he operated the business.

While Applicant has been able to satisfy one of the tax liens, his installment arrangements on the remaining liens are still relatively recent and entail modest monthly payments on an aggregate federal tax obligation that promises to accrue annual interest and penalties in excess of his scheduled monthly payments. While it is possible that Applicant will be able to settle his tax debt with a lump sum offer or increased monthly outlay, prospects for using either of these potential options are uncertain at this point. So, at this juncture, Applicant’s outstanding tax obligations create too many payment

risks to enable Applicant to fully mitigate security concerns under either the AGs or under a whole-person evaluation.

Taking into account all of the facts and circumstances surrounding Applicant's debt accumulations, his earnest but still unfinished steps to resolve them, and the absence of sufficient evidence to demonstrate his financial reliability and trustworthiness in completing his tax commitments at this early stage of his installment arrangements with the IRS, it is still too early to make safe predictable judgments about Applicant's ability to restore and maintain his finances in accordance with minimally required criteria for holding a security clearance.

Although Applicant is to be commended and encouraged in his repayment efforts, more tangible proofs of success are necessary to satisfy minimum standards of security eligibility. Unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1.b and 1.c. Favorable conclusions are justified with respect to subparagraphs 1.a and 1.d.

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

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| Sub-paras. 1.b and 1.c: | Against Applicant |
| Sub-paras. 1.a and 1.d: | 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

