



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 10-02168

Appearances

For Government: Braden Murphy, Esquire, Department Counsel
For Applicant: Richard Morris, Esquire

August 26, 2011

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, Applicant failed to mitigate security concerns over the state of his finances. Clearance is denied.

Statement of the Case

On March 24, 2011, 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 for Determining Eligibility for Access to Classified Information (AGs) that were implemented by the Department of Defense on September 1, 2006.

Applicant responded to the SOR in April 2011 (undated) and requested a hearing. The case was assigned to me on May 20, 2011, and was scheduled for hearing on June

22, 2011. A hearing was held on the scheduled date. At the hearing, the Government's case consisted of five exhibits (GEs 1-5). Applicant relied on six witnesses (including himself) and two exhibits (AEs A-B). The transcript (Tr.) was received on July 5, 2011.

Procedural Issues

Before the close of the hearing, Department Counsel moved to amend the SOR to add an additional allegation: subparagraph 1.j, which alleged that Applicant failed to file his federal and state income tax returns for tax year 2010, as required. There being no objection to the proposed amendment, and for good cause shown, Department Counsel's motion was granted. Applicant admitted to not filing his federal and state income tax returns as required for tax year 2010.

Prior to the close of the hearing, Applicant requested the record be kept open to afford him the opportunity to supplement the record with (a) a filed petition for Chapter 7 relief and (b) 2010 federal and state income tax returns. For good cause shown, Applicant was granted an additional 37 days to July 30, 2011 to supplement the record. Department Counsel was afforded seven days to respond. Within the time permitted, Applicant supplemented the record with a one-page notice of bankruptcy case filing under Chapter 13. Applicant did not copy Department Counsel with his submission.

Department Counsel responded to Applicant's supplemental submission on August 2, 2011. Department Counsel noted that he was first notified of Applicant's Chapter 13 filing by the undersigned and interposed no objection to the admission of Applicant's Chapter 13 case filing. Department Counsel noted the absence of a Chapter 13 petition in Applicant's submission, or supporting schedules, and a payment plan. Department Counsel, in turn, submitted a notice of possible dismissal of Applicant's Chapter 13 petition. Applicant's Chapter 13 case filing was admitted as AE C; Department Counsel's proposed exhibits were admitted as GEs 6-8.

Summary of Pleadings

Under Guideline F, Applicant allegedly accumulated nine delinquent debts exceeding \$230,000. In his response to the SOR, Applicant admitted the debts as alleged without explanation.

Findings of Fact

Applicant is a 42-year-old lead database administrator 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.

Background

Applicant married in July 1995 and divorced his wife in July 2004. (GE 1) He has two children from this marriage. (GE 1 and AE B). He has two additional biological children and one stepdaughter. (Tr. 66-68, 194)

Applicant earned a bachelor's degree from an accredited university in August 1992. (GE 1; Tr. 92) He claims no military service.

Finances

Between 1996 and March 2008, Applicant purchased three properties in his community. (GE 3) He acquired the first property in 1996 from an unlisted creditor and lived in the residence with his wife until 2003. (Tr. 71). After separating from his wife in 2003, he continued living in the home until February 2008. (Tr. 100-101) After vacating the premises, he leased the property to a couple. When they ceased paying rent and damaged the home, he evicted them. (Tr. 81-82) Unable to rent the home in its damaged condition, he encountered difficulties in carrying the mortgage and lost the home to non-judicial foreclosure in early 2009. (Tr. 81-82) After foreclosing on the property, this creditor (not included in the SOR) holds a deficiency balance on Applicant's first mortgage for approximately \$18,000. (GE 3; Tr. 103-104)

Applicant bought his second home in 2007 from creditor 1.g. (Tr. 72-74) He leased the home to a couple with an option to buy. (Tr.72) They paid their rent regularly for about eight months, but never exercised their option. When the job market deteriorated in 2008, they ceased paying rent. (Tr. 72-73, 80) After evicting the couple in 2009 (Tr. 79-80), Applicant tried selling the property by means of a short sale with a local realtor, but to no avail. (Tr. 80) Before they could complete a sale, they were notified that the lender had foreclosed on the property. (Tr. 80-81) Applicant estimated that he owed around \$197,000 on the property when it was foreclosed by creditor 1.g (GE 3) A \$14,000 deficiency balance remains on this foreclosed residence with creditor 1.g. (GE 3; Tr. 105)

In March 2008, Applicant purchased a third home from creditor 1.e with nothing down. (Tr. 75, 99-100, 106, 123)¹ Following unsuccessful efforts to obtain a loan modification, he lost this home to non-judicial foreclosure as well in February 2011. (Tr. 107, 120-122) Applicant estimated a mortgage balance of approximately \$272,000 remained when the property was foreclosed. (GE 3; Tr. 99-100, 124-125) Applicant does not know what sale price the property produced at the foreclosure sale, but believes there is a likely deficiency owed to creditor 1.e. (Tr. 125-126)

Besides his home foreclosures, Applicant accumulated several debt delinquencies with his consumer accounts. He acknowledged his debts to creditors 1.a through 1.d, creditor 1.f, and creditors 1.h and 1.i. Except for the credit card debt with creditor 1.d, each of these debts remains unpaid. (GE 3; Tr. 90-91) Applicant indicated he was exploring bankruptcy initiatives. (Tr. 90-91, 111)

¹ Applicant added some confusion to the status of the creditor 1.e debt when he later indicated (a) he paid approximately \$325,000 for his third property and (b) this third property purchase was not covered by either subparagraph 1.e or subparagraph 1.g of the SOR. (Tr. 122-123) By all accounts in his prior written statement (GE 3) and hearing testimony (Tr. 99-100), his third property purchase is covered by subparagraph 1.e. What property he was referring to when he claimed he owed around \$325,000 prior to foreclosure of the property remains unclear.

After the hearing, Applicant filed for Chapter 13 bankruptcy relief. In the petition he filed in July 2011, he did not include schedules, a statement of financial affairs, statement of current monthly and disposable income, or a repayment plan. (AE C and GEs 6-8) The bankruptcy court has given Applicant until August 10, 2011 to cure his filing deficiencies to avert automatic dismissal of his petition without further notice. (GE 8) Applicant has not responded to Department Counsel's submissions, and the status of Applicant's bankruptcy petition at this time is unknown.

Applicant nets approximately \$5,800 a month, inclusive of overtime. (Tr. 94) His significant other who resides with him helps him with his expenses which exceed his net monthly income. (AE A; Tr. 96-97) While he does not charge his children living with him, he has continuing child support obligations of \$1,400 a month. (AE A; Tr. 114. 121) With help from his significant other on the rent, food, and utility expenses, he is able to maintain a \$450 monthly remainder. (AE A; Tr. 114-115) He has never obtained any credit counseling. (Tr. 126)

Applicant is not current in his filing of his federal and state tax returns, and he has no extension from either taxing authority. (GE 3; Tr. 117) He filed his 2008 federal return in 2009 and his 2009 return in 2010. (Tr. 117-118)

Endorsements

Applicant is well-regarded by his supervisors and coworkers. His current and past supervisors characterized Applicant as honest and trustworthy. (Tr. 24-28, 51-53) His coworkers, who have worked with him, credit him with integrity and trustworthiness. (Tr. 36-39; 44-45) A longstanding friend described him as honest and of high moral character. (Tr. 59-60) His biological son, who recently made contact with him, characterized him as honest, trustworthy, and of good moral character. (Tr. 44-45)

Applicant's ex-wife is highly supportive. (AE B) She characterizes Applicant as a "very honest person" who has always demonstrated upstanding integrity and character. She describes him as very loyal, truthful, and trustworthy. (AE 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." They 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 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.

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 data base administrator of a defense contractor, who accumulated a number of delinquent debts over the last ten years and failed to file his Federal and state tax returns as required for 2010. Applicant's debt delinquencies and filing failures warrant the application of three of the disqualifying conditions (DC) of the financial consideration guideline: DC ¶ 19(a), "inability or unwillingness to satisfy debts," DC ¶ 19(c) "a history of not meeting financial obligations," and DC ¶ 19(g), "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same." Applicant's debts comprise delinquencies on consumer accounts and deficiency balances stemming from three foreclosures. His debts have been in delinquent status for some time. His failure to file Federal and state income tax returns as required for tax year 2010 is the result of his failure to obtain filing extensions for either his federal or state return as required by law to avert filing penalties.

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

Tenant defaults and poor market conditions account for much of Applicant's mortgage delinquencies with the three homes he purchased between 1996 and March 2008. Together, the accrued deficiencies on two of his foreclosed homes exceed \$32,000, and he expects a deficiency to accrue on the third home he lost to foreclosure in 2011. Without more historical explanations of the deficiency balances he currently

faces and his other delinquent accounts, it is difficult to find either extenuating circumstances or concrete repayment steps sufficient to mitigate security risks associated with his delinquent debt accruals.

Applicant provided no evidence either of any financial counseling, and the Chapter 13 bankruptcy petition he filed in July 2011 lacks schedules, proof of his financial status, and a repayment plan. Without documentation of financial status on file with the bankruptcy court considering his Chapter 13 petition, he remains at considerable risk of a dismissal of his petition without backup plan in place to resolve his debt delinquencies. Moreover, he provided no proof of his filing his 2010 federal and state tax returns within the times provided. Without any extensions, he remains subject to imposed interest and filing penalties.

Applicant's efforts are not enough to warrant crediting him with any of the mitigating conditions for resolving his debt deficiencies. Specifically, 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," cannot be applied to Applicant's situation." Nor is there enough repayment evidence in the record to credit Applicant with the mitigation benefits of MC ¶ 20(d), "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."

When addressing repayment efforts generally, the Appeal Board has not required an applicant to establish "that he has paid off each and every debt listed in the SOR." See ISCR Case no. 07-06482 at 2-3 (App. Bd. May 21, 2008)(internal citations omitted). All that the Board has required is that the "applicant demonstrate he has a plan to resolve his financial problems and has taken significant actions to implement that plan." See *id.*

In Applicant's case, it was incumbent upon him to demonstrate some tangible steps to satisfy the deficiencies associated with his mortgage foreclosures and his other unpaid debts with the monthly resources available to him. To date, he has made no documented showing of addressing his debts with individual payment plans or through an approved Chapter 13 plan. As matters stand, he is not able to satisfy any of the pertinent mitigating conditions.

Based on a whole-person assessment, Applicant fails to surmount the judgment questions raised by his accumulation of delinquent debts over an extended period of time which for the most part he has failed to resolve. Compounding his problems with his finances is his failure to file 2010 federal and state tax returns. On balance, Applicant has not shown sufficient tangible effort in addressing his debts and tax returns to mitigate security concerns over his substantial debt accruals and tax filing deficiencies and demonstrate renewed control over his finances.

Taking into account all of the facts and circumstances surrounding Applicant's debt accumulations and judgment lapses associated with his failure to file his 2010 tax returns, and his strong endorsement from his ex-wife, it is still too soon to make safe predictive judgments about Applicant's ability and intentions to repay his accrued debts and restore his finances to stable levels commensurate with his holding a security

clearance. His endorsements, while important, are not enough to surmount continuing concerns about his finances and judgment. Unfavorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.c and 1.e through 1.j. Favorable conclusions warrant with respect to subparagraph 1.d.

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

Subparagraphs 1.a through 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraphs 1.e through 1.j:	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

