



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 10-03352

Appearances

For Government: Caroline Jeffreys, Esquire, Department Counsel
For Applicant: *Pro se*

April 20, 2011

Decision

WESLEY, Roger C., Administrative Judge:

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

Statement of Case

On June 18, 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 in July 2010 (undated) and requested a hearing. The case was assigned to me on October 18, 2010. It was scheduled for hearing on November 18, 2010. 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, or deny Applicant's application for a security clearance. At hearing, the Government's case consisted of nine exhibits; Applicant relied on one witness (himself) and five exhibits. (AE A-E) The transcript (Tr.) was received on November 30, 2010.

Procedural Issues

Before the close of the hearing, Applicant requested leave to supplement the record with documentation of (a) correspondence from the Internal Revenue Service (IRS) and a copy of his 2008 federal tax return and (b) his ex-wife's declared responsibility for payment of the debt covered by subparagraph 1.g. For good cause shown, Applicant was granted seven days to supplement the record, and the Government was afforded seven days to respond. Applicant filed his post-hearing submission after the time permitted to supplement the record, but before the record closed.

Applicant's submission consisted of a letter from Applicant, dated November 17, 2010; a letter from the IRS regarding his 2006 taxes owed, dated May 10, 2010; and an affidavit from the judgment creditor covered by subparagraph 1.a attesting to the accuracy of the judgment and entitlement to garnishment of Applicant's earnings. Department Counsel did not object to admission of any of Applicant's post-hearing document submissions, and for good cause shown, Applicant's post-hearing submissions were admitted as AEs F through H.

Summary of Pleadings

Under Guideline F, Applicant allegedly (a) accrued an adverse judgment against him in 2005 in the amount of \$21,127; (b) incurred a federal tax lien in 2009 in the amount of \$9,111; (c) incurred a state tax lien in 2003 in the amount of \$6,126; and (d) accumulated nine consumer delinquent debts exceeding \$12,000.

Under Guideline E, Applicant allegedly falsified his security clearance application of November 2009 by omitting (a) his 2009 federal tax lien and his 2003 state tax lien; (b) his 2005 judgment; and (c) his debts over 180 and 90 days delinquent, respectively.

In his July 29, 2010 response to the SOR, Applicant admitted his adverse judgment, his federal and state tax liens, and three of the listed debts in the SOR: subparagraph 1.f for \$2,296, subparagraph 1.h for \$2,168, and subparagraph 1.j for \$4,963. He denied the remaining allegations covering delinquent debts. Addressing the falsification allegations, he admitted each of the allegations. He claimed he was confused concerning the allegations in subparagraph 2.a and unaware of any adverse judgments against him. He offered no explanations, however, for his omission of his delinquent debts over 180 days and 90 days.

Findings of Fact

Applicant is a 50-year-old-food service processor for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married his first wife in February 1985. He has three children (ages 21, 18, and 10) from this marriage. (GE 1; Tr. 31) Applicant divorced his first wife in July 2000. (GE 1; Tr. 31) He remarried in October 2004 and has one stepdaughter (age 20) from this marriage. (GE 1)

Applicant attended community college between August 1979 and August 1982, but has no advanced degree or diploma. (GE 1; Tr. 48) He has no prior military service.

Between June 2004 and June 2007, Applicant worked as a locomotive engineer for a major railroad. He also worked in the construction industry in 2007 and for parts of 2008 and 2009. (GE 1; Tr. 27, 42) His construction work diminished in 2008 and 2009, and after May 2009, he stopped working construction jobs altogether. (Tr. 27-28, 42) While unemployed, he collected no unemployment insurance benefits. (Tr. 43)

Applicant's finances

In 2004, Applicant purchased a vehicle from an auto broker for around \$12,460. (GEs 3 and 4) Applicant claims the broker ran off with the money Applicant gave him for the vehicle. (Tr. 44-45) When he was unemployed for parts of 2005, he could no longer afford payments on the vehicle and voluntarily returned it to the seller. (GEs 3 and 4) Records show that the vehicle was repossessed in late 2004 and Applicant was billed for the deficiency balance of \$21,127. When Applicant did not respond to the creditor's demands, creditor 1.a filed suit to recover the deficiency. In October 2005, creditor 1.a obtained a judgment against Applicant in the amount of \$21,127. (GEs 3 and 4; AE H) In October 2010, creditor 1.a obtained a garnishment order that permitted the creditor to levy on 25 per cent of Applicant's monthly earnings. (AE H) Beginning last month, the creditor garnishes 25 per cent of Applicant's earnings every month, which amounts to a \$375 reduction in applicant's monthly pay. (Tr. 45-46)

After repossessing Applicant's vehicle and receiving proceeds from a public sale, Creditor 1.a made demands of Applicant to satisfy the deficiency. When Applicant declined to do so, creditor 1.a initiated suit. The creditor obtained a default judgment against Applicant in the amount of \$21.127. (GE 5 and AE H)

Applicant and his wife purchased another vehicle in 2004. (GEs 2 and 3) They paid creditor 1.j \$12,460 for this vehicle and borrowed around \$8,000 from the seller or their purchase. See GEs 2 and 3; Tr. 59. Applicant voluntarily surrendered the vehicle

to the seller in 2008 when he could no longer afford to make the car payments. (Tr. 59-60) Creditor 1.j billed Applicant for a \$4,963 deficiency owing after public sale of the vehicle did not produce sufficient proceeds to cover the outstanding loan balance. To da. Applicant has never addressed this outstanding deficiency or provided explanations of why he has not tried to pay or resolve this debt.

Applicant and his wife once owned a home. The mortgage on this home was foreclosed three years ago, a period in which Applicant was unemployed and there was no viable real estate market to dispose of his property. (Tr. 28) His loss of construction work in 2008 impacted his finances considerably. With little work to sustain him, he fell behind with his bills in 2008 and 2009. (GEs 3 and 4; Tr. 53-57)

In 2003, Applicant failed to pay his state-assessed taxes in the amount of \$6,126. (GEs 3 and 4). As a result, the state filed a tax lien against him in the same year to cover his delinquent taxes. Applicant claimed he is looking into this tax assessment, but he provided no documentation of his efforts.

Applicant apparently did not file a timely federal tax return for tax year 2008 (Tr. 37-38) and failed to pay back taxes assessed for tax year 2006. In March 2009, the IRS filed a tax lien against Applicant in the amount of \$9,111 to cover Applicant's additionally assessed 2006 tax obligation (\$6,626) with accumulated interest and penalties. (GEs 3 and 4) This lien covers additionally assessed taxes for 2006. The federal taxes, interest, and penalties covered by this 2009 IRS lien have not been paid or otherwise resolved to date.

While not covered by the SOR, Applicant evidently failed to file timely federal tax returns for the 2007 and 2009 tax years. (Tr. 33-34) His documented prepared federal tax returns for tax years 2007 and 2009 were both completed in November 2010. (AEs B and C). These prepared tax returns contain no attached extension forms and no Applicant signatures or proof they were filed. (AEs B and C) Whether the refund entitlements reflected in the respective returns materialize and are ultimately credited to the taxes owing for the 2006 tax year is uncertain at this time.

Applicant assures he contacted his creditors (Tr. 41), made recent payments to one of his creditors holding delinquent accounts (viz., two payments of \$100 in 2009 to creditor 1.f), and arranged payment plans with several additional creditors after the hearing (creditors 1.d, 1.e, 1.g, and 1.k). But he provided no documentation of payments or payment agreements in the submissions he provided during and after the hearing. See AFs F through H; Tr. 53-57. His claim that creditors 1.f and 1.h are duplicates also lack documented proofs and cannot be validated.

Based on the information supplied in the admitted credit reports and Applicant's proofs, creditors 1.d through 1.l remain unpaid and unresolved as of the close of the record. Whether Applicant has established written repayment arrangements with any of these creditors is unclear and unproven.

Applicant currently nets around \$1,000 a month after deductions for child support for his oldest daughter who resides with his first wife (25 per cent of his monthly earnings), taxes, and other assessments. (AE E; Tr. 31-33, 63-65) His current wife nets around \$3,900 a month and pays out around \$1,000 a month toward her daughter's college expenses. (Tr. 64)

Applicant's monthly expenses consist of rent (\$2,150), internet service (\$75), cell phone (\$39), groceries (\$150), car insurance (\$115), gas (\$200), and credit cards (\$100). (Tr. 65-68) He has approximately \$300,000 in his retirement account that he can begin accessing in about four years. (Tr. 68) This leaves him with virtually no monthly remainder.

Applicant's e-QIP omissions

Asked to complete a security clearance application (E-QIP) in November 2009, Applicant omitted his creditor 1.a judgment, his state and federal tax liens, and his debts over 180 days and 90 days delinquent. Likewise, he failed to provide any explanations in the comments section of his e-QIP.

While Applicant does not dispute his omissions, he claims his omissions were inadvertent. He attributes his omissions to haste and confusion about his federal tax return filings; his lack of awareness of any state tax lien or adverse judgment before he was notified by DOHA; and his general uncertainty about the status of his debts following his 2000 divorce. (Tr. 71-75)

Applicant assures he relied on his wife to take care of the bills and did not know he had any outstanding judgments, liens, or accounts more than 180 days delinquent or currently more than 90 days delinquent. (Tr. 76-78) Not until he was interviewed by an investigator from the Office of Personnel management (OPM) some months later and was shown a copy of his credit report did he learn of his liens, judgment, and seriously delinquent accounts. (Tr. 77-78)

Applicant's explanations lack any documentation and detail about the specific circumstances of how and when he became aware of an adverse judgment, tax liens filed against him, and delinquent debts that exceeded 180 days and 90 days, respectively. His most persuasive explanation is that he relied on his wife to manage his finances and did not pay close attention to his debts.

When shown a credit report that reflected his judgment, tax liens, and delinquent debts by the OPM agent who interviewed him, Applicant did not deny the judgment, tax liens, and debts reflected in the reports. Still, haste and confusion do not adequately explain Applicant's omissions and cannot be reasonably accepted as plausible explanations of his actions.

Without more probative explanations from Applicant about his omissions of his judgment, state and federal tax liens, and other delinquent debts, there is not enough

evidentiary support to accept Applicant's claims that his omissions were the result of inadvertence, confusion, and inadequate information about the state of his finances. Considering all of the circumstances surrounding his omissions of pertinent financial information from his e-QIP and initial responses in his ensuing OPM interview, inferences warrant that his omissions were knowingly and wilfully made.

Endorsements

Applicant provided strong character references on his behalf. His deputy site manager described him as trustworthy. Friends and coworkers who know him and are familiar with his work habits characterize him as thoughtful, professional, courteous, and conscientious in his work and off-duty contacts. (AE A).

Policies

The AGs list guidelines to be used by administrative judges in deciding 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 any 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(c) 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. AG ¶ 18.

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. AG ¶ 15.

Burden of Proof

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.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] 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 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 respected food processor for a defense contractor who accumulated a number of delinquent debts during periods of unemployment and underemployment and failed to pay or resolve tax liens, an adverse judgment, and accrued consumer debts in a timely and prudent way.

Additional security concerns are raised over Applicant's omissions of his federal and state tax liens, adverse judgment, and delinquent debts (*i.e.*, debts over 180 days delinquent and debts currently 90 days delinquent).

Financial concerns

Applicant's accrued judgment, tax liens, and debt delinquencies warrant the application of two of the disqualifying conditions (DC) of the financial considerations guideline: DC ¶ 19(a), "inability or unwillingness to satisfy debts," and DC ¶19(c) "a history of not meeting financial obligations."

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 Snapp 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.

Addressing his listed debts, Applicant provided limited evidence of any repayment efforts. Claiming he established recent payment plans with certain listed creditors in the SOR, Applicant provided not documented proof of payments or payment agreements with any of these creditors. Nor has he provided any evidence of repayment or repayment arrangements with the judgment holder (creditor 1.a) or federal and state tax taxing authorities (creditors 1.b and 1.c).

While Applicant disputed several of the debts (claiming they belonged to his ex-wife), he provided no documentary proof. The credit reports in evidence listed the

delinquent accounts covered in the SOR in his name and provide substantial evidence that the debts belong to him. See ISCR Case No. 08-12184 at 7 (App. Bd. Jan. 7, 2010).

Based on his evidentiary showing, Applicant's proofs are sufficient to establish considerable extenuating circumstances associated with many of his debt accumulations. His circumstances include recurrent periods of unemployment underemployment in the 2008 and 2009 time periods.. 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)," applies to Applicant's circumstances.

Applicant's failure to address his pre-2009 judgment, accrued state and federal taxes, and accumulated consumer debts while previously and currently employed preclude him from drawing mitigation from MC ¶ 20(d), "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." Neither this mitigating condition nor any of the other potentially available ones have application to Applicant's situation, considering the longstanding status of his outstanding judgment, tax liens, and accumulated consumer debts.

When addressing applicant claims of good-faith payment initiatives, the Appeal Board has required Applicant-initiated efforts that reflect prudence, honesty, and adherence to duty or obligation. See ISCR Case No. 02-30204 at 3 (App. Bd. April 20, 2004)(citing ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001). Applicant's presented evidence does not meet the Appeal Board's good-faith proof requirements and preclude any application of MC ¶ 20(d) to Applicant's situation.

To Applicant's credit, he has recognized the seriousness of his current financial situation since his receipt of the SOR and has initiated efforts to identify his creditors holding outstanding debt balances. However, it is still too soon to make any safe predictions of his paying or working out sustainable payment arrangements with any of the creditors listed in the SOR. Applicant is not able to demonstrate that he is firmly in control of his finances and can be expected to stay current with his debts.

Based on a whole-person assessment, Applicant fails to surmount the judgment questions raised by his accumulation of judgments, tax liens, and delinquent debts. His positive endorsements merit considerable praise, but are not enough to overcome doubts about his financial judgment and ability to restore his finances to manageable levels.

Taking into account all of the extenuating facts and circumstances surrounding Applicant's debt accumulations, the limited resources he has had to work with while unemployed or underemployed in 2008 and 2009, and the limited efforts he has mounted to identify and resolve his outstanding debts, more time is needed to determine whether Applicant can successfully pay or otherwise resolve his listed 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.l.

Personal Conduct issues associated with Applicant's e-QIP omissions

Security concerns over Applicant's judgment, reliability, and trustworthiness are raised under Guideline E as the result of his determined knowing and willful omissions of his creditor 1.a judgment (entered in 2005), federal and state tax liens (filed in 2009 and 2003, respectively), and accumulated debts over 180 days and 90 days delinquent, respectively. By omitting all of these listed debts without any qualifications or explanations in the application form itself, Applicant failed to furnish materially important background information about his drug use that was needed for the Government to properly process and evaluate his security clearance application.

Because Applicant's omissions of his adverse judgment, state and federal tax liens, and debts over 180 days delinquent within the past seven years and currently 90 days delinquent were inadvertent, unintended, and justified based on his interpretation of question 26 of his E-QIP, one disqualifying condition of the personal conduct guideline is applicable: DC ¶ 16(a), "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities." Applicant's omissions were insufficiently explained in his hearing testimony.

And when Applicant was later interviewed by an OPM agent, he failed to disclose any of his omitted debt delinquencies until confronted by the investigator. His omissions reflect his conscious decisions to omit material information concerning his financial record.

In evaluating all of the circumstances surrounding Applicant's e-QIP omissions, his failure to promptly correct his omissions when afforded an initial opportunity to do so in his ensuing OPM interview, and his hearing explanations, his proofs are insufficient to enable him to convincingly refute or mitigate the deliberate falsification allegations. Questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations reflect core policy security concerns of the personal conduct guideline (AG ¶ 15).

Applicant's deliberate omissions of his outstanding judgment, federal and state tax liens, and other debts over 180 and 90 days delinquent are clearly evident under the facts and policy considerations developed under this Guideline. Overall, Applicant's explanations of his omissions and misrepresentations are not persuasive enough to warrant favorable conclusions relative to the falsification allegations pertaining to his e-QIP financial history and failure to make necessary prompt corrections when first interviewed by an OPM agent.

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.l : Against Applicant

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

 Subparagraphs 4.a through 4.c: 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

