



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 11-03249

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel

For Applicant: Alan Hahn, Esquire

05/31/2012

Decision

WESLEY, Roger C., Administrative Judge:

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

Statement of Case

On November 10, 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 (AGs) implemented by the Department of Defense on September 1, 2006.

Applicant responded to the SOR on December 7, 2011, and requested a hearing. The case was assigned to me on February 21, 2012, and was scheduled for hearing on March 29, 2012. The hearing was convened on that date. At hearing, the Government's case consisted of seven exhibits (GEs 1-7). Applicant relied on two witnesses (including himself) and 12 exhibits (AEs A-L). The transcript (Tr.) was received on April 9, 2012.

Summary of Pleadings

Under Guideline F, Applicant allegedly accumulated six debts, exceeding \$700,000. In his answer to the SOR, Applicant admitted the allegations covered by paragraphs 1.a through 1.c and admitted the allegations covered by subparagraph 1.f. He denied the allegations covered by subparagraphs 1.d and 1.e, claiming zero balances.

Findings of Fact

Applicant is a 45-year-old law enforcement professional (LEP II) for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in April 1988 and has two children from this marriage. (GE 1; Tr. 27) Both children reside with him. His older son has cerebral palsy, autism, and mental retardation and cannot communicate with strangers. (Tr. 27-28) Applicant attended college for one year and has no earned diploma. (GE 1)

Following high school, Applicant enlisted in the Marine Corps and was assigned to an infantry battalion. He served deployments in Panama and Korea as a non-commissioned officer (NCO). Because of his security responsibilities, he held security clearances during most of his time in military service. (Tr. 29) Applicant never encountered any security issues while in the military and was honorably discharged in 1990. (AE F; Tr. 29)

Between 1990 and 1997, Applicant was employed as a police officer for a local municipality in his home State 1. (GEs 1 and 2; Tr. 30-31) To improve living conditions for his oldest son, he and his wife relocated to State 2 in 1997. (Tr. 31-32) Once settled in State 2, Applicant obtained employment with a local police department and continued his employment with this department for over eight years (1997-2005). During his police employment, he earned promotions to detective positions. While still employed, he established a mortgage business that invested in residential properties with other partners and resold them after making repairs and renovations. (GE 2; Tr. 43-45)

In 2005, Applicant quit his police job and established a security business. (Tr. 34) His business concentrated on the marketing of security alarm systems for newly

constructed homes. (Tr. 34-37) He used a Subchapter S format to start his business. (Tr. 40) Under this format, Applicant assumed personal liability for his firm's debts. At the peak of the market in 2005, his business employed 15 employees and paid its taxes and other obligations regularly. (Tr. 35)

Applicant's Finances

Construction work slowed between 2006 and 2009, and the work reductions impacted both his real estate and security licensing businesses. (Tr. 36-39) Records reflect foreclosures on these business properties and no deficiency liabilities on any of the foreclosed properties. The SOR lists only Applicant's \$597,000 mortgage with creditor 1.e. and does not include any of the other real estate debts. (GEs 4 through 7)

Having no business training of his own, Applicant fell behind with his business debts in 2008. (Tr. 59) He struggled to pay his own bills and provide necessary care for his family.

By 2009, Applicant could not operate his business anymore and joined a security contractor company in 2010. (Tr. 40, 52) Before joining this employer, he received financial counseling from a financial advisor he engaged. (Tr. 59) In his first year as an advisor for his security contractor, he deployed to Afghanistan. (Tr. 40-41) After he ceased operating his contracting business, his business retained business liabilities. While he was able to pay off his vehicle liabilities (GEs 2-6; Tr. 38), he could not satisfy all of his company-related credit card debts (i.e., creditors 1.a through 1.c).

Applicant engaged an attorney to explore bankruptcy options and stopped paying on his credit cards in 2009. (Tr. 39, 59) But when this attorney did not follow through as expected with his bankruptcy suggestions, Applicant requested a refund of his retainer. (Tr. 39) With the help of State 2's state bar, he was successful in obtaining a refund. (AE J; Tr. 39-40)

After relocating to his current state of residence (State 3), Applicant encountered difficulties selling his previous residence in State 2. Records show Applicant purchased this property in September 2007 with a \$597,375 purchase money mortgage with creditor 1.e. (GE 2; Tr. 54-55) Applicant ceased making payments on his mortgage in 2009, and the first mortgage holder foreclosed on the property non-judicially the same year. (Tr. 63) His account statement with the creditor reflects a zero balance on his mortgage. (AE E) Should Applicant be taxed for any deficiency relief, he will bear responsibility. (Tr. 54-55) But he believes it is unlikely he will ever be assessed for tax liability on a deficiency that is barred under State 2's anti-deficiency law. (Tr. 55, 63)

In December 2011, Applicant entered into a debt consolidation agreement. (AE B) His plan covered his debts with creditors 1.a through 1.c, and called for monthly payments of \$1,008. (AE B; Tr. 51-52) He added his creditor 1.f debt to his plan in March 2012. (AE B; Tr. 59) The added debt increased his monthly consolidated loan payment to \$1,229 a month. (AE B) Not included in Applicant's plan is his \$8,995

creditor 1.d debt (a personal credit card), which he paid off in December 2011. (AE D) Now in the fourth year of his consolidation plan, he is on a regular payment schedule and expects to fulfill the payment terms of his plan within five years. (AE C; Tr. 59-62)

Once he moved to State 3, Applicant joined the Air Force Reserves. (Tr. 41-42) Even if he were to lose his clearance, he will be able to take care of his debt consolidation payments. He currently earns \$2,100 a month from his unemployment insurance and Air Force Reserve pay. (Tr. 47) With his wife's supplemental income of \$2,732 a month (AEs F and G; Tr. 47), he nets almost \$5,000 a month. And he receives an additional \$3,518 a month in federal disability income for his disabled son. (AE H; Tr. 48) Applicant is up to date with his current credit cards (AE I) and has no debts outstanding besides the ones included in his debt consolidation plan.

Endorsements

Applicant is highly regarded by former Marines who served with him in service. (AE K; Tr. 75-76) A fellow Marine who served with him, and has stayed in contact with him, considers him to be very reliable and trustworthy. (Tr. 75-77) Other colleagues in LEP status who have served with Applicant in combat with the same defense contractor credit him with strong instructional skills. He has earned the trust and respect of fellow law enforcement advisors embedded in a Marine battalion engaged in combat and training missions in Afghanistan. (AE K)

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information.

These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." They must be considered before deciding whether or not a security clearance should be granted, continued, revoked, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs. AG ¶ 2(a) is intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine

a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors:

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Financial Considerations

The Concern: "Failure or inability to live within one's means, satisfy debts and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts."

Adjudication Guidelines, ¶ 18.

Burden of Proof

By virtue of the 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.

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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). And because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Analysis

Applicant is a well regarded LEP II for a defense contractor whose credit reports list six delinquent debts. Three of the debts (creditors 1.a through 1.c) were charged off. One (a personal credit card debt) is listed as in collection; another represents a foreclosed mortgage (creditor 1.e); and the last one (creditor 1.f) represents an adverse judgment taken against Applicant. Four of these debts are covered by Applicant's debt consolidation plan (creditors 1.a through 1.c and creditor 1.f). While the largest debt

(creditor 1.e) reflects a foreclosed mortgage in the amount of \$597,375 and recites no deficiency balance.

Applicant disputes only two of the listed debts, claiming payment in full of the creditor 1.c debt and the absence of any available deficiency enforcement in State 2 with respect to the creditor 1.d debt due to State 2's anti-deficiency statute.

Security concerns are raised under the financial considerations guideline of the AGs where the individual applicant is so financially overextended as to indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, which can raise questions about the individual's reliability, trustworthiness, and ability to protect classified information, and place the person at risk of having to engage in illegal acts to generate funds. Applicant's accumulation of presumptively valid delinquent debts (based on produced credit reports) and his past inability to resolve these debts by the disputes process available to him warrant the application of two of the disqualifying conditions (DC) of the Guidelines¶ DC 19(a), "inability or unwillingness to satisfy debts," and ¶19(c) "a history of not meeting financial obligations."

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.

Four of Applicant's debts are covered by Applicant's debt consolidation plan and show good promise of being satisfied under his payment arrangements. Another (creditor 1.c) has been paid and is fully mitigated. And the largest listed debt (creditor 1.e) reflects a potential deficiency balance that is not enforceable in State 2 under the State's anti-deficiency statute.

What is presently known about Applicant's foreclosure in State 2 is that the first lien holder did not retain any identifiable deficiency rights under the non-judicial foreclosure procedures it invoked in 2009. State 2's anti-deficiency statutes prevent a lender from successfully suing for any losses on a home after non-judicial foreclosure. As outlined in State 2's statutes ((§ 33-729), a person may not be sued by his lender for a deficiency if the property is located on 2.5 acres or less and is a single family residence or duplex. A companion State 2 statute (§ 33-814) precludes a trustee of a deed of trust covering trust property 2.5 acres or less from maintaining an action for a deficiency under the trustee's power of sale.

Each of these State 2 statutory restrictions assumes the owner was not responsible for the property's decrease in value due to his or her neglect. There is nothing in the record to suggest either Applicant or his spouse damaged or neglected their State 2 residence in any way prior to the lender's foreclosure of the home in 2010. Any retained

deficiency enforcement rights against Applicant are tenuous and unlikely to materialize in any tangible way.

In recognition of the array of extenuating circumstances that impacted Applicant's business interests in State 2 and the considerable good-faith efforts Applicant made to identify and satisfy his creditors with valid outstanding debts, both extenuation and mitigation credit are available to him. All of his debts but one reflect documented, good-faith payment efforts on applicant's part. And the only remaining debt is barred from collection by State 2's anti-deficiency law.

Applicant's counseling sessions and good-faith efforts to resolve his debts merit the application of three of the mitigating conditions for financial considerations: ¶ MC 20(a), "the behavior happened so long ago, was so infrequent, or occurred under circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;" 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 under the circumstances,; and MC ¶ 20(c), "the person has received counseling for the problem and/or there are clear indications that the problem is being resolved or is under control." They have considerable applicability to Applicant's accumulated delinquent debts and loss of his home to foreclosure.

Consideration of Applicant's background and circumstances surrounding his debt disputes, his steady income and good credit for most of his personal and business career, and the concerted efforts he has made to obtain financial counseling and resolve his debts reflect positively on Applicant and demonstrate his overall good judgment, reliability, and trustworthiness. Applicant's proofs provide credible indicators of his ability to be trusted in times of stress and enable him to meet his own evidentiary burden of mitigating the covered debts.

From a whole-person standpoint, the evidence is substantial that Applicant has mounted good-faith efforts to resolve his debts. Since joining his current employer and becoming a member of the Air Force Reserves, he has paid one of listed debts in full and established a debt consolidation plan to pay off four other debts. He has made regular payments on his consolidation plan and shows considerable promise in completing his repayment plan. And he is at no risk to any deficiency enforcement on his foreclosed residence in State 2. Should Applicant ever be assessed taxes on any of his covered debts, he has ample resources available to resolve them.

Applicant has a record of outstanding military service and benefits from the trust he has earned from other Marines who have served with him in combat. He is consistently credited with strong instructional skills and respect from his fellow Marines. Applicant has also shown to be a good father to his children and one who looked first to taking care of his employees before compensating himself when he operated his businesses.

All of the extenuating facts and circumstances surrounding Applicant's listed delinquent debts and the good-faith efforts he has mounted to complete counseling and

resolve his outstanding debts under difficult circumstances enable Applicant to successfully mitigate judgment, reliability and trustworthiness concerns related to his debts. Favorable conclusions warrant with respect to the allegations covered by the financial considerations guideline.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE F: (FINANCIAL CONSIDERATIONS): FOR APPLICANT

Subparagraphs 1.a through 1.f: For Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is granted.

Roger C. Wesley
Administrative Judge