



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 11-03403

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

06/13/2012

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns regarding his finances. Eligibility for access to classified information is denied .

Statement of Case

On August 11, 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. This 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, 1962), as amended (directive), and the Adjudicative Guidelines (AGs) implemented by the Department of Defense on September 1, 2006.

Applicant responded to the SOR on September 9, 2011, and requested a hearing. The case was assigned to me on March 15, 2012, and was scheduled for hearing on May 10, 2012. The hearing was convened on that date. At hearing, the Government's case consisted of eight exhibits (GEs 1-8). Applicant relied on one witness (himself) and no exhibits (AEs). The transcript (Tr.) was received on May 17, 2012.

Procedural Issues

Before the close of the hearing, Applicant requested the record be kept open to afford him the opportunity to supplement the record with canceled checks to the law firm he engaged to file a Chapter 7 bankruptcy petition in 2006. There being no objection from Department counsel, and for good cause shown, I granted Applicant 30 days to supplement the record. I afforded the Government two days to respond. Within the time permitted, Applicant provided documentation of his Chapter 7 fee agreement. I will admit Applicant's submission as AE A.

Summary of Pleadings

Under Guideline F, Applicant allegedly accumulated 26 debts, exceeding \$55,000. In his answer to the SOR, Applicant admitted most of the allegations without explanations. He denied the allegations covered by subparagraphs 1.p, 1.q, 1.t, and 1.y. He provided no explanations for his denials in his response.

Findings of Fact

Applicant is a 59-year-old courier messenger 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.

Applicant has never married and has no children. (GE 1) He attended college for two years and earned an associate's degree. He has no military experience. (GE 1)

Between March 2005 and February 2007, Applicant was unemployed and lived off his income from his 401(k) retirement fund, unemployment insurance, and his credit cards. (GE 5; Tr. 29) Once he was laid off in March 2005, he ceased making payments on all of his debts. (GE 5; Tr. 29-30) For the full two years he was out of work, he made no payments on his debts, and they were reported as delinquent debts during this two-year period. (GE 5) Many of these debts are medically related. (GEs 2 through 4) Others involve delinquent credit cards that are either charged off or referred to collection. (GEs 2 through 4)

Appellant disputed several of the listed debts in the SOR. He claimed he did not recognize the listed debts covered by subparagraphs 1.p (\$1,238), 1.q (\$1,028), 1.t (\$407), and 1.y (\$1,885). When interviewed by an investigator from the Office of Personnel Management (OPM) in June 2010, he expressed his belief that these

disputed debts could have been discharged in the Chapter 7 bankruptcy he believed to have been filed in February 2006. (GE 5) He now understands they were not discharged as first believed (Tr. 36-37), and believes they could have belonged to his mother. (Tr. 44) Without any further documentation to verify his claims, presumptions hold that the debts belong to Applicant.

In February 2006, Applicant settled on petitioning for Chapter 7 bankruptcy relief as the means to resolve his debt situation. (Tr. 29-30) He engaged a bankruptcy firm to file the necessary paperwork and paid them \$2,500 in up-front fees to file the petition on his behalf. (AE A; Tr. 30) He obtained the \$2,500 from his mother's credit union and made advance check payments to the law firm to cover filing fees. (Tr. 30, 36) He followed up with all of the tax forms and documentary materials the law firm requested to complete the petition. And he completed on-line credit counseling to meet bankruptcy filing requirements. (Tr. 31)

After providing the law firm all of the documentary information they requested, Applicant assumed the law firm filed the Chapter 7 petition and obtained his discharge. (Tr. 31, 37) Unbeknownst to Applicant, the law firm never filed a Chapter 7 petition on his behalf and never advised him of their failing. (Tr. 32-33)

Applicant's checks with the bankruptcy court years later confirmed the absence of any filed petition on his behalf. (Tr. 33) When he checked back with the law firm some years later, he never received a return call, and later learned the firm had filed for bankruptcy itself. (Tr. 33, 41) He never received a copy of the petition that was to be filed in his name, but believes all of his delinquent debts covered in the SOR are included in the proposed Chapter 7 petition.

Currently, Applicant is still exploring measures to file for Chapter 7 relief himself, and has engaged a new law firm to file a Chapter 7 petition on his behalf. (Tr. 43-44) Currently, Applicant still owes this law firm \$800, which he expects to satisfy soon. (Tr. 34, 42) In the meantime, he continues to look to his old retained law firm for reimbursement of his paid fees. (Tr. 34-35, 43-44)

Applicant did not provide any endorsements or performance evaluations. Afforded an opportunity to supplement the record, he did not furnish copies of the canceled checks made out to the law firm he engaged to file his Chapter 7 bankruptcy petition in 2006.

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."

Adjudicative 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.

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 courier messenger whose credit reports list 26 delinquent debts. All of these debts have either been charged off or assigned for collection. While four of the debts are disputed, they presumptively belong to Applicant and are imputed to him.

Security concerns are raised under the financial considerations guideline of the AGs when an 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.

Extenuating circumstances are associated with most of Applicant’s delinquent debts he accumulated while out of work for two years (2005-2007). 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,” applies to Applicant’s situation. Applicant’s reliance on his bankruptcy attorneys to follow up with the filing of his anticipated bankruptcy petition in 2006 is reasonable and warranted to a degree. After paying the required attorneys fee and furnishing all of the requested documentation, he could reasonably expect his attorneys to file the petition or get back to him if they needed something more.

Still, Applicant retained the responsibility to follow up on his bankruptcy petition and make sure appropriate steps were being taken to process the petition through to discharge. Not until he received the LOI in 2011 did he follow up with his attorneys. When Applicant did not receive any communications from the law firm or copy of a filed petition within a few weeks of forwarding his fee payment and requested documentation, it became incumbent upon him to follow-up with his lawyers. Follow-up measures like this were required of Applicant to satisfy the good-faith and due diligence repayment requirements of MC ¶ 20(d), “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts,” and the counseling/control requirements of 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.”

Under the circumstances, Applicant can take very little advantage of either of these mitigating conditions. For while an applicant need not have paid or resolved every one of his proven debts or addressed all of his debts simultaneously, he needs a credible plan to resolve his financial problems, accompanied by implementing actions. See ISCR Case No. 07-06488 (App. Bd. May 21, 2008) By the proofs presented, Applicant has no current plan in effect to resolve his debts.

To be sure, virtually all of Applicant’s debts are now time-barred by his state’s pertinent statute of limitations. His state’s statute of limitations for written contracts and open-ended accounts (like credit card debts) is four years. See §337 of CC. When applied, the state statute bars enforcement of debts over four years delinquent.

Applicant has not asked for statute of limitations protection, and it is not available to him in any case under Appeal Board guidance. Over time, the Appeal Board has shown general consistency in disallowing applicant claims to mitigation based on charge-offs and limitation bars on debts previously unpaid due to cited extenuating circumstances. Cf. ISCR Case No. 07-16427 at 3-4 and n.6 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-01122 at 5 and n.3 (App. Bd. Feb. 9, 2009) No different application of the mitigation guidelines are warranted in Appellant's situation.

Consideration of Applicant's background and circumstances surrounding his debt accumulations, his lengthy period of unemployment in the 2006-2007 time period, and his lack of follow-up efforts in tracking the progress of his intended bankruptcy petition makes it very difficult to credit Applicant with the degree of good judgment, reliability, and trustworthiness necessary to security clearance eligibility criteria. Applicant's evidence provides insufficient indicators of his ability to be trusted in times of stress. His corrective efforts taken to date are insufficient to enable him to meet his evidentiary burden of mitigating the covered debts.

From a whole-person standpoint, the evidence is insufficient to demonstrate that Applicant has mounted sufficient good-faith efforts to resolve his debts. Since he did not provide any documentation of his work-related evaluations and civic contributions, whole-person assessment cannot help him to overcome his debt issues. In making a whole-person assessment, careful consideration was given to the respective burdens of proof established in *Egan (supra)*, the AGs, and the facts and circumstances of this case in the context of the whole person. Unfavorable 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): AGAINST APPLICANT

Subparagraphs 1.a through 1.z: 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

