



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 11-04176

Appearances

For Government: Jeff Nagel, Esq, Department Counsel
For Applicant: Paula Phinney, Esq.

09/19/2012

Decision

WESLEY, Roger C., Administrative Judge:

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

Statement of Case

On February 17, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing reasons why DOHA was unable to find that it is clearly consistent with the national interest to grant him 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 March 13, 2012, and requested a hearing. The case was assigned to me on May 14, 2012. The case was scheduled for hearing on June 25, 2012, and rescheduled for August 2, 2012. The hearing was convened on that date. At hearing, the Government's case consisted of eight exhibits (GEs 1-8). Applicant relied on four witnesses (including himself) and 21 exhibits (AEs A-U). The transcript (Tr.) was received on August 9, 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 documentation of his payments to identified creditors and clarification of his prepared budget. There being no objection from Department Counsel, and for good cause shown, I granted Applicant three weeks to supplement the record and the Government two days to respond. I also granted Applicant's request for a 30-day extension. Within the time permitted, Applicant supplemented the record with copies of letters to several of his creditors (creditors 1.b through 1.j, 1.l, 1.n, 1.p, 1.q, and 1.s), and his clarified personal financial budget, dated August 23, 2012. I admitted his submissions as AEs V through FF.

Summary of Pleadings

Under Guideline F, Applicant allegedly petitioned for Chapter 7 bankruptcy relief in February 2002 (discharged in May 2002) and subsequently accumulated 18 additional debts totaling exceeding \$431,000, inclusive of a \$416,000 mortgage foreclosure. In his answer to the SOR, Applicant admitted some of the allegations (i.e., those covered by paragraphs 1.a through 1.e, 1.g through 1.k, and 1.o through 1.q), but denied the remaining six allegations. He provided no explanations.

Findings of Fact

Applicant is a 47-year-old production supervisor 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 his wife in October 2001 and has three children from this marriage. (GE 4; Tr. 57, 74) He attended a local community college between June 1984 and January 1987. (GE 4) He claims no degree or diploma.

Applicant enlisted in the Air National Guard in March 1989 and served on active duty with his Guard unit for only a short time. For most of his 22 years with the Air National Guard of his state he worked as a full-time civilian and part-time military enlistee. (GEs 4 and 2; Tr. 53-54, 74)

Applicant's Finances

In March 1993, Applicant and his wife purchased a home and financed it with a fixed-rate first mortgage of about \$123,000. (GEs 2 and 4; Tr. 85) Records reveal that they refinanced their mortgage with another lender in July 1997 for \$152,000 and financed their purchase of a 1997 Dodge Ram truck in 1999 for \$15,000. (GEs 1 and 2) They accumulated numerous credit cards as well (13 in all) between 1993 and 2000. (GEs 1 and 2). With their limited income, they struggled to cover their monthly bills and filed jointly for Chapter 7 bankruptcy relief in February 2002. (GEs 2, 4, and 6)

In their joint bankruptcy petition, Applicant and his wife scheduled \$167,000 in secured debts: a first mortgage on their home (\$152,000) and a collateralized auto loan in the amount of \$15,000. (GE 1) Additionally, Applicant and his wife scheduled \$50,052 in unsecured claims, most of which comprised their credit card debts. (GE 1) They reported combined net annual income of \$55,000. (GE 1; Tr. 55) Records show that Applicant and his wife were able to complete satisfactory agreements with their secured creditors that enabled them to retain their home and vehicle and continue with their mortgage and car payments. (GE 1) They received their bankruptcy discharge in May 2002. (GE 1)

Following their bankruptcy discharge, Applicant and his wife opened new accounts and refinanced their home mortgage. (GEs 2-8) With their same mortgage lender, they refinanced their home in October 2006 with an adjustable-rate first mortgage in the amount of \$350,000. (GE 5; Tr. 85) They used the additional loan proceeds to cover their future expenses and debts. (Tr. 86) Some of the proceeds were used to purchase late-model vehicles. (Tr. 87-88) Less than clear is how they applied the balance of their loan proceeds. Records show that the mortgage was sold or assigned to another lender (creditor 1.m) in June 2007.

In the Fall of 2008, Applicant and his wife encountered problems with their bills and mortgage due to Applicant's pay reduction with his new National Guard unit (GE 6; Tr. 56, 66), and sought a loan remodification. (AE U) They completed a remodification plan in 2009 that consolidated their late payments with the newly calculated loan payments. The new terms increased their monthly loan payments by \$400 (to \$1,700 a month), and provided no grace period. Unable to meet their August 2009 mortgage payment by the due date, they assumed their modification agreement was in default and made no further attempts to catch up with their monthly payment obligations. (GEs 3 and 6 and AE U) By the time they learned they were not automatically defaulted, creditor 1.m had commenced foreclosure proceedings. Applicant and his wife tried to cure the defaults with their lender and avert foreclosure, but were unsuccessful. (Tr. 63-64) When creditor 1.m initiated foreclosure proceedings in late 2009, Applicant's loan balance had increased to \$416,000. (GEs 5 and 7) Creditor 1.m completed its foreclosure of Applicant's home mortgage in March 2010. (GEs' 5 and 6)

Records show that Applicant fell behind with many of his other debts after November 2007. (GEs 5 and 7) Between November 2007 and September 2010,

Applicant accrued reported delinquent debts with creditors 1.b (\$3,202), 1.c (\$202), 1.d (\$1,035), 1.e (\$1,099), 1.f (\$2,023), 1.g (\$731), 1.h (\$452), 1.i (\$3,177), 1.j (\$1,691), 1.k (\$131), 1.l (\$93), 1.n (\$371), 1.o (\$139), 1.p (\$1,133), 1.q (\$436), 1.r (\$2,694), and 1.s (\$1,109). (GEs 5 and 7) These reported delinquent debts exceed \$19,000 and remain unsatisfied. Asked about his spending habits, Applicant admitted to the possibility of a spending problem. (Tr. 83)

In August 2010, Applicant changed jobs. He resigned his Air National Guard post, where he was grossing about \$70,000, and accepted a new civilian position with his current employer where he grosses close to \$65,000. (Tr. 90) He attributes his interest in his new position to his long-term advancement goals. (Tr. 91)

Unable to make any payment progress with his listed creditors, Applicant consulted with a debt consolidation firm in July 2012. (AEs A and B; Tr. 78-79) With this firm, he completed a client action plan that included a budget assessment. In the budget summary prepared by the firm, Applicant reported net monthly income of \$4,158, minimum living expenses of \$3,082, private debts of \$714, and a monthly remainder of \$362. (AE B) Under his proposed budget, Applicant's net monthly remainder would be reduced to \$327. (AE B)

Applicant's completed June 2012 monthly budget assessment with his debt consolidation firm listed current net income of \$4,158 and essential monthly living expenses of \$3,175; he also listed monthly loan payments of \$900 and a net remainder of \$83. (AE B; Tr. 58-59, 67-68, 79-80) This assessment contrasts somewhat with the figures supplied in his submitted July 2012 personal financial statement. (AE P)

Afforded an opportunity to reconcile his furnished budget figures, Applicant provided slightly revised net monthly income figures of \$4,292, monthly net expenses of \$3,097, and a net monthly remainder of \$455. (AE V; Tr. 77) The adjustments reflect the elimination of the \$750 monthly debt consolidation payment he had factored in to his budget. (AE V; Tr. 81)

With his current budget, Applicant shows promise in addressing his accumulated debts. Payment documentation, though, is still lacking. Following several hours of counseling from Applicant's debt consolidation firm, firm personnel advised him that his accrued debts would be paid within four years. (Tr. 81)

Upon further consideration with his wife, Applicant elected to terminate his debt consolidation efforts and work with his creditors directly. (AE V) He supplied copies of letters from the creditors he contacted, but no proofs of payments or payment arrangements with any of his listed creditors.

To date, Applicant has made no documented payment progress with any of his listed consumer creditors. Because his state has no recourse for creditors who incur deficiencies on the mortgages they foreclose, Applicant has no potential deficiency liability on his foreclosed residence. (Tr. 63-64)

Endorsements

Applicant earned numerous medals and awards as a military and civilian member of his Air National Guard unit. (AE R). His awards include Air Force Commendation and Achievement Medals, an Air Force Outstanding Unit Award, an Air Reserve Forces Meritorious Service Medal, a National Defense Service Medal, an Armed Forces Expeditionary Medal, a Global War on Terrorism Service Medal, an Air Force Longevity Medal, an Armed Services Reserve Medal with 3 'M' Devices, a USAF NCO PME Graduate Ribbon, an Air Force Training Ribbon, and other awards. (AE R; Tr. 75-76)

Applicant is highly regarded by members of his Air National Guard command that he served with over the course of his 22-year military career. (AE's D through L, N, O, and U; Tr. 23-25, 35-37, and 44-45) His supervisors and co-workers uniformly credit him with integrity and security conscientiousness. (Tr. 23-25, 35-37, and 44-45) They consistently characterize him as a top performer who is respected and admired by his contemporaries and supervisors alike. They stress his familiarity with Air Force leadership and force development and find him to be a team player who can be trusted in times of stress. Since joining his current employer's work force, Applicant has impressed his National Guard superiors with his displayed pride, moral sincerity, good leadership, and total dedication to his company's defense goals. His superiors noted the two foreign deployments he has made as a deployment team leader with his unit. (AE U; Tr. 76)

Applicant furnished solid performance evaluations for the 2010-2011 rating period. (AE Q). His evaluations include an overall performance rating of "meets job requirements." (AE Q) He is credited with demonstrating excellent customer relations skills, a can-do attitude, and a willingness to accept new responsibilities and challenges. Because few of Applicant's character witnesses expressed any detailed knowledge of his financial issues, his employer impressions become more difficult to assess in the context of evaluating Applicant's financial condition. (Tr. 25, 37, 45)

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 *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995). 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 well-regarded production supervisor for a defense contractor with a considerable history of indebtedness over a number of years. After accumulating over \$50,000 in delinquent credit card and other consumer-related debts, he petitioned for Chapter 7 bankruptcy relief in February 2002 and received his discharge the same year. Within several years of his bankruptcy discharge, he refinanced his home and used his significant loan proceeds to finance future purchases and debts. When Applicant and his wife encountered payment problems with their bills in 2008, they turned to their mortgage lender to modify their loan payments. This provided a modicum of temporary payment relief. When they fell behind again with their bills in 2009, they could not forestall lender foreclosure, and lost their home to non-judicial foreclosure in early 2010. To date, they have not been able to repay or pay down their old creditors with the income resources available to them.

Applicant's accumulation of delinquent debts since his Chapter 7 bankruptcy discharge in 2002, and his past inability to resolve these debts, raise potential security concerns about his judgment, reliability, and trustworthiness in managing his finances.

His actions 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.

Insufficient income and failure to manage his finances prudently with the limited resources available to him account for most of Applicant’s financial setbacks. Together, they warrant partial 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.” Most of the time under consideration, Applicant and his wife struggled with controlling their spending and debt accruals and were considerably overextended. And Applicant’s counseling from his debt consolidation firm was brief and ultimately replaced by direct client contacts.

In circumstances similar to the present case, the Appeal Board has said that an applicant need not have paid or resolved every one of his proven debts or addressed all of his debts simultaneously. What Applicant needs is 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 achieved few of his cited objectives. His creditor contacts are recent and have not materialized into any concrete payment plans.

Applicant assures he is addressing his listed creditors individually and is prepared to resolve his debts with payments and payment plans. While his objectives show promise, they have not produced any payment progress to date. Based on his developed track record, safe predictions cannot be made as to if and when he will be able to repay his creditors, in full or through negotiated payment plans.

While Applicant’s choice to cancel his consolidated payment arrangements and work with his creditors individually offers promise and hope, his election without more proofs of documented payment progress does not meet the good-faith requirements of the financial considerations guideline. When presented with similar good-faith repayment challenges, the Appeal Board has circumscribed “good-faith” repayment efforts to entail actions aimed at resolving the applicant’s debts in ways that show “reasonableness, prudence, honesty, and adherence to duty or obligation.” See ISCR Case No. 02-30304

at 3 (App. Bd. April 20, 2004 (quoting ISCR Case No., 99-9020 at 5-6 (App. Bd. June 4, 2001). This means that an applicant must generally do more to resolve his debts than offer promises. See *id.*

Consideration of Applicant's military and educational background, his prior bankruptcy discharge in 2002, his meritorious military and civilian service, income deficiencies surrounding his post-bankruptcy debt accumulations, his current income and expense levels, and the lack of any documented payment initiatives with his listed creditors, preclude a favorable assessment at this time of his overall judgment, reliability, and trustworthiness. Applicant's proofs fail to provide sufficient credible indicators of his ability to be trusted in times of financial stress and preclude him from meeting his evidentiary burden of mitigating the covered debts.

From a whole-person standpoint, the evidence is substantial that Applicant has performed well during his 22-year tour of military and civilian service and is entitled to considerable credit for his military and civilian contributions. While economic circumstances played a pivotal role in his inability to address his accumulated debts, his efforts to date to resolve his listed debt delinquencies are insufficient to meet mitigation requirements imposed by the AGs governing his finances.

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.s: 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

