



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-03373

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel

For Applicant: *Pro se*

03/02/2015

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 financial considerations. Eligibility for access to classified information is denied.

Statement of Case

On September 12, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the affirmative determination of eligibility for a security clearance, and 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; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as

amended (Directive); and the Adjudicative Guidelines (AGs) implemented by DOD on September 1, 2006.

Applicant responded to the SOR on October 15, 2014, and requested a hearing. The case was assigned to me on December 12, 2014, and was scheduled for hearing on January 7, 2015. At hearing, the Government's case consisted of 10 exhibits (GEs 1-10). Applicant relied on one witness (himself) and five exhibits (AEs A-E). The transcript (Tr.) was received on January 16, 2015.

Procedural Issues

Before the close of the hearing, Applicant requested the record be kept open to permit him the opportunity to supplement the record with documented release of a state lien. For good cause shown, Applicant was granted seven days to supplement the record. The Government was afforded seven days to respond.

Within the time permitted, Applicant supplemented the record with a one-page email, a money order made out to the favor of one the creditors (creditor 1.e) holding a state tax lien, an employee award, documented satisfaction of his creditor 1.f debt, and an IRS transcript covering his IRS tax payments for the 2009 tax year. Applicant's post-hearing submissions were admitted as AEs F-J.

Summary of Pleadings

Under Guideline F, Applicant allegedly (a) failed to file his federal tax returns for tax years 2006 through 2008 and owes at least \$9,000 in federal taxes for these years; (b) failed to file State taxes for State A for at least tax year 2006, as required; (c) is indebted to a law firm on a judgment entered in 2012 in the amount of \$13,696; (d) accumulated four consumer debts exceeding \$1,600; and (e) accrued a delinquent home equity loan in the approximate amount of \$55,000.

In his response to the SOR, Applicant admitted most of the allegations. He denied the allegations covered by subparagraphs 1.b, 1.h-1.i, and 1.j. He claimed that (a) the debts covered by subparagraphs 1.h and 1.i are duplications and (b) that the 1.h debt is a debt that belongs to his ex-wife.

Applicant claimed the foreclosure of the first mortgage on his home and ensuing creditor 1.j sale was caused by his divorce and should have produced enough sale revenue to pay off the foreclosing lender's second mortgage on the property as well. And he claimed the foreclosed mortgage no longer appears on his credit report and is uncollectible.

Findings of Fact

Applicant is a 38-year-old web team lead 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 1997 and has two children from this marriage. (GE 1) he separated from his wife in 2006 and divorced her in July 2007. (GE 1; Tr. 31-32) He has been employed by his current employer for the past two years and has been gainfully employed since 2006. (GE 1; Tr. 29-30) Applicant attended a local college between 2003 and 2004, but earned no degree. (GE 1; Tr. 36) He claims no military service.

Applicant's finances

Applicant and his wife filed joint federal and state tax returns for 2005 and 2006, but failed to file them timely for tax years 2006 through 2008. (AE J; Tr. 37-38) He attributed his filing lapses to oversight and his past reliance on his ex-wife to file the required federal and state tax returns on his behalf. (GE 6) Applicant expressed uncertainty over when he filed his federal tax returns for the 2006-2008 tax years, but believes he filed his 2006-2007 federal tax returns in 2008 and his 2009 return in 2009. (Tr. 37-38) The historical accounting furnished by the IRS does not provide any corroborating filing dates. Applicant's expressed beliefs about the dates of his federal tax return filings are credible and are accepted.

Beginning in 2010, Applicant completed a payment plan with the IRS to pay off the estimated \$14,000 in owed federal taxes for the 2006-2008 tax years. (AEs A and J) Under his agreed payment terms, Applicant made monthly payments of \$100. (Tr. 41-42) Since 2010, he has made regular monthly \$100 payments. (AEs A and J; Tr. 43-44) In October 2014, he made his final payment of \$2,578 to the IRS (creditor 1.a) that completed his repayment agreement with the Service. (AEs A and J; Tr. 43-45)

Tax records from State A document that Applicant failed to file a state tax return for the tax year of 2006 and became indebted to the State's taxing authority in the amount of \$6,266 for tax years 2006 and 2007. (GE 8 and AE B; Tr. 44-46) The State obtained a judgment in September 2009 for the stated amount of \$4,588, and this judgment remains outstanding. (GEs 8 and 10 and AE G) While it is not clear from the furnished documentation when Applicant filed his 2006 State A tax return, he is credited with filing the return out of time and likely in 2008 when he filed his 2006 federal return.

In January 2015, Applicant addressed the State A judgment with a \$623 payment. (AE G; Tr. 46-51) His furnished documentation does not indicate whether this payment represents a down payment under a payment plan arranged with State A, or is an isolated payment that will require further negotiations between the parties.

State B's public records reveal that State B filed a tax lien in August 2011 to cover a delinquent tax debt in the amount of \$1,084. (GE 10) State B's tax records reported that only \$274 was still owing to State B as of November 2013. (AE C; Tr. 55-56) Applicant claimed that the lien has since been charged off by the State's taxing authority, but provided no documentary proof. To date, Applicant has not made any payment

arrangements with State B's taxing authority to discharge this debt, or any portions thereof (Tr. 62-63), and the debt remains unsettled and unpaid.

Besides accruing delinquent tax debts, Applicant accumulated several consumer debts. As a part of his 2007 divorce decree, Applicant was assigned responsibility for his accrued legal fees for his law firm's handling of his divorce. (GEs 1-2 and 10; Tr. 52-53) These fees totaled over \$13,000. After making several monthly payments in 2008, Applicant ceased making payments and has never resumed his payments to the law firm. (Tr. 55-56) When Applicant did not pay or settle the accrued legal fees claimed by creditor 1.c, his creditor attorneys filed suit and obtained a judgment in March 2012 for the amount of \$13,696. (GE 7) Applicant has not made any progress in addressing this judgment, and the judgment remains outstanding. (GEs 1-2 and AEs E-F; Tr. 52-53) Applicant is credited with satisfying his wife's accrued legal fees in accordance with the terms of his divorce judgment. (AE E)

Other accrued consumer debts are comprised of the following: creditor 1.f (\$198), creditor 1.g (\$229), creditor 1.h (\$461), and creditor 1.i (\$882). Applicant has since paid three of these debts. His proofs reflect payment of his creditor 1.f debt in January 2015. (AE I; Tr. 60-61) He also documented payments of his creditor 1.h and 1.i debts with a total payment of \$1,343. (AEs D and I; Tr. 64-65)

Addressing his creditor 1.j home equity loan delinquency, Applicant provided some initial historical context for the loan. In 2004, he and his wife purchased their home and financed it with a first mortgage of \$340,000. (GEs 1-2; Tr. 70-71) In April 2005, he and his wife completed a home equity line of credit in the amount of \$110,000. (GEs 1-2 and 4-5; Tr. 67-68) The line of credit was secured by a second mortgage.

Following his spousal separation in 2006, Applicant was initially ordered to pay child support of \$1,500 a month. (Tr. 33-34) This payment schedule was maintained until July 2007, when the court increased his child support payments to \$1,800 a month. (Tr. 33-34) Following their divorce, the court added monthly alimony obligations of \$1,400 a month to Applicant's family responsibilities. (Tr. 34)

Faced with these additional family burdens, Applicant could no longer meet his mortgage obligations and became increasingly late in his mortgage payments on both his first and second mortgages. (Tr. 64-66). Efforts to market the home failed when he and his wife could not agree on a sale price. (Tr. 66-67) Records reveal that the first mortgage was foreclosed in November 2006. (Tr. 69-70) Sale proceeds were insufficient to cover the \$55,000 loan balance owing on the second mortgage securing Applicant's home equity loan. Once the foreclosure sale was finalized and the deficiency fixed, Applicant made no effort to pay off the home equity loan deficiency and never received any collection notice until 2013. (Tr. 68-69) The creditor initiated its suit in 2013 to collect the deficiency. Whether the suit was ever dismissed on statute of limitations grounds is unclear. (Tr. 68) Applicant remains uncertain of the status of the creditor's suit and has received no 1099C form from the creditor. (Tr. 68)

Applicant has grossed about \$128,000 a year from his employment for the past two years and nets about \$4,600 a month after taxes and child support deductions. (Tr. 29, 76-77) After allowances for monthly expenses (i.e., rent, car payment, auto insurance, life insurance, utilities, and miscellaneous), Applicant has an estimated net monthly remainder of about \$2,000 a month. (Tr. 84) He estimates to have approximately \$83,000 in his 401(k) retirement plans from current and previous employers and \$500 in his checking account. (Tr. 81-83)

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering security clearance cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." They must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

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

The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk. The following AG ¶ 2(a) factors are pertinent: (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 individual guidelines are pertinent in this case:

Financial Considerations

The Concern: Failure or inability to live within one's means satisfy debts and meet financial obligations may indicate poor self-control, lack of

judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts. AG ¶ 18.

Burden of Proof

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).

Analysis

Security concerns are raised over Applicant's history of tax filing lapses (both federal and state) and debt delinquencies. His listed debts include federal and state tax delinquencies, an adverse judgment associated with a divorce, consumer-related debt

delinquencies (four in all), and home equity loan default. Applicant's actions invite the application of the financial considerations guideline.

Applicant's accrued debts are attributable to lapses in judgment in the management of his financial affairs. His debt delinquencies warrant the application of three of the disqualifying conditions (DC) of the Guidelines: DC ¶ 19(a), "inability or unwillingness to satisfy debts;" DC ¶ 19(c), "a history of not meeting financial obligations," and DC ¶ 19(g), "failure to file annual Federal, state, or local income tax returns as required or the fraudulent filing of the same."

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 also explicit in financial cases.

Applicant's lapses in judgment in administering his finances were accompanied by extenuating circumstances. He experienced a difficult separation and divorce in 2006-2007 that entailed considerable cost burdens that effected his finances. Divorce-related cost impositions included child support and alimony payments. Attorneys fees, both his own fees and his ex-wife's fees, were also imposed on him. These cost impositions were significant and entitle him to partial benefit of MC ¶ 20(b), "the conditions that resulted in the financial problem 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."

To date, Applicant has made visible progress in addressing his tax filing lapses and debt delinquencies. To his credit, he filed his back federal and State A tax returns for 2006 and 2007. He has paid off his federal tax debts, as well as debts owed to creditors 1.f through 1.i. However, he has not addressed his creditor 1.c judgment debt or his State C tax debt. Nor has he addressed the large home equity debt owed to creditor 1.j following the creditor's foreclosure of its first mortgage debt delinquency in 2006. His tax debts with States A and B, as well as his judgment debt with creditor 1.c, remain works in progress that will require Applicant's close personal attention in the foreseeable future. So, while there are plenty of extenuating circumstances to credit Applicant with, too many of his debts remain outstanding to enable him to take full advantage of the "acted responsibly" prong of MC ¶ 20(b). Under these circumstances, Applicant's modest repayment efforts to date entitle him to no more than partial application of MC ¶ 20(d).

To be sure, Applicant seriously disputes his creditor 1.j home equity loan debt on statute of limitations grounds. Regardless of whether this debt is an otherwise valid debt, it may no longer be enforceable under the State's applicable statute of limitations

for written contracts. Account activity covering Applicant's creditor 1.j debt was last addressed by Applicant in 2006, over six years ago.

The state statute of limitations in Applicant's state of residency for claims based on a mortgage-backed promissory note is four years. See 42 Pa. C.S. 5525(a). Applicant's listed second mortgage deficiency with creditor 1.j appears to be covered by the State's statute of limitations, and is treated, as such, as a debt that is limitations barred.

While potentially applicable statutes of limitation have not been recognized by our Appeal Board to mitigate security risks associated with unresolved delinquent debts, statutes of limitation in general are considered important policy tools for discouraging plaintiffs from pursuing stale claims and promoting finality in litigation. Still, they have never been equated with good-faith efforts to repay overdue creditors. See, e.g., ISCR Case No. 02-30304, at 3 (App. Bd. April 2004) (quoting ISCR Case No. 99-9020, at 5-6 (App. Bd. June 2001)).

Weight, if any, to be assigned to potentially applicable statutes of limitations under the financial consideration guideline should be considered in light of all the circumstances surrounding the applicant's historical track record and must take account of his entire history of demonstrated trust and responsibility. In Applicant's case, his financial history cannot completely discount the financial difficulties he has experienced since his divorce in 2007. Although the financial circumstances associated with his divorce are considerably extenuated, they do reflect a part of Applicant's financial track record and are entitled to some weight to be taken into account in assessing the amount of mitigation weight to be accorded the application of the state's statute of limitations to Applicant's circumstances. Viewed in this overall-track record perspective, the controlling state statute of limitations for secured loan transactions cannot be accorded significant mitigation weight in evaluating Applicant's overall financial risk with respect to the specifically covered creditor 1.j debt.

Based on Applicant's afforded reliance on his State's four-year statute of limitations to avert enforcement risk with respect to his limitation-barred creditor 1.j debt, full mitigation credit is not available to Applicant. By virtue of the age and non-enforcement status of the debts, 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," has only limited applicability to the limitation-barred creditor 1.j debt.

Applicant's limited repayment efforts, and failure to attempt any negotiated reduction of creditor 1.j's loan default claim do not reflect satisfactory progress in accordance with the criteria established by the Appeal Board for assessing an applicant's efforts to rectify his poor financial condition with responsible efforts considering his circumstances. See ISCR Case No. 08-06567 at 2-3 (App. Bd. Oct. 29, 2009). Applicant's modest repayment actions are not enough to enable him to meet the Appeal's Board requirements for stabilizing his finances. ISCR Case No. 07-06482

(App. Bd. May 21 2008); see ISCR Case No. 05-11366 at 4 n.9 (App. Bd. Jan. 12, 2007) (citing ISCR Case No. 99-0462 at 4 (App. Bd. May 25, 2000)); ISCR Case No. 99-0012 at 4 (App. Bd. Dec. 1, 1999).

From a whole-person standpoint, Applicant documents some repayment progress, but not enough to facilitate safe predictions about his ability to manage his finances in the future. He has not completed repayment plans with his remaining two tax debt creditors (i.e., creditors 1.d and 1.e) or judgment creditor (creditor 1.c), and has failed to demonstrate sufficient payment track record that meets minimum Appeal Board criteria. He provided no evidence of civic or community contributions and only limited evidence of repayment with his payoffs of his four smaller creditors (i.e., creditors 1.f-1i) Overall, Applicant's corrective actions to date are insufficient to meet mitigation requirements imposed by the guideline governing his finances. Unfavorable conclusions are warranted with respect to the allegations covered by Guideline F.

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

Subparas. 1.c-1.e and 1.j:	Against Applicant
Subparas. 1.a-1.b and 1.f-1.i:	For 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

