DATE: October 18, 2001

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 00-0618

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Two bankruptcies within a 10 year period raise security concerns about Applicant's financial habits, as well as her ability to pay debts voluntarily incurred. Even though the first bankruptcy is found to be beyond Applicant's control, it is difficult to comprehend how two property liens could be overlooked by a closing attorney and a title insurance company, both being responsible for ensuring against encumbrances on the property at the time of sale. Nonetheless, the defective house sale is potentially mitigated by two additional reasons Applicant identified in February 1992, as to why she filed the bankruptcy in December 1991. Applicant faced advancing legal problems caused by her daughter's car accident, and a $17,000.00 tax problem caused by her residential move to the local area. However, the two additional reasons provide very little mitigating weight to the bankruptcy reorganization because Applicant never mentioned these problems again during the security investigation, in her Answer or at the hearing. Furthermore, even though Applicant successfully completed the Chapter 13 reorganization plan in March 1996, she was not entirely forthright in her disclosures concerning her real property interests during the life of the plan.

There is some evidence to support the conclusion the second bankruptcy filed in November 1998 also resulted from events beyond Applicant's control. For an unknown reason in approximately 1995, Applicant's cousin could not maintain monthly payments on a $60,000.00 loan for a boat Applicant had originally cosigned. The creditor foreclosed and sold the boat at auction, then obtained a judgment against Applicant for over $30,000, and attached Applicant's wages. Applicant's judgment must seriously be questioned for cosigning a $60,000.00 loan, allowing the creditor to repossess and auction off the boat after one missed payment. While Applicant's unsuccessful involvement with the same cousin in nine rental properties cannot be used against Applicant for substantive purposes, Applicant's loss of all rental properties has a negative impact on Applicant's financial habits and practices. Considering the entire record as a whole, the filing of a second bankruptcy action within three years of completing the first reorganization, coupled with the absence of positive evidence reflecting meaningful changes in Applicant's financial habits, Applicant's evidence in mitigation and extenuation is insufficient to persuasively demonstrate Applicant will not encounter future financial problems similar to those she has encountered in the past.

STATEMENT OF CASE

On May 3,2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5200.6 (Directive), dated January 2, 1992, as amended by Change 4, April 20, 1999, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked. Applicant filed an Answer on May 12, 2001.

The case was transferred to me on July 30, 2001. A notice of hearing was issued on August 8, 2001, and the case was heard on August 30, 2001. The Government submitted documentary evidence. Testimony was taken from Applicant. The transcript was received on September 13, 2001.

RULINGS ON PROCEDURE

After Applicant received the transcript, she contacted the undersigned and proposed certain changes in the transcript (Tr.) at pages 90 and 91 to reflect the correct spelling of Applicant's employer. Those proposed changes are hereby **accepted**.

During the hearing, Applicant proffered two exhibits which were not admitted in evidence. Regarding AE A (the first exhibit not admitted in evidence), although Applicant claimed she made a $4,000.00 payment to the creditor (who repossessed the boat) on May 30, 2000,[(1)] Applicant's documentary proffer of payment (AE A), pursuant to a consent order dated March 23, 2000 (AE C,

admitted in evidence), was rejected after a voir dire examination. (Tr. 32-48) AE A, two pages in length,[(2)] was not admitted in evidence because the exhibit is irrelevant.

Applicant's second exhibit (AE B), five pages in length, and offered to prove Applicant paid the creditor (who repossessed the boat) $6,000.00, in full satisfaction of AE C, was not admitted in evidence because of serious authenticity problems. In addition, the credibility of the document is undermined even more by Applicant's inconsistent explanations as to why the document should be received in evidence. First, when asked whether the exhibit was a copy of the finalized settlement, Applicant replied she did not have a copy of the finalized settlement. (Tr. 33) Later, when asked whether the exhibit (which was neither notarized nor signed by a witness) would normally be notarized and signed by a witness, Applicant replied "yes." (Tr. 34) Yet, later in her testimony she furnished another explanation with her contention AE B, in its present status, was completed in accordance with agency practices (Tr. 41), and not all closing documents like AE B are notarized or filed with a court or the state. After carefully evaluating Applicant's inconsistent testimony regarding the five page exhibit, AE B was not admitted in evidence.

Pursuant to Paragraph 17 of Enclosure 3 of the Directive, Paragraph 1.a. of the SOR shall be amended by substituting the word "creditors" in place of "debtors," the last word in the allegation.

FINDINGS OF FACT

The SOR alleges financial considerations. Applicant's admissions shall be incorporated into the following factual findings. Applicant is 48 years old and has been employed as a manager of product assurance for the past eleven years. She seeks a secret level clearance.

Applicant petitioned for Chapter 13 bankruptcy on December 6, 1991. (subparagraph 1.a.) She completed the Chapter 13 plan on March 14, 1996, and was discharged after paying approximately $228,354.73[(3)] to her creditors. On December 2, 1991 (GE 7), Applicant signed a Declaration Concerning Debtor's Schedules, certifying all schedules to be true and correct under penalty of perjury. Under Schedule 1, Applicant estimated her total monthly income (after payroll deductions) to be $1,220.00. On January 23, 1992, the presiding judge ordered the debt reduction plan to begin, with $750.00 per month being withheld from Applicant's wages and remitted to Applicant's Trustee. On June 11, 1993, because of administrative oversight resulting in a lack of sufficient funds to pay all secured creditors under the original

plan, the amount of wage withholding under the plan was increased to $945.01 a month to satisfy an unlisted secured creditor. In addition, on at least three occasions, certain banks/lenders with security interests in Applicant's rental properties, and who had not been notified of Applicant's original bankruptcy action, filed motions to lift the automatic stay imposed and authorize foreclosure sales of the listed properties. Those motions were granted. (GE 7)

On February 13, 1992 (GE 6), Applicant advised her employer she filed bankruptcy in December 1991 because moving expenses in relocating from the western part of the United States to the employer's facility location, caused her $17,000 tax liability. Applicant's second reason was because the closing attorney did not pay property taxes and insurance on the property. Applicant indicated she paid the delinquent taxes and then pursued legal action against the closing attorney and the title company.[(4)] The mortgage company also paid the delinquent taxes and foreclosed on the property. Applicant's third reason for filing the bankruptcy was an auto accident involving her daughter, resulting in a lawsuit against Applicant.

In her sworn statement dated October 19, 1992, Applicant explained she filed the Chapter 13 bankruptcy in December 1991 because the taxes and insurance by the previous owner had not been paid. In her sworn statement dated January 7, 1999, and at the hearing in August 2001, Applicant essentially furnished the same reason for her 1991 bankruptcy. She tried to make contact with the closing attorney and the title company. However, the closing attorney had gone out of business and the title company refused to honor the title policy. (Tr. 21) Having weighed all the evidence behind Applicant's filing for bankruptcy reorganization in December 1991, I find Appellant is mistaken in her repeated claims that neither of the bankruptcy petitions (subparagraphs 1.a. and 1.b.) involved financial matters. Applicant's acknowledged $17,000 tax liability (resulting from her residency relocation) clearly created a financial dilemma for Applicant, which could not be addressed through any legal avenue short of bankruptcy reorganization.

Paragraph 1.b. reflects Applicant petitioned for Chapter 7 bankruptcy on November 5, 1998. On May 5, 2000, Applicant's unsecured debts of $36,120.48 were discharged in bankruptcy.

Applicant's Chapter 7 filing in November 1998 was caused by her cousin missing a payment on a boat in approximately 1995 (Tr. 27), which she and her former husband purchased for her cousin in the late 1980s. (GE 2)[(5)] The boat was repossessed and sold by the creditor for $16,000 at auction. The creditor was awarded a judgment of approximately $36,000 against Applicant. (Tr. 25) When Applicant could not pay the judgment, the creditor attached Applicant's wages. AE C reflects a settlement of $10,000.00 was reached withe the creditor, to be paid in two separate amounts. Although Applicant contends she paid the creditor the full amount, she has not supported her claim.

Appellant received a masters' degree in operations management. She has had a real estate license since 1986 (Tr. 49), and continues to earn approximately $3000.00 annually from seeking real estate.

Though not alleged in the SOR, Applicant held some level of interest in nine rental properties in the late 1980s to late 1990s with the same cousin (also a real estate broker) who caused Applicant's bankruptcy filing in November 1998. According to her sworn statement dated January 1999 (AE 2), Applicant's cousin would loan[(6)] her and her former husband money to make down payments on rental property. The cousin's real estate company would then manage the property by collecting the rent and paying the mortgages. (GE 2) All the properties went into foreclosure because the associate of Applicant's cousin kept the money instead of making the mortgage payments. As GE 7 indicates, several of the secured creditors of the nine rental properties had to resort to legal action because Applicant had not been completely candid about her real property interests.

In her sworn statement (GE 2), Applicant indicated she borrows money from her mother whenever she is "short." She received money from her mother in January 1999 for a car down payment, but did not consider the transfer to be a loan. (Tr. 54) Although she did not request the money, Applicant received $200.00 from her mother a week before the hearing.

Applicant maintains she has no financial problems at the present time. (Tr. 74) Applicant continues to pay for her two daughter's overall support and education; she also pays for her granddaughter's day care.

POLICIES

Enclosure 2 of the Directive sets forth policy factors which must be given binding consideration in making security clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in this case are:

Financial Considerations

Disqualifying Factors:

1. A history of not meeting financial obligations;

2. Deceptive or illegal financial practices such as filing deceptive statements;

3. Inability or unwillingness to satisfy debts.

Mitigating Factors:

3. The conditions that resulted in the behavior were largely beyond the person's control.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at page 2-1 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, exploitation, or duress; and, (9) the likelihood of continuation or recurrence.

Burden of Proof

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information in the future. The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must establish all the factual allegations under financial considerations (Guideline F) which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to the sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation which demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance.

CONCLUSIONS

A person's financial problems fall within the scope of the financial considerations guideline when there is evidence demonstrating an inability to pay debts voluntarily incurred. When a person files for bankruptcy, regardless of the type,

she is having a problem paying bills and needs the assistance of the bankruptcy courts. A successful reorganization under the bankruptcy laws allows a debtor an opportunity to catch up on obligations by reducing payments to all creditors so that more creditors can be paid at least some portion of the original debt owed. A successful bankruptcy allows the debtor a fresh start by discharging all qualifying debts when earnings provide no realistic avenue of paying debts. Applicant's first Chapter 13 bankruptcy in December 1991 would ordinarily not receive much scrutiny had Applicant not petitioned for a second Chapter 7 bankruptcy in November 1998, within three years of her first discharge. The brief period between the discharge and new filing compels a hard look at Applicant's conduct under the first disqualifying condition (DC) of the financial considerations guideline. (a history of not meeting financial obligations) Even though the first bankruptcy case raises far less financial concern by itself under DC 1, considering the evidence as a whole, the two bankruptcy actions place a cloud of suspicion over Applicant's reasons for filing the first bankruptcy reorganization, as well as Applicant's overall financial practices and decision making.

Applicant's failure to fully disclose her real property interests during the first bankruptcy reorganization required legal action on several occasions. Although the legal action did not interfere with Applicant's successful discharge in March 1996, her conduct during the course of the reorganization plan, must be characterized as deceptive within the meaning of DC 2. In addition, the failure to fully reveal her property interests is relevant under DC 3 as indicating an inability to or unwillingness to satisfy debts under the reorganization plan.

The two sworn statements (GE 2 and GE 3) indicate Applicant had a close business relationship with her cousin involving nine rental properties. This is the same cousin Applicant purchased the boat for in the 1980s, and the same cousin who triggered the repossession and the filing of bankruptcy by Applicant in November 1998. Though Applicant denies any blame for losing all nine rental properties, she must share some of the blame for losing the properties, particularly because she was a real estate agent during the period.[(7)]

The first four mitigating conditions (MC) under the financial considerations guideline apply when the behavior was not recent, when the behavior was isolated, when the conditions were outside the person's control, and when the person has received counseling, and the problem is being resolved. The sixth MC also applies when the individual has made a good faith effort to repay creditors. Having carefully weighed all the circumstances, I am unable to find any of the mitigating conditions, either by themselves or in combination, sufficient to overcome the negative evidence under the financial considerations guideline. MC 1 is inapplicable because the last bankruptcy filing was in November 1998 less than three years ago. The filing of two bankruptcy actions within 10 years removes MC 2 from consideration.

Applicant must be accorded limited mitigation under MC 3 because of Applicant's inability to obtain a clear title when she purchased the property in 1991. Applicant also receives limited mitigation under MC 3 because of the initial intransigence of the creditor (who repossessed the boat) leading to the filing of the second bankruptcy in November 1998.

On the other hand, the limited mitigation Applicant receives under MC 3 is insufficient for an ultimate finding in Applicant's favor because Applicant has offered no documented evidence supporting a return to financial stability. (MC 4) The consent order (AE C) dated March 23, 2000, indicates Applicant was to pay $4,000.00 before May 31, 2000. In her Answer to the SOR, Applicant even stated she had a cashier's check to prove she paid the amount. Yet, at the hearing, she chose to proffer irrelevant documentation regarding payment. In apparent support of her claim she paid the remaining $6,000.00 in May 2000, she unsuccessfully proffered documents which lacked authenticity.

In addition to the counseling referred to in MC 4, the individual must show a good faith effort to pay overdue debts or otherwise resolve debts. Other than her statements, Applicant has provided no evidence to confidently support a conclusion Applicant has regained control over her financial affairs and has no present financial difficulties.

Having found against Applicant under the specific conditions of the financial considerations guideline, the evidence should be reviewed under the variables of the whole person concept to determine whether it is clearly consistent with the national interest to grant or deny a security clearance. Two bankruptcies in less than ten years raises significant doubt about a person's financial practices. Applicant was over thirty years old when she launched these real estate ventures with her cousin. Given (1) Applicant's failure to completely disclose her financial interests during the course of the bankruptcy repayment plan between 1991 and March 1996, (2) her filing of bankruptcy within three years after her

discharge, and her suspect credibility, the chances of recurrence of financial problems are too high to find for Applicant under the whole person concept.

FORMAL FINDINGS

Paragraph 1 (financial considerations): AGAINST THE APPLICANT.

a. Against the Applicant.

b. Against the Applicant.

DECISION

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 a security clearance for Applicant.

Paul J. Mason

Administrative Judge

1. In her Answer, Applicant indicated she had a cashier's check to back her claim she paid the creditor on May 26, 2000.

2. The first page is an express mail receipt dated May 30, 2000, not May 26, 2000, as Applicant had indicated in her Answer. The second page shows an address label to the creditor (who repossessed the boat).

3. The amount paid under the plan appears in a "Final Report and Accounting" (GE 7), time-stamped February 14, 1996. The plan contains a record of disbursements under the plan. .

4. However, there is no evidence substantiating Applicant's claim legal action was taken.

5. However, at the hearing, Applicant made no mention of her cousin making payments on the boat. Instead, she testified, "[we (former husband and Applicant)] had purchased a boat, from [the creditor]. We were making payments, and we were one payment behind and the boat was repossessed." (Tr. 24)

6. While Applicant testified her cousin paid rather than loaned her the down payments for the rental property (Tr. 61), the repeated use of the word "loan" and not "payment" in both sworn statements (GE 2, GE 3) convinces me Applicant's cousin loaned her the down payments.

7. The last property did not foreclose until 1998.