

DATE: December 13, 2001

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-01183

## **DECISION OF ADMINISTRATIVE JUDGE**

**WILLIAM R. KEARNEY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Michael H. Leonard, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

When completing his Security Clearance Application, the Applicant was not aware of all of his old debts, and answered questions 38 and 39 in the negative. This was a mistake on his part, as it was not done willfully with the intent to deceive the Government. When he became aware of his indebtedness, he promptly satisfied all his creditors.

### **STATEMENT OF THE CASE**

On July 2, 2001, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked. In a sworn written statement, dated July 27, 2001, the Applicant responded to the allegations set forth in the SOR and requested a hearing.

The undersigned Administrative Judge received the case assignment on September 10, 2001, and a notice of hearing was issued on September 15, 2001. The undersigned held a hearing on October 2, 2001. The Department Counsel presented six exhibits only. The Applicant's case consisted of the presentation of twelve exhibits and his own testimony. Subsequently, the Applicant filed an additional exhibit L, which is an explanation of exhibit I. After this exhibit was received, the record in this case was closed on October 25, 2001. There was no objection to the receipt of Exhibit L into evidence. The undersigned Administrative Judge received the Transcript ("Tr") of the hearing on October 11, 2001.

### **FINDINGS OF FACT**

The Statement of Reasons (SOR) consisted of allegations predicated on the following two guidelines: paragraph 1, Guideline E (personal conduct); paragraph 2, Guideline F (financial considerations). The undersigned Administrative

Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following Findings of Fact:

The Applicant is a 36-year-old married male, an employee of a U.S. Government contractor. The Applicant seeks to obtain a secret personnel security clearance. The Applicant completed his Questionnaire For National Security Position, Standard Form SF-86, on March 24, 2000. In response to questions 38, and 39, which refers to delinquent debts, either 180 days or 90 days delinquent, the Applicant answered "No" to both questions. Paragraph 1 of the SOR lists four instances wherein the Applicant has been delinquent more than 180 days on these debts. It appears that three of these debts are the result of the use of credit cards, and one debt is a hospital bill. In his Answer to the SOR, the Applicant has admitted all the allegations alleged in subparagraph 1.a, 1.b, 1.c, and 1.d. There was no response to the allegation in subparagraph 1.e, as it was an alleged statement of fact.

On August 30, 2000, the Applicant was interviewed by a Special Agent of the Defense Security Service, (DSS) and the Applicant's Credit Bureau Report was discussed, which revealed, among other matters, that he had three delinquent credit card accounts still outstanding. These accounts are very old, and they are the same accounts listed in the Applicant's SOR. At the time of the interview the Applicant gave a written statement to the DSS Agent regarding his financial background, together with a Personal Financial Statement, and stated that he plans to contact the companies involved and satisfy these debts in full. (Exhibit No. 2). The total amount of the said indebtedness was less than \$9,000.00. The Applicant settled the hospital debt on July 12, 2000. (Exhibit A), and all the other debts were satisfied or paid prior to the hearing in this matter.

Subparagraph 1.e of the SOR refers to the fact that the Applicant submitted a Personal Financial Statement at the time of the interview with the DSS Agent, which showed that he would have approximately \$1,221.84 remaining each month after paying his monthly expenses, which did not include the four debts listed in the SOR. However, the Applicant took care of this as he borrowed on his 401-k retirement plan from his local credit union to satisfy these delinquent accounts.

Paragraph 2 of the SOR, Guideline E, Personal Conduct, alleges that the Applicant falsified material facts on his Questionnaire for National Security Positions, SF-86, when he executed it on March 24, 2000, in that he answered questions 38 and 39 in the negative. As stated aforesaid, the questions 38 and 39, relate to any delinquent debts 180 days or 90 days old. The SOR also alleges that the Applicant deliberately failed to disclose the four debts that were set out in Paragraph 1 of the SOR. The SOR further alleges that the Applicant's conduct in failing to disclose the four delinquent debts is conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonest, or unwillingness to comply with rules and regulations which could indicate the person may not properly safeguard classified information. The Applicant's July 2001 answer states that he was not aware of the said delinquent debts, as they were acquired several years ago and he had not heard from them, nor did he have a point of contact to satisfy these accounts. He further stated that these debts will be paid now that he has a point of contact for them. In fact, he did satisfy the three outstanding credit card debts and the old hospital bill before the hearing.

### **POLICIES**

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluating an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The guidelines, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

### **GUIDELINE F - FINANCIAL CONSIDERATIONS**

**An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.**

**Conditions that could raise a security concern and may be disqualifying include:**

[1st] A history of not meeting financial obligations;

[3rd] Inability or unwillingness to satisfy debts;

**Conditions that could mitigate security concerns include:**

[6th] The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

**GUIDELINE E - PERSONAL CONDUCT**

**Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.**

**The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:**

**Conditions that could raise a security concern and may be disqualifying also include:**

[2nd] The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

**Conditions that could mitigate security concerns include:**

[5th] The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress;

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section 6.3:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.
- e. Absence or presence of rehabilitation.
- f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct

The circumstances surrounding the conduct, to include knowledge- able participation

The frequency and recency of the conduct

The individual's age and maturity at the time of the conduct

The voluntariness of participation

The presence or absence of rehabilitation and other pertinent behavioral changes

The motivation for the conduct

The potential for pressure, coercion, exploitation, or duress

The likelihood of continuation or recurrence

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

"It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial [of a security clearance] by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations."

*Dept. of the Navy v. Egan*, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go to the minimum *quantum* of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence--rather than as an indication of the Court's tolerance for error below. <sup>(1)</sup>

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the Government's case or through evidence of affirmative defenses. Assuming the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a security clearance. <sup>(2)</sup>

## CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of those who testified, the undersigned concludes that the Applicant has, through evidence of extenuation, and explanation, successfully mitigated and overcome the government's case with respect to his financial considerations, Guideline F, and his personal conduct, Guideline E.

The Applicant in his Answer to the SOR admitted that he owed the four debts set forth in the SOR, however, it appears that he did not have a point of contact with these creditors, and he forgot about them. Once the DSS Special Agent brought them to his attention, he satisfied all of his creditors, by getting a loan on his retirement fund. There was no evidence that the Applicant was negligent or willful. It appears that it was a case of forgetfulness on his part. There is evidence of rehabilitation on the part of the Applicant and that this type of conduct will not recur in the future. Each clearance decision is required to take into consideration pertinent factors set forth in Section 6.3 of the Directive and in the adjudicative process discussion at enclosure two to the Directive. These factors are identified on pages four and five *supra*.

With reference to paragraph two of the SOR, there is no doubt that the Applicant should have listed all his delinquent debts when he answered questions 38 and 39 on his SF-86 security questionnaire. However, at the time he answered the said questions, he was not aware of these debts. However, once he became aware of them he proceeded to promptly satisfy these debts. From the evidence of record, I cannot conclude that the Applicant deliberately failed to disclose to the Government the existence of these debts, as he was not aware of them when he executed his questionnaire. It was a mistake on his part; nevertheless, he has paid all of his past indebtedness.

### FORMAL FINDINGS

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item 25 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline F: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

### DECISION

In light of all the circumstances presented by the record in this case, it is the determination of the undersigned that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

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William R. Kearney

Administrative Judge

1. The rule has been restated as requiring "that security clearances should be revoked [*sic*] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D.Cal. 1992). *Cf.* with regard to the *quantum* of evidence the DOHA Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:

[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the [DOHA] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.

Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. §556(d).

2. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).

