

DATE: March 20, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-04806

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant's financial problems began in the early 1990s when he overextended his credit card use and had to establish a repayment plan to satisfy his creditors. Applicant exacerbated his financial difficulties by failing to pay federal and state income taxes in 1995, 1997 and 1998, leading to a Chapter 7 discharge in January 1997. Although two unforeseen periods of unemployment, and his wife's unemployment followed by a serious injury, contributed to Applicant's financial problems from 1995 through 1998, his overall lack of participation in past financial matters, and the lack of detailed evidence of rehabilitation, i.e., financial counseling, suggests Applicant's present financial problems will persist in future. Clearance is denied.

STATEMENT OF THE CASE

Pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as modified by Change 4, April 20, 1999, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR), dated August 8, 2002, to Applicant. The SOR detailed the 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 Applicant access to classified information. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted continued, denied or revoked. Applicant answered the SOR on September 5, 2002, and requested a hearing.

A notice of hearing was furnished to Applicant on January 8, 2003, and the hearing was held on February 5, 2003. The Government submitted 10 exhibits (GE). Applicant furnished 10 exhibits (AE A through AE J). Testimony was taken from Applicant and two witnesses. The transcript was received February 13, 2003.

RULINGS ON PROCEDURE

While preparing this case for decision, I discovered five documents located in the back of Applicant's answer which should have been removed and returned to Applicant for submission in his case-in-chief. The exhibits include two pages

(admitted in evidence as AE H) pertinent to Applicant's bankruptcy discharge in January 1997 and his payment plan with the state. The second exhibit is a one page document indicating the payment history for June, July and August 2002 to three creditors (admitted in evidence as AE I). The third exhibit is a one page exhibit (admitted in evidence as AE J) indicating Applicant's debt with the creditor identified in subparagraph 1.d. was settled for \$300.00 in August 2002. The final exhibit is a one page privacy act request, which is admitted in evidence as AE K. The Government reviewed the exhibits and indicated no objection to their admission in evidence.

Subparagraph 1.a. of the SOR inaccurately indicates Applicant's debts were discharged on June 21, 1997. The correct date for discharge is January 21, 1997. Pursuant to Enclosure 3 of the Directive, E3.1.17., I am amending 1.a. of the SOR by changing the present date to January 21, 1997.

FINDINGS OF FACT

The SOR alleges financial considerations. Applicant admitted all allegations except for subparagraph 1.d., which he settled in August 2002 for \$300.00. (AE J). Applicant is sixty-three years old and has worked for his present employer since April 1997 as a telecommunications engineer. He seeks a secret clearance.

On October 11, 1996 (1.a.), Applicant filed a Chapter 7 bankruptcy petition, seeking a discharge of over \$35,000.00 in liability. On January 21, 1997, Applicant was discharged.

Applicant owes the Internal Revenue Service (IRS) \$29,722.05 (1.b.) for tax years 1995, 1996, and 1998. While working for a previous employer between 1978 and September 1994, Applicant established an IRA with a private bank. In September 1994, Applicant was laid off and had to rely on his wife's earnings. By February 1995, Applicant and his wife discovered they could not keep current on the bills so they decided to withdraw IRA funds they had in the bank.

Applicant and his wife both testified they instructed the bank to take all the appropriate taxes from the periodic withdrawals. ⁽¹⁾ (Tr. 37-40; 88) However, the income tax was not taken out of the withdrawals, and instead, was added to his year-end earning statements. The extra amount of money placed them in a higher tax bracket, requiring them to pay more taxes than they could pay.

Applicant's wife set up their first repayment plan with IRS in 1996 (Tr. 73, 93), with payments of \$200.00 a month. After they received their discharge in bankruptcy in January 1997 (1.a.), ⁽²⁾ the first IRS repayment plan was declared void without their knowledge.

Appellant's wife was laid off from her job in December 1997 and was involved in a serious car accident in May 1998, leaving her partially paralyzed.

According to Applicant's documentation, a second repayment plan with the IRS was implemented at \$215.00 a month in October 1998. (Tr. 59; AE F) Finally, there is documentation reflecting another payment plan was established on September 4, 2002 where Applicant was to pay \$358.00 a month, beginning September 28, 2002. ⁽³⁾ When asked why he had stopped making payments under any of the IRS repayment plans, Applicant did not know and indicated his wife had conducted all the negotiations with the IRS. (Tr. 60-62)

Applicant's wife remembered there might have been some payments missed to the IRS while the two were separated for two years in 2000. (Tr. 74) His wife also recalled the IRS applied all tax returns towards satisfaction of the overall debt. In addition, although she provided no documentation, Applicant's wife believed they were current on the IRS repayment plan at \$358.00 a month. ⁽⁴⁾

Applicant owes the state \$2,631.51 (1.c.) for state income tax for the tax years 1995 and 1996. Applicant's state tax problems were also caused by the bank not taking out the necessary income tax from his early IRA withdrawals. (Tr. 46) In December 1998, Applicant began repaying the state \$67.68 for his back taxes.

The debt identified in subparagraph 1.d. was opened in November 1997 (GE 4), with Applicant making late payments 13 times. The account was settled by Applicant in August 2002. (Tr. 45; AE J)

Before filing for Chapter 7 bankruptcy in October 1996 (1.a.), Applicant sought credit counseling but was told that because of the seriousness of his financial problems, he should file bankruptcy, which he did. (Tr. 50) Although he was not sure when his earlier counseling occurred, Applicant was certain he enrolled in individual counseling with the same counseling organization before he was married in 1994. (Tr. 53) He had purchased too much on credit, and the organization worked out a repayment plan which he believed he had successfully completed; he also destroyed his credit cards. (Tr. 66) Applicant indicated he made all payments under the repayment plan. (Tr. 67)

However, Applicant's wife provided a different picture of the counseling program Applicant was involved in prior to their marriage in 1994. His wife testified her husband had worked out a \$1,000.00 a month payment program with the counseling organization to pay them off. (5) Prior to their marriage she was paying his repayment plan account plus her individual credit cards, which numbered 23 credit cards altogether. (Tr. 83-85)

With regard to preventing the financial problems from recurring in the future, Applicant's wife explained they will avoid credit cards. (Tr. 85) She is keeping one or two credit cards because they are necessary to reestablish credit. They purchased a new truck because Applicant's truck stopped working. She had to take out loan of \$700.00 to fix her van. (TR. 86) They plan to furnish an offer of compromise to both the federal (Tr. 76) and the state to settle both accounts.

Character evidence

The program director for past three ½ years, has been Applicant's second line supervisor for the same length of time. Applicant is a part of a global network (according the program director) who provides a lot of information and makes sure it is provided to the Government in a certain format. Given Applicant's high level performance, the program director understands why his employer receives glowing evaluation reports from the Government. (Tr. 21)

The senior manager who is Applicant's immediate supervisor, complimented Applicant's integrity and honesty.

The engineering director has known Applicant since 1997, and believes he is a reliable employee. According to the engineering director, Applicant provided a valuable contribution in keeping communication mediums open during a war in the middle east in early 1991.

POLICIES

Enclosure 2 of the Directive sets forth policy factors/conditions 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 CONDITIONS:

1. A history of not meeting financial obligations;
3. Inability or unwillingness to satisfy debts.

MITIGATING CONDITIONS:

1. The behavior was not recent;
2. It was an isolated incident;
3. The conditions that resulted in the behavior were largely beyond the person's control.

4. The person has received counseling or is receiving counseling for the problem and there are clear indications the problem is being resolved or is under control;
6. The individual has initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

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 16 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; and, (8) the potential for pressure, coercion, 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 Guideline F (financial considerations) 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

An individual's financial habits are a private matter until the evidence discloses he is not paying his bills on time. An individual who is having difficulty paying his bills places himself at risk of engaging in illegal acts to generate funds. The first disqualifying condition (DC) 1 refers to a history of not meeting financial obligations. The record reflects even before Applicant filed the Chapter 7 bankruptcy in October 1996, he was having serious financial problems in the early 1990s. Applicant had several delinquent credit cards causing him to establish a repayment plan through the same counseling program that recommended Applicant file bankruptcy in October 1996.

Even though Applicant believes he completed the repayment plan before he married his wife in 1994, the record provides ample justification to conclude his wife continued to pay his monthly payment and her credit cards until all the credit accounts were discharged in bankruptcy.

Following Applicant's financial problems leading to formulation and repayment of his creditors under the repayment plan, Applicant did not ensure the appropriate taxes were taken out of his premature withdrawals from his IRA account, and became indebted to the IRS for failing to pay federal income taxes for 1995.

The third strong item of evidence under DC 1 is the bankruptcy which discharged 23 credit cards totaling approximately \$34,000.00. As a general rule, a bankruptcy is not considered negative evidence unless it is followed by continued financial problems. Under the circumstances in this case, Applicant continued to get entangled in additional financial

problems, including the failure to pay federal and state taxes for 1995, 1996 and 1998. Also, Applicant applied for and received a new credit card in November 1997, 10 months after he was discharged from bankruptcy and while he had the tax problems from the federal Government and the State.

When a history of not meeting financial obligations has been established, the individual must show the underlying circumstances giving rise to problem have been removed. The first mitigating condition (MC) may apply where the behavior was not recent. MC 1 is not available to mitigate the circumstances of this case. Even after Applicant was discharged in bankruptcy in January 1997, he arranged for new credit in November 1997. He did not pay off the delinquent credit card until August 2002, about two weeks after he received the SOR. In addition, the record contains very little evidence of Applicant making any of the financial decisions after he enrolled in the repayment plan in the early 1990s. Given the state of the evidence, I am unable to say Applicant has made positive changes in his financial habits to warrant consideration under MC 1.

MC 2 of the financial considerations guideline applies to isolated incidents. Applicant's financial problems were not isolated. He confronted his first financial difficulty in the early 1990s. The financial problems continued with the Chapter 7 bankruptcy he filed in October 1996. In 1995, 1996, and 1998, Applicant was not vigilant with his finances, and did not take time to ensure taxes were taken out of an account he was making premature withdrawals from. Even after Applicant was discharged in bankruptcy in November 1997, he secured new credit with the old debt looming.

MC 3 refers to unanticipated events which cause an individual's financial problems. One event which is not beyond an individual's control is failing to use credit cards in a responsible manner, particularly when the individual is between 50 and 55 years old, and creates more credit than he can pay back. In the early 1990s, Applicant was at least fifty years old when he developed credit problems. His decision to abuse his credit was a choice he voluntarily made, and one which removes his early financial problems from consideration under MC 3.

While Applicant was laid off between September 1994 and May 1995, he only had his wife's income to pay bills. The unexpected period of unemployment entitles Applicant to extenuation under MC 3. Applicant is entitled to more consideration under MC 3 because he encountered unexpected unemployment a second time from August 1996 until April 1997.

The lay-off of Applicant's wife from her job in December 1997 and serious injury in May 1998, establishes extenuating reasons why Applicant receives additional consideration under MC 3.

However, the mitigation Applicant receives under MC 3 with regard to his two periods of unemployment, his wife's unemployment and serious injury, must be weighed against his failure to pay federal and state income taxes in 1995, 1996 and 1998. As noted earlier, Applicant is still responsible for the taxes incurred on income he prematurely removed from the IRA account.

MC 4 of the financial considerations guideline comes into play when the person has received counseling or is receiving counseling for the problem, and there are clear indications the problem is under control. Even though Applicant received counseling back in the early 1990s, the record indicates the only service he received was assistance in creating the repayment plan to help him begin paying back several creditors. Further, there is persuasive evidence the plan was not completed, and the debts to those creditors were discharged through the Chapter 7 bankruptcy in January 1997. While the record reflects some knowledge by his wife about finances, there is no evidence she has ever received counseling.

The final mitigating condition is MC 6 regarding the debtor's good-faith effort to repay creditors. Applicant is entitled to some mitigation under MC 6 for making regular payments to the IRS in 1996 and early 1997. However, the IRS repayment plan was reinstated at least twice after 1997. There is no documentary support reflecting regular payments to the IRS or the state by Applicant for any significant period of time. In addition, the fact that the debt to the creditor in 1.d. was settled in August 2002 represents negligible, positive evidence because the delinquent debt was not paid until after Applicant received the SOR. In sum, the mitigating evidence of unemployment by Applicant and his wife, and the positive evidence from Applicant's supervisors falls short of overcoming the negative evidence under 1.a., 1.b., 1.c., and 1.d. of the financial considerations guideline.

In reaching my decision under the financial considerations guideline, I have also evaluated the ten general policy factors

of the whole person concept. The absence of independent evidence demonstrating regular payments under the federal repayment plan since February 1997, together with the lack of counseling, lead me to conclude Applicant's financial problems may persist in the future.

FORMAL FINDINGS

Paragraph 1 (financial considerations): AGAINST THE APPLICANT.

1.a. Against the Applicant.

1.b. Against the Applicant.

1.c. Against the Applicant.

1.d. Against the Applicant.

1.e. For the Applicant.

DECISION

In light of all the circumstances presented by the record in his 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. The taxes included the penalty for early withdrawal, the 10% penalty, and income tax on the amount withdrawn.
2. AE D indicates Applicant paid \$200.00 for thirteen weeks on a regular basis from October 1996 to February 1997.
3. However, there is a notice of payment indicating a payment of \$315.00 was made on October 16, 2002. (AE E).
4. At page 77, Applicant's wife referred to documentation dated December 31, 2002, purportedly verifying their current agreement with the IRS is \$358.00 a month. None of Applicant's exhibits (which are in the record) are dated December 31, 2002. The only exhibit confirming the \$358.00 amount is AE E, four pages in length, including a one page letter from Applicant to DOHA dated November 4, 2002, and a three page letter from IRS dated September 4, 2002, indicating their agreement to the \$358.00 monthly payment. Applicant still owes \$29,000.00 to the IRS. (Tr. 61)
5. Though Applicant's financial problems in the early 1990s are not alleged in the SOR, they are historically relevant to the subsequent financial difficulties listed in the SOR. .