

DATE: May 14, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-05107

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq, Department Counsel

Henry Lazzaro, Esquire, Department Counsel

FOR APPLICANT

Lawrence J. Anderson, Esquire

SYNOPSIS

Applicant failed to mitigate security concerns over his finances and personal conduct. While he disputes debts to some creditors and while an earthquake in 1994 contributed to his financial problems, he failed to make prompt and sufficient efforts to address them. Nor did he seek financial counseling. He waited until his wages were garnished by creditors before he sought counsel in June 2001 and filed for Chapter 7 bankruptcy, but he included only a partial listing of his debts. His state tax liability of over \$26,000 remains unresolved. He still has not demonstrated sufficiently that he has control of his finances. Further, he failed to provide all required information in response to financial questions on his security questionnaire. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on November 21, 2001. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. [\(1\)](#) (Item 1) The SOR alleges specific concerns in paragraph 1 over financial issues (Guideline F) and in paragraph 2 over personal conduct (Guideline E). Applicant retained legal counsel and responded to these SOR allegations in an Answer notarized on January 30, 2002. He denied all allegations and requested a hearing.

The case was assigned to Department Counsel who indicated that the case was ready to proceed on March 12, 2002. Initially, the case was assigned to another administrative judge on March 13, 2002; the case was re-assigned to me on March 14, 2002. On March 21, 2002, the hearing was set for April 16, 2002; but the next day an Amended Notice re-scheduled the matter for April 8, 2002, at a location near where Applicant works and lives. At the hearing the Government introduced six exhibits which were all admitted into evidence (Exhibits 1A & 1B-5). Applicant's counsel offered one exhibit for Official Notice and 15 exhibits (Exhibits A-O) which were all admitted into evidence. Applicant

testified and called one witness. The transcript (TR) was received on April 16, 2002.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, a 61 year old employee of a defense contractor, has worked at Company #1 in State #1 since August 1998 when he received an interim security clearance. In September 1999 he completed a Security Clearance Application (Standard Form 86) and requested a Secret clearance.

(Exhibits 1A & 1B)

Previously, he owned his own company (Company #2 in State #2) where he was President and Chief Executive Officer (CEO). He was in business from September 1985 to 1995; after an earthquake in January 1994 damaged his business and home, he moved to State #3 in November 1996. He continued to work for Company #2 until August 1998, but he could not generate any income from 1996-98. (Exhibits 1A & 1B; TR 17-18; TR 46-47; 57-59; 89-90, 121)

In July 1989 he had received a Defense Department Secret clearance which he held until 1996. He received an engineering degree in 1974 in State #2. He served in the military from 1961 to 1966. His 1974 marriage to Wife #1 ended in divorce in 1975; his 1978 marriage to Wife #2 ended in a separation in 1995 and a divorce in 1996. (Applicant was not sure of the dates.) He married Wife #3 in December 1998. (Exhibits 1A & 1B; TR 43-46; 78-79; 124)

Financial Considerations and Personal Conduct

On Standard Form 86 in response to questions on his finances, Applicant acknowledged no financial issues of concern; and he certified that the statements on the form were "true, complete and correct" after he was advised that a knowing and willful false statement on the form could be punished under Section 1001 of Title 18, United States Code). (Exhibits 1A & 1B) He justified these omissions by linking all his documented financial problems to his failed business and did not reveal them on his SF 86 as he did not consider them personal debt. (TR72-73; 122)

However, a February 2000 Credit Report revealed a variety of financial concerns. (Exhibit 3) In March 2000 Applicant was interviewed by the Defense Security Service (DSS) and explained his finances. He claimed to be unaware of the reported debts and judgments as he had not looked at his credit report. He had incorporated Company #2 in 1986 which he self-funded, but the business was hampered by insufficient financing. He explained some of the adverse credit, denied any tax problems with State #2, and could not identify some creditors. He said Creditor #1 had financed an automobile loan for his son, but the car was totaled in 1997; and he believed that the insurance company paid them in full. He claimed the debts to Creditors #3, #4, and #9, were covered by a March 1994 agreement with the company who bought Company #2 in 1994 where he would have no personal liability for certain debts. However, after the purchasers failed to make a payment, he attempted to re-start the company without success. He acknowledged a debt to Creditor #7 for a loan for products he planned to sell; he committed to pay that debt. He retained a hand-written copy of notes of all of the debts and judgments identified on the credit report. His Personal Financial Statement revealed his monthly net salary to be \$5,200 a month (\$92,000 per year) and his wife's to be \$5,400 per month. He documented only \$1,400 in monthly expenses and \$4,000 in monthly debt payments, leaving a net remainder of \$5,000 per month. (Exhibits 2, 5; Exhibit O; TR 47-48, 55-56; 137-139) Despite Applicant's substantial resources noted in March 2000, he failed to take any significant actions to resolve these debts.

Applicant explained that his business was adversely affected by an earthquake in State #2 in January 1994 when much of his inventory was destroyed and his test equipment was damaged ⁽²⁾ beyond repair; he had to move out of the building as he had no income from the business and could not pay the rent. Also his personal dwelling was damaged and condemned by the Federal Emergency Management Agency (FEMA) who provided him \$13,000 in living expenses. His wife wanted him to re-start the business; when he did not want to do so, they decided to divorce. (Exhibit N, TR 48-55, 150) Most of the company records were destroyed in the 1994 earthquake. (TR 93-94; 127-131)

While he denied in his answer all of the liabilities listed in the SOR, other records support the debts:

1.a. Applicant purchased a vehicle for his son. When Applicant was out of the country, his son had an accident and totaled the car in 1997. He assumed the insurance company paid them in full as he heard nothing to the contrary from his wife, son, insurance company, or from Creditor #1. A debt of approximately \$8,000 is due to Creditor #1 for the balance owing on a totaled vehicle after the insurance paid approximately \$21,000. He learned of the debt in the DSS interview. Amended Schedule E filed in April 2002 includes this \$8,000 debt. (Answer; Exhibits 3, 4; Exhibits B, J, O; TR 56-59; 79-86; 114-116; 164-66)

1.b. Applicant disputes a debt of approximately \$3,000 to Creditor #2, a bad debt charged off in October 1992, as he never had a credit card from Creditor #2; it was removed from his credit report. Amended Schedule E filed in April 2002 includes this debt. (Answer; Exhibits B & J; TR 60-61; 86-88; 122)

1.c. Applicant claims the debt of approximately \$9,000 to Creditor #3 for a bad debt charged off in 1987 was a corporate debt that is now included in his personal bankruptcy. Amended Schedule E filed in April 2002 includes this \$9,000 debt. (Answer; Exhibits A, B & C; TR 61-62; 88-89; 106, 122)

1.d. Applicant disputes this debt of approximately \$20,000 to Creditor #4 for a cellular phone for his business, Company #2, which was charged off in 1994. When he closed the business, he terminated all cell phones. The only evidence in the record shows a debt of \$345 from a 2000 credit report. This debt was not included on a 2002 credit report. It is now included in his personal bankruptcy. (Answer; Exhibit 3; Exhibits A & B; TR 62; 105, 122; 167-169)

1.e. Applicant has no knowledge of a \$2,200 debt to Creditor #5 for an account which he disputes. Creditor #5 is the same as Creditor #2. (Answer; TR 62)

1.f. Applicant claimed to have no knowledge of this \$26,900 debt to Creditor #6, for a personal state tax lien⁽³⁾ filed in State #2 in July 1999, until he was interviewed by DSS in 2000. He learned that after the Internal Revenue Service (IRS) disallowed some of his claims of loss assets for failure to document, the state followed suit. He has not resolved the matter as he is still in negotiations with the IRS⁽⁴⁾ which will affect his state tax issues. Wife #2 was granted an "innocent spouse" letter. He has not made any arrangements to pay the IRS or State #2. Tax debts cannot be discharged under the Bankruptcy Code so his State #2 tax liabilities remain unresolved. (Answer; Exhibit 4; Exhibits A, B, & C; TR 63-64, 69-70, 71-72; 108-111; 125-126, 136; 170-173; 180-183)

1.g. Applicant acknowledged a debt of approximately \$13,000 to Creditor #7, an individual, who filed a civil judgment against him in December 1997. He considered this judgment as resulting from a business debt, not a personal debt as Creditor #7 was interested in investing in the business. He committed to DSS in March 2000 to pay that debt. However, he only paid Creditor #7 partially. After Creditor #7 garnished his wages, Applicant sought counsel to file a Voluntary Bankruptcy Petition in June 2001; the \$12,620 debt included in his bankruptcy was discharged in October 2001. This debt was also included in the Amended Schedule E filed in April 2002. (Answer; Exhibits 3, 4; Exhibits A, B, C, E & F; TR 65-66, 71-72; 92, 98-104, 139-141; 173-174)

1.h. Applicant acknowledged a debt of approximately \$1,000 to Creditor #8, an individual, who had lent him the money to help him make payroll one week. Creditor #8 obtained a civil judgment in March 1996; Applicant believed he resolved this judgment by providing Creditor #8 with a wide screen television in lieu of the \$1,000. Although he considered this judgment as resulting from a business debt, not a personal debt, Amended Schedule E filed in April 2002 includes this \$1,000 debt. (Answer; Exhibits 3, 4; Exhibits A, B & F; TR 66-67, 72; 92; 97-98)

1.i. Applicant has a debt of approximately \$5,400 owed to Creditor #9 for legal work done for Company #2. Creditor #9 filed a civil judgment filed against him in May 1994. He learned of this judgment in the DSS interview. Although he considered this judgment as resulting from a business debt, not a personal debt, Amended Schedule E filed in April 2002 includes this \$8,000 debt. (Answer; Exhibits 3, 4; Exhibits A, B & F; TR 67, 72; 92-96; 104)

Applicant did not seek credit counseling, but did attempt to work out a payment plan with Creditor #7. (TR 131-132) However, when he could not pay Creditor #7 one month, the creditor garnished his wages which led Applicant to seek legal counsel. (TR 142-143) In June 2001 Applicant filed a Voluntary Petition for bankruptcy under Chapter 7 in State

#3 to discharge his personal ⁽⁵⁾ and business debts. His listed debts were discharged in October 2001. (Exhibits A, E, F, G; TR 113-120; 125) However, Applicant failed to include many of his debts detailed in the SOR in the original petition, so his counsel filed an amendment in April 2002 to include all of the debtors which he planned to file on the day of the hearing. (Exhibit B; TR 143-144)

Applicant and Wife #3 have a joint account; and she handles the finances. (TR 74) His sole income now comes from Company #1 where he has no ownership interests or liabilities. His wife has changed jobs and no longer makes as much as she did at the time they provided the earlier Financial Statement. She owns the house where they live. (TR 75-76; 134) He has applied for one credit card subsequent to the bankruptcy to rebuild his credit. (TR 132-133)

Applicant's friend, a retired military officer Mr. R, testified he has known Applicant since 1969 and recommended him as trustworthy. Mr. R. visited Applicant in State #2 after the earthquake and learned from Applicant of the damage he had sustained. He recognized both the plant and the home from pictures that Applicant had taken. After Applicant moved to State #1, he disclosed to Mr. R, that he had "ruined his credit." Mr. R understood that Applicant had had financial problems both with his personal obligations and his business obligations. (TR 148-157; Exhibit N) After Mr. R. testified he knew Applicant during his military career, Department Counsel wanted to use that testimony as a basis to recall Applicant to question him in order to undermine his credibility. However, Mr. R. did not testify about any military incident; neither was this undisclosed incident alleged in the SOR. As Applicant was not put on notice of this issue and the incident was not specifically alluded to by Mr. R., Department Counsel's request was denied. (TR 158-161)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole in evaluating this case, I weighed relevant Adjudication Guidelines as set forth below :

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:

- (1) a history of not meeting financial obligations;
- (3) inability or unwillingness to satisfy debts;

Conditions that could mitigate security concerns include:

- (3) 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);

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:

Refusal to complete required security forms, releases, or provide full, frank and truthful answers to lawful questions of

investigators, security officials or other official representatives in connection with a personnel security or trustworthiness determination.

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

2. 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;
3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trust-worthiness determination;

Conditions that could mitigate security concerns include:

None

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. 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 after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Financial Considerations

Applicant has (1) a history of financial problems and has shown (3) an inability or unwillingness to satisfy debts. While Applicant asserts that conditions largely beyond his control lead to these financial problems, he failed to document sufficiently how the 1994 earthquake created financial problems with his many creditors. Indeed, some are clearly unrelated and are personal in nature such as the debt to Creditor #1 after his son totaled a car in 1997. Indeed his failure to document how this earthquake led to his business and personal losses is the cornerstone of his tax problems with IRS (not alleged in the SOR) and with State #2 where he owes over \$26,000 in back taxes. Overall Applicant neglected for several years his responsibility to address and resolve his debts to a wide range of creditors even after he was re-employed by Company #1 in 1998 and even after he was advised of their adverse security implications in a DSS interview in March 2000. Even at that point he did not immediately seek financial counseling nor did he initiate a good-faith effort to repay these overdue creditors or otherwise resolve these debts. While he claimed to have no knowledge of many of these debts, his witness Mr. R testified that Applicant had disclosed to him after Applicant moved to State #3 in 1998 that Applicant had "ruined his credit." Mr. R understood that Applicant's financial problems included both his personal obligations and business obligations. Even after he gained a stable job in 1998 and a good income, he failed to address these debts

While security concerns may be mitigated if conditions were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), he failed to take any corrective action until a creditor (Creditor #7) garnished his wages which led him to file for bankruptcy under Chapter 7 in June 2001. Even then he did not fully research and seek to include and discharge all of his creditors as the debts to most of the creditors alleged in the SOR were not included in the original filing and were not covered until a late amended filing in April 2002. Thus, while the debt to Creditor #7 was resolved by the October 2001 bankruptcy discharge, many others alleged in the SOR were not included until the April 2002 filing of an Amended Schedule E. While his attorney argues that these debts will be discharged under *In Re Stecklow*, 144 B.R. 314 (Bkrcty. D.Md. 1992), no ruling that these debts were discharged was available at the time of the hearing. Applicant's failure to include them in

his initial filing, when he was put on notice of them by DSS, shows a lack of due diligence.

Even if all of the listed debts are discharged, his tax debt to Creditor #6 for a state tax lien cannot be discharged in bankruptcy and is still unresolved pending negotiations with the IRS for substantial tax liabilities. Though the IRS liabilities are not alleged in the SOR, they have impacted his overall financial situation adversely.

While he has made a substantial salary in his professional position for almost four years, he has failed to sufficiently demonstrate he is now financially responsible. For example, he has not demonstrated that he has met MC 4: The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control. For example, he acknowledges Wife #3 handles their finances. Thus, Applicant has not sufficiently met the mitigating conditions (MC (6)) except for the debts he denies (1.b. and 1.e.) or the debt discharged in bankruptcy in 2001 (1.g.). After considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraphs 1.a., 1.c., 1. d., 1.f, 1.h., 1.i., and 1.j. under SOR Paragraph 1.

Personal Conduct

Applicant had a duty in completing his SF 86 to disclose all adverse information in response to the questions asked: he failed to do so with respect to the financial questions. Thus conditions that could raise a security concern and may be disqualifying include his deliberate omission, concealment, or falsification of relevant and material facts from the personnel security questionnaire. He failed to give the required information completely even though he had a duty to fully disclose all relevant and material information.

Applicant's defense that he did not know of any of these debts is not credible in the face of his witness's statement that Applicant had disclosed to him after Applicant moved to State #1 in 1998 that Applicant had "ruined his credit." Knowing of his financial problems, he had a duty to inform himself about the extent of his fiscal issues and to disclose this information on the SF 86. Thus, Applicant has failed to demonstrated he meets the personal conduct mitigating conditions. (7)

While he was cooperative in explaining some of the financial details to the DSS agent, that conduct is not sufficient to fall with MC 3 as he did not volunteer all the facts before he was confronted by the adverse credit report. Applicant never argued that his failure to provide complete responses fell within MC 4 (Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided.) After considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraphs 2.a. through 2.c. under SOR Paragraph 2.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline F: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: Against Applicant

Subparagraph 1.i.: Against Applicant

Subparagraph 1.j.: Against Applicant

Paragraph 2. Guideline E AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c: Against 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 the Applicant.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.
2. Although he provided some pictures of his home and business he took after the earthquake, he did not provide any other documentation on the extent and consequences of the damage from the earthquake. (Exhibit N)
3. Note that all transcript references to this tax lien are misspelled as tax "lean."
4. According to Amended Schedule E filed in April 2002 and IRS documents, Applicant owes IRS over \$33,000 for his 1995 federal taxes and over \$9,000 for his 1996 federal taxes in addition to the \$26,000 owed for State #2 taxes. According to the IRS documents for the 1995 tax year, he failed to document that the business expenses were paid in that taxable year and were ordinary and necessary. He was charged a \$2,680 penalty for negligence for the 1995 tax year. (Exhibits B, I, K, L, M) If the IRS rules against him, he will have a substantial debt; there is no timetable for when this issue will be resolved. (TR 207-208) The federal taxes were not alleged in the SOR, but I consider them a documented issue affecting his current financial status as Applicant offered the IRS Examination Changes in evidence.
5. Applicant reaffirmed the debt for his 1999 automobile where he owed approximately \$10,000. (TR 74; 133; Exhibit H)
6. **Conditions that could mitigate security concerns include:** 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 (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation); 4. The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control; 5. The affluence resulted from a legal source; and 6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.
7. **Conditions that could mitigate security concerns include:**
 1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability; 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct

information voluntarily; 3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts; 4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided; 5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress; 6. A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information; 7. Association with persons involved in criminal activities has ceased.