

DATE: February 26, 2002

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-07657

## **DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Matthew E. Malone, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant with a history of financial problems attributable to periods of unemployment and who has struggled with maintaining Chapter 13 repayment plans in the past has established a good period of repayment under his current Chapter 13 repayment plan (over two years now), and with his positive character references, shows safe promise of staying the course this time with taking care of his old debts. His financial problems of the past are both extenuated by work-related income losses and mitigation through established repayment measures and is a safe risk to maintain financial stability for the foreseeable future. Clearance is granted.

### **STATEMENT OF THE CASE**

On October 6, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, 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 granted, continued, denied or revoked.

Applicant responded to the SOR on October 25, 2001, and requested a hearing. The case was assigned to this Administrative Judge on December 18, 2001, and on January 2, 2002, was scheduled for hearing. A hearing was convened on January 25, 2002, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of twelve exhibits; Applicant relied on one witness (himself) and eleven exhibits. The transcript (R.T.) of the proceedings was received on January 24, 2002.

### **STATEMENT OF FACTS**

Applicant is a 51-year old electronic technician for his defense employer, who seeks a security clearance at the secret

level.

## Summary of Allegations and Responses

Applicant is alleged to have (a) filed successive Chapter 13 petitions in November and December 1998, respectively, both of which were dismissed for failure to make required monthly payments to the US Trustee and (b) filed another Chapter 13 petition, this in September 1999, the terms of which require him to make monthly payments of \$1,394.00 to the US Trustee for 56 months, in which he is alleged to be in arrears in the amount of \$5,016.00 on his payments.

For his answer to the SOR, Applicant admitted to his repeated filing of bankruptcy petitions, attributing his filings to three job layoffs, two job changes, and five separate places of employment, while claiming he had no other choice, if he wanted to keep his home and other possessions which he and his wife worked honestly to acquire. In further explanation of his seeking Chapter 13 bankruptcy protection, he claimed to have been laid off from his job and unable to find other stable employment, necessary to enable him to keep making his required payments to the US Trustee. Only as a result of his inability to make the required payments, he claimed, were his Chapter 13 petitions dismissed, without prejudice.

## Relevant and Material Factual Findings

The allegations covered in the SOR and admitted to by Appellant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

Applicant's financial difficulties began long before he filed a series of Chapter 13 bankruptcy petitions in 1998 and 1999: They began shortly after he and his first spouse divorced in 1989. With his new employment (commenced in 1988), he was able to slowly stabilize his finances and maintain a good payment history over the eight years that followed.

Following a period of steady employment between October 1993 and September 1997, Applicant was laid off from his employer at the time due to a lack of work. For the ensuing six months, he worked at temporary contract jobs which didn't bring him near enough income to meet his mortgage and other financial obligations. Called back for a brief period in 1997 by his employer, he was soon laid off once again: this time for approximately a week before being called back, only to be laid off once again in October 1997. When he returned to work in January 1998, his debts were in arrearage. His arrearage included sixteen to seventeen months worth of mortgage payments (ultimately accumulating over \$26,000.00 worth of back principal and interest) on his home, which fell into default during his periods of unemployment and essentially remained there (*see* R.T., 78-79). He had also fallen behind in his child support payments and experienced wage garnishment for several years until his children reached majority (*see* R.T., at 42-43).

Applicant efforts to work with consumer credit counseling service ("CCC") were unavailing (*see* ex. I). Efforts to work out any form of mortgage forbearance assistance with the VA were also unsuccessful (*see* exs. J and K). He was advised, in turn, by his counsel to petition for Chapter 13 relief under the federal bankruptcy laws. He filed his initial Chapter 13 petition in March 1998. It was court-approved, and the court set monthly payments for delivery by the US Trustee in the amount of \$455.00 (*see* ex. 4). When more creditors responded to his creditor inquiries, Applicant's monthly payments increased to \$460.00 per month (*see* ex. 4). After repeatedly defaulting on his required monthly payments, the trustee dismissed the petition in November 1998 (ex. 4). When he re-filed his Chapter 13 petition a month later (*i.e.*, in December 1998), the court (on the US Trustee's suggestion) raised his required monthly payments even higher: to \$1,114.00 a month (*see* ex. 3; R.T., at 31). Only after defaulting repeatedly on his re-filed petition did the bankruptcy court on the US Trustee's motion dismiss (in August 1999) his re-filed Chapter 13 petition: this it did in August 1999 (*see* ex. 3; R.T., at 32).

On the advice of counsel, fear of once again losing his home, and hoped for additional income, Applicant re-filed a Chapter 13 petition in September 1999. His court-approved program required him to make monthly payments to the US Trustee of \$1,394.00 for 56 months. To help him in his efforts to surmount his financial hurdles, Applicant applied for veterans' disability benefits from the Department of Veterans' Affairs ("DoV") in early 2000 and received disability benefits of \$9,600.00 in March 2000. From these received funds, Applicant made a lump payment to the US Trustee of \$5,016.00, with a view of returning his Chapter 13 plan to good standing. Ever since, he has met his required monthly payments in a timely way (*see* ex. A; R.T., at 93).

Applicant was unable to avert non-judicial foreclosure of his home with his Chapter 13 petition and approved plan and lost his home to non-judicial foreclosure in June 2001. He had come to find it simply impossible to make his monthly US Trustee payment and still satisfy his monthly mortgage obligation. Because the property was sold non-judicially, no deficiency was reserved under his State's foreclosure law, and he has never been tendered a deficiency demand from his mortgage holder or assigns. Actually, Applicant believes there was some equity in the home over and above the face amount of his mortgage loan. But whatever equity there was in the home would have covered little more than his arrearage (*see* R.T., at 90-92). Covered in his current Chapter 13 plan are his consumer debts, second mortgage on his home, which was not discharged by the foreclosure and consumes around \$175.00 of his monthly trustee payment, and mortgage on his rental house, which is a little over \$500.00 a month. Because the first mortgage was previously foreclosed, it is not included (*see* R.T., at 80-82)

Applicant currently maintains a monthly net income of \$4,018.00, down from the \$4,559.30 he and his wife netted when she was working. After expenses and deductions are subtracted, he has a net monthly remainder of around \$1,181.00. With his house foreclosed, he is now staying current with his required Chapter 13 payments to the US Trustee, but is looking to convert his Chapter 13 petition into a Chapter 7 bankruptcy within the next few months, as well as exploring efforts to sell his rental property (*see* R.T., at 93).

Despite his financial struggles in recent years, Applicant assures that he would do anything to jeopardize his employer or country with security breaches of any kind. He is considered reliable and conscientious by work colleagues and his church pastor (*see* ex. D).

### **POLICIES**

The Adjudicative Guidelines of the Directive (Change 4) lists "binding" policy considerations to be made by Judges in the decision making process covering DOHA cases. The term "binding," as interpreted by the DOHA Appeal Board, requires the Judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the Judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E2.2 of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

#### **Financial Considerations**

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

#### **Disqualifying Conditions**

DC 1. A history of not meeting financial obligations.

DC 3. Inability or unwillingness to satisfy debts.

#### **Mitigating Conditions**

MC 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).

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

#### **Burden of Proof**

By dint of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for 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 common sense 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. As with all adversary 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 any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a nexus to the applicant's eligibility to obtain or maintain a security clearance. The required showing of nexus, 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, consideration must take account of accessible 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 burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

### CONCLUSION

Applicant's encountered financial adversities dating to work-related problems in meeting his mortgage and other debts following a series of unanticipated lay-offs culminated in a series of Chapter 13 bankruptcy petitions: two in 1998 which were court-dismissed for failure to meet required US Trustee payments, and a third initiated in 1999 which Applicant continues to be committed to.

At issue in this proceeding is not only Applicant's reliability and trustworthiness in light of her accumulation of delinquent debts and aborted Chapter 13 petitions, but also his difficulties in establishing and sustaining a payment schedule under court-approved Chapter 13 relief plans to discharge his old debts and avert foreclosure. Ultimately, he failed in saving his home and now faces the continuing burden of making his monthly payment requirements on both his consumer debts and second mortgage obligation and avoiding the same dismissal fate that befell him twice with his previous Chapter 13 petitions. Security determinations have never confined risk considerations to the elimination of debts that result from bankruptcy and other repayment mechanisms, but rather it has looked to the applicant's overall financial history to shed light on his most recent conduct as an indicator of recurrence potential. This the Government has done in underscoring Applicant's still ongoing financial strains associated with his continuing repayment responsibilities under his most current Chapter 13 plan. In other words, judgment/trust concerns are implied from past financial problems when considering the security significance of delinquent debts.

True, Applicant cannot be faulted for experienced payment binds during recurrent periods of unemployment. Extenuating are the circumstances in which he was forced to stretch out his debts with the limited resources he had at his disposal during his lay-offs in 1997 and 1998. The predicament he found himself in was a difficult one for sure, and one in which he deserves considerable credit in seeking means to take care of his debts with the aid of Chapter 13 relief. In recognition of these exigent circumstances in which he found himself, he may claim the extenuation benefits of MC 3 (conditions out of the person's control, such as a death in family)

Just the same, some judgment imprudence must be imputed to Applicant for not taking more concerted individual and coordinated credit consulting initiatives before resorting to Chapter 13 relief in 1998. Security concerns justifiably attach to Applicant's failure to make more earnest efforts to repay his old creditors, either through individual repayment efforts, or debt consolidation. Appraising the security significance of Applicant's financial deficiencies, several Disqualifying Conditions (DC) of the Adjudicative Guidelines (for financial) apply: DC 1 (history of not meeting financial obligations) and DC 3 (inability or unwillingness to satisfy debts).

Applicant is to be encouraged in his ongoing efforts to pay off his old debts through a court-approved Chapter 13 repayment plan, which offers good prospects for succeeding. With over two years of payment seasoning, he can be expected to complete the plan, even with some reduction in his monthly income attributable to his spouse's reduced

contributions. By all accounts, he is well regarded by his superiors. Safe predictions can be made that he can remain in control of his finances by either completing his latest Chapter 13 plan, or utilizing other resolution measures available to him to discharge his old debts. Favorable conclusions warrant, accordingly, with respect to the allegations covered by sub-paragraphs 1.a through 1.c.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors set forth in the Procedures section (paragraph 6) of the Directive, as well as E.2.2 of the Adjudicative Process of Enclosure 2 of the same Directive.

### **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, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE F (FINANCIAL CONSIDERATIONS): FOR APPLICANT

Sub-para. 1.a : FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

### **DECISION**

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

Roger C. Wesley

Administrative Judge