

DATE: October 30, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 01-08227

## **DECISION OF ADMINISTRATIVE JUDGE**

**BURT SMITH**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Kathryn D. MacKinnon, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant successfully rebuts the Government's allegations that his indebtedness and false answers on background questionnaire are cause to deny clearance (Guidelines F and E), but for clearance purposes Applicant is not satisfactorily rehabilitated from a 1997 conviction for fraud (Guideline J). Clearance is denied.

### **STATEMENT OF THE CASE**

On November 1, 2001, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant. The SOR details 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. It recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked. In an answer dated March 15, 2002, Applicant responded to the SOR, and he elected to have his case decided on the written record in lieu of a hearing.

A complete copy of the Government's File of Relevant Material (FORM) was provided to Applicant on May 13, 2002, and he was afforded 30 days to file objections and submit further material in refutation, extenuation, or mitigation. Applicant received the FORM on May 22, 2002, and he submitted a letter dated July 19, 2002, with documents attached. The case was assigned to me September 12, 2002.

### **FINDINGS OF FACT**

The Applicant is 41 years old, and he is employed by a defense contractor as an engineering technician. He seeks a DoD security clearance in connection with his employment in the civilian defense industry. The Government opposes the Applicant's request for a security clearance on the basis of allegations set forth under Paragraphs 1, 2, and 3 of the SOR. The following findings of fact are entered as to the allegations.

Paragraph 1 (Guideline F- Financial). The Government alleges Applicant is ineligible for clearance because he is financially overextended and at risk of having to engage in illegal acts to generate funds.

The Applicant's indebtedness arose primarily from an unsuccessful marriage that ultimately ended in divorce, leaving him with serious financial difficulties and responsibility for the support of a teenage daughter. After the divorce Applicant was hospitalized twice for medical conditions that prevented him from working for an extended period. However, Applicant has made an acceptable effort to pay his debts and restore his financial stability.

With regard to the status of Applicant's debts, the Government alleges in subpara. 1.a. that Applicant owes a financial institution \$7,501. Applicant presents evidence that he has made regular payments to the company since August 2000, and his indebtedness is now reduced to \$3,973. (App. Ex. A.)

Two other debts, far smaller in amount, have been paid. Applicant presents documentary evidence that the two debts listed at subparas. 1.d. and 1.e. of the SOR, totalling \$116, have been

paid. (App. Exs. D and E.) The \$49 debt at subpara. 1.j. has apparently been paid because Applicant's bank entries show regular payments to this creditor at previous times near the indebtedness period described in the SOR. (App. Ex. J.) Likewise, Applicant demonstrates that since April 2000 he has made regular twice-monthly payments to the creditor identified at subpara. 1.g. (App. Ex. G), and he has entered into a payment agreement with the creditor identified at subpara. 1.c. of the SOR. (App. Ex. C.)

Concerning the remainder of his debts (subparas. 1.b.; 1.f., 1.h.; and 1.i) these concern a total overdue amount of less than \$1,700. Applicant states credibly that these debts are either disputed, unknown by the creditor, or the subject of an offer to pay in installments. Applicant is gainfully employed, his house is on the market, and he is now relieved of college expenses for his daughter due to her inheritance of a trust fund.

In summary, it is found that Applicant entered a difficult period of financial turbulence when he was divorced, temporarily disabled, and left with the responsibility to care for his daughter. However, he has taken a responsible attitude toward his debts, and he is making a good faith effort to pay his creditors.

The above discussion does not include a factual discussion pertaining to subpara. 1.k. of the SOR. In this subparagraph the Government alleges Applicant intentionally defrauded a municipal housing authority, and he was convicted of a misdemeanor. As part of his sentence he was required to make restitution in the amount of \$4,020 plus a \$100 fine and court costs. Applicant admits to this past indebtedness, and the facts are more fully discussed below under Guideline J.

Paragraph 2 (Guideline J - Criminal Conduct). The Government alleges Applicant has engaged in criminal conduct that casts doubt upon his judgment, reliability, and trustworthiness.

In 1995 Applicant became unemployed, and he applied for and received unemployment compensation from his state's bureau of employment services. However, Applicant's compensation was insufficient to meet his mortgage notes and they went unpaid for a lengthy period, leading to a foreclosure notice.

By 1996 Applicant had secured a job, and he was required to notify the state that he was now receiving an income. Because he wanted to pay his overdue mortgage notes and stop the foreclosure, Applicant intentionally failed to notify the state of his new job, and in this manner he continued to receive unemployment benefits even though he was no longer entitled. During four months in 1995-1996, Applicant was employed and he earned \$10,778, while wrongfully collecting \$4,020 unemployment compensation.

Ultimately, the state learned of Applicant's re-employment, and in June 1997 he was prosecuted and convicted on a plea of no contest for his failure to report his earnings. As noted above, Applicant was required to pay restitution in the amount of \$4,020 plus a \$100 fine and court costs. Applicant was also sentenced to serve 30 days in jail, suspended for five years.

In a sworn statement furnished to the Government on June 23, 2000, Applicant states credibly that when he was convicted he made partial restitution of \$3000. (FORM, Item 5.) The record contains no documentary evidence

regarding payment of the remaining \$1,020. However, the

Government does not allege that the remainder is overdue or delinquent, and it is found that, more likely than not, Applicant has successfully made full restitution and paid his fine and court costs, as required.

In his response to the SOR, Applicant concedes that he was convicted for fraudulent acceptance of unemployment benefits, and he openly admits this was unacceptable behavior on his part. Applicant states that this was an isolated instance of dishonesty, and is his "deepest source of shame and regret." (See Applicant's response, dated July 19, 2002.) Applicant also provides documentary evidence indicating that his employer considers him a reliable and productive employee, and he is an asset to the company. (Ltr of Appreciation, March 13, 2002; and performance Appraisal, October 01 to March 02.)

Paragraph 3 (Guideline E - Personal Conduct). The Government alleges Applicant intentionally failed to disclose adverse background information during the security clearance screening process.

On April 21, 1999, Applicant completed a Questionnaire for National Security Positions (Standard Form 86) seeking factual information about his personal background, to be furnished under penalty of perjury. (FORM, Item 4.) The Government's concern about Applicant's honesty is related to his answers to questions 20 (employment history); 24 (drug offenses); and 38 (financial delinquencies).

Subpara. 3.a. of the SOR pertains to question 20, Applicant's employment history. Applicant was asked whether in the last ten years he had ever left a job under unfavorable circumstances such as being fired, resigned following allegations of misconduct or poor performance, or similar unfavorable circumstances. Applicant answered "No" to the question, although the Government's background investigation led to the conclusion Applicant was terminated once by employer A (in 1989) and twice by employer B (in 1990 and again in 1991).

In a letter to the Government dated March 15, 2002, Applicant denies that he intentionally gave a false answer to Question 20. He admits he was terminated by employer A, but he claims he was terminated only once by employer B in 1990. (FORM, Item 3.) He further claims when he completed the questionnaire he was under intense job pressure to quickly return it, and he did not have time to properly analyze all elements of each question.

The record indicates that Applicant has previously informed the Government of his prior terminations from employment, and at that time he did not try to falsify his work history. This information was furnished in response to questions 38 and 45 of an application for federal employment completed by the Applicant on May 7, 1991. (FORM, Item 12.) Furthermore, the Applicant furnishes a letter from his Facility Security Officer confirming that when he was given the SF86 in the instant case he was told it had "a short fuse (couple of days)" for completion. (App. Ex., Guideline E.) Applicant claims credibly he was truthful but rushed and could not provide accurate details.

Subpara. 3.b. of the SOR pertains to question 24 which inquires about past charges for drug offenses. The question requires the Applicant to answer whether he has ever been charged with any offenses related to alcohol or drugs. Applicant answered "No" to the question, although in June 1985 he was given military administrative punishment for marijuana usage. (FORM, Item 11.)

Applicant again responds that he was rushed in his completion of the SF86, and he had no intention to falsify his answers. In determining Applicant's truthfulness, it is significant to note that in his former application for federal employment (FORM, Item 12, discussed above) Applicant provided a full description of his former drug dependence which ended after rehabilitation treatment in 1990. While this is not information about a drug charge as required by Question 24, Applicant's prior admission of his drug history is strong evidence that he did not intend to give dishonest information on the SF86 questionnaire. (Applicant has been drug-free for 12 years.)

Subpara. 3.c. of the SOR pertains to Question 38 which requires Applicant to state whether he has been over 180 days delinquent in paying any debt during the last seven years. Applicant answered "No" to this question. In its allegation of false statements, the Government points to subparas. 1.e., 1.f., 1.g., and 1.j. of the SOR which recite four debts overdue at the time Applicant completed the SF86. Applicant responds by stating when he completed the SF86 he was not aware of the details of his finances because he was recovering from the financial turbulence of a divorce, and he did not have

precise information at his fingertips. Also, he was under pressure to complete the SF86 within 24 - 48 hours.

Applicant's explanation is accepted. The four debts in question total only about \$350, averaging \$88 each, and it is reasonable to believe Applicant was not well-informed on these delinquencies due to his fluctuating financial status at the time. Also, it is once again noted that Applicant was given an extremely short time to complete and return the SF86.

### POLICIES

Enclosure 2 of the Directive, as amended by DepSecDef Memorandum dated June 7, 2002, sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. The guidelines are divided into those that may be considered in deciding whether to deny or revoke an Applicant's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant access to classified information (Mitigating Conditions).

Based upon a consideration of the entire record, I find the following adjudicative guidelines have application in this case:

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

Disqualifying Conditions applicable:

1. A history of not meeting financial obligations;
2. Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust;
3. Inability or unwillingness to satisfy debts.

Mitigating Conditions applicable:

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

Guideline J - Criminal Conduct. *The concern:* A history of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Disqualifying Conditions applicable:

1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses;

Mitigating Conditions applicable:

2. The crime was an isolated incident.
6. There is clear evidence of successful rehabilitation.

Guideline E - Personal Conduct. *The concern.* 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.

Disqualifying Conditions applicable:

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;

Mitigating Conditions applicable:

1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;

The whole person concept. In addition to the above guidelines, the Directive provides in Para. E.2.2.1. that under the "whole person concept" the Administrative Judge shall also consider (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

### CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information 24 hours a day. The Government is therefore appropriately concerned where reliable information indicates an Applicant for clearance demonstrates financial unreliability, criminal activities, and dishonesty. On a commonsense basis, these unfavorable personal characteristics might easily lead to a compromise or loss of classified defense secrets.

Concerning burdens of proof in DOHA cases, the Government must first prove all controverted facts that tend to demonstrate Applicant is ineligible for clearance. Once this burden is met, the Applicant must overcome the Government's case, if he or she is to prevail, by persuasive evidence in refutation, mitigation, or changed circumstances.

However, the Applicant always bears the ultimate and overall burden of proving that it is clearly consistent with the national security to grant him or her a security clearance. Furthermore, the Directive provides that "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, Para. E2.2.2.) Thus, the Applicant's ultimate burden is a heavy one.

With respect to Paragraph 1 of the SOR (Guideline F - Financial), the Government has met its burden of proving that Applicant's past overdue debts give rise to legitimate concern about his reliability and responsibility in his personal life. Where a clearance holder has numerous overdue debts it may be reasoned that he can be subjected to pressure, coercion, or illegal acts to solve his financial problems.

In this case, the Applicant's financial problems are not indicative of an ongoing and continuing pattern of poor judgment and unreliability. His indebtedness arose out of a divorce, followed by unemployment, and was accompanied by the responsibility to provide sole support for his teenage daughter. Applicant has made a good-faith effort to restore his finances without declaring bankruptcy or otherwise denying his creditors their due.

Paragraph 1 of the SOR is therefore concluded in Applicant's favor. This includes a favorable finding as to Applicant's debt to the state arising out of his fraudulent receipt of unemployment compensation. When viewed as a debt under Guideline F it may be concluded that Applicant's payment of restitution and his financial stability thereafter are factors in his favor.

However, the Government alleges under Paragraph 2 of the SOR (Guideline J - Criminal conduct) that Applicant's

criminal conduct in 1996 - 1997 gives rise to serious doubt as to his judgment, reliability and dependability in a security environment. Where an Applicant is willing to violate criminal statutes for personal gain, it may be reasoned that he could easily violate security regulations and procedures where it suits his convenience.

There is little doubt that Applicant was in serious financial distress late in 1996. He was overdue on many debts due to divorce, illness, and lack of employment, and his mortgage creditor had given notice that a foreclosure was imminent. At this time Applicant secured employment, but his income was not sufficient to prevent a foreclosure. Applicant yielded to the temptation to continue receiving unemployment compensation by failing to report his renewed employment. In this manner Applicant knowingly and willfully engaged in a fraudulent deception by collecting over \$4,000 in unemployment compensation.

Applicant's criminal misconduct was a serious demonstration of his lack of honesty at the time. Although his financial situation was precarious, it was not impossible for Applicant to deal with this problem without resorting to fraud and deception. In short, Applicant willingly engaged in criminal fraud against the state as a way to avoid the consequences of losing his house.

Applicant states with credibility that he deeply regrets his criminal act of defrauding the state, and he gives assurance this misconduct will not be repeated in the future. Applicant's admissions of criminal conduct indicate insight into his unlawful behavior, and there is clear evidence of rehabilitation. (Mitigation Conditions 2 and 6.) On the other hand, Applicant's theft arose out of deliberate plan to take money in an illegal manner, and it was carried out over an extended period, not disclosed or confessed until he was apprehended. (Disqualifying Conditions 1 and 2.)

Evidence of Applicant's good behavior and meritorious performance on the job have been considered, but under "the whole person concept" this evidence is outweighed by negative effects of the seriousness and recency of Applicant's criminal conduct; his age and maturity at the time; and the knowledgeable and voluntary nature of his participation. On the positive side it is noted that Applicant was motivated by a desperate need for funds, and his financial situation is now close to stable.

Applicant was convicted and sentenced for his crime in June 1997, and he has remained a law-abiding citizen for five years. In terms of rehabilitation for employment or paying one's debt to society, this arguably is sufficient time to conclude that Applicant is again worthy of civic trust. However, in terms of access to classified information, it is too soon to conclude with safety that Applicant has reformed his dishonest behavior to the point that he can be counted upon diligently to preserve and protect the nation's defense secrets. Paragraph 2 is concluded against the Applicant.

In his responses to Paragraph 3 of the SOR, Applicant argues essentially that his incomplete or incorrect answers about previous employment, drug offenses, and financial delinquencies were the result of haste imposed upon him by his company. The Facility Security Officer confirms the truth of Applicant's claim. Furthermore, the record contains evidence that Applicant previously informed the Government about his terminations from employment and he also advised the Government of his former drug usage, to include his successful treatment. The omission of financial data is explained by the inadequacy of Applicant's financial records because of his recent divorce. Applicant's explanations are persuasive, and Paragraph 3 is concluded in his favor.

For clearance purposes, it is too early to conclude that Applicant has overcome the negative effects of his fraud conviction. However, it is evident that Applicant is making a good faith effort to achieve the high level of reform and rehabilitation needed to form the basis for award of a security clearance. In the event that Applicant elects to re-apply for a clearance in the future, his success in this regard may then provide justification for favorable consideration of his request.

On balance, after considering the entire record and applying DoD policies, guidance, and regulations, it is concluded that the Government has met its burden of proving its factual allegations, all or in part as indicated above, but the Applicant has failed to overcome the negative security implications of the Government's case.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of

Enclosure 3 of the Directive are:

Paragraph 1. Guideline F: FOR THE APPLICANT.

Subparas. 1.a.-1.k.: For the Applicant.

Paragraph 2. Guideline J: AGAINST THE APPLICANT.

Subpara. 2.a.: Against the Applicant.

Paragraph 3. Guideline E.: FOR THE APPLICANT.

Subparas. 3.a.-3.c.: For 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.

Burt Smith

Administrative Judge