DATE: April 30, 2002

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 01-10347

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This case involves an engineering professional for a defense contractor who experienced financial difficulties with several of his creditors attributable to his divorce, to include a judgment for a marital award and child support arrearage, and who has since taken steps to resolve these problem debts and restore most of his problem debts

to current status. Conversely, allegations of falsification of Applicant's SF-86, as to both his 1999 malicious destruction/carrying concealed weapon arrest and understating of his outstanding marital award/child custody arrearage judgment, are both proven and unmitigated by any prompt, good faith correction. Clearance is denied.

STATEMENT OF THE CASE

On November 28, 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 December 19, 2001, and requested a hearing. The case was assigned to this Administrative Judge on February 6, 2002, and on February 11, 2002, was scheduled for hearing (amended on February 20, 2002 as to location). A hearing was convened on March 1, 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 ten exhibits; Applicant relied on two witnesses (including himself) and four exhibits. The transcript (R.T.) of the proceedings was received on March 12, 2002.

STATEMENT OF FACTS

Applicant is a 56-year old systems analyst for a defense contractor who seeks a security clearance.

Summary of Allegations and Responses

Applicant is alleged to have falsified his security clearance application of December 9, 1999, by omitting (a) his prior arrest of May 1999 involving charges of malicious destruction of property - less than $300.00 and carrying a concealed weapon, both charges of which were later placed on the stet docket (*viz.,* deferred prosecution) and (b) numerous debts in excess of 180 days past due - indebtedness to his prior spouse in the amount of $13,342.66 for a marital monetary award court-ordered in April 1995, which Applicant disputes, and three other small debts totaling in excess of $400.00.

Additionally, Applicant is alleged to be indebted to creditors on accounts past due in excess of $4,000.00, with the largest debt attributable to a filed lien for unpaid child support in the amount of $16483.43, for which Applicant's bank account was ordered garnished to satisfy in July 2000 and later satisfied, except for the sum of $3,630.00.

For his response to the SOR, Applicant admits to his prior arrest and most of his listed debts, but denies any attempt to falsify his SF-86. He claims most of his listed debts have been previously satisfied. Specifically, of his six listed (all but one under $200.00), he claimed one (a marital monetary award was based on non-existent and overvalued assets, a second (a debt he can not identify in the amount of $157.00, owed to a local bank) to be an accumulated late fee he is not obligated to pay, a third (a $105.00 medical debt) to be an erroneous charge on a claim paid by his HMO insurer, a fourth (a $110.00 medical claim) to have been previously satisfied by his HMO and an error, a fifth (a $144.00 medical claim) to have already been paid by his HMO insurer and an error (*e.g.,* listed as 2000 1998 in the SOR) and a sixth (a $917.00 medical claim) to have been the result of his HMO not paying their agreed upon portion of the authorized covered treatment.

Appellant admits to a court-ordered lien being filed against him in June 2000 in the amount of $16,483.43, and to his being later garnished for his failure to satisfy this lien voluntarily, leaving approximately $3,630.00 still owing. But he claimed he gave his ex-spouse both a $1,200.00 check and an $18,000.00 check in June 2000, expressly earmarking each for payment of child support, only to have his ex-spouse claim the checks to be for payment of the marital monetary award ordered in another court. So, Applicant claimed that with both his paid $18,000.00 and garnished $16,483.43 (for a total of $45,783.13) taken from him in 2000, he had nothing leftover from his $97,313.00 annual earnings in 2000 to pay even his accrued $37,965.00 in assessed federal income taxes. Claiming he decided not to pay his wife any more money, he instead went back to court to let the judge decide what he owes. With no resolution in sight in October 2001, when his contract job with his defense contractor expired, he filed a motion with the court to modify child support: He claimed his motion still awaited court resolution.

Relevant and Material Factual Findings

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

Applicant's finances

As the result of a fall from a scaffold on a habitat for a charitable humanity project in November 1999, Applicant broke his knee, which required surgery to repair. He accumulated numerous medical bills in connection with the surgery, which he believed were covered by his medical insurer. Applicant expressed surprise to find that several of his medical accounts stemming from his surgery still carried small balances. These debts (five in all) cover assorted medical services. Of the five, only one exceeds $200.00 in amount: This debt (listed as $917.00 in amount) was the subject of a dispute between two of his medical insurance carriers and is at present still unresolved. Applicant earnestly believes he is not responsible for any of these small debts, which either were or should have covered by his insurance or were the result of accumulated late fees erroneously billed to Applicant's account. His claims are not disputed and generally hold up under scrutiny, despite the absence of documentation.

Applicant's marriage to his former spouse (Ms. X) in 1976 produced four children. Following separation from his spouse in 1990 (*see* ex. 8) for mutual and voluntary reasons, Applicant and his spouse entered into a temporary separation agreement in 1991 that included provision for private schooling for the children, which Applicant agreed to

contribute towards at the rate of $1,725.00 a month (ex. 8). When Applicant was laid off from his company of 22 years in 1992, he found difficulty in locating comparable work. He assumed part time teaching responsibilities at a local community college to tide him over while he looked for engineering work. But with his income reduced considerably, he fell behind in his agreed child support payments in 1994. By the time Applicant and his wife returned to court (April 1995) to finalize their divorce and fix child support, Applicant had accumulated $15,907.73 in back child support owed (ex. 8). After hearing testimony from the parties, the court entered a decree that, in addition to fixing custody and visitation, bestowed the following financial obligations on Applicant by entered judgment: (1) payment of monthly child support of $1,622 .41 to Ms. X for the months of March and April 1995, and $749.18 thereafter, beginning in May 1995 and (2) a monetary award favoring Ms. X in the sum of $13,342.66, with interest to accrue at the rate of 10 per cent (ex. 8).

Applicant readily accepted his child support obligations fixed by the court but continued to dispute the marital award. Unable to find good paying work, however, he found himself unable to address either and continued to fall behind. In October 1999, Ms. X went to court and obtained a court order declaring Appellant to be in arrears on child support in the amount of $14,968.43 and ordering him to pay the reduced sum of $600.00 a month in current child support and $250.00 a month towards the arrearage (*see* ex. 5). Still pressed by underemployment issues, Applicant by the year 2000 had accumulated in excess of $17,000.00 of child support arrearage, in addition to accruing interest on the marital award, which he has continued to dispute.

Shortly after returning to full time employment in his engineering field for a prominent defense contractor (this in December 1999), he managed to scrape together enough to remit an $18,000.00 check to Ms. X in June 20, 2000; this was in addition to the monthly checks he had been sending her monthly since April 1999 ($400.00 initially, which was increased to $1,200.00 in March 2000 - *see* ex. C) to defray child support (each earmarked for child support). On the face of the each check (inclusive of the $18,000.00 check), he expressly earmarked the check proceeds to be applied towards his child support arrearage (*see* ex. C). Unbeknownst to Applicant, Ms X cashed the $18,000.00 check, along with one $1,200.00 check, and credited each to her still outstanding marital award for a total of $19,200.00, ignoring Applicant's plain instructions on the checks (*see* ex. D; R.T., at 77-76).

Contemporaneously with Applicant's return to full time employment, Ms. X enlisted the domestic relations department of the local county to return to court in he behalf to obtain a lien against Applicant for child support arrearage. In February 2000, the court (having determined Applicant to be in arrearage on his child support to the extent of $14,668.43) ordered his earnings withheld in the amount of $1,191.00 a month (*see* ex. 6). In August 2000 (with, the court unaware of Applicant's ensuing $18,000.00 remittance as far as can be determined from the record), Applicant's local bank account was garnished to the extent of $16,483.43 (*see* R.T., at 73-74). Altogether, Applicant has now paid in excess of $40,000.00 in combined marital award and child support arrearage that he can document, on a disputed judgment (*see* ex. C), the effect of which has left him with insufficient resources to take care of his taxes (estimated to be $37,965.00), much less the balance of $3,630.00 left still owing on his child support as of April 2001.

Still unclear about the basis of the court's two awards in 1995 (*see* ex. 8), Applicant is in the process of returning to court to secure clarification about the ordered marital award and child support arrearage. Whether he stands to obtain relief is unclear. In the meantime, though, he continues to dispute the bona fides of the marital award and disclaims any intention of paying anything on the award voluntarily, should he succeed in obtaining reallocation of the $19,200.00 his spouse misapplied towards her marital award to child support arrearage (*see* R.T., at 61-62). To be sure, he has enlisted legal aid to seek reallocation relief in court; reallocation, if successful, would likely turn the current $3,630.00 child arrearage deficit into a credit balance in the estimated $12,00.00 plus range (*see* R.T., at 62, 81-84), and perforce return the previously credited marital award to judgment debt status.

Unable to obtain a security clearance, Applicant was laid off from his prior defense contractor in October 2001. With his second son already having turned eighteen in February 2001, Applicant has returned to court to seek modification of his child support, and in the interim has ceased sending his ex-spouse any more $1,200.00 monthly support payments, pending resolution by the court he has petitioned. Still indebted in excess of $3,630.00 on his child arrearage, he hopes to have resolution soon on his separate reallocation and support reduction petitions. If successful, he assures he will resist in whatever legal way he can to repay any of the returned proceeds towards his ex-spouse's marital award: leaving garnishment as a repayment option should it come to that (*see* R.T., at 127-28). Applicant is current with most of his

finances. Still unresolved are his small medical debts (believed by Applicant to have been paid by his medical insurer) and the accrued post-garnishment child support arrearage and accruing current monthly obligations, which are presently the subject of court petitions.

Applicant's SF-86 omissions

Asked to complete an SF-86 in December 1999 in connection with his application for a security clearance (then with his now former employer), Applicant omitted a May 1999 arrest on charges of malicious destruction of property (less than $300.00) and carrying a concealed weapon. The charges themselves involved his observed carrying of garden clippers while Applicant was strolling on a bike path. Exhibiting no intention to use the clippers for anything more than Applicant's trimming overhanging trees on his property (the result of a misunderstanding), the case was placed on the stet docket (or prosecution deferral docket) at the suggestion of the local prosecutor (*see* R.T., at 167). Applicant initially attributed his failure to list this arrest to memory lapse (in his answer). When pressed at hearing, he provided a slightly different explanation: He considered his arrest to be not what the question was "looking for"and it just "didn't cross my mind at the time" (R.T., at 168-69). He acknowledged the arrest only after being later confronted by a DSS agent. On its face, though, the charge was important and only several months removed from his completing his SF-86, much too important an arrest (even if never prosecuted) and too recent to be easily forgotten by someone as educated as Applicant. Inferences necessarily warrant that Applicant omitted the arrest when knowledge and prudence called for its listing to enable Government background investigators to complete their background checks of Applicant's clearance eligibility.

Not sustainable either are Applicant's explanations that he believed he owed one lump sum to his ex-spouse for marital award and child support, in the amount of $15,000.00 (*see* R.T., at 174-76). Claiming confusion over what was owed in marital award and child support, he acknowledged under questioning to previously receiving a copy of the 1995 order (ex. 8; R.T., at 126,170) and understanding the order to cover both marital award and child support arrearage (*see* 170-77). Having been pressed from time to time between 1995 and 1999 by the child support division to pay the child support arrearage, it strains bounds of reason to accept Applicant's claims of confusion over whether the court's combined 1995 order covered substantially more than the $15,000.00 lump sum Applicant saw fit to list when responding to question 37 of his SF-86. His explanations for understating the unpaid amount of the judgment at the time are not convincing. With his unconvincing understating of his unpaid judgment when answering question 37, he cannot be excused either from his omitting the unsatisfied judgment portion from the 180 and 90 day delinquency coverage of questions 38 and 39.

By contrast, Applicant's claims of no knowledge of any residual medical debts not covered by his medical insurer until later provided a credit report by an interviewing DSS agent in June 2000 (*see* ex. 2) are plausible and accepted. These debts, though more than 90 and 180 days old based on Applicant's received credit report and perforce covered by questions 38 and 39 of his SF-86, are for the most part small and dated and could reasonably have been dismissed as satisfied by his insurer until shown otherwise with a credit report by an interviewing DSS agent. No deliberate falsification can be attributed to Appellant on these claims.

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:

Personal Conduct

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:

DC 2 The deliberate omission, concealment, falsification or misrepresentation 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:

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

MC 5 The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.

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.

CONCLUSIONS

Applicant comes to these proceedings with raised security-significant omissions in the security clearance application he completed in October 1999, in addition to raised concerns about several claimed alcohol-related charges (only one resulting in a conviction).

In his December 1999 SF-86, Applicant omitted any references to his prior malicious destruction of property/carrying a concealed weapon arrest in May 1999 when answering question 26, and failed to list four prior debts in delinquency, exceeding 180 and 90 days, respectively, when answering questions 38 and 3. By his varied claims of memory lapse and perceived unimportance (as to his arrest), his claimed confusion about the status of his marital award/child arrearage obligations, and his stated absence of any awareness of other debt delinquencies when he responded to questions in his SF-86, Applicant places his intent and credibility squarely in issue.

Motivation is key here and provides the all too critical backdrop by which Applicant's omission explanations re: his 1999 SF-86 must be assessed. Both reason, motivation and whole person reliability converge here to demonstrate that Applicant's explanations are not fully reconcilable with his exhibited knowledge of his omitted arrest and understating of his marital award/child support arrearage judgment, and are neither reasonable nor free of credibility doubts about the quality of his falsification denials.

Even obvious omissions of material facts (to include non-prosecuted misdemeanor charges occurring within the previous seven years) may be extenuated where circumstances indicate the declarant was under some mistaken impression or understanding when he executed a government form (such as an SF-86) or signed off on a deficient signed, sworn statement. *Cf. Raybourne v. Gulf Atlantic Towing Corp.*, 276 F.2d 90, 92 (4th Cir. 1960). Both the E.2.2 factors of the Directive's Change 3 amendments and relevant case authorities underscore the importance of motive and subjective intent considerations in gauging knowing and wilful behavior. *Cf. United States v. Chapin*, 515 F.2d 1274, 1283-84 (DC Cir. 1975); *United States Steinhilber*, 484 F.2d 386, 389-90 (8th Cir. 1973); *United States v. Diogo*, 320 F.2d 898, 905 (2d Cir. 1963). Applicant's omissions reveal claimed mistaken impressions that betray reason when matched with his demonstrated knowledge and education. Government may invoke Disqualifying Condition (DC) for personal conduct of the Adjudicative Guidelines: DC 2 (falsification of a security questionnaire).

Mitigation is difficult to credit Applicant with, since he failed to take advantage of the first obvious opportunity afforded him to correct his earlier SF-86 omissions in his initial DSS interview. Not until confronted with both his 1999 arrest and outstanding debts did he acknowledge them. Having failed to convince his arrest omission and judgement understatement were inadvertent and excusable, he neither refutes nor mitigates the falsifications allegations covered sub-paragraphs 1.a and 1.b of Guideline E. Only with respect to the omitted medical debts does Applicant succeed in demonstrating the omissions were lacking in the requisite knowledge and intent. He may take protective sanctuary in MC 1 (information of falsity unsubstantiated) only with respect to the old medical debts.

Taking into account all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E.2.2 factors), unfavorable conclusions warrant with respect to sub-paras. 1.a and 1.b of Guideline E.

Extenuated from the beginning by his lengthy and recurrent periods of unemployment and under employment, Applicant has since has taken manifest steps to satisfy the major pending debts attributed to him , either voluntarily or by garnishment: the outstanding judgment stemming from a marital award and child support arrearage. Applicant discounts the remaining four debts as medically related debts he believes were or should have been covered by his medical insurance. True, some of his child support arrearage remains outstanding, though, even after the garnishment, and he is currently withholding current monthly child support payments pending resolution of his petitions for reallocation of his marital award payments and reduced child support. Should he be successful in one or both, the marriage award will need to be addressed, perhaps by some involuntary means such as garnishment, which he appears amenable to, should it come to that.

Overall assessment of Appellant's finances is both extenuating and mitigating. Government's concerns over insufficient payment information and seasoning with respect to his marital award judgment and other creditors have now for the most part been sufficiently explained or corrected to absolve Applicant of future risks associated with his past debt delinquencies. True, payment seasoning is still very limited and necessarily invites some unpredictability over the core issue of whether he will be able to sustain his repayment assurances re: his continuing child support obligations, which he has since restored to current status. Applicant may take some advantage of two of the Mitigating Conditions of the Adjudicative Guidelines (for financial): MC 3 (behavior largely beyond the person's control, such as unemployment), and MC 6 (good-faith effort of repayment of creditors). And on the whole, Appellant mitigates Government concerns over his past judgment lapses associated with his delinquent debts.

Everything considered, Applicant's documented partial satisfaction of the outstanding marital award judgment against him and additional child support payments are sufficient to successfully mitigate any residual judgment and reliability concerns associated with his mostly extenuated debt delinquencies. With just over $3,630.00 in child support arrearage still outstanding after garnishment of most of the adjudged arrearage and some reason to believe he could benefit from reallocation of his previously credited marital award payments and child support reduction from his pending petitions, he faces a debt load that looks to be a manageable one. The remaining medical debts, while contested by Applicant, are for the most part too small in the aggregate (just over $1,000.00) to be of sufficient security clearance alone. Favorable conclusions warrant, accordingly, with respect to the allegations covered by sub-paragraphs 2.a through 2.d of Guideline F.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS and CONDITIONS listed above, this Administrative Judge makes the following separate FORMAL FINDINGS with respect to Appellant's eligibility for a security clearance.

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

GUIDELINE F (FINANCIAL): FOR APPLICANT

Sub-para. 2.a: FOR APPLICANT

Sub-para. 2.b: FOR APPLICANT

Sub-para. 2.c: FOR APPLICANT

Sub-para. 2.d: FOR 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 Applicant's security clearance.

Roger C. Wesley

Administrative Judge