DATE: November 26, 2002

In Re:

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

Applicant for Security Clearance

ISCR Case No. 01-19278

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

Peregrine D. Russell-Hunter, Esquire, Department Counsel

FOR APPLICANT

James R. Klimaski, Esquire

SYNOPSIS

Applicant's falsification of his clearance application suggested he could not be relied upon to state the truth if the truth presented potential adverse consequences to his personal interests. His financial difficulties were not mitigated where they were due in part to his mismanagement of his finances and had not been addressed because of his moral, but not legal, disputes about the amounts owed.

STATEMENT OF THE CASE

On 19 April 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding[(1)] that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 16 May 2002, Applicant answered the SOR and requested a hearing. The case was assigned to me on 2 August 2002, and received by me on 5 August 2002. I originally issued a notice of hearing on 26 August 2002 for a hearing on 24 September 2002. However, on 9 September 2002, I received Applicant's counsel's request for continuance--dated 28 August 2002--to one of seven listed dates in October 2002.[(2)] On 2 October 2002, I issued a notice of hearing for 21 October 2002.

At the hearing, the Government presented six exhibits--five admitted without objection; one excluded from the record as improper rebuttal--and no witnesses;[(3)] Applicant presented eleven exhibits--admitted without objection--and the testimony of one witness, himself. DOHA received the transcript on 29 October 2002.

FINDINGS OF FACT

Applicant admitted the financial allegations of the SOR, except for subparagraph 1.c.--a medical bill allegedly placed for collection in December 2000.[(4)] He denied the falsification allegations of paragraph 2.[(5)] Accordingly, I incorporate

the admissions as findings of fact.

Applicant--a 37-year old employee of a defense contractor--seeks to retain access to classified information. He has held a security clearance since 1989 as a member of the Naval Reserve, and has held a clearance as a government contractor (G.E. 1; Tr. 21). He received a bachelor of science degree in a mechanical engineering field in 1989 and a master of science degree in environmental science in 1998 (G.E. 1; Tr. 22-23, 60-61, 95-96). After graduating in 1989, Applicant was first employed as a ship's engineer, then as a test control engineer in a nuclear power plant. Both jobs were fairly complex, highly technical, detail-oriented positions, requiring precision operations, and entailing a high risk of danger for erroneous actions. Applicant has also served in the Naval Reserve since 1989,[(6)] most recently in an operations area requiring great technical precision and involving high risk of explosion if operations are not carried out correctly (Tr. 95-102). His most recent officer fitness report (FITREP)(A.E. 2) extols Applicant's leadership and organizational skills (Tr. 26-27, 60-61).

On 21 October 1998, Applicant executed a Security Clearance Application (SCA)(SF 86)(G.E. 1) which showed Applicant's meticulous attention to detail.[(7)] However, he falsified this SCA when he failed to disclose that he had been arrested for disorderly intoxication in January 1995.[(8)] Applicant acknowledges that he omitted this arrest, but denies an intent to falsify his SCA, because he had been told he did not have to disclose the arrest which had been expunged from state records. However, this explanation for the omission was not credible.[(9)]

Applicant also falsified his SCA when he answered "no" to a question requiring him to disclose any financial accounts currently 90+ days past due.[(10)] He failed to disclose the past due status of the account at subparagraph 1.a.[(11)] He failed to disclose the past due status of the account at subparagraph 1.d.[(12)] He failed to disclose the past due status of other accounts as well.[(13)]

Applicant has a history of financial difficulties, which have not been entirely resolved as of the date of the hearing. Applicant attributes his financial difficulties to his decision to attend graduate school (which he attended from September 1996 to August 1998, diploma awarded in March 1999) coupled with the loss of his part time employment that he had intended to rely upon to meet his living expenses. Applicant intended to attend graduate school without taking out educational loans. He had several from college which he was still paying on. He cashed in his retirement savings accounts for the school expenses. He had been working full time at his current employer, and had representations from his supervisor that he could continue part time. Applicant expected to rely upon this income to meet his current living expenses. Unfortunately, the supervisor died, and his replacement was not as inclined to let Applicant continue to work part time. He was let go, although he was apparently rehired by the same employer in June 1998, just before he completed his degree requirements.

Applicant's earnings statement partially corroborates this work history, but raises some questions unanswered by Applicant. Applicant testified that he accepted a recall to active duty while still employed at the nuclear power plant (Tr. 22-23), before deciding to pursue graduate school. His 1995 earnings dropped precipitously (more than half) from 1994, presumably the difference between his civilian job and lower active-duty earnings.[(14)] Nevertheless, although Applicant did not start school (according to his SCA) until September 1996, his earnings for 1996 were only $4,000.00 for what should have been two-thirds of a year of working.[(15)] Consistent with his reported work history, Applicant earned only $1,300.00 in 1997, and almost $15,000.00 for the partial year he worked in 1998. However, when Applicant resumed full time employment with his current employer, his earnings grew dramatically, substantially exceeding his full time earnings at the nuclear power plant (1991-1994)(A.E. A).

With the decline in income, Applicant was unable to meet his expenses.[(16)] He decided to continue with his graduate school education. He did not take out any more educational loans to cover graduate school expenses, although the record does not reflect whether this is because he was not eligible for more loans (either because of money limits or repayment status on his other accounts) or because he chose not to pursue that option. However, he had three credit cards that he used to pay his expenses, the two accounts alleged at subparagraphs 1.a. and b., and a third which was later charged off, but which Applicant has paid after being put into a default program run by the creditor. Applicant began to fall behind in his payments.[(17)] The three creditors had a predictable response to Applicant's default: they raised his

interest rate to the statutory maximum,[(18)] and imposed late fees and other fees consistent with the credit agreements Applicant accepted when he signed and used the cards. Applicant thinks this conduct unfair, but acknowledges that it is legal (Tr. 92-93). Applicant got the one creditor to place him in a default payment plan when he was so outraged that he was not making any progress the debt that he complained to the creditor (G.E. 5). He has been unable to reach a similar settlement with the two creditors alleged in 1.a. and b., in part because these creditors charged off the accounts and referred or sold them for collection, and he has not been able to get reliable information on who the authorized collection agents are. Nevertheless, Applicant has no documentary corroboration of his efforts to pay or otherwise resolve these accounts. The accounts remain unpaid, for $4,421.00 (1.a.) and $8,241.00 (1.b).[(19)] Applicant intends to pay the accounts, but has not stated how or when he will accomplish that.

The record contains no evidence of Applicant's work performance, aside from the FITREP from the Naval Reserve.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc*.

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

FINANCIAL CONSIDERATIONS (GUIDELINE F)

E2.A6.1.1. The Concern: 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.

E2.A6.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A6.1.2.1. A history of not meeting financial obligations;

E2.A6.1.2.3. Inability or unwillingness to satisfy debts;

E2.A6.1.3. Conditions that could mitigate security concerns include:

E2.A6.1.3.3. The conditions that resulted in the behavior were largely beyond the person's control (e.g. loss of employment. . . divorce or separation).

PERSONAL CONDUCT (GUIDELINE E)

E2A5.1.1. 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. . .

E2. A5.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A5.1.2.2. 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, . . . [or] determine security clearance eligibility or trustworthiness. . .;

E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, . . . in connection with a personnel security or trustworthiness determination;

E2.A5.1.3. Conditions that could mitigate security concerns include:

None.

Burden of Proof

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

The Government has established its case under Guideline F. The record evidence establishes Applicant's history of indebtedness and his current failure to address that indebtedness despite having the apparent means to do so. While circumstances beyond his control may have partly contributed to the original indebtedness (to the extent that Applicant lost the part time job he was relying on for living expenses), the greater cause is Applicant's voluntary choice to both continue his graduate school education and to not obtain additional educational loans. In other words, while Applicant had a primary plan for his graduate school education, he did not have an alternate plan for reductions in income beyond what he had already calculated, and the choice he ultimately made (financing through credit cards) does not demonstrate good judgment. Applicant cannot be surprised that the credit card companies exercised their legal rights under the contract to hike the interest rate of a defaulting debtor and impose contract-authorized fees. Even if I accept Applicant's contention that their conduct is immoral or unfair, the creditor's conduct does not remove Applicant's obligation to pay. Further, while the account at 1.b. was closed in March 1998, the account in 1.a. apparently did not begin to fall past due until after Applicant resumed full time employment in June 1998. The accounts remain unpaid, despite increases in Applicant's earnings to over $70.000.00 per year in 2000 and 2001. Applicant did not corroborate his claimed efforts to resolve these debts, and articulated no plan for resolving them in the future, only a vague intent to pay them.

Applicant meets none of the mitigating factors for financial considerations. His financial difficulties are both recent and not isolated. They are due in substantial part to his mishandling of his finances in response to losing his part time job while in graduate school. His belated, uncorroborated--and incomplete--efforts to repay the creditors listed in 1.a. and b. or otherwise resolve these debts do not constitute a good-faith effort within the meaning of the Directive. Applicant's most recent credit reports, while suggesting progress, do not demonstrate that Applicant has put his financial problems sufficiently behind him to conclude that they will not be a problem in the future. I find Guideline F. against Applicant.

The Government has established its case under Guideline E. Applicant knew he had past due accounts going back several months, accounts on which he had stopped making payments, and failed to disclose them. He certainly knew his finances had been, and continued to be, in disarray, yet there is not one indication on his SCA that he had any financial problems.[(20)] His claim that he did not know about the past due status of the account in 1.d. cannot be credited where Applicant essentially disregarded the account status by failing to keep this creditor advised, either by direct communication with the creditor or by filing a general change of address notice with the postal service. Applicant's omission of the 1995 arrest is even more deliberate. Applicant went to a great deal of trouble to establish, and then invoke, a record expungement which--by the very clear language of the question--did not permit Applicant to withhold the information. He consulted as an authority for guidance on the question not a federal official or his FSO, but a state official with no authority to answer the question Applicant put to him. Applicant's subsequent disclosure to the DSS agent was not prompt within the meaning of the Directive, and seemed aimed more at covering himself in case the expungement was not completely successful than at good faith disclosure. The omissions had the potential to influence

the course of the background investigation. I find Guideline E. against Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline F: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: For the Applicant

Paragraph 2. Guideline E: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: For the Applicant

Subparagraph c: Against 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.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996, and by Change 4 dated 20 April 1999 (Directive).

2. Counsel requested the continuance based on his previously scheduled trip out of the country.

3. Department Counsel proffered a rebuttal witness, who I concluded could not be called for the proffered purpose (Tr. 114-122).

4. Applicant asserted in his Answer that the medical bill had been paid by his medical plan, and had confirmed with both the provider and the medical plan that the account was paid. Applicant's Exhibits I and J, corroborated Applicant's testimony (Tr. 50-54; 68-69) that the referral for collection was due to the combination of slow pay by the medical plan and the provider erroneously crediting one of Applicant's payments to the wrong account.

5. Technically, Applicant admitted omitting his arrest (2.a), but asserted that he did so based on advice from state officials that his arrest was expunged from state records and therefore Applicant could respond "no" to the question. Applicant also asserted that he disclosed the arrest to the DSS agent who interviewed him.

6. Currently in pay grade O-4, soon to be in-zone for O-5.

7. For example, Applicant provides precise day/month/year information in every instance where the application requires a date. In many places, he produces the middle names of listed references and current telephone numbers, even where the time period covered is in the somewhat distant past. In listing his foreign travel, he provided 21different entries with precise dates, including continuous trips to several Carribean island nations.

8. The SOR (2.a) alleges that Applicant falsified a 21 October 1998 Questionnaire for National Security Positions (QNSP), also an SF-86, by falsely answering "no" to question 26 requiring Applicant to disclose if he had ever been "charged or convicted" of a drug or alcohol offense. I take official notice of the fact that at the time Applicant executed his SCA, two different editions of Standard Forms 86 were in use, one labeled SCA, one labeled QNSP, with slightly different numbering schemes and wording. For example, the SCA executed by Applicant asks the drug/alcohol question at question 24, with the identical language alleged in the SOR. Question 26 requires an applicant to disclose any arrest, charge, or conviction within the last seven years, not required to be disclosed elsewhere (including question 24) on the SCA. However, question 26 on the SCA contains the same specific instruction to disclose the required information regardless of whether the record has been "sealed" or otherwise stricken from the record (with a single exception for certain expungements under federal law). I consider the SOR references to question 26 on a QNSP to be typographical errors which nevertheless properly put Applicant on notice of the allegation he was expected to defend. The only clearance application in the record is G.E. 1, and there was no suggestion by Applicant that he executed any other clearance application on 21 October 1998.

9. In addition to the reclama in his Answer, Applicant provided extensive details of the arrest, his perception of the unfairness of it, his entry into a pre-trial diversion program, and ultimate efforts to have the record expunged (Tr. 28-30, 84-90, 103-106; A.E. C). He clearly understood the question on the SCA, because he called state officials to obtain confirmation that the record was indeed expunged. However, he also acknowledged that he did not ask his facility security officer (FSO)(Tr. 85) or any federal official whether he should report the arrest, only a state official. He ignored the plain language of the question which required him to disclose even "sealed" arrests, unless the offense involved a federal drug offense (clearly not the case here). His testimony that he saw no difference between federal and state law (or federal and state officials)(Tr. 88, 105) is simply not credible, given both the clear language of the question, Applicant's demonstrated attention to detail elsewhere in the SCA, and Applicant's own military service with the federal government. Indeed, the facts as recorded support the inference that Applicant deliberately consulted with only state officials to ensure that he did not run the risk of disclosing the arrest to his FSO (who has a fiduciary duty to the Government to report known adverse information), with whatever risk there might be to either his employment or his clearance. Applicant's claimed disclosure to a DSS agent during a subject interview (before confrontation) is only partly confirmed by the fact that G.E. 1 (the only record of the arrest) was obtained in April 2001. However, even if I accept the representation that Applicant brought up the arrest (which was allegedly unknown to the agent), the disclosure was not promptly made after the original falsification. Further, the disclosure does not appear to be made in good faith, but merely as a hedge against the known vagaries of inter-agency communication (Tr. 89, 106).

10. However, he did not falsify the financial question which required him to disclose whether he had any liens placed against his property in the last seven years. The record reflects that the Applicant is the joint owner of the property at issue (which Applicant and his brother bought from their parents as a means of providing them with financial help), but that the brother is responsible for managing the property and paying the bills (Answer, Attachment A; Tr. 34-37, 82-83). The liens in question are sewer liens for the local government, in a jurisdiction where the liens may apparently be recorded automatically when payments are late and released when payments are recorded. Applicant credibly states he was not aware of the liens when he filled out the SCA. The liens do not appear on the January 1999 Credit Bureau Report (CBR)(G.E. 2). They appear for the first time on a March 2002 CBR (G.E. 3).

11. The CBRs in the record (G.E. 2, 3; A.E. E, F, G, H) are in substantial agreement that the debt at 1.a. was charged off in January or February 1999. The last recorded activity on the account was April 1998. In June 1998, the account was 30 days past due; the status progressed to 60 days (July 1998), 90 days (August 1998), 120 days (September 1998), 60 days (October 1998), 90 days (November 1998), 120 days (December 1998), 150 days (1999), charge off (February 1999)(A.E. G).G.E. 2 shows the account 90+ days past due, with last activity in April 1998. A.E. E shows the account 90+ days past due in September 1998, 120+ days past due in October and November 1998. A.E. F shows the account closed as a charge off in November 1995. Applicant's claimed 10 September 1998 payment on this account (Answer, Attachment B; Tr. 37), was actually for a different-numbered account (Tr. 64-66)--one shown on A.E. F as closed, paid, in January 1999. I conclude that Applicant hoped, rather than knew or believed, that this account was current when he completed his SCA.

12. Again, the CBRs in the record (G.E. 2, 3; A.E. E, F, G, H) are in substantial agreement that the debt at 1.d. was a paid/charge off in March 2000. The last recorded activity on the account was June 1998. In August 1998, the account

was 30 days past due; the status progressed to 60 days (September 1998), 90 days (October 1998), 120 days (November 1998), 150 days (December 1998/January 1999, 180 days (February 1999), charge off (March 2000)(A.E. G). G.E. 2 shows the account 120+ days past due, with last activity in June 1998. A.E. E shows the account 120+ days past due in December 1998, January 1999, February 1999. A.E. F shows the account paid after charge off/collection in August 1999. Applicant asserts that he did not know the status of the account in October 1998, because he had moved without providing the new address to the creditor (Tr. 37-38, 69-70, 79-80). He does not remember when he paid it off. However, records reflect the account has been paid (A.E. D.) I conclude Applicant knew about this account at the time he completed his SCA.

13. Because these omissions were not alleged in the SOR, I do not consider them on the merits of the case. However, I do consider them on the general issue of Applicant's credibility. For example, the debt alleged at subparagraph 1.b. was incorrectly alleged to have been charged off in February 2002, as well as alleging an incorrect amount. G.E. 2 suggests that it was over $1,000.00 past due with a balance of $8,241.00 and last activity in March 1998, and was charged off as a bad debt--a status that should have been reported as both currently more than 90 days past due and more than 180 days past due (at any time in the last seven years). G.E. 3 asserts that the account was 120 days past due in November 1998. A.E. E reflects the account was 90+ days past due in September 1998, 120+ past due in October and November 1998. A.E. F shows the account charged off as a bad debt with last activity in March 1998. Applicant acknowledged that he knew this account had been closed in March 1998 and that he had not been making payments to the creditor, yet insisted that he did not know if the account was 90+ days past due in October 1998, more than six months later (Tr. 66-68).

14. Although I take official notice of the fact that as an active duty Naval officer, a significant portion of his remuneration consists of non-taxable subsistence allowance, housing allowance, and variable housing allowance.

15. I observe that Applicant's otherwise detailed SCA provides no work history for the period 30 December 1994, when he left the utility company, to March 1997, when he reported a brief period of self-employment. It does not report his period of active duty, or any of the claimed periods of employment with his current employer, except for the period beginning in June 1998.

16. And indeed, the credit reports he submitted showed a wide variety of accounts, now current or paid, which fell delinquent--some significantly--during this period of time, including some of his college educational loans. However, the record also suggests that Applicant did not take steps to reduce his expenses during the period his income was reduced. The extensive foreign travel reported by Applicant (G.E. 1; Tr. 101-102) was mostly to participate in international sailing races. Between March 1996 (Applicant began graduate school in September 1996) and February 1997, Applicant reported seven visits to foreign countries in the Carribean.

17. Applicant's credit reports (A.E. E, F, and G) suggest that the debt at 1.a. and d. began to be past due beginning in June 1998 and August 1998, respectively--after Applicant resumed full time employment with his current employer.

18. The accounts were governed by state laws in states where the legal interest rates are quite high.

19. As noted earlier, the SOR incorrectly alleges the amount of the debt as $7,500.00, which is the credit limit on the account. Accumulated interest and fees bring the amount to $8,241.00, the debt reflected in most of the credit reports entered into the record.

20. There is an argument, based on the account status for creditor 1a. contained in A.E. G, that Applicant truthfully omitted this account because at the precise moment he completed the SCA (October 1998) the account was "only" 60 days past due. However, the account was 90+, and 120+ days past due the immediate two months before the SCA was completed, and became 90+, and 120+ days past due the two months immediately following completion of the SCA. However, crediting the argument would only confirm my assessment of Applicant's untruthfulness in manipulating the investigative process.