

DATE: November 26, 2003

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-22628

## **DECISION OF ADMINISTRATIVE JUDGE**

**JOAN CATON ANTHONY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Robert J. Tuidor, Esq., Department Counsel

#### **FOR APPLICANT**

Nathaniel J. Webb III, Esq.

### **SYNOPSIS**

Applicant's financial problems date back several years. In the past seven years, he has twice filed for bankruptcy under Chapter 13. Both suits were dismissed, the first for failure to commence payments under a Chapter 13 plan, and the second for failure to make required payments. In January 2001, Applicant filed for Chapter 7 bankruptcy and some of his debts were discharged in May 2001. He failed to report material facts relating to his financial liabilities on the security clearance application he filed in January 2000. Applicant's financial vulnerability raises continuing security concerns. Clearance is denied.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On December 17, 2002, under the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on January 15, 2003 and elected to have a hearing before an administrative judge. The case was transferred to me from another judge due to caseload considerations on April 21, 2003. A hearing was scheduled for June 18, 2003, but by Order dated June 13, 2003, for good cause shown, I continued Applicant's hearing to July 10, 2003. On July 10, 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. At the hearing, Department Counsel proposed that the record remain open for a period of time to allow Applicant to submit additional evidence of satisfied debts. I agreed to hold the record open for 10 days for that purpose. Before the time for the closing of the record, Applicant requested additional time. By order dated July 21, 2003, I granted Applicant until July 31, 2003 to supply additional documentation in support of his case. On July 29, 2003, Applicant submitted additional documents, which were marked as Applicant's Exhibit E and admitted to the record. DOHA received the transcript (Tr.) of the proceeding on July 17, 2003.

### **FINDINGS OF FACT**

The SOR in this case contains 21 allegations of disqualifying conduct. Seventeen allegations relate to conduct charged under Guideline F, Financial Considerations, and four allegations relate

to conduct charged under Guideline E, Personal Conduct. In his answer to the SOR, Applicant admitted the debts alleged under Guideline F. He also admitted allegation 1.l., his Chapter 13 bankruptcy filing of September 1996, allegation 1.m., his Chapter 13 bankruptcy filing of April 2, 1997, and allegation 1.q., his Chapter 7 bankruptcy, which was filed January 23, 2001 and a discharge order entered May 5, 2001. At the hearing, Applicant presented as his Exhibit D the Chapter 7 Schedule F listing his creditors holding unsecured non-priority claims. He testified that SOR allegations enumerated 1.a., 1.b., 1.c., 1.d., 1.e., 1.h., 1.j., 1.k., and 1.p. identified specific debts to creditors listed on Schedule F and that those debts had been discharged by order of the Bankruptcy Court.

Applicant acknowledged that the debts identified at SOR allegations 1.f., 1.g., 1.i., 1.n., and 1.o. were not listed on Schedule F of his Chapter 7 bankruptcy filing. While he asserted that he believed they were settled, he had no receipts or documents with him at the hearing to demonstrate this. The record was held open so that Applicant could provide evidence, if he had it or could acquire it, to demonstrate that the alleged debts had been paid.

Applicant's financial problems began several years ago when he was laid off from his job. (Tr. 56-58.) His SF-86 shows a period of employment in 1995.

Applicant completed and signed his security clearance application, SF-86, on January 19, 2000. Question 33 on the SF-86 states: "In the last 7 years, have you filed a petition under any chapter of the bankruptcy code (to include Chapter 13)?" If an applicant has filed for bankruptcy, he is asked to provide the date of the filing, the amount and the name of the individual filing the action, and the name of the court and the location of the court in which the petition in bankruptcy was filed. Applicant answered "yes" in response to Question 33 and listed his Chapter 13 filing of April 1997, but he did not list his Chapter 13 filing of 1996.

Allegation 2.a. of the SOR states that Applicant, in response to Question 33, listed his 1996 Chapter 13 bankruptcy filing but failed to list his 1997 Chapter 13 filing. The record shows that allegation 2.a. is in error.

Allegation 2.b. of the SOR states that, in response to Question 35 on the SF-86, Applicant responded "no" when asked if any of his property had been repossessed in the past 7 years. SOR allegation 1.b. states that Applicant's automobile was repossessed in June 1996. Applicant admits that he returned the automobile to the creditor voluntarily when he lacked sufficient funds to make the required payments. Applicant insists he made an honest mistake and did not equate repossession with voluntary surrender of the vehicle.

Allegation 2.c. of the SOR states that Applicant falsified his response to Question 37 on the SF-86 when he answered "no" to the question: "In the last 7 years, have you had any judgments against you that have not been paid?" SOR allegations 1.h., 1.i., 1.j., and 1.k. identify four separate judgments entered by courts against Applicant for debts totaling approximately \$3,000. Two of the four judgments, those alleged at 1.j. and 1.k., were in existence at the time Applicant completed and signed his SF-86. Applicant contends he was confused in answering the question and did not understand that a judgment was a determination made by a court in a law suit.

Allegation 2.d. of the SOR states that Applicant falsified his SF-86 when he answered "no" to Question 38, which reads: "In the past 7 years have you been over 180 days delinquent on any debt(s)?" SOR allegations 1.a., 1.b., 1.c., 1.d., 1.e., and 1.f. allege debts that were over 180 days past due when Applicant completed and signed his SF-86 on January 19, 2000.

On July 29, 2003, Applicant filed documents showing that he still owed the debts alleged at 1.g. and 1.i. of the SOR. The debt alleged at 1.i. was the result of a judgment rendered against Applicant in February 2000. The debt at 1.g. was a delinquent account turned over for collection in April 2000. (Ex. E.)

Applicant also filed a document showing that the debt alleged in the SOR at 1.f. in the amount of \$46.00 had been paid. He reported that his state tax debt was zero, but stated that the state would not provide documentation of the zero balance. He also reported that he was awaiting documentation from the Internal Revenue Service showing that he owed

no federal taxes for the years 1993-1996. (Ex. E.)

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

## CONCLUSIONS

### **Guideline F-Financial Considerations**

The Government's concern under Guideline F, Financial Considerations, is that individuals who are financially overextended and unable or unwilling to pay their just debts may try to generate funds by engaging in illegal acts. Applicant has a history of not meeting his financial obligations, and this financial history suggests an inability or unwillingness to satisfy his debts, conditions which raise security concerns under subparagraphs E2.A6.1.2.1. and E2.A6.1.2.3. of Guideline F.

In the SOR, DOHA alleged Applicant had delinquent debts (¶¶ 1.a., 1.b., 1.p); delinquent debts that had been referred for collection (¶¶ 1.c.-1.g.); unpaid judgments (¶¶ 1.h.-1.k.), dismissed Chapter 13 bankruptcies (¶¶ 1.l, 1.m.); and tax delinquencies (¶¶ 1.n, 1.o.). In December 2002, when the SOR was prepared, DOHA alleged that Applicant intended to file a Chapter 7 bankruptcy proceeding in order to reduce his financial overextension. (¶ 1.q.). At his hearing, Applicant acknowledged that he had filed a Chapter 7 bankruptcy petition in January 2001 and that 9 of the debts alleged in the SOR had been discharged by action of the Bankruptcy Court. An applicant who is financially overextended is at risk of having to engage in illegal acts to generate funds. Directive ¶ E2.A6.1.1.

Applicant's financial overextension continues despite the discharge in Chapter 7 bankruptcy of some of his debts. His financial difficulties are on-going and recent and are not isolated incidents. Thus, mitigating conditions E2.A6.1.3.1. and E2.A6.1.3.2. do not apply. While Applicant's Chapter 7 bankruptcy proceedings indicate that he has initiated a good faith effort to repay overdue creditors or otherwise resolve his debts, pursuant to mitigating condition E2.A6.1.3.6., the

record also shows overdue debts incurred since his bankruptcy filing in 2001, leading to the conclusion that he has not yet been able to mitigate his on-going financial over extension. Accordingly, allegations 1.a. through 1.q. under Guideline F of the SOR are concluded against the Applicant.

### **Guideline E-Personal Conduct**

In the SOR, DOHA alleged Applicant deliberately falsified his answer on his SF 86 to questions 33 (¶ 2.a.); 35 (¶ 2.b.); 37 (¶ 2.c.); and 38 (¶ 2.d.). Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The record shows that DOHA's allegation at 2.a. under Guideline E of the SOR was inaccurately framed, and, in fact, Applicant listed his 1997 Chapter 13 bankruptcy on his SF-86. Accordingly, the allegation in subparagraph 2.a. of the SOR is concluded for the Applicant.

Applicant's assertions that he did not intend to falsify his responses to Questions 35 (¶ 2.b.), 37 (¶ 2.c.), and 38 (¶ 2.d.) are not credible in light of his awareness of his financial problems over a period of several years, beginning in 1996, and his creditors' many attempts to put him on notice of delinquent debts. Three mitigating conditions under Guideline E might be applicable to the instant case. The security concern raised by Applicant's Guideline E disqualifying conduct could be mitigated under E2.A5.1.3.1. if the information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability. However, because the information was substantiated and pertinent to a determination of the Applicant's judgment, trustworthiness or reliability, mitigating condition E2.A5.1.3.1. does not apply to the facts of his case. Mitigating condition E2.A5.1.3.2. also is inapplicable, for his falsifications were recent, were not isolated incidents, and he did not supply correct information voluntarily. Mitigating condition E2.A5.1.3.3. is also inapplicable, since Applicant did not make prompt good faith efforts to correct the falsification before being confronted with the facts. Accordingly, the allegations in subparagraphs 2.b., 2.c., and 2.d. are concluded against the Applicant.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline F: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Subparagraph 1.i.: Against Applicant

Subparagraph 1.j.: Against Applicant

Subparagraph 1.k.: Against Applicant

Subparagraph 1.l.: Against Applicant

Subparagraph 1.m.: Against Applicant

Subparagraph 1.n.: Against Applicant

Subparagraph 1.o.: Against Applicant

Subparagraph 1.p.: Against Applicant

Subparagraph 1.p.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

### **DECISION**

In light of all of 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. Clearance is denied.

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Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.