

DATE: January 8, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-24247

DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Robert A. Soltis, Esquire

SYNOPSIS

The Applicant filed for Chapter 7 bankruptcy protection in 1983 and 2000. The Applicant's financial difficulties were primarily due to the medical conditions of his children. In 1983 the Applicant unsuccessfully attempted to discharge student loans. The loans were successfully discharged in 2000. The Applicant has a prudent financial plan which he is following to avoid any recurrence of financial difficulty. Adverse inference is overcome. Clearance is granted.

STATEMENT OF THE CASE

On January 29, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on February 20, 2003, and requested a hearing. The case was received by the undersigned on July 11, 2003, and a Notice of Hearing was issued on July 11, 2003.

A hearing was held on July 28, 2003, at which the Government presented nine documentary exhibits (Government Exhibits 1 through 9). Testimony was taken from the Applicant, who called one additional witness and also submitted seven hearing exhibits (Applicant's Exhibits A through G) and six post-hearing exhibits (Applicant's Exhibits H through M). Applicant's Exhibit H are letters from the Applicant to Experian, Applicant's Exhibit I is a letter from the Applicant to his counsel, Applicant's Exhibit J is the Order of Discharge and Order Closing Case from the Applicant's 2000 bankruptcy, Applicant's Exhibit K is the Motion for Relief from Automatic Stay filed by Banc One in the Applicant's 2000 bankruptcy, Applicant's Exhibit L is a page from Schedule F of the Applicant's 2000 bankruptcy and Applicant's Exhibit M is a copy of the Section 523 of the United States Bankruptcy Code. The transcript was received on August 11,

2003.

FINDINGS OF FACT

The Applicant is 44, married and has a Bachelor of Science degree in Engineering Technology. He is employed by a defense contractor as an engineer, and he seeks to retain a Secret-level DoD security clearance previously granted in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

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

The Applicant has filed for bankruptcy twice. The first time was in 1983. The Applicant's first child was born in January 1982. She had severe medical problems upon her birth and the Applicant was forced to pay many medical bills. While he was able to keep up with his medical bills, he got behind on his other bills, especially for student loans. The Applicant was represented by counsel and decided to file for bankruptcy under Chapter 7 of the Bankruptcy Code. As part of the filing, Schedule A-3 indicated that the three student loans were dischargeable under Section 523(a)(8) of the Bankruptcy Code due to the undue hardship that repayment of the loans would impose on the Applicant. (Government Exhibit 1 at 6.) The Applicant received a discharge from bankruptcy in December 1983. Because of the representations of his counsel, the Applicant had a good faith belief that his student loans had been discharged. In reality, it appears that the student loans had not been appropriately discharged.

By 2000, the Applicant and his wife now had seven children. Three of them had serious medical conditions. However, the Applicant was able to maintain his payments on his debts, including his medical bills. About this time, the Applicant discovered that his student loans, which he thought had been discharged 16 years earlier, were in fact not discharged. His financial situation was such that he could not afford to pay off the student loans in addition to his other financial responsibilities.

The Applicant consulted a different attorney, one who specialized in bankruptcy law, who advised him to file another Chapter 7. Under the terms of Section 523(b) of the Bankruptcy Code, the student loans which were not discharged in 1983 were now eligible to be discharged. (Government Exhibit 5 at 15.) (*See also* Applicant's Exhibit M; and *In re Tanski*, 195 B.R. 408 (E.D. Wi. 1996).) The case was filed in October 2000 and the Applicant was discharged on December 11, 2000. (Applicant's Exhibit J.)

Under subparagraph 1.c., the SOR alleges that the Applicant owes \$2, 513.00 for a corporate credit card. The Applicant maintains that this account existed in 2000 and was included in his bankruptcy. The Government's evidence is a credit bureau report which shows that account number 4798264101070993 was opened in October 1995, had the last action in October 2000 and was charged off in 2002. (Government Exhibit 8 at 1.) In his 2000 bankruptcy filing the Applicant stated that he owed the same credit card company \$2,478.05 on account number 4798264101020993. (Government Exhibit 5 at 14.) In addition, a June 3, 2003, credit report does not show this debt. (Applicant's Exhibit A.) From all the available evidence, it appears that the Applicant did list this credit card debt in his bankruptcy schedules. Accordingly, it was discharged in 2000 and is no longer due and owing. This subparagraph is found for the Applicant.

Mitigation.

The Applicant has worked to resolve any concerns the Government may have about his future financial situation. He has sold his house, is moving to a lower cost house, and his new budget shows that he will have a surplus of approximately \$600 every month after the payment of his normal expenses. (Applicant's Exhibit C.) He and his wife have taken on additional employment in order to help their financial situation.

The Applicant is well-respected in his profession. His evaluations show him to be a Successful Contributor. (Applicant's Exhibit B.) He has received many commendations for his work in the defense sector. (Applicant's Exhibits E, F and G.)

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Guideline F (Financial considerations)

Conditions that could raise a security concern:

(1) a history of not meeting financial obligations (E2.A6.1.2.1);

Conditions that could mitigate security concerns:

(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) (E2.A6.1.3.3);

(6) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts (E2.A6.1.3.6).

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

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 twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in acts of financial irresponsibility that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration

and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has declared bankruptcy twice, in 1983 and 2000.

The Applicant, on the other hand, has successfully mitigated the Government's case. The bankruptcy filing in 1983 was brought about by the inability of the Applicant to pay the medical bills of his seriously ill infant daughter and his student loans. (Mitigating Factor 3.) Evidently, his counsel did not do all that was required because the student loans were not discharged. The Applicant resolved this situation 17 years later with his subsequent bankruptcy filing. In both cases the Applicant depended, as he should, on the advice of legal counsel in resolving the debts. The Applicant has had some financial problems, but the evidence shows that he has a plan for his future financial stability which is prudent and which he is following. (Mitigating Factor 4.)

In looking at this case under the General Factors we see that his conduct was serious (Factor 1); that the majority of the financial difficulties occurred because of the medical conditions of his children (Factor 2); there have been pertinent behavioral changes which show rehabilitation (Factor 6); and, there is very little or no likelihood of continuation or recurrence (Factor 9).

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: For the Applicant.

Subparagraph 1.a.: For the Applicant.

Subparagraph 1.b.: For the Applicant.

Subparagraph 1.c.: For the Applicant.

DECISION

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

Wilford H. Ross

Administrative Judge