DATE: April 15, 2003

In re:

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

Applicant for Security Clearance

ISCR Case No. 01-24431

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Katherine A. Trowbridge, Department Counsel

FOR APPLICANT

Phillip W. Ogden, Esq.

SYNOPSIS

Applicant encountered serious personal and business related setbacks when his family business failed in March 2000. After unsuccessful efforts to repay his creditors, he obtained work with his current defense contractor and explored bankruptcy. Most of Applicant's unpaid personal and business-related debts were discharged in bankruptcy in December 2000, and his surviving state tax debt was later paid in full. Applicant extenuates and mitigates financial issues associated with his delinquent debt history. His omission of his old debts from his executed SF-86 is demonstrated to have been the result of a good-faith mistake that is reflected in several consistent ways: (a) his shown overall good honesty and (b) his contemporaneous counseling with his facility clearance officer (FSO) and bankruptcy attorney before completing his SF-86. And his subsequent notifying his FSO of his Chapter 7 bankruptcy petition filing provided implicit prompt, good-faith acknowledgment of his delinquent debts. Clearance is granted.

STATEMENT OF THE CASE

On August 20, 2002, 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 September 03, 2002, and requested a hearing. The case was assigned to this Administrative Judge on November 5, 2002. Hearing was scheduled for December 17, 2002. Pursuant to further notice of December 31, 2002, the case was scheduled for completion of the commenced hearing on January 15, 2003. Hearing was reconvened on January 15 2003, as scheduled, 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 six exhibits; Applicant relied on six witnesses (including himself) and seven exhibits. Transcripts

(R.T.) of the proceedings were received on December 26, 2002 and January 23, 2003, respectively.

PROCEDURAL ISSUES

Before the close of the hearing, Department Counsel asked to keep the record open for a short period to enable her to locate and provide a copy of a certain judgment taken against Applicant. Applicant offering no objections, and for good cause shown, Government was allowed two (2) days to supplement the record with a copy of the judgment (assuming the same could be located), and Applicant was permitted seven (7) days to respond. Within the time permitted, Department Counsel did not supplement the record with any adverse judgment submission.

Before the close of the record, Applicant asked and was afforded the opportunity to fax a copy of an adverse information report of September 2000, which had been identified as Applicant's exhibit F. The document was pre-admitted as exhibit F (*see* R.T., at 185-86) and later faxed before the close of the record.

STATEMENT OF FACTS

Applicant is a 39-year old maintenance electronics technician for a defense contractor who seeks a security clearance.

Summary of Allegations and Responses

Applicant is alleged to have experienced financial difficulties reflected in numerous debt delinquencies: some were addressed in a Chapter 7 bankruptcy filed in September 2000 (discharged in December 2000), and others (three in all totaling in excess of $1,800.00) show to be still delinquent, as of July 2002.

Additionally, Applicant is alleged to have falsified his security clearance application (SF-86) of June 2000 by deliberately omitting six separate debts more than 90 days delinquent and totaling in excess of $2,100.00.

In his response to the SOR, Applicant admitted to filing a Chapter 7 bankruptcy petition but denied being indebted to any of the creditors listed in the SOR. He claimed the debts of the two listed commercial creditors were discharged in his bankruptcy; he claimed his state tax debt was otherwise satisfied. Addressing the allegations he falsified his SF-86, Applicant denied intentionally falsifying the SF-86. He claimed to have relied on the advice of his lawyer to stop paying his bills (as they were to be charged off in his bankruptcy) when he answered **no** to the question inquiring about any debts he had over 90 days delinquent.

Relevant and material factual findings

Married to his current spouse since November 1984, Applicant served in the Air force for three and a half years before receiving an honorable medically-related discharge in October 1992. His AF duties required a security clearance, which he held till his discharge.

Following his discharge, Applicant joined his father-in-law's government contracts business. For the first seven years of his employ in the business, Applicant trained as a laborer, field foreman, and finally the company's president. Sometime in late 1999, his father-in-law closed the doors of his business to pursue other interests (*see* ex. 2; R.T., at 80-82). At this point, Applicant and his spouse committed to forming their own business. In turn, they incorporated their new business to operate as a small family owned construction business (*see* R.T., at 33, 71-73). Between November 1998 and June 2000 Applicant essentially ran their start-up contractor business. The company soon began to joint venture in projects under a separate logo with two others Applicant characterized as informal business partners. Two of his company's largest accounts were covered by this joint venture.

Unbeknownst to Applicant, the two joint venture partners aligned with his company took his company off the accounts of his company's two large customers (sometime in late 1999) and persuaded the customers to go around Applicants' company and pay them directly (*see* ex. 2; II R.T., at 70-74). These account diversions had such a devastating impact on his company that by March 2000, his company was losing money so badly that it could no longer operate. So, Applicant shut down his company's operations in the Spring of 2000 and looked to options to pay off the company's creditors. He soon came to the realization, however, that he and his spouse could not cover the company's losses with their limited

resources and sought out a bankruptcy specialist to consider their bankruptcy options (*see* II R.T., at 90-93). For financial advice, Applicant and his spouse turned to an experienced bankruptcy attorney (Mr. A) in June 2000 to consider petitioning for bankruptcy.

While still assessing his financial options, Applicant went to work for his current defense contractor in June 2000, and has worked there ever since. Shortly, thereafter Mr. A advised him to petition for bankruptcy and cease paying on any of his business or personal accounts (R.T., at 93). After compiling Applicant's schedules of debts and assets and researching the various creditors and accounts listed, Mr. A filed a Chapter 7 bankruptcy petition in behalf of Applicant, his company and his spouse in September 2000. With the approval of Mr. A, Applicant and his spouse executed re-affirmance agreements with three of their creditors, none of which are covered in the SOR. Two of these reaffirmed debts involved family car and stove purchases, which have since been paid off; while the third one concerned Applicant's home mortgage, which remains in current status.

Of the listed debts in the SOR, one (creditor 1.b) is covered in Applicant's bankruptcy petition (*see* exs. 6 and B, at 73). It is not clear, though, whether the other listed commercial debt is covered in the petition (*see* exs. 2 and D). That it may not be expressly listed in the bankruptcy schedules under the name of the listed creditor in the SOR is not dispositive. The debt is a very small one (just $141.00) and is not contested by the affected creditor. Without a creditor challenge, Applicant's claimed understanding that this very small commercial debt was discharged in bankruptcy may be accepted. As to his uncharged state tax debt, this debt is clearly documented to have been paid in full following Applicant's bankruptcy discharge (*compare* exs. 5 and C).

When hired by his defense contractor employer, Applicant was required to execute an SF-86. Uncertain as to whether he was required to acknowledge either a planned bankruptcy filing or debts that had not been subjected to creditor action, he sought the advice of both Mr. A and his (FSO). Neither person provided Applicant clear advice to list any of his past due debts or his bankruptcy. Mr. A simply told him to quit paying on any of his old bills, as they would be scheduled in his planned bankruptcy petition (*see* R.T., at 34-45, 93-95). His FSO was more specific in her advice, but no more clear about his listing his old debts (that she could remember). She provided very specific advice only about his covering his planned bankruptcy, counseling him not to list his bankruptcy, but to let her know when he actually filed his bankruptcy petition (*see* ex. 2; R.T., at 91-92). Applicant followed the directions of both Mr. A and his FSO to the letter. When Mr. A filed his Chapter 7 bankruptcy petition in September 2000, Applicant provided a copy of the petition to his FSO (*compare* ex. G with R.T., at 94-95 and R.T., at 95-97). His FSO, in turn, forwarded a copy of Applicant's bankruptcy petition on to DSS (*see* ex. F).

Applicant's claims misunderstanding the meaning of delinquent debts as used in question 29 of his SF-86: He claims the word meant more to him than debts past due. Mr. A afforded him some cover on this interpretation by describing other clients coming to him with similar misunderstandings about the meaning of the word "delinquency" (*see* R.T., at 78-79). Still, Applicant's claimed uncertainty about the meaning of delinquency is a bit troubling, particularly for someone like himself who operated his own construction business.

Most favorable for Applicant in dispelling any falsification intent re: his personal debts is the good sense he displayed in seeking guidance from both his bankruptcy attorney and FSO about his debts and his proposed bankruptcy plans. While neither his FSO nor his attorney could provide any clear impressions of how they perceived any Applicant confusion over delinquency phraseology, each laid out the advice they provided Applicant on bankruptcy filing and notice. Applicant's returning to his FSO months later to furnish her a copy of his Chapter 7 petition only reinforces his overall good faith efforts to be honest and forthcoming about his accounting of any delinquent debts attributed to him, in addition to his wife and company. His shown good intentions in following up with his FSO in providing financial information reflects positively on his claimed well placed misunderstanding of the meaning of debt delinquencies. Both his discussing his bankruptcy plans with his FSO before completing his SF-86 and his later providing her a copy of his Chapter 7 petition reflect at the very least an Applicant disposition to be forthcoming about his financial problems. For implicit in bankruptcy schedules covering secured and unsecured creditors is disclosure of creditors with past due histories.

To be sure, Applicant could not identify the dates or circumstances of a certain repossessing business creditor's taking either non-judicial or judicially sanctioned repossession of certain furniture. Since he did not list this creditor when

answering question 35 of his SF-86, he was challenged by Department Counsel at hearing about why he omitted this non-pleaded repossession. It was never clear, however, whether this specific repossession was covered by any judgment entered before he executed his SF-86 (*see* R.T., at 141-42, 161-64). Afforded a chance after hearing to provide documentation of this repossession and any related judgment, the Government did not provide any. All that is reflected in the bankruptcy petition (under the debtor's statement of financial affairs) is this business creditor's taking repossession in July 2000 (*see* ex. 6), well after Applicant executed his SF-86. As a result, this item cannot be used in any way to discredit Applicant's overall credibility.

Another repossession listed (in the statement of financial affairs) in the combined bankruptcy petition of Applicant and his company, however, reflects a vehicle of some interest to Applicant (whether his own or his company's is not clear), and valued at $15,000.00, being repossessed in May 2000 (*see* ex. 6). As to this unpleaded item, Applicant does admit to omitting it from his SF-86 (*see* R.T., at 141-42). Applicant's explanation for this omission tracks his explanations for his omission of his old debts (over 90 days): his intended inclusion of his debts in a bankruptcy petition to be filed and his reliance on his bankruptcy attorney to take care of his debts and assets in his planned bankruptcy petition. This repossession reportedly involved a truck used in Applicant's corporate business. Whether Applicant had personal liability for the this truck is not clear and would likely depend on whether he leased the vehicle in behalf of himself or his corporation on an arms length basis (*see* exs. 2 and 6; R.T., at 134-43). Its uncertain status makes Applicant's omission of the vehicle repossession more explainable. For while his Chapter 7 bankruptcy petition required his listing of both his personal and business-related debts, his SF-86 sought disclosure of only his personal debt delinquencies. From Applicant's testimony, it is not at all clear whether he knew enough about the legal status of the truck repossession to make the distinction when responding to question 35 of his SF-86 (*see* ex. 6; R.T., at 145-51). Ultimately, of course, neither judgment nor repossession omissions were pleaded by the Government in its SOR.

Non-pleaded past due business taxes challenged by Department Counsel (while properly included in Applicant's combined bankruptcy) show no personal connections to Applicant either. Unless the proof could demonstrate a less than arms length relationship between Applicant and his incorporated business, Applicant would not appear to have any personal liability for these taxes. These were the assurances communicated to him by an IRS official and are accepted for evidentiary purposes here sans any firm indications to the contrary. As business-related taxes, they too would not require listing in Applicant's SF-86.

Applicant appears to be highly regarded by his employer and is credited with some excellent performance evaluations (*see* ex. E). One direct supervisor (a cost account manager) characterizes him as very honest and never disposed to concealing anything (*see* I R.T., at 89-90) and offered that he might have difficulty himself in filling out an SF-86. Another supervisor (Applicant's functional supervisor and personal friend of almost two years) describes Applicant as dependable, trustworthy and devoted to his family and community. This functional supervisor considered Applicant's steps in going to his FSO to clarify questions he had with the SF-86 (*see* I R.T. 113-21) to be totally reasonable under the circumstances. Applicant is known for making considerable contributions to his community's foster care program: The clinical director of a local foster care facility extolls the generosity of Applicant and his wife who have taken three to four children into their home as foster parents (*see* R.T., at 130-37).

Applicant's explanations of his reasons for omitting his delinquent debts from his SF-86, when appraised in light of his shown overall honesty and specifically demonstrated good faith in seeking advice from his FSO and bankruptcy attorney. While the SF-86 question about Applicant's delinquent debts do seem clear and straight forward to the trained reasonable eye, a mistaken understanding cannot be entirely ruled out. Applicant is credited here with making a mistake about what he was called upon to provide in answering the SF-86 question about his delinquent debts. As a mistake, it negates any inferences of knowing and wilful falsification of his SF-86. He is credited, too, with keeping his FSO notified of his bankruptcy filing: a prompt, good faith disclosure of not only his bankruptcy filing, but implicitly any personal debt delinquencies listed in the included schedules.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list "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 E.2.2 of the Adjudicative Process 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:

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 2. It was an isolated incident.

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.

Personal Conduct

Basis: conduct involving questionable judgment, untrustworthiness, unreliability, 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 3 The individual made prompt, good-faith efforts to correct the falsification from being confronted with the facts.

Burden of Proof

By reason 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

and 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.

CONCLUSIONS

Applicant accrued considerable personal and business-related debt between 1998 and 2000 following the diversion of his company's two major corporate accounts by his joint venture partners. Unable to keep his company operating, Applicant and his company were overcome with debts they could no longer handle by June 2000. After closing the business, Applicant sought and obtained employment with his current defense contractor and began exploring strategies for addressing his accumulated personal and business debt.

Choosing Chapter 7 bankruptcy on the advise of his bankruptcy attorney, Applicant filed a combined personal and business bankruptcy petition in September 2000. With his ensuing discharge in December 2000, Applicant, his spouse and his company were discharged from all but several debts they reaffirmed, and a state tax debt. Both this state tax debt and two of the reaffirmed debts were subsequently paid off, leaving only Applicant's mortgage, which remains in current status. Because of Applicant's history of debt problems associated with his business failure, his finances do bear security significance. On the strength of the evidence presented, Government may invoke two of the Disqualifying Conditions (DC) of the Adjudicative Guidelines for financial considerations: DC 1 (history of not meeting financial obligations) and DC 3 (inability or unwillingness to satisfy debts).

Since his emergence from his principally business-related bankruptcy, Applicant and his family have stabilized their finances and kept their debts in current status. Altogether, Applicant can reasonably claim over two years of uninterrupted financial stability, with good prospects for maintaining healthy finances in the future.

Based on the testimony of Applicant, his spouse, and their bankruptcy attorney, Applicant's covered debts are both extenuated and mitigated by circumstances and time (*viz.,* his business failure and ensuing business related bankruptcy) and earnest repayment efforts. Applicant may take advantage of several mitigating conditions of the Adjudicative Guidelines to extenuate and mitigate her actions: MC 2 (isolated incident), MC 3 (conditions largely beyond the person's control) and MC 6 (initiated good-faith effort to repay overdue creditors). Favorable conclusions warrant, accordingly, with respect to sub-paragraphs 1.a through 1.d of the Adjudicative Guidelines governing financial considerations.

Posing potential security concern as well are Applicant's omissions of his past due personal debts (exceeding 90 days) from his June 2000 SF-86. Applicant's explanations of his misreading the question, which were followed by his earnest efforts at supplementing his financial status with his FSO, are sufficient to enable Applicant to surmount the falsification implications of his omissions. Even if Applicant's reading of question 29 of the SF-86, and implicitly question 35 as well (albeit not covered in the SOR) might seem to be a stretch to a reasonable person, both his overall honesty and pre/post actions with his FSO and bankruptcy attorney reveal no motivation or specific intent to falsify his SF-86. Developed falsification jurisprudence within DOHA's Appeal Board and the courts nationally have never been tied to reasonable man tenets (save for use in appraising all of the surrounding circumstances) and at the core still require established motive and specific intent to falsify a document. *Cf.* ISCR OSD Case No. 01-06870 (September 13, 2002).

Moreover, Applicant's follow-up furnishing of his bankruptcy petition to his FSO provides Applicant solid grounds for claiming an implicit prompt, good-faith correction of any deemed unreasonable omission of his debt delinquencies. In Applicant's case, his prompt, good-faith clarification of his debt picture was made far before he was ever called to provide details of his finances by an interviewing DSS agent. Both in Applicant's case and in personal and small business bankruptcies generally, scheduled debts are implicitly past due ones, except in the rarest instances not present here.

On the strength of the evidence presented, Applicant may invoke MC 1 (information unsubstantiated) and MC 3 (prompt, good-faith correction) of the Adjudicative guidelines for personal conduct and carries his evidentiary burden in refuting the allegations he falsified his SF-86 by omitting his debts over 90 days delinquent. Favorable conclusions warrant with respect to sub-paragraph 2.a of Guideline E.

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

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE F (FINANCIAL): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

Sub-para. 1.d: FOR APPLICANT

GUIDELINE E: (PERSONAL CONDUCT): FOR APPLICANT

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

Roger C. Wesley

Administrative Judge