

DATE: March 7, 2003

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-26436

## **DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jonathan Byer, Department Counsel

#### **FOR APPLICANT**

Delila Ledwith, Esq.

### **SYNOPSIS**

Applicant has a history of delinquent debts accumulated during periods of her husband's unemployment that followed the failure of their family operated business. While most of her old debts languished under extenuating circumstances related to the failure of their family business and ensuing two-year period of unemployment of Applicant's husband, the debts have not since been mitigated through demonstrated efforts to either pay them down, consolidate them, or seek bankruptcy or Chapter 13 relief. As such, Applicant fails to absolve himself of security risks associated with unresolved debts and unwillingness to address them through the variety of options available to him. Clearance is denied.

### **STATEMENT OF THE CASE**

August 27, 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 17, 2002, and requested a hearing. The case was assigned to this Administrative Judge on October 25, 2002, and was scheduled for hearing on January 13, 2003, following a granted continuance to enable Applicant to obtain counsel. A hearing was convened on January 13, 2003, 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 three exhibits; Applicant relied on three witnesses (including herself) and ten exhibits. The transcript (R.T.) of the proceedings was received on January 22, 2003.

### **PROCEDURAL ISSUES**

Prior to the close of the hearing, Applicant requested the record be kept open to permit her the opportunity to supplement the record with letters from her creditors documenting her listed debts being charged off. There being no objections from the Government, and good cause being shown, Applicant was afforded ten days to supplement the record. Within the time submitted, Applicant submitted a post-hearing submission consisting of (a) copies of letters from two of her creditors and an affidavit from Applicant's husband detailing his efforts to obtain a similar letter from the third creditor and (b) citations to controlling state statutes of limitations. While the Government does not object to the admission of these documents, it disclaims any mitigation force from the exhibits. Applicant's attached two letters and affidavit are admitted as Applicant's exhibit K.

### **STATEMENT OF FACTS**

Applicant is a 42-year old senior software engineer for a defense contractor who seeks a security clearance.

#### **Summary of Allegations and Responses**

Applicant is alleged to have incurred numerous delinquent debts between 1988 and 1994: Specifically, she is alleged to have incurred three delinquent debts, which exceed \$10,000.00 in the aggregate.

For her answer to the SOR, Applicant admitted each of her listed debts. She claimed the listed debts reflect events and financial situations beyond the control of her husband and herself at the time: failure of their family owned business and her husband's ensuing unemployment, which strained their limited resources (limited to her income). She claimed past efforts to work out repayment schedules with the three creditors during her husband's lingering two plus years of unemployment, but to no avail. She claimed she and her husband rejected professional advice to file bankruptcy in the hopes they could pay off all their debts. She claimed she and her husband were able to pay off most of their remaining debts from the proceeds of the sale of their home following their divorce, but chose to let stand the three listed debts, which had already been charged off. And she claimed achievement awards for her job performance and recognition for her many community leadership initiatives.

#### **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.

Married to her former husband in 1983, Applicant soon became involved in her husband's family owned business. Applicant joined her husband, his brother and his wife in taking out a loan to purchase the buildings holding the business's office. Not long afterwards, Applicant and her husband also purchased a home (*see* R.T., at 18-19, 44).

By the early 1990s, the family partnership business began to fail. This business failure forced her husband's brother and his wife to declare bankruptcy and leave Applicant and her husband with not only the business loan debt, but their mortgage on their residence as well. For a while, Applicant and her husband were able to pay their debts on the strength of Applicant's income from her job. But as they struggled to stay up with their payments during her husband's lingering unemployment, they fell further behind in their debts. During 1994, they stopped altogether making payments on their business loan after the business completely failed and was shut down (albeit, never drawn into the declared bankruptcy of Applicant's brother-in-law and his wife). The lender subsequently filed suit and was granted a money judgment in 1996 for approximately \$16,000.00 (*see* exs. 2, A and B; R.T., at 22-23). Later faced with credit problems in obtaining a car loan, Applicant and her husband (who had since found full time employment) paid off the business judgment with a gift from her husband's father in 1998. With their available resources from the sale of their home, they were able to pay off another judgment and other credit-card debts (*see* exs. 2, C and E; R.T., at 20-26, 50-52, 61).

Over the ensuing years following the closing of the family business and the ensuing employment problems encountered by Applicant's husband, Applicant and her husband became delinquent in their household debts as well. The credit card charge-offs of the three listed creditors were payment casualties among the various credit card accounts Applicant and her husband held at the time. With Applicant's limited income and her husband unable to find work for almost two years, Applicant and her husband struggled to stay current with their personal creditors and ultimately defaulted in their payments. While they sought and received professional advice on paying their delinquent debts (*viz.*, to declare

bankruptcy), they rejected this option in the hopes of repaying their creditors (*see* ex. 2; R.T., at 44-45). With some of their creditors they were able to work out repayment arrangements. They could not with the three listed creditors, who always insisted on full payment. When these creditors never pursued them for collection, Applicant and her husband ceased addressing them and came to accept them as charge-offs barred by controlling statutes of limitations (*see* ex. I; R.T., at 46-47).

Applicant and her husband divorced in November 2000. Prior to finalizing their divorce, they worked out respective payment responsibilities with respect to their creditors. Because the three listed creditors had written off their debts, Applicant and her husband made no attempt to allocate primary payment responsibilities regarding these debts (*see* ex. 2). When interviewed by a DSS agent in January 2001 about her security clearance application, Applicant stated emphatically she had no intention of paying any of these three listed debts. Two of these same creditors confirmed to her now ex-husband following the hearing that their accounts had been charged off, one of whom is no longer reflected on her latest credit report (*see* ex. F). The third creditor confirmed only that the account had been sold to a third party. Applicant and her ex-husband continue to rely on the charged-off status of these debts and bar of the State's controlling statute of limitations as a defense against any further repayment responsibilities.

Applicant continues to excel in her employment as a senior software engineer and now makes \$74,000.00 annually (*see* R.T., at 32). With her added income she is able to keep up with her current debts and maintain a personal asset portfolio that exceeds \$18,000.00 (*see* exs. 2, F and G; R.T., at 27-29, 39). She is highly regarded by her employer and has numerous achievement awards to her credit as recognition for her employment contributions to her company (*see* exs. H and I; R.T., at 37-38). Applicant has been recognized, too, for her many leadership contributions in her community (*see* R.T., at 34-36).

## **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 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 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 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 accrued considerable debt, much of it credit card-related, following the failure of the family-owned business Applicant and her former husband became involved in following their marriage in 1983. Struggling to pay their bills on her income over a two-year period spanning 1995 to 1997, while her husband was out of work, she and her husband resisted recommended bankruptcy and settled instead on a strategy of paying those creditors that pursued them with legal actions. Creditors like the three listed creditors who charged off their debts were essentially ignored after initial efforts to work out repayment arrangement with them failed. Altogether, Applicant and her former husband accrued over \$27,000.00 in delinquent debt, much of it covered by a defaulted loan on their purchase of the buildings that housed their family business. The listed debts alone account for over \$10,000.00 of aggregate debts that were written off by the creditors and are now barred from enforcement by pertinent statutes of limitation. On the strength of the evidence presented, Government may invoke two 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).

While Applicant's three listed credit card debts are understandable and extenuated, considering the financial predicament she and her former husband found themselves in following the failure of their business and his ensuing unemployment, her explanations for failing to later tend to these debts are not. Once Applicant's creditors rebuffed their past attempts to work out modest repayment arrangements with the resources they had at their disposal at the time, Applicant and her husband still had several options to turn to: debt consolidation, Chapter 13 relief, counseling, and even exploration of Chapter 7 bankruptcy relief. Applicant chose none of these options, and continues to rely exclusively on pertinent statutes of limitations (save for the prior repayment of judgment debts of her husband and herself with the aid of her father-in-law) not included in the SOR to forestall creditor enforcement and ultimately remove her old debts from credit reporting.

An applicant's shown history of ignoring undisputed creditor obligations even when resources become available for repayment bears close resemblance to an applicant's being asked to place his own private interests in subordination to the Government's security interests when the two clash with each other. Over time, our Appeal Board has shown general consistency in disallowing applicant claims to mitigation based on charge-offs and limitation bars on debts previously unpaid due to cited extenuating circumstances. *Cf.* ISCR Case No. 01-17474 (March 7, 2003); ISCR Case No. 01-13653 (March 7, 2003); ISCR Case No. 01-12147 (January 21, 2003). Security clearance decisions are, of course, never an exact science, but rather involve predictive judgments about a person's security eligibility based on the person's past conduct and present circumstances. *See Department of Navy v. Egan*, 484 U.S. 518, 528-29 (1988). Without any

payment seasoning to rely on to advance her mitigation claims, she lacks the probative mitigation necessary to absolve her of the pressure and judgment risks associated with being in debt.

So, while Applicant may take advantage of MC 3 (conditions largely beyond the person's control) of the Adjudicative Guidelines to extenuate her debt delinquencies, she may not fully invoke the mitigating provisions of MC 6 (initiated good-faith effort to repay overdue creditors), absent more concerted efforts to address her old creditors than reliance on pertinent statutes of limitations, removal and anticipated removal of her listed debts from credit reports.

To find insufficient mitigation of Applicant's accrued delinquent debts is not to minimize her personal accomplishments with her employer and in her community. For these credits, Applicant merits acknowledgment and commendation. Unfavorable conclusions warrant, accordingly, with respect to sub-paragraphs 1.a through 1.c of the Adjudicative Guidelines governing financial considerations.

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): AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

Sub-para. 1.c: AGAINST 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