

DATE: January 9, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-09005

**DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esquire, Department Counsel

**FOR APPLICANT**

John F. Mardula, Esquire

Roberts, Abokhair & Mardula, LLC

**SYNOPSIS**

This 55-year-old engineer filed for bankruptcy protection on three occasions, in 1981, 1993, and 1999. All three bankruptcies resulted from the failure of a business, the breakup of his marriage - ending in divorce, and tax debts related to the divorce and not previously resolved. There is no evidence of extravagant living. Applicant is currently remarried, has a sizable and stable family income, steady and well-paying employment and no delinquent debts. There is minimal risk of the recurrence of financial problems. Mitigation has been shown. Clearance is granted.

**STATEMENT OF THE CASE**

On April 25, 2003, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On May 11, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made after a hearing before a DOHA Administrative Judge. The matter was assigned to another Administrative Judge, but was reassigned to me on June 24, 2003, because of caseload considerations. A Notice of Hearing was issued on August 8, 2003, setting the hearing for August 26, 2003. At the hearing, the Government did not call any witnesses, but offered 10 exhibits, which were marked for identification and admitted as Government Exhibits (GX) 1-10. The Applicant testified, called three other witnesses, and offered nine exhibits, which were marked and admitted as Applicant's Exhibits (AX) A-I. The transcript (Tr) was received at DOHA on September 2, 2003.

## FINDINGS OF FACT

Applicant is a 55-year-old engineer for a defense contractor and has been employed by this company since 1995. He has held a DoD security clearance since 1992. The SOR contains three allegations under Guideline F (Financial Considerations), 1.a., 1.b., and 1.c. In his response to the SOR, Applicant admits the factual allegations of all three allegations. These admissions are incorporated herein and are considered as Findings of Fact.

After considering the totality of the evidence derived from the contents of the case file, I make the following additional FINDINGS OF FACT as to each SOR allegation:

### Guideline F (Financial Considerations)

1.a. - On September 30, 1999, Applicant filed for Chapter 7 Bankruptcy protection, listing assets of \$14,826.00 and liabilities of \$71,604.00. The bankruptcy was discharged on December 28, 1999. This bankruptcy covered only the tax liability remaining from the divorce and property settlement in 1993. No other debts were included in the bankruptcy. Applicant retained counsel to help him to finally resolve all of his remaining tax problems. (Tr at 40-44).

1.b. - On July 9, 1993, Applicant filed for Chapter 13 Bankruptcy protection. This filing resulted from a divorce action filed in 1990, after several years of marital difficulties. In an unsuccessful attempt to save the marriage, he changed jobs to be able to be home more, but this led to a substantial decrease in earnings. The marriage ultimately failed, after three years of increasing financial problems. Applicant, with the advice of counsel, first filed for Chapter 13, but later changed it to Chapter 7, because of his inconsistent income made it impossible to be sure of sufficient income to make payments under a Chapter 13 plan. Most debts were discharged, but tax issues involving the house foreclosure, family support, custody and exemption remained. Documentation attached to Applicant's response to the SOR shows Applicant's efforts to resolve these issues. (Tr at 40-42).

1.c. - On November 23, 1981, Applicant filed for Chapter 7 Bankruptcy protection. It was discharged in March 1982. This bankruptcy resulted, in substantial part, from the failure of a business in 1977-1979, followed by a long period of unemployment in 1980-1981. Working with an attorney, Applicant was able to negotiate a settlement with several major creditors, but other creditors demanded more money immediately than Applicant could afford, leading him to choose bankruptcy protection.

## POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

### **GUIDELINE F** (Financial Considerations)

*The Concern:* An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Conditions that could raise security concerns and may be disqualifying include:

1. a history of not meeting financial obligations.
3. inability or unwillingness to satisfy debts.

Conditions that could mitigate security concerns:

1. the behavior was not recent;
2. it was an isolated incident; [\(1\)](#)
6. the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

### *Other Policy Considerations*

Eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the Directive's "whole person" concept, I am not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses.

If the Government meets its initial burden of proof and establishes conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended,

at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

### CONCLUSIONS

Because of a business failure in the late 1970s, a failed marriage in the early 1990s, and related excessive expenses through the late 1990s, Applicant filed for bankruptcy protection on three occasions, 1981, 1993, and 1999. The fact that Applicant filed each bankruptcy is not disputed, but Applicant's explanations add considerable detail not evident in the rest of the Government's evidence. The main concern expressed in the SOR by the Government, i.e., that excessive debt might lead Applicant to perform illegal acts, i.e., improperly disclosing classified information, to obtain funds, is not currently valid here. Applicant currently has no delinquent debts and is financially stable.

A second concern in Guideline F cases is that the manner in which excessive or delinquent debts are incurred and/or resolved can demonstrate that the applicant does not possess the level of good judgment, reliability, or trustworthiness required of someone seeking access to the nation's secrets. I conclude that this concern, likewise, is not established by the totality of the record evidence. The evidence supports Applicant's contention that business, employment, and divorce-related problems, have been the cause of most of the delinquent debt load and the time it has taken him to resolve those debts.

All three allegations pertain to bankruptcy filings and discharges, in 1981/1982, 1993, and 1999. Bankruptcy has long been a Congressionally authorized way to avoid legal responsibility for one's delinquent debts, and is therefore not generally a basis for finding an individual to be unsuitable to hold a DoD security clearance. A final discharge in bankruptcy by a federal judge indicates a formal finding of legality and appropriateness. Bankruptcy generally is of security concern only when it is abused, and thus shows poor judgment, unreliability, and/or untrustworthiness. It is usually an issue when multiple use of the bankruptcy laws indicates either planned abuse or a pattern of such poor financial planning that a risk remains of similar conduct in the future.

I conclude that while Applicant has a history of financial difficulties, they do not suggest a lack of integrity or good judgement. Given the history behind the three bankruptcies, it is difficult to see what Applicant could have done that he

has not done. Clearly, Disqualifying Conditions 1 (history of not meeting financial obligations) and 3 (inability [but not unwillingness] to satisfy debts are applicable ). In the context of three bankruptcies over an 18-year period, it is arguable whether the passage of more than 3 years since the last bankruptcy is no longer "recent," as that term is used in Mitigating Condition (MC) 1. The series of three bankruptcies does not qualify as an "isolated incident" (MC 2). However, the incurring of the delinquent debts was substantially beyond the Applicant's control (MC 3). He has established a good-faith effort to repay overdue creditors or to otherwise resolve his debts (MC 6). Applicant currently owes about \$20,000 on credit card balances, but none of this is delinquent, which suggest that while high, this figure is not excessive or otherwise problematic. (Tr at 73-77). Applicant's present employment appears to be stable, Applicant had a gross income of about \$128,000 in 2002,<sup>(2)</sup> and the credit reports show relatively little debt, and none that is delinquent. (Tr at 57-59).<sup>(3)</sup>

1. An "isolated incident" is generally taken to mean one time only. In context, I conclude that there are two incidents of criminal conduct, a year apart (1975 and 1976) which, while not a single act, are entitled to some weight under this condition since they were related and have not recurred for over 25 years.

2. More than \$100,000 for the past three years (Tr at 53).

3. Counsel's citation of Applicant's transaction record from Ebay is novel, but nonetheless significant, since most sales and purchases are instantly rated as positive or negative, depending on how satisfied the parties are. A record of 353 positive favorable responses out of 354 transactions does indicate the party's financial credibility.<sup>(4)</sup>

4.