

DATE: December 30, 2003

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-30304

## **DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Erin. C. Hogan, Department Counsel

#### **FOR APPLICANT**

Terry Kordelski, Esq.

### **SYNOPSIS**

Applicant has a history of delinquent debts accumulated during periods of unemployment and low-earning underemployment situations, in addition to current and past child support obligations. While he promises to address his old debts when he is financially able, he provides no specific plan for doing so. He is no less definite about addressing his child support obligations, opting to withhold child support until he is afforded visitation rights by his estranged spouse. As such, Applicant fails to absolve himself of security risks associated with his unresolved debts and unwillingness to address his child support obligations. By filing his past due federal tax returns for tax years 2000 through 2002, he mitigates security concerns associated with his filing failures. Clearance is denied.

### **STATEMENT OF THE CASE**

On April 11, 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, 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 April 28, 2003, and requested a hearing. The case was assigned to me on July 7, 2003, and was scheduled for hearing on September 23, 2003. A hearing was convened as scheduled for the purpose of considering whether it is clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of five exhibits; Applicant relied on three witnesses (including himself) and five exhibits. The transcript (R.T.) of the proceedings was received on October 2, 2003.

### **PROCEDURAL ISSUES**

Before the close of the hearing, Applicant requested the record be kept open to permit him to document filing of his

federal tax returns for tax years 2000 through 2002. There being no objections from the Government, and good cause being shown, Applicant was afforded 14 days to supplement the record. Government, in turn, was afforded 7 days to respond. Within the time allowed submitted, Applicant submitted (a) an affidavit from counsel confirming he had mailed Applicant's 2000 federal return to the IRS on September 23, 2003 and was advised by the IRS it would take at least 4 weeks to verify Applicant's filing of his 2001 and 2002 returns and (b) a memorandum from his accountant tabulating a running balance of amounts owing, a payment received in May 2003 of \$554.74, and a zero balance as of May 2003. Department Counsel interposed no objections to the admission of any of Applicant's post-hearing submissions. Applicant's affidavit and accountant's memorandum are admitted as Applicant's exhibits F and G.

### **SUMMARY OF PLEADINGS**

Applicant is a 43-year old owner-operated truck driver who seeks a security clearance.

Under Guideline F, Applicant is alleged to have (a) accrued numerous delinquent debts ten in all) totaling in excess of \$14,000.00 between April 1998 and May 2002, (b) been ordered in May 2001 to pay monthly child support to his sons and pay an additional child support arrearage of \$1,435.00 (having previously declined to make any child support payments pending disposition of child support issues and (c) completed a financial statement in February 2003 that reflects no monthly income to pay on his listed debts.

Under Guideline J, Applicant is alleged to have wilfully failed to file his federal income tax returns for tax years 2000 and 2001.

For his response to the SOR, Applicant admitted each of the allegations. In mitigation, he claimed to have taken steps to correct his tax problems and contact his creditors to resolve his debt issues.

### **FINDINGS OF FACT**

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.

Applicant and his spouse at the time (W) accrued considerable debts between 1998 and 2001. Among these accrued debts are the ten debts listed in the SOR as delinquent consumer debts totaling in excess of \$14,000.00. Following his job loss in 2000 and separation from W in May 2001, he lost both a son (to an auto accident) and W to a divorce.

Applicant's initial marital troubles with W arose out of a suspected marital entanglement between W and the husband (H) of the owner (V) who employed both Applicant (at an annual salary of \$63,000.00 ) and W at the time in State B. W's relationship with H created so much tension in the office that V compelled to release Applicant from his company employment. V believed that H was trying to run V out of the company and had enlisted the assistance of W to help achieve his objective. V never questioned Applicant's skills or contributions to her company and would welcome him back to the company's employ.

Returning to State A (Applicant's home state) to be closer to W and his children following his discharge from V's company, Applicant encountered considerable difficulty finding full-time work. R employed Applicant as a mechanic for a brief period on a part-time basis to tide him over while he continued to seek full time employment. During this time, he met X (a widow), who owned a leased truck and invited Applicant to help her operate it. Applicant accepted X's offer and for a brief period continued to help X while continuing his part-time employment with R (*see R.T.*, at 71-72). But his professional relationship with X soon turned into a personal one, and after several months of this, he moved in with X, while continuing to drive her truck for her, and quit his job with R. Applicant has received no income from X, however, during his affiliation with her. While she has promised to place him on salary when her trucking business begins making money, to date she has been unable to pay him for his services, beyond room and board. With the very little revenue X has been able to generate from her truck operations, she has had to allocate virtually all of it for truck operating expenses and repairs. Applicant cannot say now when X's business can begin making money that will enable X to compensate him (*see R.T.*, at 74-75).

Initially, Applicant had high hopes of reconciling with W. Instead, she kept him guessing while she secretly made

arrangements to sell their house furnishings and horses (nine quarter horses in all) and the horse farm they owned. After she had completed the sale of their joint assets (save for the farm itself), W petitioned for divorce (in May 2000). As soon as W finalized her divorce from Applicant, she promptly prevented him from seeing his children any more. From the sale of the house that ensued, the proceeds proved to be enough to satisfy the mortgage, but nothing more. Pending reinstatement of his visiting privileges by W, Applicant remains resistant to making any child support payments, either current or arrearage.

Applicant has considered bankruptcy in the past but has avoided it out of a desire to pay his creditors. Debt consolidation (another option) would simply cost too much in his estimation. Despite promises made to the creditors he has contacted to repay his old debts, to date he has not worked out any repayment arrangements with any of them.

Besides debt issues, Applicant failed to file timely federal tax returns for tax years 2000 and 2001. He attributes his filing failures to distractions and having no income to pay the taxes he expected to owe (*see ex. 3*) or receipts to document his expenses for the year. Because W had taken all of his receipts with her, he had no discernible way of describing his expense deductions. Without money to even engage an accountant to prepare his tax returns, much less pay any taxes he might be deemed to owe, he declined to file any federal tax returns for years 2000 and 2001 in a timely way.

Applicant has since engaged an accountant who prepared and filed his tax returns for the 2001 and 2002 tax years. Applicant assured he engaged an accountant to prepare and file his 2000 federal income tax return before the hearing. And his attorney documents filing the prepared 2000 federal tax return in his behalf within the time permitted to supplement the record.

Applicant is well regarded by his current and past employers as a skilled mechanic and one who is reliable and trustworthy in the performance of his assigned responsibilities.

### **POLICIES**

The Adjudicative Guidelines of the Directive (Change 4) list policy guidelines to be made by judges in the decision making process covering DOHA cases. These guidelines, 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.

### **Criminal Conduct**

*The Concern:* A history or pattern of criminal activity creates doubt about a person's judgement, reliability and trustworthiness.

#### **Disqualifying Conditions:**

DC 1. Allegations or admission of criminal conduct.

DC 2. A single serious crime or multiple lesser offenses.

#### **Mitigating Conditions:**

MC 1: The criminal behavior was not recent.

MC 6. There is clear evidence of rehabilitation

### **Burden of Proof**

By virtue 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 material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of a material bearing, 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 debts during his marriage to his former spouse (W). Following his forced release from his previous employer in another state, he made concerted efforts to reconcile with his spouse before she filed for divorce in 2001. Besides taking most of his home furnishings before initiated foreclosure proceedings, W failed to help Applicant to address his debts. To date Applicant has been unable to address his old debts.

Denied visitation rights to see his children, Applicant has refused to address either his past or current child support obligations. Compounding his financial difficulties, he quit his interim job to devote his full time to a trucking business operated by a widowed owner who currently is unable to compensate him for his work beyond the room and board he receives in sharing her home. At the present, Applicant remains obligated, jointly and severally, on his old debts which exceed \$14,000.00 in the aggregate. While Applicant remains interested in paying these debts when he is able, he has not been able to provide any documented plan for repaying his creditors. 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 listed ten debt delinquencies with his consumer debts are extenuated to some extent as the result of his precipitous loss of income once he was discharged from V's employ, his election to give up his interim job with R before he had established any viable income source with X is not. Once Applicant encountered compounded financial set backs as a result of his estranged spouse's selling off their joint assets (before filing for divorce), he 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 undocumented intentions to repay his creditors in the future.

An applicant's shown history of ignoring undisputed creditor obligations and declining child support obligations (both current and arrearage) even when resources become available for payment 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 discounting promises to take repayment actions in the future when resources become available. *Cf.* ISCR Case No. 99-0012 (December 1, 1999); ISCR Case No. 98-0188 (April 29, 1999). Put another way, the assumed possibility an applicant might achieve resolution of his outstanding debts at some future date is not a substitute for a worthy track record of remedial actions, or evidence of financial reform or rehabilitation in the present. *Cf.* ISCR Case No. 98-0614 (July 12, 1999). 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 documentation of repayment efforts or definitive plan to address his child support obligations absent reinstatement of visitation rights, Applicant lacks the probative mitigation necessary to absolve him 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 some of his debt delinquencies, he may not fully invoke the mitigating provisions of MC 6 (initiated good-faith effort to repay overdue creditors), absent more concerted efforts to address his old creditors to date. Unfavorable conclusions warrant, accordingly, with respect to sub-paragraphs 1.a through 1.l under Guideline F.

Posing potential security concerns as well are Applicant's long-delayed filing of his federal income tax returns for tax years 2000 and 2001. Applicant provides little in the way of specifics about his filing failures: Distractions in general attributable to recurrent hardships over his family and employment losses and concern over his lack of resources to pay any determined tax liabilities comprise the rough essentials of his claimed collective failures to address his 2000 and 2001 federal tax returns. By all reasonable accounts, though, his multiple filing omissions meet the wilful test traditionally expounded by the courts. *See United States v. Weninger*, 624 F.2d 163, 167 (10th Cir.), *cert. denied*, 449 U.S. 1012 (1981)(good faith disagreement over taxes owed, no matter how earnest, cannot avert a conclusion of wilful failure to file).

A taxpayer's established wilful failure to file federal income tax returns (as here) constitutes criminal conduct of a misdemeanor nature under the federal statutory scheme, punishable by fine and imprisonment. *See* Sec. 7203 of Title 28 (U.S.C.A.) *et seq.* That Applicant was never charged with any criminal conduct by the Federal Government is not exonerating. For cognizable criminal conduct under the Directive's Adjudication Guidelines does not depend for its sustenance upon an actual admission or conviction. Our Appeals Board has consistently affirmed that the fact that federal or state authorities have not pressed criminal charges against an applicant for failure to timely file tax returns is not dispositive of the security significance of the same conduct. *See* ISCR Case No. 90-0049 (Sept. 26, 1991); ISCR Case No. 90-0095 (January 14, 1991). In the course of establishing an applicant's security worthiness, criminal conduct may be considered *de novo* independent of any decision by federal prosecutors whether to press criminal charges against an applicant.

Of some extenuating value is Applicant's years of family turmoil highlighted by his loss of his out-of-state job, loss of his son, and his separation and divorce from W. While worthy of considerable empathy for his personal losses, Applicant provides insufficient explanations for why he did not take care of his tax returns in a timely way.

Mitigation is availing to Applicant, however, on the strength of his recent filings of his federal returns for tax years 2001

and 2002, as well as 2000. Applicant persuades that he has not only corrected his judgment lapses associated with his past filing failures, but that he can and will avoid any such recurrences in the future. Conclusions warrant, accordingly, that the allegations covered by sub-paragraphs 2.a and 2.b under Guideline J are concluded favorable to Applicant.

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 guidelines listed above, I make the following FORMAL FINDINGS:

#### **GUIDELINE F (FINANCIAL CONSIDERATIONS): AGAINST APPLICANT**

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

Sub-para. 1.d: AGAINST APPLICANT

Sub-para. 1.e: AGAINST APPLICANT

Sub-para. 1.f: AGAINST APPLICANT

Sub-para. 1.g: AGAINST APPLICANT

Sub-para. 1.h: AGAINST APPLICANT

Sub-para. 1.i: AGAINST APPLICANT

Sub-para. 1.j: AGAINST APPLICANT

Sub-para. 1.k: AGAINST APPLICANT

Sub-para. 1.l: AGAINST APPLICANT

#### **GUIDELINE J (CRIMINAL CONDUCT): FOR APPLICANT**

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR 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