

DATE: January 20, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-15277

## **DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Kathryn A. Trowbridge, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant has a history of delinquent debts accumulated during a tough period of unemployment, divorce and incapacitating medical issues. While most of his old debts languished under extenuating circumstances related to his employment and personal issues, 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**

April 23, 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 May 19, 2003, and requested a hearing. The case was assigned to me on July 2, 2003, and was scheduled for hearing on August 21, 2003. A hearing was convened on August 21, 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 five exhibits; Applicant relied on one witness (himself) and eight exhibits. The transcript (R.T.) was received on September 2, 2003.

### **STATEMENT OF FACTS**

Applicant is a 49-year old truck driver for a defense contractor who seeks a security clearance.

## Summary of Allegations and Responses

Under Guideline F, Applicant is alleged to have incurred numerous delinquent debts: Specifically, he is alleged to have incurred five delinquent debts, which exceed \$28,000.00 in total For his answer to the SOR, Applicant admitted each of his listed debts without explanation.

## 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.

Applicant and his wife at the time (W) accrued considerable credit card debts between 1997 and May 2000 (when they separated). During this period both Applicant and W were employed (W as a member of a local city council Applicant faced serious medical issues, beginning in August 2000, when he was diagnosed with a herniated disk in his neck that required corrective surgery (*see* R.T., at 27). His medical situation worsened in March 2001 when he suffered a massive heart attack that required the placement of two stints in his heart (*see* exs. D and E; R.T., at 26-27). Later in 2001, he was diagnosed with colon cancer (*see* exs. F and G; R.T., at 27-28).

Beginning in May 2001, following his lay-off from work and ensuing initiation of divorce proceedings by his spouse (W), Applicant fell behind in a number of his accrued consumer debts. These problems only compounded the adverse conditions affecting his physical and psychological state as the result of his medical set backs.

Applicant's divorce settlement made provision for W's obtaining the family home and Applicant's award of the accumulated credit card debts. Unable to discharge the debt with his available resources, Applicant consulted a bankruptcy attorney in May 2002. This attorney counseled against his initiating bankruptcy, citing his lack of assets and corresponding judgment-proof status (*see* R.T., at 43-44). At the time, he didn't have the up-front \$1,400.00 retainer fee to give the bankruptcy attorney and, in any event, elected not to pursue this course of action. Instead, he made arrangements to pay off the \$1,200.00 debt owed to the IRS (which he did) and attempted to reach payment arrangements with each of the remaining four consumer creditors (*see* R.T., at 29, 33-34). However, each of these creditors wanted payment in full and were unwilling to work out any payment arrangements with him (*see* R.T., at 33-34).

Each of Applicant's covered debts were, in turn charged off by the listed creditors. None of these listed creditors have made any attempts over the past year to pursue debt collection against Applicant. When he inquired of both his employer and the interviewing DSS agent what he should do about these debts, he was essentially advised by both to simply self-report them (*see* R.T., at 45-46), which he did.

Applicant currently lives week to week, is finished paying alimony to his ex-wife, and is current with his other debts (excluding the listed delinquent debts in the SOR). He has made no payments on any of his remaining delinquent debts and has not explored either credit counseling or bankruptcy. While he continues to experience deteriorating back problems, his cancer is in remission. Most of his medical bills associated with his medical treatment are covered by medical insurance with his employer (*see* R.T., at 38-39).

Applicant is praised by friends who know him as a caring and generous person who gives a considerable amount of his time to aid others with health problems and to act as an ombudsman volunteer for a local agency that dedicated to helping nursing care residents receive the medical care they require (*see* ex. B).

## 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 material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of 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 debt, much of it credit card-related, following his lay off and spouse initiated divorce proceedings in 2001. These problems, coupled with the medical set backs he experienced in 2001, created financial strains, and ultimately his defaulting his debts. Struggling to keep current with his other creditors over the two years that have elapsed since his lay-off and separation from his spouse, Applicant elected not to pursue either bankruptcy or credit counseling. Creditors like the four listed consumer creditors (exclusive of his IRS debt which he paid) who charged off their debts were essentially ignored after initial efforts to work out repayment arrangement with them failed. Altogether, Applicant and his former spouse accrued over \$27,000.00 in listed delinquent debt. These listed debts were written off by the creditors without any payments being contributed by Applicant since they became delinquent and are

now likely 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 he found himself in following his lay-off, divorce, and compounding medical problems, his explanations for failing to later tend to these debts are not. Once Applicant's creditors rebuffed Applicant's attempts to work out repayment arrangements with the resources he had at his disposal at the time, Applicant 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 (after consulting with a bankruptcy attorney), and continues to rely exclusively on pertinent statutes of limitations to forestall creditor enforcement and ultimately remove his old debts from credit reporting.

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 his mitigation claims (save for his repayment of his IRS debt), he 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 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 than reliance on pertinent statutes of limitations, removal and anticipated removal of his listed debts from credit reports.

To find insufficient mitigation of Applicant's accrued delinquent debts is not to minimize his work contributions or his personal expenditures of time in his community in the service of others requiring medical assistance. For these credits, Applicant merits acknowledgment and commendation. Unfavorable conclusions warrant, accordingly, with respect to sub-paragraphs 1.a through 1.d of the Adjudicative Guidelines governing financial considerations. Favorable conclusions warrant with respect to sub-paragraph 1.e of the SOR.

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

Sub-para. 1.d: AGAINST APPLICANT

Sub-para. 1.e: 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