

DATE: April 28, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-22325

## DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

### APPEARANCES

#### FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

#### FOR APPLICANT

*Pro Se*

### SYNOPSIS

Applicant's financial problems led him to file Chapter 13 bankruptcy in 2002. He has a history of financial delinquencies and bad debts. He failed to report material facts relating to his financial liabilities on the security clearance application he completed and certified on July 30, 2001. He did not provide financial information requested by DOHA in interrogatories served on him in April 2003. Applicant's financial problems and his lack of candor raise security concerns which he is unable to mitigate. Clearance is denied.

### STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On July 29, 2003, under the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on August 22, 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on October 27, 2003. On November 21, 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. At the conclusion of the hearing, I held the record open until close of business January 21, 2004, so that Applicant could submit additional documentation. By facsimile communication on December 23, 2003, Applicant provided DOHA with eight documents. By facsimile communication dated March 5, 2004, Applicant supplied DOHA with one additional document. The documents were identified as Applicant's Exhibits B, C, D, E, F, G, H-1, H-2, and I. By memorandum filed March 12, 2004, Department Counsel transmitted Applicant's documents to me and stated he had no objection to their admission. Accordingly the exhibits were admitted into evidence. DOHA received the transcript (Tr.) of the proceeding on December 2, 2003.

### RULINGS ON PROCEDURE

The SOR was amended to conform with the record facts, without objection from either party, to reflect that Applicant

signed and dated his SF-86 on July 30, 2001, and to delete the money amount owed from SOR allegation 1.a., substituting instead the phrase "in an undetermined amount."

### FINDINGS OF FACT

The SOR contains eight allegations of disqualifying conduct. Four allegations were related to conducted charged under Guideline F, Financial Considerations, and four allegations were related to conduct charged under Guideline E, Personal Conduct. In his answer to the SOR, Applicant admitted one allegation and denied three allegations charged under Guideline F. He admitted two and denied two allegations of disqualifying conduct under Guideline E. His admissions are incorporated as findings of fact.

Applicant is 41 years old, married, and the father of two minor children. In 2001 he retired as a staff sergeant (E5) from the U.S. Air Force, and he went to work for a defense contractor. Applicant has a history of financial problems. While he and his wife projected an income based on both of them being employed, Applicant's wife was often employed for periods of about six months, and then either lost or quit her job, causing strain or instability on the family's finances and budget. Applicant accepted responsibility for the financial problems caused by his wife's employment history.

On July 30, 2001 Applicant completed a security clearance application (SF-86) as a part of his employment as a civilian. Question 38 on the SF-86 asks: "In the last 7 years, have you been over 180 days delinquent on any debts?" Applicant answered "yes" to question 38 and indicated that he was 180 days delinquent on a debt of \$3675 incurred in August 2000 for the purchase of furniture. Question 39 on the SF-86 reads: "Are you currently over 90 days delinquent on any debt?" Applicant responded "no" to Question 39.

In a signed, sworn statement dated May 29, 2002, Applicant listed as paid two debts listed on his credit report as bad debts. He listed four other debts, also identified on his credit report, and stated: "I am paying on these debts and plan to have these [paid] off in full with[in] a couple of years." In June or July of 2002, Applicant filed for Chapter 13 bankruptcy. After his hearing, he provided a pay stub for a two-week period in November 2003 to show that as a condition of his Chapter 13 bankruptcy, \$150 is garnished from his paycheck every two weeks for payment of debts included in the bankruptcy. (Ex. D.) At the time of his hearing, Applicant had been making payments on his Chapter 13 bankruptcy for approximately 16 months.

Applicant failed to respond fully to financial interrogatories served upon him by DOHA in April 2003. He did not provide documentation to establish the status of his income, debts, and financial obligations. He said he had been instructed by the attorney who represented him in his Chapter 13 bankruptcy not to contact his creditors regarding his debts. At his hearing, he disputed the status of some of his debts on the credit reports provided to him by DOHA.

After his hearing, Applicant provided a creditor's report for one of his accounts, opened in 1998 and last paid on by him in April 2002. (Ex. E.) The report read as follows:

"The account history shows 10 occasions when a payment was 30 days past due, 8 occasions when it was 60 days past due, 3 occasions when it was 90 days past due, 3 occasions when it was 120 days past due, 2 occasions when it was 150 days past due, and one occasion when it was 180 days past due."

Applicant provided documents to show that a debt to a cable television company, alleged at SOR ¶ 1.c., had been satisfied when he returned leased equipment in October 1999. (Ex. G.; Ex. I.) He provided documents to show that, on September 30, 2001, he paid in full an unpaid charged off account alleged at SOR 2.b.i). (Ex.F.) Applicant also provided photocopies of two cancelled personal checks, one dated July 13, 2001 and one dated August 15, 2001, written in the amount of \$215.00 each on an account identified as 120 days past due on his credit report of August 14, 2001.

(Ex. H-1; H-2.)

Applicant did not provide a list identifying creditors included in his bankruptcy. At his hearing he verbally identified some creditors as included in his bankruptcy. A credit report dated February 5, 2003 identified still other creditors as a part of the bankruptcy filing.

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

## CONCLUSIONS

### **Guideline F-Financial Considerations**

The Government's concern under Guideline F, Financial Considerations, is that individuals who are financially overextended and unable or unwilling to pay their just debts may try to generate funds by engaging in illegal acts. Applicant has a history of not meeting his financial obligations, and his financial history suggests an inability or unwillingness to satisfy his debts, conditions which raise security concerns under subparagraphs E2.A6.1.2.1. and E2.A6.1.2.3. of Guideline F. DOHA's Appeal Board has concluded that "[a] person who is unwilling to fulfill his legal obligations does not demonstrate the high degree of good judgment and reliability required of persons granted access to classified information." ISCR Case No. 98-0810 at 4 (App. Bd. June 8, 2000).

In the SOR, DOHA alleged Applicant had charged off accounts (¶¶ 1.a. and 1.b.), a collection account debt (¶ 1.c.), and owed creditors for additional debts that had been discharged in Chapter 13 bankruptcy in July 2002 (¶ 1.d.) An applicant who is financially overextended is at risk of having to engage in illegal acts to generate funds. Directive ¶ E2.A6.1.1.

In a post-hearing submission, Applicant provided evidence to show that the debt alleged in SOR ¶ 1.c. had been paid in full in October 1999, approximately 21 months before he completed and signed his SF-86. (Ex. G.) The debt alleged in SOR ¶ 1.a. arose from the repossession of an automobile. Applicant was unable to make required monthly payments and was held accountable for the amount remaining after the creditor sold the automobile. Neither the Government nor the Applicant was able to specify the amount owed by Applicant and how much of the debt he had satisfied. The debt was listed as a bad debt with a zero balance on a February 2003 credit report. (Ex. 3, at 2.) While Applicant denied the debt alleged at SOR ¶ 1.b., it also appeared on the February 2003 credit report with a balance of \$4535 and the notation that it had been sold to another lender. (Ex. 3, at 2.) In response to SOR allegation ¶ 1.d., Applicant admitted additional

debts to creditors.

A discharge in bankruptcy between the time an Applicant files for a security clearance and his due process hearing does not preclude an assessment of his overall history of financial problems. ISCR Case No. 98-0349 at 3 (App. Bd. Feb. 3, 1999). Because he had no records of payment or communications from creditors identified at ¶¶ 1.a. and 1.b., Applicant was unable to establish that the debts alleged had been paid or otherwise resolved. Because the Government was unable to specify an amount for the debt alleged at SOR ¶ 1.a. and Applicant denied the debt, the finding is for Applicant. Applicant was also able to show that the debt alleged at SOR ¶ 1.c. had been paid long before he applied for his security clearance and had therefore been mistakenly reported as an active debt. Accordingly, the finding is for Applicant on SOR allegation ¶ 1.c. The status of these two debts notwithstanding, the Government has established, through Applicant's admissions and the record evidence, a *prima facie* case that Applicant is financially overextended. Applicant provided no persuasive evidence to rebut the financial concerns specified in the SOR allegations ¶¶ 1.b. and 1.d. and identified as disqualifying conditions under ¶¶ E2.A6.1.2.1. and E2.A6.1.2.3. of Guideline F.

We turn to a review of the several conditions that could mitigate the security concerns raised by Applicant's financial delinquencies. Applicant's acknowledged delinquencies involve long-standing debts which continue to be unsatisfied to this day. Thus, neither mitigating condition E2.A.6.1.3.1. nor mitigating condition E2.A6.1.3.2. applies.

The record shows that Applicant retired from military service in 2001 and became employed as a civilian immediately upon retirement. The record evidence suggests that Applicant's wife's employment problems contributed at least in part to Applicant's financial difficulties and were largely beyond his control. Thus, mitigating condition E2.A6.1.3.3. applies in part.

While Applicant has sought counseling for his financial problems and has received protection from some of his creditors through a Chapter 13 bankruptcy proceeding, he has not specified those creditors or the amounts due them and there is little indication that he has developed and implemented a practical plan for resolving debts not included in the bankruptcy and avoiding further indebtedness. Thus, mitigating conditions E2.A6.1.3.4. and E2.A6.1.3.6. apply only partially to the allegations of debt in subparagraphs 1.b. and 1.d. of the SOR, and, accordingly, those allegations are concluded against the Applicant.

### **Guideline E, Personal Conduct**

In the SOR, DOHA alleged Applicant failed to respond completely to the information requested by DOHA in financial interrogatories (¶ 2.a.) and falsified material facts on his answer to Question 39 on his SF 86(¶¶ 2.b.i), 2.b.ii), and 2.b.iii.). Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

With respect to the Guideline E conduct alleged in SOR subparagraph ¶ 2.a., Applicant stated that he was advised by his bankruptcy attorney that he should not communicate with his creditors to obtain the information requested of him in the interrogatories. Assuming, *arguendo*, that Applicant was correct in following the advice of his counsel, this would have precluded communicating with the creditors identified in the Chapter 13 bankruptcy, but would not have prevented him from identifying creditors included in the bankruptcy and providing information on debts to and payment plans arranged with creditors not included in the Chapter 13 bankruptcy. Applicant provided no information on any of his creditors in response to the DOHA interrogatories, bringing his conduct under disqualifying condition E2.A5.1.1.2. While Applicant said his refusal to cooperate was based on advice from legal counsel, he was informed by DOHA of the requirement to fully and truthfully provide financial information in response to interrogatories served on him in April 2003. (*See Ex. 3, at 1.*) He did not fully and truthfully provide the requested information, and thus mitigating condition E2.A5.1.3.6. does not apply.

A person's refusal to provide relevant and material information to the Government provides a rational basis for denial or revocation of access to classified information for that person. ISCR Case No. 98-0445 at 3 (App. Bd. April 2, 1999), quoting *Gayer v. Schlesinger*, 490 F. 2d 740, 754 (D.C. Cir. 1973); *Clifford v. Shoultz*, 413 F. 2d 868 (9<sup>th</sup> Cir. 1969), *cert. denied*, 396 U.S. 962 (1969).

In subparagraphs 2.b.i), 2.b.ii), and 2.b.iii), the Government alleged that Applicant falsified material facts on his SF-86 by answering "no" to Question 39, thus denying he was currently 90 days delinquent on any of his debts. DOHA alleged that on July 30, 2001, Applicant had an unpaid charged off account with one creditor, was 120 days past due on an account with a second creditor, and was 120 days past due on two accounts with a third creditor. Applicant admitted the allegation at ¶ 2.b.i), and the record evidence supports his admission. Applicant's post-hearing submission, identified as Ex. E, indicates that he was past due by 90 days or more 9 times on the debt identified at SOR 1.b.ii). While Applicant submitted cancelled checks for July and August 2001 showing payments to the third creditor on one of two accounts, the cancelled checks do not rebut the Government's allegation that he was past due on two accounts on July 30, 2001.

With respect to the Guideline E conduct alleged in the SOR, the Government has established its case. Applicant's assertions that he did not intend to falsify his response to Question 39 are not credible in light of his awareness of his financial problems over a period of several years and his creditors' many attempts to put him on notice of delinquent debts. His statements reveal that he failed to answer Question 39 completely, truthfully, and correctly, and this raises a security concern under ¶ E2.A5.1.2.2 of Guideline E. Applicant's conduct raises concerns under ¶ E2.A5.1.2.5. because it suggests a pattern of dishonesty or rule violation. Applicant's reticence to reveal the truth about his conduct suggests that, under some circumstances, he may put his interests before those of the Government.

Mitigating condition E2.A5.1.3.1. does not apply to this case. The information withheld by Applicant is pertinent to a determination of his judgment, trustworthiness, and reliability. Two other mitigating conditions under Guideline E might be applicable to the instant case. The security concern raised by Applicant's disqualifying conduct could be mitigated if the falsification was an isolated incident, was not recent, and if the Applicant subsequently provided the correct information voluntarily. ¶ E2.A5.1.3.2. While Applicant supplied some correct information about his financial delinquencies in his post-hearing submissions, his falsifications were not isolated incidents and they are recent. Mitigating condition E2.A5.1.3.3. is also inapplicable, since Applicant did not make prompt good faith efforts to correct the falsification before being confronted with the facts. Accordingly, the allegations in subparagraphs 2.a., 2.b.i), 2.b.ii), and 2.b.iii) of the SOR are concluded against the Applicant.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline F: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.i): Against Applicant

Subparagraph 2.b.ii): Against Applicant

Subparagraph 2.b.iii): Against Applicant

### **DECISION**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

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Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.