

KEYWORD: Financial

DIGEST: Applicant has a history of accumulated debt: some discharged in a recent bankruptcy, and some not. Absent evidence of repayment efforts of his remaining debts, Applicant is unable to mitigate security concerns associated with his pattern of financial difficulties. Clearance is denied.

CASE NO: 02-25435.h1

DATE: 04/27/2004

DATE: April 27, 2004

In re:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-25435

**DECISION OF ADMINISTRATIVE JUDGE
ROGER C. WESLEY**

APPEARANCES

FOR GOVERNMENT

Rita O'Brien, Department Counsel

FOR APPLICANT*Pro Se***SYNOPSIS**

Applicant, having accumulated delinquent debts after suffering stock market losses and tightening finances attributable to significant adoption and family medical expenses, petitioned for bankruptcy in 2001, and was discharged. Debts omitted from his bankruptcy have not been pursued by the creditors, and Applicant has disowned them. Characterizing these two debts (approximating about \$15,000.00) as (a) his mother's legal obligation which he benefitted from and (b) a charged off debt of his own that was not pursued by the creditor, Applicant declines to pay either of them. His failure to address the outstanding debts attributed to him with the ample resources that have been available to him precludes him from mitigating the security concerns associated with his judgment lapses. Clearance is denied.

STATEMENT OF THE CASE

On September 16, 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 October 3, 2003, and requested a hearing. The case was assigned to me on February 2, 2004, and was scheduled for hearing on March 4, 2004. A hearing was convened on March 4, 2004, 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 six exhibits. Applicant relied on one witness (himself) and six exhibits. The transcript (R.T.) was received on March 16, 2004.

PROCEDURAL ISSUES

Before the close of the hearing, Applicant requested leave to keep the record open to afford him the opportunity to document legal authority for being excused from a credit card obligation assumed by another (his mother) but on which he was listed as a user on the card. There being no objections from Department Counsel, and good cause being demonstrated, Applicant was granted 14 days in which to supplement the record. Government, in turn, was afforded 7 days to respond. Applicant's March 29, 2004 response was received late and objected to by Department Counsel for lack of timeliness. Applicant's response, while late, will be received and considered as Applicant's exhibit G.

SUMMARY OF PLEADINGS

Under Guideline F, Applicant is alleged to have experienced financial difficulties. Specifically, he is alleged to (a) have petitioned for Chapter 7 bankruptcy relief in July 2001 (discharged in November 2001), (b) be indebted to creditor 1.b for \$12,061.00 for an account that was charged off as a bad debt in November 2001, and (c) be indebted to creditor 1.b for \$2,290.00 for an account that was charged off and sent to collection in December 2000.

For his response to the SOR, Applicant admitted to petitioning for Chapter 7 bankruptcy relief in July 2001 and receiving his discharge in November 2001, but disputed the amount of the debts discharged (claiming only \$91,034.58 in discharged debts). Applicant also admitted the debt to creditor 1.c, but claimed it was inadvertently omitted from his bankruptcy filing. He denied any legal obligation to creditor 1.b, claiming the debt belonged to his mother, who was not financially able to repay the debt.

FINDINGS OF FACT

Applicant is a 45-year-old senior financial analyst for a defense contractor and a certified public accountant by training who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

Applicant and his wife (W) adopted a little girl from a foreign country in 2000. The expense from this adoption, coupled with the \$30,000.00 loss Applicant and W encountered in the stock market in 2000, and incurred out-of-pocket medical expenses associated with medical treatment in his family, created considerable pressure on their already considerable debt structure. Applicant and

W borrowed approximately \$20,000.00 from Applicant's 401-K retirement fund to take advantage of stock market opportunities in the late 90s (R.T., at 60). Before borrowing from the fund to invest in the market, he and his spouse had

earmarked the funds for use in the adoption (R.T., at 60). To cover his unanticipated stock market losses, Applicant borrowed anew from his 401-K retirement fund and obtained a second mortgage on his home to raise the monies needed to pay for his adoption and the expenses associated with his family's medical needs (*see ex. 2*).

Faced with tightening finances and W's inability to maintain steady employment because of a medical problem, Applicant and W made the decision in July 2001 to file for Chapter 7 bankruptcy relief. Their July 2001 Chapter 7 bankruptcy petition listed secured debts totaling \$184,638.31 and unsecured claims totaling \$91,034.58 (*see ex. 6*). Of the listed unsecured debts, \$36,915.02 represented two student loans of W, which survived their bankruptcy. However, over \$25,000.00 of the unsecured debts represent unpaid credit card debts. W has been unable to work and claims an exemption from repayment of her outstanding student loans based on a total disability. It is still unclear whether her exemption request has been approved by the federal agency supervising her student loans (*see ex. G*). At hearing, Applicant could not provide any documentation that his wife's student loans had been forgiven (R.T., at 55-56). The balance of his listed unsecured debts appear to have been discharged in bankruptcy.

Applicant omitted his creditor 1.b and creditor 1.c debts from his bankruptcy filing. In the case of his previously charged off 1.b debt for \$2,290.00, he claims the debt preceded his bankruptcy and was inadvertently omitted from his petition. This debt appears on his latest credit report (*ex. 5*) as a debt originated in 1995 and charged off in December 2000. Applicant attested to its remaining a legal obligation in the personal financial statement he attached to a statement given to DSS in May 2002 (*see ex. 3*). After charging off the debts some years ago the creditor has never contacted Applicant looking for payment (R.T., at 47-51). Whether or not the debt is currently time-barred is unclear. Applicant will consider payment of this debt only if pressed by the creditor (R.T., at 53).

Applicant's other listed debt (covered by creditor 1.b) represents a credit card debt in excess fo \$12,000.00 that was also omitted from his bankruptcy filing. Applicant acknowledged this debt as his own in the personal financial statement attached to the statement he gave to DSS in May 2002 (*ex. 3*), convinced at the time it was debt. It was not until he double checked his credit report when responding to a DOHA interrogatory in April 2003 that he was able to remember that the creditor 1.b debt was actually his mother's credit card that he had used (*see ex. 4; R.T., at 44-46*).

At hearing, Applicant acknowledged his purchases on his mother's credit card account (creditor 1.b) as an added user of the card (R.T., at 67-68). Over the ten years he used his mother's card, he made the monthly payments without showing his mother the statements, or denying the charges were his. Still, he denies any legal obligation for the charges accumulated on the credit card (R.T., at 68-71) and relies on the creditor's most recent correspondence confirming his mother as the obligor as probative of its exempting from liability. That creditor 1.b continues to treat his mother as the legal obligor does not document its excuse of Applicant from liability for his use of the credit card in his own behalf (*see ex. E*). Whether (as he insists) he is exempt from liability for using his mother's card is unclear from either the documentation or testimony reviewed. However, Applicant's continued use of the card in the knowledge the creditor expected payment which his mother could not make reflects poorly on his judgment and trustworthiness. Because his mother is not financially able to repay the debt and he believes he is not liable for it, the debt has never been paid and has since been charged off (R.T. , at 46-47).

Applicant currently earns about \$84,000.00 a year, a 20 per cent reduction from his 2001 income. He attributes the income drop to his loss of overtime pay (R.T., at 41). Since receipt of the SOR, Applicant and W have refinanced their home mortgage and taken out a \$20,000.00 home equity loan. They used the funds they received to purchase home

improvements, furnishings and other personal items and not to repay either of Applicant's listed debts or W's outstanding student loans. Applicant has since been to obtain new car loans on two vehicles. Applicant continues to believe he is not responsible for either of the two outstanding listed debts, either because the debt is not legally his (creditor 1.b) or the debt has been charged off (creditor 1.c)

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, require 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. Judges must also 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 pertinent to 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 affluence 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).

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.

CONCLUSIONS

Applicant and his spouse accrued considerable debts during the late 90s: some credit card related, some covering his spouse's student loans, and others related to the medical treatment needs of his family. Faced with these mounting debts and anticipated additional expenses in connection with his planned adoption, he borrowed from his 401-K retirement fund to invest in the stock market. He encountered unexpected heavy stock market losses in the 2000 downturn and was

forced to borrow again from his 401-K fund and take out a second mortgage on his own. When this was not enough to stabilize his finances he and his spouse filed for Chapter 7 bankruptcy relief in 2001. Two of his major debts were omitted from his bankruptcy petition and were not discharged .

At present, Applicant remains obligated, jointly and severally, on one of the two old debts (*viz.*, the one covered by creditor 1.c of the SOR), and potentially obligated on W's student loans and the purchases he ran up on his mother's credit card without regard to her ability to pay for them, or his intention to do so. To date, he continues to resist any payment of these two debts: the first (covered by creditor 1.b) because he is not legally liable and the second (covered by creditor 1.c) because the debt has been charged off and should have been included in his bankruptcy. While Applicant remains interested in addressing the smaller debt (*viz.*, creditor 1.c) should the creditor pursue him, he has made no attempt to date to initiate payment. Prospects for the creditor pursuing him on the obligation are uncertain at this time.

Applicant's continued refusal to acknowledge any financial responsibility for his mother's credit card on which he has secured personal benefits raises serious questions about his willingness to be personally accountable. That he would knowingly run up large balances on his mother's card and put her at risk to collection enforcement action (including adverse credit reporting) manifests a disposition to prioritize his own needs over a loved one who has placed her trust in him. It is difficult to separate this type of disregard for his mother's financial well being from how he could be expected to protect the Government's interests when faced with a potential conflict with his own interests. On the strength of the evidence presented, the 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).

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 meaningful repayment efforts on either of his two covered debts (not to mention his wife's outstanding student loans) or definitive plan to address these debts with his current resources, Applicant is unable to mitigate the security concerns that are associated with being significantly in debt, or potentially obligated, on these two debts. Both of these listed debts were closely preceded by his 2001 Chapter 7 bankruptcy discharge and, as such, reflect part of a continuing pattern of financial difficulties.

So, while Applicant may take advantage of MC 3 (conditions largely beyond the person's control) of the Adjudicative Guidelines to extenuate some of the debts associated with his bankruptcy, he may not invoke the mitigating provisions of MC 6 (initiated good-faith effort to repay overdue creditors), absent more concerted efforts to address his still outstanding debts. These conclusions should in no way suggest that bankruptcy is ever a *per se* reason for denying or revoking an applicant's clearance. Bankruptcy by itself reflects a Congressionally prescribed means of obtaining a fresh credit start. It is when the circumstances contributing to the bankruptcy are in recurrent evidence (as is the case here with Applicant's declination to address his two outstanding major debts) that security concerns arise. These security

concerns have not been mitigated. Unfavorable conclusions warrant, accordingly, with respect to subparagraphs 1.a through 1.c under Guideline F.

In reaching my 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 CONSIDERATIONS): 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. Clearance is denied.

Roger C. Wesley

Administrative Judge