

DATE: January 13, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-33097

**DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

**APPEARANCES**

**FOR GOVERNMENT**

Rita C. O'Brien, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant has a history of delinquent consumer debts he and his wife accrued over a number of years. Unwilling to address his debts until receiving the SOR, Applicant and his wife took out a collateralized loan on their home, which they used to pay off their consumer and their mortgage debt. Demonstrating good repayment ability on the consolidation loan they have in place, Applicant mitigates security concerns associated with his delinquent debts, and he successfully refutes allegations of falsification of his security clearance application (SF-86) by a demonstrated unawareness of the delinquency of his debts. Clearance is granted.

**STATEMENT OF CASE**

On October 31, 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 (undated) and requested a hearing. The case was assigned to me on July 19, 2004, and was scheduled for hearing on August 25, 2004. A hearing was convened on August 25, 2004, 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 four exhibits; Applicant relied on two witnesses (including himself) and 10 exhibits. The transcript (R.T.) of the proceedings was received on September 1, 2004.

**SUMMARY OF PLEADINGS.**

Under Guideline F, Applicant is alleged to have accumulated delinquent debts, nine in all, which total over \$18,000.00. Under Guideline E, he is alleged to have falsified his security clearance application (SF-86) by denying he had debts

over 180 and 90 days delinquent, respectively.

For his response to the SOR, Applicant admitted some of his debts (*i.e.*, those with listed creditors 1.a through 1.f and 1.i, which he is paying off monthly) while denying debts attributable to creditors 1.g (same as 1.f) and 1.h. Applicant denied falsifying his SF-86, claiming his wife pays the bills and had not discussed any delinquent debts with him prior to his completing his SF-86.

### **FINDINGS OF FACT**

Applicant is a 64-year-old functional analyst for a defense contractor, with over 46 years of combined military and civilian government service, who seeks to retain his 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.

Over the duration of their marriage (over 22 years), Applicant and his wife accumulated a number of delinquent debts which they failed to address. Altogether, they accumulated over \$8,000.00 in consumer debts (after eliminating duplicated and mistaken debts), which for lack of payment were either charged off or placed in collection by May 2003 (*see* exs. 2 and 4). Two of the listed debts in the SOR (creditors 1.f and 1.i) represent the same time share debt, and Applicant was successful in enlisting the credit reporting agency to delete both creditor 1.g and creditors 1.f/i. from its inclusion in Applicant's credit report (*see* ex. F; R.T., at 44-45, 69-71).

Despite acknowledging his listed obligated debts as his debts in a signed, sworn DSS statement and ensuing financial interrogatory (*see* exs. 2 and 3), he failed to initiate any major steps (either himself or through his wife) to discharge his debts prior to receiving the SOR in October 2003. Through his wife, in whom he entrusted responsibility for paying his bills, he made sporadic payments on his debts between January 2003 and September 2003, but nothing significant. Since receiving the financial interrogatory from the Government in July 2003, Applicant's wife has made more concerted efforts to contact Applicant's listed creditors and pay them off.

Applicant reported net disposable income in July 2002 of \$4,563.86 (*see* ex. 2). After allowing for monthly expenses and debt payments, his financial statement showed a \$509.88 net remainder. His monthly net remainder had increased to \$1,015.00 by June 2003 based on increased monthly income of \$5,227.00 (primarily attributable to inclusion of his military retirement income), slightly more monthly expenses (\$2,370.00) and decreased payments on his debts (\$1,842.00). According to Applicant's wife who prepared Applicant's June 2003 personal financial statement, this reported monthly disposable income included his retirement benefits (R.T., at 60). She attributed the higher monthly remainder to Applicant's making less payments on his debts than in the previous year. Her accounts appear to be credible, are generally corroborated by Applicant (R.T., at 88-89), and are accepted.

With the proceeds from a consolidated loan collateralized with his home (*i.e.*, \$44,285.00) Applicant and his wife obtained from a bank lender in June 2004 (*see* ex. J), they have paid off all of their listed obligated creditors (*see* exs. A through F and H; R.T., at 42-43) and mortgage. They appear to be fully capable, with Applicant's income and his wife's retirement benefits, to handle the \$917.99 monthly payments (in 84 installments, beginning in July 2004). His monthly loan payments are automatically deducted from his pay checks (R.T., at 76). Applicant expects to pay off his consolidation loan in two years with the income from his job and his wife's social security (R.T., at 94-95), which she is scheduled to start receiving in September 2004 (R.T., at 63).

Asked to complete an SF-86 in May 2002, Applicant answered in the negative when responding to question 38 (inquiring about his debts over 180 days delinquent) and question 39 (inquiring about his debts over 90 days delinquent). Applicant denies any awareness of delinquent debts at the time, save for his debts with creditors 1.c and 1.i, which he thought might be over 30 days past due, but not 90 or 180 days (R.T., at 75). Applicant's wife corroborates his falsification denials (R.T., at 53). Except for these two debts, he insists he never discussed his debts with his wife, who he relied on to pay the bills (R.T., at 81-82). When pressed, he did acknowledge familiarity with answering security clearance applications. And in the SF-86 he executed, he certified to the accuracy of his answers, inclusive of the negative answers he provided when responding to questions 38 and 39.

Despite debt delinquencies that appear to have persisted for years (some as far back as 1997), Applicant never looked at

any of the bills that arrived at his house or inquired of the status of any of the listed debts from his wife. Save for the debt pertaining to creditor 1.c, which he inquired about with his wife after getting a phone call from the creditor about a late bill, Applicant made no inquiries of his wife about the status of his debts before completing his May 2002 SF-86. He recalls his wife's showing him the creditor 1.i debt notice after completing his SF-86. But his recollection of this debt was that it was being paid, albeit a little late (but not 90 or 180 days late).

A review of the listed seven debts in the SOR found to be owing provides some helpful illumination of Applicant's disclaimers of any awareness of the true status of his debts. Three of the debts (creditors 1.a, 1.d and 1.h) are relatively small and were not placed in collection before May 2002. Two of the other listed debts actually constituted just one debt (creditors 1.f and 1.i). This debt Applicant discussed with his wife after completing his SF-86 and was told she was paying on it (R.T., at 79). A debt believed to be related to creditors 1.f and 1.i is creditor 1.g. This debt turns out, however, to have been carried on Applicant's credit report in error, and has since been removed. One of the major debts (creditor 1.b), like the three smaller ones, was not placed in collection until April 2002 (just one month before Applicant executed his SF-86) and conceivably could have escaped the interest of Applicant and his wife. More difficult to reconcile with Applicant's active pay status claims is creditor 1.c, which was charged off in April 1997.

Overall, Applicant's claims of ignorance about the status of his debts are persuasive enough to avert inferences of knowing and wilful falsification. While his efforts lack due diligence one could expect of an applicant who has held a security clearance for years and completed numerous security clearance applications, they are not enough under the facts of this case to draw inferences of falsification.

When later confronted with a credit report by the interviewing DSS agent at his July 2002 interview, Applicant acknowledged the listed debts as his own upon being refreshed by the interviewing agent (*see ex. 2*). Applicant assured his wife took care of his family's finances and had never told him about any of the debts, except for creditor 1.c.

Inferences warrant, accordingly, that Applicant was not aware of the delinquent status of his debts when he completed the SF-86. While due diligence inquiries from his wife and creditors most likely would have produced more accurate, up-to-date profiles of his debts, his failure to inquire of his creditors in these circumstances is not enough to infer knowing and wilful concealment.

## **POLICIES**

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

*The 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 good-faith efforts to repay overdue creditors or otherwise resolve debts.

### **Personal Conduct**

*The Concern:* Conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

**Disqualifying Conditions:** None

**Mitigating conditions:** None

### **Burden of Proof**

By virtue of the precepts framed by the Directive, a decision to grant or continue an applicant's 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 cognizable 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 persuasion 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.

### **CONCLUSION**

Applicant accumulated considerable delinquent debts prior to 2000. The Government's security concerns center on the amount of delinquent debt he compiled before 2000 (settled to comprise over \$8,000.00 spread over seven debts) and his ensuing omissions of these debts from his pertinent answers to questions 38 and 39 of his SF-86.

### **Financial Issues**

Applicant's accumulated listed debts, which number just seven after eliminating one of the time share debts as a duplication (*i.e.*, creditor 1.i) and another as an erroneous debt reflected in his creditor report (*i.e.*, creditor 1.g), still total more than \$8,000.00 as of the date of the issuance of the SOR in October 2003. Each of these seven debts became delinquent: most were either placed in collection or charged off by the creditors. On this record, two of the Disqualifying Conditions (DC) of the Adjudicative Guidelines for financial considerations apply: DC 1 (history of not meeting financial obligations) and DC 3 (inability or unwillingness to satisfy debts).

Extenuation is not manifest in any of Applicant's delinquent debt accumulations, which he claimed little or no knowledge of prior to his July 2002 DSS interview. Nonetheless, he mitigates active security concerns associated with his debt problems by his payment of his covered debts with the proceeds of a collateralized consolidation loan on his home. Appraising Applicant's mitigation circumstances with respect to all of his covered debts, Applicant may take advantage of the mitigation benefits of MC 6 (initiated good-faith effort to repay overdue creditors) based on his

repayment efforts.

Taking into account all of the circumstances of Applicant's accumulated debts, the overlaps and mistake relative to his time share debt, and the good- faith efforts he demonstrated in satisfying his debts after he and his wife obtained a collateralized consolidation loan on their home, favorable conclusions warrant with respect to subparagraphs 1.a through 1.i as to the allegations governed by the Adjudicative Guidelines pertinent to Guideline F.

### **Falsification Concerns**

Posing potential security concerns, too, are Applicant's documented omissions of his covered delinquent debts from the SF-86 he completed in May 2002, which he attributes to his lack of knowledge that any of his listed debts had been either 180 or 90 days delinquent. His claims are corroborated by his wife who confirms she paid the bills regularly and never told Applicant about the status of their debts (mostly of a consumer nature). Applicant with his experience in filling out clearance applications made no inquiry of his debts before certifying to the accuracy of his SF-86 answers. Similarly, he made no attempt to inquire of his wife, his creditors or creditor reporting agencies in the more than eight months that elapsed after completing his SF-86. That he knew at least one of the debts were past due (albeit, no more than 30 days past due) prior to executing his SF-86 suggests he knew something about his debts, certainly enough to trigger some form of inquiry from his wife and creditors, if not during the many of years of debt accumulation, then certainly before and after completing his SF-86. His failure to make any inquiries about his debts in the face of manifest indications he should reflects a considerable degree of poor judgment on his part, a core predicate concern of Guideline E.

Applicant's longstanding disinclination to look into his debts in the face of his familiarity with security clearance applications over a 46-year military and government civilian career reflects a lack of due diligence. Were the standard for knowing and wilful falsification in a Guideline E case a reasonable man test, falsification might well be attributed to Applicant. For as a security professional who has filled out many SF-86 forms and knows the importance of candor, he could have been expected to use more due diligence in checking the status of his debts before answering no to questions that ask him about his debts over 180 and 90 days delinquent, respectively. But while the Appeal Board has questioned an applicant's explanations at times as either contradictory, unsupported by the evidence, or just plain untenable (a variation of unreasonableness), it has not adopted a reasonable man test. Even the more recent Sarbanes-Oxley legislation (18 U.S.C. 1350 (2002)) that adds new criminal liability for corporate chief executive and financial officers who falsely certify the financial condition of their issuers incorporates the knowing and wilful test used for 18 U.S.C. Sec. 1001 cases: not a knew, or should have known, test of accountability. A reasonable man test is essentially a standard of care designed to determine whether negligence or departures of good judgment occurred.

Falsification, by contrast, involves knowing and wilful conduct that tests a person's honesty and requires evidence of specific intent, and generally motive. Proof of falsification requires more than poor judgment or unreasonable assumptions. *Cf. United States v. Chapin*, 515 F.2d 1274, 1283-84 (DC Cir. 1975); *United States v. Steinhilber*, 484 F.2d 386, 389-90 (8th Cir. 1973); *United States v. Diogo*, 320 F.2d 898, 905 (2d Cir. 1963).

While it is not unusual or unreasonable for Applicant to rely on his spouse to take care of the monthly bills, his failure to make any inquiry of her about the status of his debts over the course of several years is difficult to apprehend, given his considerable knowledge and experience with security applications. But this was his accepted corroborated testimony.

Applicant's answers to questions 38 and 39 of his SF-86, while incorrect, were not knowingly and wilfully false under all of the circumstances surrounding his completion of the SF-86. Under the accepted facts of this case, Applicant's wife handled the family's finances and failed to inform him of the overdue debts. There being no misconduct substantiated, no need to show extenuation or mitigation arises. *Cf. ISCR Case No. 02-13568* (February 13, 2004). While Applicant's efforts lack due diligence inquiries about the state of his debts, his due diligence failures alone are insufficient to preclude his surmounting of the Government's falsification allegations. Favorable conclusions warrant with respect to subparagraphs 2.a and 2.b under Guidelines E.

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): FOR APPLICANT**

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

Sub-para. 1.d: FOR APPLICANT

Sub-para. 1.e: FOR APPLICANT

Sub-para. 1.f: FOR APPLICANT

Sub-para. 1.g: FOR APPLICANT

Sub-para. 1.h: FOR APPLICANT

Sub-para. 1.i: FOR APPLICANT

**GUIDELINE E (PERSONAL CONDUCT): FOR APPLICANT**

Sub-para. 2.a: FOR APPLICANT

Sub-para. 2.b: FOR APPLICANT

## **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is granted.

Roger C. Wesley

Administrative Judge