

DATE: June 7, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-17523

## **DECISION OF ADMINISTRATIVE JUDGE**

**MATTHEW E. MALONE**

### **APPEARANCES**

#### **FOR GOVERNMENT**

James B. Norman, Esquire, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant has a history of financial difficulties and delinquencies dating back to 1984 and he still owes approximately \$20,000.00 in bad debts. Applicant has also been charged three times with writing bad checks, but he disclosed only one of these criminal charges on his most recent Security Clearance Questionnaire (SF 86). A prior background investigation had revealed financial problems, which he promised to resolve but never did. Applicant's recent actions to resolve or pay his debts, taken in response to the SOR, are insufficient to mitigate, extenuate, or refute the security concerns under Guideline E (Personal Conduct), Guideline F (Financial Considerations) and Guideline J (Criminal Conduct). Clearance is denied.

### **STATEMENT OF THE CASE**

On October 1, 2003, in accordance with DoD Directive 5220.6, as amended (Directive), the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline E (Personal Conduct), Guideline F (Financial Considerations), and Guideline J (Criminal Conduct). The SOR further informed Applicant that, based on available information, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to continue Applicant's security clearance. <sup>(1)</sup>

On October 27, 2003, Applicant answered the SOR (Answer), wherein he denied the allegations in SOR subparagraphs 1.c, 1.f, 1.m, 1.v, 1.y, 1.aa, 1.ee, <sup>(2)</sup> 3.a, and 3.b. He admits with various explanations the remaining 21 allegations.

On February 2, 2004, DOHA Department Counsel submitted a file of relevant material (FORM) in support of the government's preliminary decision, a copy of which was sent to Applicant on February 5, 2004. Applicant received the FORM on March 5, 2004, and responded thereto (Rebuttal) the same day. The case was assigned to me on March 26, 2004.

## FINDINGS OF FACT

Applicant's admissions are incorporated herein as facts. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact:

Applicant is 47 years old. He and his wife have been married for 26 years and they have two adult sons. Since July 2002, Applicant has been employed as an area mechanic by a defense contractor supporting the space program. He previously worked for the same company (then known by a different name) from 1989 until 1998. From 1998 until 2000, he was self-employed as he tried but failed to run a small business. In 2000, he found work as a chief engineer with a property management company until he was re-hired by the same manager for whom he had worked before 1998. (3)

Of the delinquencies listed in the SOR, those at subparagraphs 1.f, 1.m, and 1.t have been paid. The debt listed in 1.m was a judgment Applicant satisfied in August 2000. The other two were paid in the first two months of 2004. The debt listed at SOR 1.c is a duplicate of that listed in 1.b. Additionally, the debt listed at SOR 1.y is a workman's compensation claim that should have been paid by the company he worked for between 2000 and 2002. (4)

Since receiving the SOR, Applicant claims to have entered into payment or settlement agreements with creditors for the debts listed in SOR subparagraphs 1.b, 1.g, 1.h, and 1.i. These debts total about \$1,200 and are for medical services rendered between June 1997 and November 2000. They were referred to the same collection agency at various times. (5) Applicant claims he is paying \$25.00 monthly on each of these accounts; however, aside from the statement in his answer, he has provided no supporting documentation of this arrangement.

Applicant has also reached an agreement with the creditor listed at SOR 1.d to pay 50% of the balance due, or about \$500.00. This agreement is documented in a credit report he provided with his response to the FORM. The plan calls for him to pay \$187.00 each month.

Applicant also has entered into a payment agreement with the creditor for the debts listed at SOR subparagraphs 1.p through 1.s. These debts are for ambulance services rendered on or about January 2003 totaling \$1,128.00 and are being collected by a single collection agency. Applicant pays \$100 monthly through electronic funds transfer from his bank account. (6)

Since October 2003, Applicant has tried to work out a payment plan with the creditors listed in SOR subparagraphs 1.j, 1.k, 1.o, 1.u, 1.w, 1.x, 1.z, 1.aa, and 1.bb. These debts, totaling approximately \$4,600.00, are for hospital services provided at various times between July 1996 and November 2001 and are being collected by four different collections agencies on behalf of two medical facilities. (7) Some of these accounts are apparently connected to an injury one of his sons suffered in 1998. The total medical expenses were \$60,000.00, of which Applicant owed 20% or \$12,000.00. (8) Applicant states that despite the collectors' unwillingness to work with him, he nonetheless is sending them each \$25.00 monthly. (9)

According to Applicant, the actual balance due on the debt listed at SOR 1.l, another collection account for medical services rendered in or before January 2002, is \$323.00 as opposed to the \$296.00 balance listed in the SOR. As of October 2003, Applicant had paid \$200.00 toward this debt; (10) however, the credit report he submitted with his Response still lists this account in collection and unpaid with a balance due of \$296.00. (11)

The debt listed at SOR 1.aa represents the balance left over from a voluntary repossession Applicant executed in 1986. In his answer, Applicant admitted he owed the debt but did not recall the bank listed in the SOR as the creditor. Yet, attached to his answer were copies of court documents from the suit the bank filed to enforce the debt. He has taken no action to pay this debt. (12) A prior background investigation disclosed Applicant also had three other cars repossessed in the early and mid-1990s. He paid the remainder of one of these accounts. None were listed on his last SF 86 and he was confronted about his omissions by a Defense Investigative Service (DIS) agent in a July 1996 subject interview. (13)

That prior investigation revealed Applicant had his pay garnished for income tax delinquencies for tax years 1992, 1993

and 1994.<sup>(14)</sup> Applicant also incurred delinquent medical bills for various services for his two sons and for multiple small strokes Applicant suffered in the early 1990s. Applicant had thought his medical insurance would cover all of these expenses. The credit report DIS obtained during the prior investigation showed nine accounts delinquent and referred for collection.<sup>(15)</sup>

The current investigation revealed Applicant failed to report income from a small business he and his father ran in 1984. The Internal Revenue Service (IRS) assessed him, and he subsequently paid a tax deficiency of \$2,041.00.<sup>(16)</sup> Further, the debt listed in SOR 1.a is a judgment in favor of a business partner in that venture. The original judgment was for about \$12,400.00 in 1986, but has accrued interest at 12% per annum since then. Applicant told the Defense Security Service (DSS) in June 2003 that he does not feel he should have to pay this judgment; however, after receiving the SOR he entered into a payment plan whereby he pays his former partner \$100.00 each month.<sup>(17)</sup> At that rate, it will take him over 10 years to satisfy the judgment as it continues to grow at a 12% interest rate.

In 1998, Applicant left his job as a launch pad mechanic to go into business for himself. He and his wife opened a restaurant and catering business. He financed the purchase of a local property for \$700,000.00, a price that also satisfied pre-existing tax liens on the property. After Applicant started his business, he discovered other debts attached to the property that had become his responsibility. The business apparently struggled and Applicant sold the property for \$1 million in 2000. However, of the \$300,000.00 "profit," Applicant realized only about \$35,000. The remainder was owed to various suppliers who had obtained civil judgments to enforce the debts Applicant owed them. From the \$35,000.00 he kept, Applicant paid tuition bills for his sons who were in college around this time.<sup>(18)</sup>

Applicant has been charged three times with the misdemeanor criminal offense of Knowingly Uttering / Issuing a Worthless Check. He wrote bad checks in February 1997, January 1999, and May 2002. He asserts the first two checks resulted from the poor state of his business,<sup>(19)</sup> but he was not in business in 1997. The last check is attributed to a miscommunication with his wife, who wrote the check, about how much money they had in the account. Applicant was not physically arrested for any of these offenses and the charges were dismissed after Applicant made restitution on each check.

After closing his catering business in 2000, Applicant found work as an engineer and his wife returned to a teaching position she had left to help run their business. When he was re-hired as a launch mechanic in 2002, he re-applied for a security clearance by submitting an SF 86 on September 20, 2002. In response to the questions pertaining to financial matters, he was generally forthcoming and listed significant (if not all) details about his debts. In response to question 26, pertaining to arrests not addressed through other questions, he listed only the 1999 bad check charge.<sup>(20)</sup>

A personal financial statement (PFS) included with Applicant's most recent statement to DSS in June 2003<sup>(21)</sup> showed that Applicant and his wife had about \$650.00 left over each month after expenses; however, his expenses listed did not include his recent payment to creditors discussed above. These recent payments total at least \$587.00. Assuming none of Applicant's other expenses have changed in the past year, this leaves he and his wife with less than \$70.00 net per month.

Applicant is active in a variety of community activities such as supporting the local high school baseball team, fund raising for cancer research, and working at the county fair.<sup>(22)</sup>

## POLICIES

The Directive sets forth adjudicative guidelines<sup>(23)</sup> to be considered in evaluating an Applicant's suitability for access to classified information. The Administrative Judge must take into account both disqualifying conditions (DC) and mitigating conditions (MC) under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having

considered the SOR allegations and having reviewed the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are those conditions listed in the Directive under Guideline E (Personal Conduct), Guideline F (Financial Considerations), and Guideline J (Criminal Conduct).

### **BURDEN OF PROOF**

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>(24)</sup> for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If the government meets its burden, it establishes a *prima facie* case that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, the Applicant bears a heavy burden of persuasion.<sup>(25)</sup>

A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. The Government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the Government.<sup>(26)</sup>

### **CONCLUSIONS**

The security concern under Guideline E (Personal Conduct) is that conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.<sup>(27)</sup> Department Counsel has presented sufficient evidence to establish a *prima facie* case for disqualification under this guideline.

The government's concern is two-fold; first, that Applicant may have deliberately lied on his SF 86 when he failed to disclose two of his three criminal charges for writing worthless checks. Such conduct may indicate Applicant may be dishonest or that he is willing to place his own interests ahead of the government's need to protect classified information. The government is also concerned that Applicant's financial problems over the past 20 years indicates he lacks the sound judgment and decision-making qualities expected of a person entrusted with access to and responsibility for classified information.

As to the government's allegation that he deliberately falsified his latest SF 86, it does not initially appear Applicant intended to mislead the government about the two charges he omitted. He disclosed one of the arrests, thereby putting investigators on notice of criminal conduct in his background. Further, he appears to have been forthcoming about other adverse information in his background. However, the explanations for his omissions he offered in response to the SOR and the FORM - that he did not think he had to list the charges because they were dismissed, or that he did not have at hand the dates and other details about the charges - are inconsistent with each other and with the fact he disclosed another charge for the same offense. It also appears from the record that Applicant has omitted other adverse information from his latest SF 86 and from at least one prior SF 86. I conclude, therefore, that Applicant's omission of two of his bad check charges was deliberate.

In light of the record evidence as a whole on the issue of falsification, I conclude Guideline E DC 2<sup>(28)</sup> applies here. Further, a review of the listed mitigators under Guideline E pertaining to falsification leads me to conclude that none apply here. Applicant's deliberate omissions are recent, and are not isolated when one considers his omissions from an earlier SF 86. Finally, Applicant only disclosed the information when questioned about its omission by a DSS agent.

For the reasons stated below under Guideline F, I also conclude that Applicant's financial problems reflect poor judgment and decision-making, further undermining his suitability for access to classified information. Based on the foregoing, I conclude Guideline E against Applicant.

Under Guideline F, a security concern exists where it is shown an individual is financially overextended, thus being at

risk of having to engage in illegal acts to generate funds. An inability or unwillingness to pay one's debts and to manage one's finances in a reasonable sound manner may also indicate poor judgment and reliability. <sup>(29)</sup> Department Counsel has presented sufficient evidence in the FORM to establish a *prima facie* case for disqualification under this guideline. Based on the record as a whole, Guideline F DC 1 <sup>(30)</sup> and DC 3 <sup>(31)</sup> apply here. By contrast, despite making some recent progress in paying or otherwise resolving his debts, there is insufficient information on which to base application of any of the Guideline F mitigating conditions.

Applicant has amassed significant debts since his last investigation in 1996. In that investigation, he was questioned by DIS about several debts and tax deficiencies and clearly stated his intent to resolve his debts and avoid similar problems in the future. However, in 1998, while still carrying some of the bad debts noted in his prior background check, he made an ill-fated decision to leave a steady paying job in support of the space program to finance a \$700,000 property purchase and start a restaurant and catering business. He had no prior experience in the restaurant business, and, like so many other first-time restaurants, it failed. Fortunately, Applicant was able to re-sell the property for about \$300,000.00 more than he paid for it. Unfortunately, while he was in business he ran up sizable debts to various suppliers and other creditors that had to be satisfied out of the proceeds of sale.

His restaurant experience was not the first small business venture Applicant had tried. In 1984, Applicant started a small business, the income from which he did not report to the IRS. Also, a business partner obtained a civil judgment to enforce a \$12,000.00 debt, which Applicant purposely refused to pay until after he received the SOR in October 2003. The judgment has been accruing interest at the rate of 12% per annum since it was entered in 1986. His 1998 and 1984 business ventures indicate poor decision-making on his part, and his refusal to pay what appear to be his just obligations as ordered by a civil court, show he is unreliable and may be willing to deliberately ignore other obligations, such as his duties to protect classified information.

I am also concerned by Applicant's near complete inaction to resolve his debts until after he received the SOR in October 2003. I have credited him where appropriate with having paid some of his debts. But, in light of his extensive history of financial problems, he has provided insufficient information regarding the agreements he has reached with some of his creditors for me to conclude he will continue to make the progress necessary to pay or otherwise resolve his debts. As noted above, he waited nearly 18 years to begin a minimum payment plan in satisfaction of the debt listed in SOR 1.a and he has never addressed the debt listed in SOR 1.cc. Considering the scope of his debts, the length of time he has borne several of them, the minimal attention he has paid to these debts over the years, the fact he now has less than \$100.00 left over each month (hardly a useful buffer in the event of unforeseen difficulties), and the lack of information about how he is managing his finances currently so as to avoid such problems in the future, I conclude it is too early to safely say Applicant's financial condition will improve anytime soon. Applicant has failed to mitigate the Guideline F security concerns presented by this record and I conclude this guideline against him.

The security concern under Guideline J (Criminal Conduct) is that someone who is willing to disregard the law, even through minor violations, may also be willing to disregard rules, regulations and procedures in place to safeguard classified information. That person's judgment, reliability and trustworthiness may be sufficiently undermined as to disqualify him from holding a security clearance. <sup>(32)</sup> Department Counsel has established a *prima facie* case for disqualification under this guideline, as DC 1 <sup>(33)</sup> and DC 2 <sup>(34)</sup> apply here; however, none of the available mitigating conditions is supported by these facts.

Applicant has been charged three times with writing bad checks. Such misdemeanor offenses can be considered minor infractions, and Applicant was not physically detained for these charges, which were dismissed once he made good on the checks. However, the fact Applicant repeated these violations indicates he lacks the requisite judgment for someone who might be entrusted with following procedures for handling and protecting classified information. These acts are not isolated and occurred as recently as two years ago. More importantly, the factors giving rise to this conduct, namely Applicant's financial difficulties, are still present, thus preserving the possibility of similar violations in the future. Similarly, Applicant's continuing financial concerns undermine any finding of rehabilitation under this guideline. In the absence of sufficient mitigating information, I conclude Guideline J against Applicant.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed

under each applicable adjudicative guideline. I have also considered the whole person concept as contemplated by the Directive in Section 6.3, and as called for by a fair and commonsense assessment of the record as required by Directive Section E2.2.3. The favorable information about Applicant's successful family life and his noteworthy activities in support of his community are simply not enough to overcome the security concerns presented herein. It may be that when Applicant is eligible to re-apply for a security clearance one year from the final decision in this matter, he will have satisfactorily resolved his financial matters and related personal and criminal conduct concerns. However, at this juncture I cannot conclude it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

### **FORMAL FINDINGS**

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Financial Considerations (Guideline F): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: For the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: Against the Applicant

Subparagraph 1.f: For the Applicant

Subparagraph 1.g: Against the Applicant

Subparagraph 1.h: Against the Applicant

Subparagraph 1.i: Against the Applicant

Subparagraph 1.j: Against the Applicant

Subparagraph 1.k: Against the Applicant

Subparagraph 1.l: Against the Applicant

Subparagraph 1.m: For the Applicant

Subparagraph 1.n: Against the Applicant

Subparagraph 1.o: Against the Applicant

Subparagraph 1.p: Against the Applicant

Subparagraph 1.q: Against the Applicant

Subparagraph 1.r: Against the Applicant

Subparagraph 1.s: Against the Applicant

Subparagraph 1.t: For the Applicant

Subparagraph 1.u: Against the Applicant



Subparagraph 1.v: Against the Applicant

Subparagraph 1.w: Against the Applicant

Subparagraph 1.x: Against the Applicant

Subparagraph 1.y: For the Applicant

Subparagraph 1.z: Against the Applicant

Subparagraph 1.aa: Against the Applicant

Subparagraph 1.bb: Against the Applicant

Subparagraph 1.cc: Against the Applicant

Subparagraph 1.dd: Against the Applicant

Subparagraph 1.ee: Against the Applicant

Paragraph 2, Personal Conduct (Guideline E) AGAINST THE APPLICANT

Subparagraph 2.a: Against the Applicant

Paragraph 3, Criminal Conduct (Guideline J) AGAINST THE APPLICANT

Subparagraph 3.a: Against the Applicant

Subparagraph 3.b: Against the 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 a security clearance for the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6, as amended.
2. Applicant did not specifically respond to this allegation, but he denied 3.a and 3.b, on which this allegation is based.
3. Item 4.
4. Answer; Rebuttal.
5. Item 7.
6. Answer; Rebuttal.
7. Items 6 and 7.
8. Rebuttal.
9. Answer.

10. Id.
11. Rebuttal.
12. Answer.
13. Item 8.
14. Id.
15. Item 8.
16. Item 5.
17. Id.
18. Answer; Rebuttal.
19. Rebuttal.
20. Rebuttal; Item 4.
21. Item 5.
22. Rebuttal.
23. Directive, Enclosure 2.
24. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
25. *See Egan*, 484 U.S. at 528, 531.
26. *See Egan*; Directive E2.2.2.
27. Directive, E2.A5.1.1.
28. Directive, E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;
29. Directive, E2.A6.1.1.
30. Directive, E2.A6.1.2.1. A history of not meeting financial obligations;
31. Directive, E2.A6.1.2.3. Inability or unwillingness to satisfy debts;
32. Directive, E2.A10.1.1.
33. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
34. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.