

DATE: October 31, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 04-08547

DECISION OF ADMINISTRATIVE JUDGE

ARTHUR E. MARSHALL, JR.

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Jr., Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Applicant is a 38-year-old electronics technician who has worked for the same defense contractor since November 2002. Following his involuntary military discharge in 2000, Applicant experienced a period of protracted unemployment. In 2001, he and his wife filed for bankruptcy and they divorced in 2002. He addressed the seven delinquent debts at issue, and shown that all but one have been satisfied or disputed. His evidence indicates that the remaining debt was included in the couple's bankruptcy. Applicant mitigated security concerns. Clearance is granted.

STATEMENT OF THE CASE

On June 2, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) concluding it was unable to find that it is clearly consistent with the national interest to grant him a security clearance. (1) The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline F (Financial Considerations). In a notarized statement, dated June 24, 2005, Applicant responded to the SOR allegations. He admitted two of the nine allegations raised under Guideline F, submitted documentation regarding the remaining allegations, and requested a personal hearing. After moving abroad in furtherance of his employment, Applicant, on May 15, 2006, withdrew his request for a personal hearing in favor of a determination based on the record.

Department Counsel prepared a File of Relevant Material (FORM), (2) dated August 8, 2006. Included in the FORM was a Motion to Amend the SOR to include an additional guideline, Guideline E (Personal Conduct). Applicant received a complete copy of the FORM on August 21, 2006, and was given the opportunity to submit documentary information in rebuttal, or to explain adverse information in the FORM. He was also requested to file any objection to Department Counsel's Motion to Amend the SOR with his response to the FORM. A response, dated September 18, 2006, was timely submitted. In his response, Applicant presented additional explanation regarding the adverse information in the FORM and constructively opposed the amendment to the SOR. The case was subsequently assigned to me on October 4, 2006.

PRELIMINARY MOTION

In his Motion to Amend the SOR, Department Counsel seeks to attach an additional guideline to the SOR of which Applicant had no prior notice. Specifically, Department Counsel seeks the addition of Guideline E (Personal Conduct) based on the allegation that Applicant falsified material facts in response to allegation 1.c of the SOR which alleges "You are indebted to [automobile manufacturer credit account], in the amount of \$23,404.00, the balance owed after resale of your automobile which was repossessed for nonpayment in October 2000. As of November 21, 2003, this debt had not been satisfied." In his response, Applicant stated "I deny the above statement. The [account] was filed with bankruptcy courts. I contacted [the merchant's credit recovery department] spoke with Ron and confirmed this information. Balance due after sale of the automobile was estimated to be \$9,000 as reported by Ron at [the recovery department]. According to credit report dated 06-09-2005, this account has been closed."

Department Counsel now seeks to allege, under Guideline E, that Applicant "knew said response in [his] Answer was false at the time [he] made it, *because [he] did not include this vehicle and the specific debt with [the manufacturer's credit recovery department] with your bankruptcy petition.*" (emphasis added) Had the motion merely sought to amend the SOR with an additional financial allegation under Guideline F in order to render the SOR in conformity with the evidence admitted, Applicant would have already been on notice that his finances, in general, raised security concerns. (3) Under such circumstances, his input might rightly be limited to an objection to the motion, with additional preparation time afforded upon request. (4)

Here, however, Applicant was not previously provided any notice that the his personal conduct or the security concerns posed under Guideline E were at issue. They were raised for the first time after he chose to pursue a determination based solely on the written submissions, rather than personally appear before the Department, regarding what was purported to be a comprehensive and detailed SOR. (5) By now attempting to expand the SOR with the addition of a new and distinct guideline, and consequently an entirely different litany of security concerns of which Applicant had no prior notice, Department Counsel has potentially abrogated Applicant's right to personally appear before the Department regarding a comprehensive and detailed SOR, as provided under the Directive. To have afforded Applicant the opportunity to request a personal appearance before the Department on this new and distinct guideline would have posed little more administrative burden than did Department Counsel's invitation to him to object to the motion at issue. Indeed, to have afforded him this opportunity would have been in better keeping with both the spirit of the Directive and the basic tenets of administrative notice. (6)

Furthermore, and of more practical concern, Department Counsel has not presented evidence making a *prima facie* case of falsification. Department Counsel argues that Applicant did not list an obligation arising from the balance owed after resale of a repossessed vehicle in his bankruptcy petition. (7) This is incorrect. The repossessed automobile is noted as having been repossessed within the prior year on the bankruptcy petition's Statement of Financial Affairs, Continuation Sheet No. 1. (8) For the above-stated reasons, I deny Department Counsel's Motion to Amend the SOR.

FINDINGS OF FACT

Applicant's answers to the allegations in the SOR are incorporated herein. After a thorough review of the pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 38-year-old electronics technician who has worked for the same defense contractor since November 2002. He served in the U.S. Army from June 1986 to June 1990, and received a discharge at the rank of Corporal [E-4]. He was married in May 1991, and he returned to the Army in October 1995. He eventually achieved the rank of Sergeant [E-5].

On March 8, 2000, Applicant was discharged from the Army for medical reasons. After his discharge, he remained unemployed until approximately November 2002. In the interim, his 1999 mid-sized Volkswagen valued, at \$20,000, was repossessed on or about January 6, 2001. (9)

As debts mounted, Applicant and his wife filed for Chapter 13 bankruptcy on May 1, 2001. That petition was converted

to a Chapter 7 filing on or about May 22, 2001, with liabilities of approximately \$220,197. The majority of their unsecured debt of nearly \$35,000 was due to unpaid credit cards and personal loans.⁽¹⁰⁾ The repossessed vehicle was listed in the Statement of Financial Affairs under the section for "Repossessions, foreclosures, and returns." Schedule D of the bankruptcy petition noted the other 1999 vehicle with a value of \$21,000.⁽¹¹⁾ Applicant and his wife reaffirmed their obligation on the latter vehicle by retaining it for her use, while the remainder of their debt was discharged on September 12, 2001. Nearly a year later, on October 16, 2002, Applicant and his wife were divorced.⁽¹²⁾ As part of the divorce settlement, Applicant's wife assumed possession of, and the obligation for the non-repossessed vehicle.⁽¹³⁾

On February 26, 2003, Applicant completed an SF-86, and a background check was commenced. A June 2, 2005, SOR raised nine allegations, to which Application responded:

SOR ¶ 1.a: CHAPTER 13 BANKRUPTCY, CONVERTED TO CHAPTER 7 BANKRUPTCY, DISCHARGED ON SEPTEMBER 13, 2001: Applicant admits this allegation.⁽¹⁴⁾

SOR ¶ 1.b: DEBT TO STORE CHAIN IN THE APPROXIMATE AMOUNT OF \$250 FOR MERCHANDISE REPOSSESSED FOR NONPAYMENT IN ABOUT JULY 2000 AND NOT SATISFIED AS OF ABOUT APRIL 19, 2005: Applicant admits that the debt once existed. He explained, however, that the merchandise had been repossessed from his ex-wife. Upon notice of the existence of the debt, he contacted the merchant, reached a settlement in the amount of \$360, and paid that amount in full on or prior to June 10, 2005.⁽¹⁵⁾

SOR ¶ 1.c: DEBT TO AUTOMOBILE MANUFACTURER CREDIT ACCOUNT ENDING -6881 IN THE APPROXIMATE AMOUNT OF \$23,404, THE BALANCE OWED AFTER RESALE OF HIS AUTOMOBILE WHICH WAS REPOSSESSED FOR NONPAYMENT IN ABOUT OCTOBER 2000 AND WHICH HAD NOT BEEN SATISFIED AS OF NOVEMBER 21, 2003: This obligation was included in the section entitled "Repossessions, foreclosures, and returns" on his bankruptcy petition's Statement of Financial Affairs; the car manufacturer was sent a copy of the Notice of Conversion to Chapter 7.⁽¹⁶⁾ That bankruptcy was subsequently discharged on September 12, 2001, and the creditor is listed twice on the list of creditors mailed copies of the discharge.⁽¹⁷⁾ Moreover, Applicant notes that he was told the remaining balance on the car after resale was actually about \$9,000. Applicant also notes that this obligation is no longer on his credit report.

SOR ¶ 1.d: DEBT TO A TELECOMMUNICATIONS COMPANY IN THE APPROXIMATE AMOUNT OF \$112 FOR AN ACCOUNT PLACED INTO COLLECTION IN ABOUT OCTOBER 2000 AND WHICH HAD NOT BEEN SATISFIED AS OF DECEMBER 1, 2003: Applicant denied this allegation. The account was opened by his ex-wife under his name, but with her Social Security number and without his knowledge. It is no longer in collection and he showed that the collection agent requested this entry be removed from Applicant's credit report.⁽¹⁸⁾

SOR ¶ 1.e: DEBT TO A FINANCIAL INSTITUTION IN THE APPROXIMATE AMOUNT OF \$661 FOR AN ACCOUNT AT LEAST 90 DAYS PAST DUE SINCE ABOUT MARCH 2001 AND WHICH HAD NOT BEEN SATISFIED AS OF APRIL 19, 2005: Applicant denied this allegation. The successor to the creditor indicated to Applicant that it has no record of this account or his Social Security number and the matter was put into formal dispute. Applicant was waiting for a copy of a confirmation letter at the time his response to the FORM was due.⁽¹⁹⁾

SOR ¶ 1.f: DEBT TO A BANK RECOVERY DEPARTMENT IN THE APPROXIMATE AMOUNT OF \$85 FOR AN ACCOUNT CHARGED OFF AS A BAD DEBT IN ABOUT JULY 2001 AND WHICH REMAINED UNSATISFIED AS OF APRIL 19, 2005: Applicant denied this allegation. He has confirmed with the creditor that this account was included in his bankruptcy and introduced both a copy of the page listing the creditor in his bankruptcy and an April 19, 2005, credit bureau report reflecting that this obligation was "unsecured."⁽²⁰⁾

SOR ¶ 1.g: DEBT TO A TELECOMMUNICATIONS COMPANY IN THE APPROXIMATE AMOUNT OF \$264 FOR AN ACCOUNT PLACED FOR COLLECTION IN ABOUT FEBRUARY 2003 AND WHICH REMAINED UNSATISFIED AS OF APRIL 19, 2005: Applicant denied this allegation. He never resided at the address to which service was provided and never authorized that this account should be established. He disputed the

matter with the company and submitted a detailed fraud claim package to it establishing his identity and distinguishing his own place of residency during the time at issue.⁽²¹⁾ He characterizes this account as being fraudulent and an investigation is pending.

SOR ¶ 1.h: DEBT TO AUTOMOBILE MANUFACTURER CREDIT ACCOUNT ENDING -6657 IN THE APPROXIMATE AMOUNT OF \$12,677 FOR AN ACCOUNT 120 DAYS PAST DUE SINCE ABOUT SEPTEMBER 2003 AND WHICH REMAINED UNSATISFIED AS OF APRIL 19, 2005: Noted on Schedule D of the bankruptcy petition, this automobile debt was reaffirmed and the vehicle retained for Applicant's wife. As part of the property division in his October 12, 2002, divorce, his ex-wife became responsible for the balance due, including principal, interest, and all other charges, on the promissory note payable to this creditor for the automobile she retained. As proof, he provided a copy of the couple's Final Decree of Divorce, dated October 16, 2005, including that section indicating "Debts to Wife" to support his explanation.⁽²²⁾

SOR ¶ 1.i: APPLICANT'S NOVEMBER 21, 2003, PERSONAL FINANCIAL STATEMENT INDICATES THAT HE IS FINANCIALLY CAPABLE OF PAYING THOSE DEBTS SET FORTH ABOVE, AS EVIDENCED BY A MONTHLY NET REMAINDER OF \$1,545, AFTER EXPENSES; HOWEVER, HE HAS MADE LITTLE EFFORT TO RESOLVE HIS INDEBTEDNESS: Applicant denied this allegation, noting that his finances have changed since November 2003. He explains, however, that he has made every attempt to research and settle the debts he owed and cites to the evidence introduced herein to support this claim.⁽²³⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽²⁴⁾ The government has the burden of proving controverted facts.⁽²⁵⁾ The burden of proof is something less than a preponderance of evidence.⁽²⁶⁾ Once its burden is met, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against her.⁽²⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽²⁸⁾

No one has a right to a security clearance⁽²⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽³⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽³¹⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽³²⁾ 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 security clearance.

Based upon consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline F - Financial Considerations. *The Concern:* An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially

profitable criminal acts. (33)

Conditions pertaining to these adjudicative guidelines that could raise a security concern and may be disqualifying, as well as those which would mitigate the security concerns raised in this matter, are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the applicable legal standards. The government has established a *prima facie* case for disqualification under Guideline F (Financial Considerations). The government demonstrated that Applicant accrued some delinquent debts over the past few years. Consequently, Financial Considerations Disqualifying Condition (FC DC) E2.A6.1.2.1 (*a history of not meeting financial obligations*) and FC DC E2.A6.1.2.3 (*inability or unwillingness to satisfy debts*) apply.

With the government's burden met, the burden shifts to Applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. Applicant was discharged in March 2000 for medical concerns and remained unemployed until November 2002, during which time debts accrued and an auto was repossessed. Such facts raise FC MC E2.A6.1.3.3 (*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)*).

Applicant admitted that he and his ex-wife were discharged from bankruptcy in 2001, prior to their divorce. He also showed that as part of the divorce settlement, she took sole financial control over the obligation on her vehicle. He admitted that he formerly owed \$250 to a retail chain for items repossessed from his ex-wife, but noted that he satisfied this obligation on, or prior to, June 10, 2005. Applicant has shown that one account at issue, from a bank recovery department, was included in his bankruptcy. He has also shown that one telecommunications company's account opened by his ex-wife was erroneously attributed to him, and that another has no nexus to him and has been disputed. Applicant has also demonstrated that a debt allegedly owed a financial institution for \$661 has been put into dispute.

As for any balance owed on the repossessed auto, the evidence shows that the vehicle was properly included on the bankruptcy petition's section for recent repossessions. The creditor was properly served twice with a copy of the Applicant's discharge, presumably one copy for each of the two cars noted in the petition. Inasmuch as deficiencies on repossessed automobiles are generally discharged under Chapter 7 unless they are reaffirmed, the evidence indicates that this debt was properly discharged and its continued inclusion on his credit bureau report was in error. (34) Given the actions taken to address his obligations and to correct his credit report, FC MC E2.A6.1.3.6 (*[t]he individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*) applies.

I have considered all the facts and evidence in this matter. I have also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests with regard to the security concerns raised. He is a mature man who resorted to bankruptcy after being discharged from the Army and finding himself unemployed for a protracted period of time. He was discharged from bankruptcy over five years ago and currently lives within his means without apparent difficulty or distress. When DOHA called into question seven past debts it believed to have survived the bankruptcy or been accrued since that discharge, he showed that he personally satisfied one debt, created by his ex-wife without his knowledge, prior to the issuance of the SOR (¶ 1b) and has contested another account she opened without his knowledge (¶ 1.d). He also showed that he formally contested two accounts as being listed in his credit report in error (¶ 1.e and ¶ 1.g) and that two of the accounts at issue were properly included in his bankruptcy (¶ 1.c and ¶ 1.f). Moreover, he established that his ex-wife assumed responsibility over the Volkswagen she retained as part of their divorce settlement (¶ 1.h). In view of the facts presented, and in light of Applicant's continued solvency, the financial considerations security concerns raised have been mitigated. Clearance is granted.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline F (Financial Considerations) FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: For Applicant

Subparagraph 1.g: For Applicant

Subparagraph 1.h: For Applicant

Subparagraph 1.i: For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant a security clearance for Applicant. Clearance is granted.

Arthur E. Marshall, Jr.

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended (Executive Order), and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).
2. The FORM includes a nine-page brief and 15 documents.
3. As noted by Department Counsel, the "SOR need not allege every piece of evidence that is relevant and material to evaluating an applicant's security eligibility . . . [A]s long as there is fair notice to an applicant about the matters that are at issue in his case, and the applicant has a reasonable opportunity to respond, a security clearance should be adjudicated on the merits of the relevant issues and should not be overly concerned with pleading deficiencies." *Citing* ISCR Case No. 02-24512 (App. Bd. July 27, 2005), at 2.
4. Directive, Enclosure 3, ¶ E3.1.17.
5. *See* Directive, Enclosure 1, Section 3.
6. *See Mathews v. Eldridge*, 424 US 319, 335 (1976) and its progeny.
7. Department Counsel incorrectly states that Applicant's bankruptcy petition only included a reference to one vehicle, an identical car which was reaffirmed, retained, and listed on the petition's Schedule D (Creditors Holding Secured Claims).
8. Item 12 (Bankruptcy Petition and related records), at 31. It is additionally noteworthy that there is no indication of falsity and, with regard to Applicant's assertion of the auto's balance after resale, that Department Counsel's own FORM seems to later embrace a balance of \$9,000 as correct.
9. Automobile Manufacturer Credit account number ending -6881.
10. Item 12, *supra*, note 7, 19-22 and 28.

11. Automobile Manufacturer Credit account number ending -6657.
12. *See* Item 5 (Standard Form 86 [SF-86], signed on February 26, 2003), indicating date of divorce as October 2002, and Item 3 (Applicant's Answer to the SOR, dated June 24, 2005) at 22; *contrast* Item 6 (Applicant's Statement, signed on November 21, 2003) at 1.
13. Item 3, *supra*, note 12, at 2-3.
14. *Id.* at 1.
15. *Id.* at 2-3.
16. Item 12, *supra*, note 7, at 4.
17. *Id.* at 45.
18. Item 3, *supra*, note 12, at 5-6.
19. *Id.* at 7.
20. *Id.* at 8-9 and Item 10 (Credit Report dated April 19, 2005) at 2.
21. Item 3, *supra*, note 12, at 10-20.
22. *Id.* at 21-23.
23. *Id.* at 24.
24. ISCR Case No. 96-0277 at 2 (App. Bd. Jul 11, 1997).
25. ISCR Case No. 97-0016 at 3 (App. Bd. Dec 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
26. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
27. ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
28. ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
29. *Egan*, 484 U.S. 518, at 531.
30. *Id.*
31. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
32. Executive Order 10865 § 7.
33. Directive, Enclosure 2, ¶ E2.A6.1.1
34. It is noteworthy, as demonstrated by Applicant, that this obligation is no longer on his credit bureau report.