

DATE: August 31, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-03393

**DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esquire, Department Counsel

**FOR APPLICANT**

Eric F. Hartman, Esquire

**SYNOPSIS**

The Applicant's financial problems were directly related to a period of unemployment and his serious medical problems. He is resolving the situation through the valid use of a Chapter 7 bankruptcy. He did not intentionally falsify his security clearance questionnaire. The adverse inference is overcome. Clearance is granted.

**STATEMENT OF THE CASE**

On January 31, 2006, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on February 13, 2006, and requested a hearing. The case was assigned to another Administrative Judge on April 28, 2006. The case was reassigned to me on June 22, 2006, and a Notice of Hearing was also issued on that day.

A hearing was held on July 12, 2006, at which the Government presented six documentary exhibits. Testimony was taken from the Applicant, who called one additional witness, and also submitted two hearing exhibits and one post-hearing exhibit. The transcript was received on July 25, 2006.

**RULING ON PROCEDURE**

At the conclusion of the hearing, the Department Counsel made a motion to amend the SOR to conform with the facts presented. The Applicant's counsel did not object to the form of the motion, and it was granted. The SOR was amended to add two additional subparagraphs under Paragraph 1. The Applicant admitted the factual truth of each allegation, but

denied their security significance. (Transcript at 108-111.)

### **FINDINGS OF FACT**

The Applicant is 48 years old. He is employed by a defense contractor, and he seeks to obtain a DoD security clearance in connection with his employment in the defense sector.

The Government opposes the Applicant's request for a security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

**Paragraph 1 (Guideline F - Financial considerations)**. The Government alleges in this paragraph that the Applicant is ineligible for clearance because he is financially overextended and therefore at risk of having to engage in illegal acts to obtain funds. The Applicant admitted all of the factual allegations under this Paragraph. Those admissions are hereby deemed findings of fact.

The Applicant's medical history has a direct bearing on his financial condition, and should be discussed first. He has suffered from lupus for 28 years. Part of the effects of lupus is renal failure. The Applicant's kidneys first shut down in 1988. In January 2001, he was unable to continue working because of his progressive kidney failure. Eventually, his kidneys completely failed and the Applicant had to be on 11 hour a day home dialysis. In October 2003, the Applicant received a kidney transplant from his brother and was able to return to work for several months. In the Summer of 2004, the Applicant suffered a left hip fracture. This was due to the drugs he has to take to treat his lupus and stop the rejection of his transplanted kidney. He was again off of work until November 2005, when he had his left hip replaced. A month before the hearing, the Applicant suffered a right hip fracture and will probably have to have a hip replacement there as well. (Applicant's Exhibit 2 and Transcript at 54-68.)

The Applicant has a good job and is well paid when he works. He had good credit and was able to pay his bills in a timely manner until he was laid off in 1999. This caused some problems, but he was able to make it until he suffered major medical problems beginning in January 2001. For some period of time between January 2001 until November 2003 the Appellant's, employer paid, medical insurance ran out and his replacement medical insurance did not cover all of his medical costs. It was at that time that the debts set forth in subparagraphs 1.c., 1.d., 1.e., 1.f., 1.g., 1.h., 1.i., 1.j., 1.l., 1.m. and 1.o. were incurred. (Transcript at 67-68, 75-79, and Government Exhibit 5.)

During this same period of unemployment, the Applicant also fell behind on credit cards. He had to use the credit cards for the necessities of daily living. These debts are set forth in SOR subparagraphs 1.a., 1.b., 1.k., 1.n. and 1.p. After he got back to work, the Applicant contacted his creditors in an attempt to pay off his indebtedness. He was referred by one creditor to a Financial Counseling Program. The Applicant went to this Program and worked with them to make payment arrangements with several other of his creditors set forth in subparagraph 1.p. This program was successful and from the period of 2004 until the hearing the Applicant repaid approximately \$9,000 to those creditors who were in the program. (Transcript at 70-72, 75, and Government Exhibit 5.) The credit reports submitted by the Government confirm that several of his debts were being handled by the Financial Counseling Program. Those debts which were being handled by the Financial Counseling Program are marked in the credit reports, "Pays as Agreed." (Government Exhibits 2 at 3, 3 at 3, and 6 at 2.)

The Applicant also owes past taxes to the Federal and state governments. The amounts are approximately \$9,100 and \$2,000 respectively. He has been making payments on both of these debts since 2004. (Transcript at 98-99.)

The Applicant consulted with a bankruptcy lawyer in May 2006 and, based on those discussions, he decided to file a Chapter 7 bankruptcy. This bankruptcy was filed on June 13, 2006. (Applicant's Exhibit 3.) The Applicant has not filed for bankruptcy before. His Schedule F shows that approximately \$96,734 in unsecured debt will be discharged. Of that total, \$60,755 are medially related debts. The Applicant's bankruptcy attorney testified at the hearing and stated that no creditors appeared at the Meeting of Creditors and, in his opinion, the Applicant will be discharged in early September 2006. (Transcript at 25-50.)

The Applicant's case was filed under the new Bankruptcy Code (11 U.S.C.), as amended by the "Bankruptcy Abuse

Prevention and Consumer Protection Act of 2005," Public Law 109-8. As part of this law, a person proposing to file a Chapter 7 bankruptcy must first fill out a "Statement of Current Monthly Income and Means Test Calculation." This form evaluates income and expenses to determine if the debtor has sufficient income over 60 months to allow some payments to unsecured creditors. If a debtor has over \$10,000 in disposable income over that 60 month period, then the Chapter 7 filing is presumed to be abusive and the debtor may be forced to file a Chapter 13 bankruptcy instead. After the Applicant and his lawyer filled out the form, the conclusion was that the presumption did not exist in this case because the Applicant did not have any disposable income. (Applicant's Exhibit 3 at 47-52, and Transcript at 46-50.)

Paragraph 2 (Guideline E - Personal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

On February 18, 2004, the Applicant completed an official DoD questionnaire in which he stated that he had not been 180 days delinquent on any debt within the past seven years, and was not currently 90 days delinquent on any debt. (Government Exhibit 1, questions 38. and 39.) These statements were false answers to material questions pertaining to the Applicant's financial situation.

On the same application under "General Remarks," the Applicant stated, "From 5-01-2001 to 10-13-2003 I was off work due to kidney failure. I had late charges due [to] less income and getting paid once a month. I have a debt [consolidation company] handles all of bills. I started in Sept 2003." (Government Exhibit 1, question 43.)

The Applicant testified concerning why he filled out the questionnaire the way he did. He stated that he misinterpreted the questions. In his mind at that time, if he had contacted the creditors and was attempting to work with them to pay his debts off, he was no longer delinquent. He now realizes that his interpretation was incorrect. (Transcript at 83-87.)

Paragraph 3 (Guideline J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has engaged in criminal acts.

If the Applicant knowingly and willfully provided false material information to DoD during the clearance screening process, that would be a violation of the felony criminal provisions of 18 U.S.C. §1001. The facts set forth under Paragraph 2, above, will be evaluated under this Paragraph as well.

### **POLICIES**

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case will be set forth under CONCLUSIONS, below.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct

- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may have financial difficulties and/or be involved in criminal acts of falsification that demonstrate poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

### CONCLUSIONS

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the granting of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has had a history of not meeting his financial responsibilities (Guideline F); that he made incorrect statements on a Government questionnaire (Guideline E); and that he may have violated a Federal criminal statute (Guideline J).

The Applicant, on the other hand, has successfully mitigated the Government's case. Since 2001, the Applicant has suffered from severe and continuing medical problems that have seriously affected his ability to pay his bills. Notwithstanding that, he was working with a Financial Counseling Program for several years to pay down several of his debts. While he has continuing medical problems, he was showing an ability and desire to resolve his financial indebtedness.

Based on advice of counsel, the Applicant filed for a Chapter 7 bankruptcy earlier this year. He will discharge \$96,734 of unsecured debt. Of that amount, almost two thirds are medical bills from a period when his medical insurance had run out during a period of unemployment.

The Applicant's financial problems place him squarely within Disqualifying Conditions E2.A6.1.2.1. (*A history of not meeting financial obligations*) and E2.A6.1.2.3. (*Inability or unwillingness to satisfy debts*). However, as described

above, the Applicant is not someone who has forgotten his creditors. He attempted to work out a payment arrangement and finally decided to declare bankruptcy to give himself a fresh start. Mitigating Conditions 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)*) and E2.A6.1.3.6. (*The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*). Paragraph 1 is found for the Applicant.

Turning to Guidelines E and J. The Applicant is not a sophisticated person. Based on the particular facts of this case, I find that he did not intend to falsify his security clearance questionnaire about his debt situation. Indeed, his comment in "General Remarks" put the Government on notice that he had late charges on some of his debts. His testimonial evidence on his thought processes at the time he filled out the form is credible and believable. It is also noteworthy to note that some of his creditors were showing his formerly past due accounts as "Pays As Agreed" on his credit reports at the same time he was completing the questionnaire. The Applicant's answers to questions 38 and 39 were false. They were, however, result of confusion or misinterpretation on the Applicant's part, and not a lie. Paragraphs 2 and 3 are found for the Applicant.

In addition, application of the General Factors is appropriate and supports a decision in the Applicant's favor. Factor B states that it is appropriate to look at "The circumstances surrounding the conduct." The Applicant's unique set of circumstances are described in detail, above. The Applicant is motivated to continue paying his debts in a satisfactory manner (factor g.), he shows considerable evidence of rehabilitation (factor f.), and there is little or no potential for pressure, coercion, exploitation or duress (factor h). The Applicant is a talented and hard worker. He is gainfully employed and has the ability to maintain his current debts.

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1, 2 and 3 of the Government's Statement of Reasons.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: For the Applicant.

Subparagraphs 1.a. through 1.s.: For the Applicant.

Paragraph 2: For the Applicant.

Subparagraphs 2.a. and 2.b.: For the Applicant.

Paragraph 3: For the Applicant.

Subparagraph 3.a.: For the 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 a security clearance for the Applicant.

Wilford H. Ross

Administrative Judge