

DATE: September 28, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-04649

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Cary P. Gianoulis, Esq.

SYNOPSIS

Applicant overextended himself on consumer credit and filed for Chapter 7 bankruptcy in October 2003 seeking a discharge of \$42,586 in unsecured debt. He had the bankruptcy dismissed in January 2004 in order to save his home. Financial considerations persist where he has made little effort to repay his creditors. Alleged personal conduct concerns for failure to disclose his delinquent debts on his security clearance application are not proven where he listed his then very recent bankruptcy filing. Clearance is denied.

STATEMENT OF THE CASE

On December 2, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons under Guideline F, financial considerations, and Guideline E, personal conduct, 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. [\(U\)](#)

On January 6, 2006, Applicant answered the SOR and requested a hearing before a DOHA administrative judge. The case was assigned to me on February 2, 2006. Counsel for Applicant entered his appearance on March 16, 2006. On April 25, 2006, I convened a hearing pursuant to formal notice dated March 24, 2006. Six government exhibits were admitted and testimony was taken from Applicant, as reflected in a transcript received May 8, 2006.

FINDINGS OF FACT

Applicant was alleged under Guideline F to owe \$62,317 in delinquent consumer credit card debt and to have had an October 2003 Chapter 7 bankruptcy listing \$140,086 in liabilities dismissed in January 2004. Under Guideline E, he was alleged to have deliberately falsified his security clearance application (SF 86) by failing to disclose the delinquent credit card debts alleged in SOR ¶¶ 1.a. through 1.h. as having been delinquent more than 180 days in the preceding seven years (question 38) or as currently over 90 days delinquent (question 39). Applicant admitted owing the creditors alleged, although he was not sure as to the exact amounts. He also acknowledged the bankruptcy had been dismissed at

his request, as he learned no declaration of homestead exemption had been filed and he wanted to keep his home. Applicant attributed his negative responses to the financial delinquency inquiries on his SF 86 because he was in bankruptcy when the application was filed and he thought his debts had therefore been discharged.

Applicant's admissions to unpaid delinquent debt and to the Chapter 7 bankruptcy filing and dismissal are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings:

Applicant is a 57-year-old equipment technician (mechanic) who has worked for the same contractor since May 1974. He seeks to retain the security clearance he has held for 32 years.

In the early 1980s, Applicant's spouse was a vice president of a small bank that went public. Applicant and his spouse took an unsecured loan of \$50,000 that they invested in the financial institution. The bank failed in about 1987, and Applicant's spouse lost her job. She managed to find another job, but earned about \$20,000 less per year. In February 1992, Applicant and his spouse refinanced their home, taking \$38,000 to settle the \$50,000 loan. ⁽²⁾

Applicant began accumulating credit card debt of his own. In about 1998, his spouse told him that they had to file for bankruptcy. Applicant refused, so she filed a Chapter 7 bankruptcy individually on August 6, 1998. Applicant's spouse signed a declaration of homestead at that time which they assumed had been filed.

In February 1999, Applicant took on a second job as a newspaper carrier. On joint income of \$77,830 in 2000 and \$82,119 in 2001, Applicant managed to make at least the minimum payments, but made little progress toward paying off his account balances because of the extent of his debt and financial support for his daughters and two grandchildren. Both of his daughters are young unwed mothers who receive little support from the fathers of their children. Applicant eventually contacted legal counsel about a possible debt consolidation. ⁽³⁾ The attorney recommended bankruptcy. In anticipation of the bankruptcy filing, Applicant subsequently stopped paying on several accounts while he remained current on credit accounts opened with a department store retailer, a home improvement retailer, and a warehouse club (balance \$1,577 as of January 2004), as well as in his mortgage. The financial history of his delinquent accounts follows.

Debt alleged in SOR	Delinquency history	Repayment status
¶ 1.a. \$70 credit card account 120 days delinquent	\$70 fee imposed on credit card account opened May 01 he never used, \$106 balance as of Oct 03	Applicant disputes legitimacy of the debt
¶ 1.b. \$11,576 charged off credit card debt	MasterCard opened May 95, \$11,576 charged off balance transferred for collection Aug 03; listed as still owed on Nov 05 credit report	Creditor reported balance as \$17,000, no payments
¶ 1.c. \$9,113 charged off credit card balance	VISA opened Apr 01, \$9,113 charged off Dec 02; listed as \$7,760 balance on Oct 03 bankruptcy	No payments, admits incurred debt but contends no longer responsible
¶ 1.d. \$4,878 installment loan in collection	Account opened Jun 98, last activity Dec 02, \$4,878 balance in collection as of Nov 03	No payments
¶ 1.e. \$12,674 charged off credit card	VISA opened Sep 93, \$12,674 balance charged off Dec 02, transferred to another lender as of Aug 03; listed as \$10,820 balance on Oct 03 bankruptcy	No payments, admits incurred debt but contends no longer responsible
¶ 1.f. \$4,900 delinquent revolving charge	Listed as \$4,900 debt on Oct 03 bankruptcy	No payments, admits incurred debt but contends no longer responsible
¶ 1.g. \$9,710 delinquent gasoline credit card	Listed on Oct 03 bankruptcy as \$9,710 debt	No payments, admits incurred debt but contends no longer responsible

¶ 1.h. \$9,396 delinquent credit card balance	MasterCard opened May 97, high credit \$11,134, last activity Dec 02; listed as \$9,396 balance on Oct 03 bankruptcy	No payments. admits incurred debt but contends no longer responsible
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On October 17, 2003, Applicant filed an individual petition for bankruptcy under Chapter 7, seeking discharge of \$42,586 in unsecured debt. He did not include his debt owed on revolving charge accounts with retailers as he planned to pay them off. He listed \$97,500 in secured debt, the balance of his mortgage loan, but indicated he would retain the property and continue regular payments on his mortgage.

On November 3, 2003, Applicant completed a security clearance application (SF 86). In response to financial record inquiries, Applicant listed his October 17, 2003, bankruptcy filing in response to question 33 (any bankruptcy filing in the last 7 years), but responded "No" to questions 38 ("In the last 7 years, have you been over 180 days delinquent on any debt(s)?"), and 39 ("Are you currently over 90 days delinquent on any debt(s)?"). By listing the bankruptcy, he figured it covered the delinquent debts and he was not late on his other obligations, such as his mortgage ("I'm saying by filing bankruptcy, okay? I have to be delinquent on my, to file bankruptcy, right? So I thought the question might have meant since you filed bankruptcy, have you been late on your mortgage? Have you been late on any bills?" Tr. 73).

Applicant subsequently moved to dismiss his Chapter 7 case as no declaration of homestead had been filed with the registry of deeds before the filing of his Chapter 7 petition. On November 24, 2003, the trustee objected on the basis that Applicant and his spouse had \$132,500 in equity in their residence, and that Applicant's share (\$66,250) even with the federal exemption of \$17,425, would be sufficient to pay the \$42,586 in unsecured debt. On December 31, 2003, Applicant countered that he had relied in good faith that counsel for his spouse had filed the declaration of homestead at the time of his spouse's Chapter 7 bankruptcy. On January 6, 2004, his Chapter 7 bankruptcy was dismissed.

Applicant took no effort to inform his creditors of the dismissal or to pay the balances owed as he instead waited for the creditors to contact him. One creditor to whom he owed about \$12,000 contacted him and offered to settle for \$4,000. Applicant did not accept the offer as he was planning to refile for bankruptcy and figured his credit was ruined. Sometime in 2004, he quit his part-time newspaper carrier job as he was tired of working seven days a week.

On November 12, 2004, Applicant was interviewed by a special investigator for the Office of Personnel Management (OPM) investigations service about his October 2003 bankruptcy. He explained he had become financially overextended on consumer credit. He claimed he had never missed a payment until three to four months before his October 2003 filing for bankruptcy, when he sought discharge of \$42,586 in consumer credit debt. Concerning the dismissal of his bankruptcy, Applicant averred his lawyer had not realized they had not filed a homestead declaration to prevent his home from being included in the bankruptcy. He was still delinquent on those debts included in the bankruptcy as he intended to refile for bankruptcy within the next year. Applicant denied any use of a credit card since October 2003, and indicated he was up to date on all his other accounts. Applicant reported a net monthly remainder of \$1,485 after payment of living expenses and three small retail revolving charge debts that he had not included in his bankruptcy filing.

A check of Applicant's credit on November 29, 2005, showed an outstanding revolving charge debt totaling \$11,956 (\$106 on ¶ 1.a., \$274 to the warehouse club, and \$11,576 on ¶ 1.b.) The creditors owed the unsecured debt included in the bankruptcy reported zero balances. Applicant had reported balances of \$82,240 on his primary mortgage. He also owed \$30,646 on a line of credit he had taken out in June 2005.

In early April 2006, Applicant contacted the creditor in ¶ 1.b. and expressed his desire to settle the debt. He was apprized that due to interest, the balance had risen to \$17,000. He also claimed he contacted the creditor in ¶ 1.d., who told him the "account had been discharged" because of his bankruptcy.

By April 2006, Applicant had not refiled for bankruptcy. When asked at his hearing about his reasons for not filing, Applicant responded:

Well I think because I've never got contacted and I was aware that, you know, I'm thinking that the credit card company would come after me somehow and say, you know, give it to a collection agency or whatever they do. To not hear from

anything, I guess I can honestly say out of sight, out of mind, I really didn't think about it and, as time went on, I probably thought less about it, that nobody was bothering me and, you know, like it was gone. (Tr. 40)

Applicant's two daughters (ages 26 and 23 as of April 2006) moved out of the family home in spring 2005. Their youngest is living alone with her child. Proud of their younger daughter's completion of a two-year program to be a therapist, Applicant and his spouse are helping her repay her \$14,000 in student loan debt, although the loans are in their daughter's name.

The home improvement retailer would not extend Applicant any future credit. As of April 2006, Applicant continued to rely on credit for purchases with the other two retailers. He owed \$500 or \$600 on his charge account with the warehouse club and \$100 on the other card for a grill that he bought. He and his spouse own a week at a timeshare that they purchased for \$7,000 or \$8,000.⁽⁴⁾ Applicant believes it is paid for although they continue to be responsible for maintenance fees, which are "a couple hundred dollars a year." (Tr. 86) Applicant has 401(k) assets. As of November 2004, the balance was about \$210,000.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. 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 clearance.

After considering the evidence of record, the following adjudicative guidelines are pertinent to an evaluation of Applicant's security suitability:

Financial Considerations. 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. (¶ E2.A6.1.1)

Personal Conduct. 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. (¶ E2.A5.1.1)

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of the Applicant, I conclude the government established its case with respect to Guideline F, financial considerations, as follows:

Under Guideline F, financial considerations, the security concerns arise when the applicant is shown to have a history of excessive indebtedness, recurring financial difficulties, or a history of not meeting his financial obligations. The government must consider whether individuals granted access to classified information are, because of financial irresponsibility, in a position where they may be at risk of having to engage in illegal acts to generate funds. Applicant

incurred more than \$42,000 in unsecured credit card debt by October 2003 that he sought to have discharged in bankruptcy. DC ¶ E2.A6.1.2.1. *A history of not meeting financial obligations*, and ¶ E2.A6.1.2.3. *Inability or unwillingness to satisfy debts*, apply.

Applicant and his spouse's financial situation was clearly negatively affected by the failure of the bank where his spouse was a vice president. She managed to find a new job, but her salary was about \$20,000 less per year. Mitigating condition (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)* does not fully extenuate or mitigate debt incurred largely due to financial mismanagement on his part, however. With his spouse's discharge in bankruptcy in 1998, part of the debt burden was alleviated. He failed to take advantage of the financial fresh start it afforded the family and continued to accumulate personal credit card debt. At least one of his credit card accounts (¶ 1.c.) was opened after her bankruptcy, and the accounts alleged in the SOR became delinquent after the bankruptcy. Furthermore, whether Applicant and his spouse purchased the timeshare in October 1997, which would have been before her bankruptcy, or six or seven years ago when Applicant was struggling to make the payments on his accounts, they exercised questionable financial judgment in taking on a monthly installment obligation when they were overextended on credit.

Applicant made an effort to resolve his delinquent debt in an October 2003 Chapter 7 filing. No adverse inference is drawn from the dismissal itself, since Applicant and his spouse believed in good faith that a homestead had been filed in her bankruptcy. Yet, he was still obligated to address these debts. He told the OPM investigator that he would refile the bankruptcy, but did nothing as he waited to see if he would be actively pursued by his creditors. Most of his creditors wrote off the debt, and reported a zero balance to the credit reporting agencies. Applicant submits, without citing to any specific provision of the Fair Credit Reporting Act, he is no longer responsible for repaying those debts which have been reported to the credit agencies as charged off with a zero balance. A creditor charge-off is an account transfer made when a creditor no longer expects to be repaid. It is noted that the purpose of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., is to minimize credit reporting errors, rather than to give a debtor relief from significant debt burden, which is the purpose of bankruptcy. Since there was no liquidation of his unsecured accounts, the debts remained legally enforceable even after they were charged off. Irrespective of whether collection can ensue once a zero balance is reported, the practical effect of the bankruptcy filing is that most of his creditors are not likely to pursue him for the debt. When Applicant recently contacted the creditor in ¶ 1.d., he was told there was nothing to be done because of the "bankruptcy discharge."

As noted by the DOHA Appeal Board (ISCR 01-09691, App. Bd. Mar. 27, 2003), even if a delinquent debt is unenforceable, the federal government is still not precluded from considering the facts surrounding the incurring of debt and failure to satisfy it in a timely manner. Not knowing that many of his creditors had simply charged off the debt balances, Applicant made no effort to pay for the goods and services he enjoyed because of the credit extended to him. By letter of February 1, 2006, Applicant was provided discovery from the government, including a copy of his November 29, 2005, credit report which shows a delinquent debt balance of \$11,576 on ¶ 1.b. Evidence of recent disregard is seen in his failure to contact that creditor until early April 2006 when he has the "financial wherewithal" to settle the debt (Tr. 88). Assuming Applicant had been aggressively pursued by his creditors at some point (he testified he looks at them as "predators" Tr. 68), their tactics do not justify his failure to take reasonable steps to address his legitimate obligations. His exhibited tendency to place his personal interests ahead of his legal obligations is inconsistent with retention of a security clearance. Some reform is evident since he is no longer incurring MasterCard or VISA credit card debt, but it is not enough to overcome the concerns for his financial judgment that exist because of abuse of consumer credit. Accordingly, SOR ¶¶ 1.b., 1.c., 1.d., 1.e., 1.f., 1.g., 1.h., and 1.i. are resolved against him. SOR ¶ 1.a. is found for him as he credibly testified that the debt represents a fee for a credit card sent to him under terms he declined, and he never used the card.

Under Guideline E, personal conduct, the government alleges Applicant deliberately falsified his SF 86 by failing to disclose his delinquent debts. Clearly, where he had filed for bankruptcy under Chapter 7 on October 17, 2003, he should have responded "Yes" to questions 38 (any debts over 180 days delinquent in the last seven years) and 39 (any debts currently over 90 days delinquent) on a security clearance application executed on November 3, 2003. Applicant explained that since he listed the bankruptcy, he thought it was sufficient to cover him as to notifying the government of his financial problems, and he was not late on his day-to-day obligations. Nothing in the language of questions 38 or 39

exempts from reporting delinquent debts included in a bankruptcy. Even so, a good faith belief that he did not have to report debts included on a bankruptcy would negate the knowing and willful intent required under DC ¶ 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.* While the bankruptcy raises concerns for his financial judgment, he was obviously not trying to conceal his indebtedness from the government. He reported reasonably accurately that he had filed for discharge of \$40,000 in debt. SOR ¶¶ 2.a. and 2.b. are found for him.

FORMAL FINDINGS

Formal findings as required by Section 3, Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline F: AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

Subparagraph 1.e.: Against the Applicant

Subparagraph 1.f.: Against the Applicant

Subparagraph 1.g.: Against the Applicant

Subparagraph 1.h.: Against the Applicant

Subparagraph 1.i.: Against the Applicant

Paragraph 2. Guideline E: FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant

Subparagraph 2.b.: For 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 Applicant. Clearance is denied.

Elizabeth M. Matchinski

Administrative Judge

- 1.
2. Applicant testified the loan debt was settled in the late 1980s (Tr. 98), but his November 2005 credit report (Ex. 6) reflects a mortgage loan taken out in February 1992.
3. Applicant told a special investigator for the Office of Personnel Management in November 2004 (Ex. 2) that in May or June 2003, he had consulted with a lawyer about debt consolidation and the lawyer recommended bankruptcy. The bankruptcy petition (Ex. 4) indicates Applicant paid the lawyer \$950 in September 2001 to file. It is not clear whether

this is a typographical error. Applicant testified he went to a lawyer to file for bankruptcy in 2003. (Tr. 36) His credit report of February 2004 reflects charged off balances as of December 2002, before he would have consulted with a lawyer if the 2003 date is correct.

4. Applicant testified he and his spouse bought the timeshare approximately six or seven years ago, at a cost of \$7,000 or \$8,000 (Tr. 88, 92), although he later indicated he did not want to be held to the \$7,000 figure (Tr. 99). Applicant's credit report of February 2004 (Ex. 3) reflects a secured loan of \$8,669 taken out in October 1997 paid in full by November 2000. That loan may well have been for the timeshare, as Applicant testified they made installment payments.