

DATE: November 27, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 05-09601

## DECISION OF ADMINISTRATIVE JUDGE

MARY E. HENRY

### APPEARANCES

#### FOR GOVERNMENT

John Bayard Glendon, Esq., Department Counsel

#### FOR APPLICANT

*Pro Se*

### SYNOPSIS

Applicant started his own computer software business in 1999, with the encouragement of his former employer. His employer later withdrew its support for his business at the same time the computer industry began an economic slowdown. He incurred significant personal debt to finance his business, which closed in 2004. Although he is now employed with a good income, he has made little effort to pay this debt. He has not mitigated the government's security concerns regarding his finances. The government has not established its case under the personal conduct guideline. Clearance is denied.

### STATEMENT OF THE CASE

On January 30, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Specifically, the SOR set forth security concerns arising under Guideline F (Financial Considerations) and Guideline E (Personal Conduct) of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On April 14, 2005, Applicant submitted a notarized response to the allegations. He requested a hearing. This matter was assigned to me on August 25, 2006. A notice of hearing was issued on August 31, 2006, scheduling a hearing for September 19, 2006. On September 13, 2006, an amended notice of hearing was issued and a hearing was held on September 21, 2006. Applicant waived the 15-day notice of hearing requirement for the new hearing date. The government submitted six exhibits, which were marked and admitted into evidence as Government Exhibits 1 through 6. Applicant submitted seven exhibits, which were marked and admitted into evidence as Applicant Exhibits A through G. I held the record open for the submission of additional documents, which Applicant timely filed. These documents are

marked as Applicant Exhibit H, and admitted into evidence without objection by the government. The SOR and Applicant's response to it are also admitted into evidence. Applicant and two witnesses testified. At the hearing, the government withdrew allegation 1.g because it was the same as allegation 1.a. The hearing transcript was received on September 29, 2006.

### FINDINGS OF FACT

Applicant denied in whole or in part the allegations under Guideline F. Under Guideline E, he argues that his conduct in operating his business did not involve questionable judgment, untrustworthiness, dishonesty, lack of candor, unreliability, or a failure to comply with rules and regulations. (1) After a complete review of the evidence in the record and upon due consideration, I make the following findings of fact.

Applicant is a 36-year-old software systems engineer for a defense contractor. He began work for this contractor two years ago. He has Bachelor of Arts degree in economics and extensive experience in the computer industry. He married in 1999 and separated from his wife in 2004. He should received his final divorce papers at any time. He completed a security clearance application (SF 86) in July 2004. (2)

Applicant initially worked as a bank auditor. In 1994, he began working as a software consultant for a specialized computer company. In 1996, he opened his own company for the sole purpose of receiving payment of his consulting salary. By 1999, his employer had promoted him to lead architect of its entire enterprise systems. In late 1999, it laid him off. (3) At this time, his employer released him from a non-compete agreement and encouraged his decision to start a company which could provide filler services to its customers. Thus, he redirected his company's focus to a computer corporation with, as its mission, the design and development of financial software for a PC environment. His company targeted a very specific market by selling a product for data warehousing and financial reporting capability. Through this product, he sought to fill a hole between the services provided by his former employer and its customers. (4)

Because he knew that his former employer intended to lay off all the employees in his office, he hired former colleagues to work for his company prior to their actual termination. With their skills and his, he initially experienced some business success. It lasted only a short time, as his former employer withdrew its support for his business venture. This action by his former employer negatively impacted his ability to develop his business. (5)

He original business working capitol came from equity in his house and personal assets. Within the first year of business operations, the computer industry suffered an economic downturn, causing income earning problems for his business. In the summer of 2000, he obtained several credit cards on his personal credit because he could not get financing for his company. He then secured monetary loans on these cards to continue financing his business. For six months, the company paid regularly on the loans, but stopped when earnings continued a severe decline. His unpaid debt from these loans totaled approximately \$184,000. To combat his financial problems, he laid off staff, and formed a partnership with another individual in an effort to keep the business operational. He closed the business in 2004. (6)

During the time he operated his business, Applicant had no other source of income. He used personal assets to pay personal bills until he exhausted these funds. In time, his personal finances were severely strained, as he had little money to pay ordinary expenses. (7) In late 2004, he started his present employment. His employer recently promoted him to associate department head position. (8) His current salary is \$129,000 a year. He also receives about \$300 a month from a recently opened revenue generating website. His retirement account is valued at approximately \$64,000. (9) His only debt is a \$640,000 mortgage on his \$680,000 house. He used the equity from his last home refinance to pay the debt on his 2-year-old car, a Lexus, and to make repairs or improvements in his house. As part of his divorce settlement, he is to pay his wife \$10,000 at \$200 a week for 50 weeks. (10)

A review of Appellant's credit reports dated January 25, 2005, October 11, 2005, August 11, 2006 and the SOR shows the following debts. (11) The current status of these debts is as follows:

SOR ¶	TYPE OF DEBT	AMOUNT	STATUS
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1.a.	sales financing	\$14,357.00	Unpaid, credit reports note that debt is disputed <a href="#">(12)</a>
1.b.	credit card	\$17,959.00	Unpaid; Stipulated dismissal with prejudice in court action to collect <a href="#">(13)</a>
1.c.	credit card	\$39,763.00	Unpaid
1.d.	credit card	\$27,424.00	Unpaid
1.e.	credit card	\$18,944.00	Unpaid
1.f.	credit card	\$18,161.00	Unpaid; Court dismissed creditor action. <a href="#">(14)</a>
1.g.	sales financing	\$8,418.00	Same as 1.a., withdrawn
1.h.	credit card	\$30,553.00	Unpaid
1.i.	telephone fees	\$143.00	Disputes
1.j.	credit collection	\$7,876.00	Unpaid; Stipulated dismissal with prejudice in court action to collect <a href="#">(15)</a>

Applicant contacted one creditor and offered to pay \$400 a month on his debt. The creditor rejected his offer and filed a debt action in court to recover \$17,959.00. The creditor agreed to a stipulated dismissal with prejudice when it could not provide Applicant with a copy of the papers showing the debt he actually owed. This creditor has no further legal right of action against Applicant. In a second case, the court dismissed the creditor's action for failure to answer interrogatories. This creditor has no further legal rights to collect the \$18,161.00 owed. In a third action, the creditor again agreed to dismiss with prejudice its action against Applicant because it could not provide documentation of the debt owed. Any further legal rights of action have been eliminated for this creditor. [\(16\)](#)

Applicant disputed two debts totaling almost \$14,500. He, however, still has nearly \$117,000 in unpaid and unchallenged credit card debt, related to his business operations, which he does not deny. He has not initiated any payment plans to resolve this debt nor has he legally resolved this debt. Since January 2005, he has refinanced his home three times. He did not use any of the proceeds to pay the debt he incurred on behalf of his business. He testified that the statute of limitations for recovery of these monies is 6 years and 6 months. It is clear from his testimony that he does not intend to pay these debts because his legal obligation for the debts expires shortly. [\(17\)](#)

During the course of running his company and as a business decision, Applicant, as an agent for his company, purchased an unused Domain Name of his former corporate employer (employer). The employer filed a complaint against his company, not him individually, which was resolved in favor of the employer. In a split arbitration decision, the majority opinion held that his company had no rights or legitimate interests in the Domain Name; that his company had registered its use in bad faith, and used it in bad faith. The dissenting opinion strongly argued for a decision in favor of his company, relying on the position taken by his company in the arbitration. I have no authority to review this arbitration decision, but will consider it under Guideline E. Applicant disagrees with the arbitration decision and continues to contend that he, as an officer of his company, did nothing wrong when his company purchased the Domain Name. His legal argument continues to be the same as argued to the arbitration panel, and accepted by the dissenting panelist. [\(18\)](#)

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2., Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. 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. In addition, each security clearance decision must be based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in the Directive. Specifically, these are: (1) the nature,

extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. (19)

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. (20) The government has the burden of proving controverted facts. (21) The burden of proof is something less than a preponderance of the evidence. (22) Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. (23) Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. (24)

No one has a right to a security clearance, (25) and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." (26) Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. (27) Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant. (28) 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

**Financial Considerations - Guideline F: 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.**

**Personal Conduct - Guideline E: 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.**

## CONCLUSIONS

Upon consideration of the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

### **Financial Considerations**

The government has established its case under Guideline F. Applicant has a history of excessive, unpaid debt which arose when he used personal credit cards to finance his business. He has not paid any of this debt since sometime in 2000. Applicant's financial problems clearly fall within the Financial Considerations 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*).

A security concern based on financial problems can be mitigated in several ways. Applicant's debt problems have been ongoing for a number of years, and are not recent. Thus, he has not established a mitigating condition under Financial Considerations Mitigating Conditions (FC MC) E2.A6.1.3.1 (*The behavior was not recent*).

Applicant incurred his debt during a small window of time in 2000 for the sole purpose of financing his developing business, which ultimately failed. His business failed because his primary client withdrew support for the business and due to a downward economic swing in the computer industry. He has no outstanding debt other than the debt related to his failed business. Thus, FC MC E2.A6.1.3.2 (*It was an isolated incident*) and E2.A6.1.3.3 (*The conditions that*

*resulted in the behavior were largely beyond the person's control) apply.*

He has not received counseling for his financial problems, hence, FC MC E2.A6.1.3.4 (*The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control*) does not apply.

In 2004, Applicant contacted one creditor about repaying his debt. Rather than develop a payment plan with him, the creditor filed a debt action in court. Because it could not document the amount of his debt, the creditor eventually agreed to a dismissal of this action without recovering any money. Two other debts have been resolved in a similar manner for the same reason. Applicant has contested two additional debts, but does not intend to resolve the remaining unpaid debts he acknowledges owing. His testimony reflects that he prefers to wait for the statute of limitations for collecting of the debts to expire, which will cause the debts to drop from his credit report. Thus, FC MC E2.A6.1.3.6 (*The individual initiated a good faith effort to repay overdue creditors or otherwise resolve debts.*) has some applicability to the debts he attempted to resolve.

The issue before me is not whether Applicant is still legally liable for any or all of his outstanding debts, but whether he has presented sufficient evidence of extenuation, mitigation or changed circumstances to warrant a favorable security clearance decision. His remaining unpaid debt of more than \$100,00 constitutes a security risk. In the last 6 years, he has not made any effort to repay this debt. For several years, he had no resources to do so, but once he returned to the workforce as a well paid employee, he made minimal effort to resolve his debt. His decision to avoid further contact with creditors and to allow his debt to drop off his credit report unpaid raises questions about his willingness to accept responsibility for his conduct and his trustworthiness to hold a security clearance. Given that my decision turns on more than applying disqualifying and mitigating factors, I find that Applicant's unwillingness to take responsibility and resolve his large, outstanding debt outweighs the other positive factors in his case. He has not mitigated the government's concerns under Guideline F.

### **Personal Conduct**

Under Guideline E, the government asserts that since the arbitration panel found his company used a Domain Name in bad faith, Applicant's personal conduct is in question. Applicant, acting in his corporate capacity as an officer of his company and on its behalf, made a business decision to purchase an unused Domain Name belonging to his former employer. The employer filed an arbitration complaint against Applicant's company, a corporation, not Applicant individually. Both parties hotly contested the issues, presenting opposing views to the arbitration panel. The arbitration panel rendered a split decision against Applicant's company, but made no finding against him personally. The arbitration panel's findings of corporate misconduct by a company are insufficient to apply any of the Personal Conduct Disqualifying Conditions as the findings relate more to business decision making than personal misconduct. The government has not met its burden of proof under Guideline E.

Accordingly, for the reasons stated, I find that it is not clearly consistent with the national interest to grant a security clearance to Applicant.

### **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 : AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: Against Applicant

Subparagraph 1.e: Against Applicant

Subparagraph 1.f: For Applicant

Subparagraph 1.g: Withdrawn

Subparagraph 1.h: Against Applicant

Subparagraph 1.i: For Applicant

Subparagraph 1.j: For Applicant

Paragraph 2, Guideline E : FOR APPLICANT

Subparagraph 1.a: For Applicant

### **DECISION**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant a security clearance for Applicant. Clearance is denied.

Mary E. Henry

Administrative Judge

1. Applicant's response to the SOR, dated April 14, 2006, at 1-4.
2. Government Exhibit 1 (Applicant's Security Clearance Application, dated July 6, 2004) at 1-2; Tr. at 25, 38, 122.
3. Tr. at 25-27, 45.
4. *Id.* at 25-28, 48, 52, 105-106.
5. *Id.* at 27, 50.
6. *Id.* at 28-31, 54-61, 117-118; Government Exhibit 3 (Credit report, dated January 25, 2005; Government Exhibit 4 (Credit report, dated October 11, 2005); Government Exhibit 5 (Credit report, dated August 11, 2006).
7. Tr. at 30, 56-57, 123.
8. *Id.* at 31-32.
9. *Id.* at 33-34, 46-47; Applicant Exhibit A (Pay statement, dated September 22, 2006) at 1-2; Applicant Exhibit G (Retirement savings statement for August 1, 2006 through August 31, 2006).
10. Tr. at 45-47, 110.
11. Government Exhibit 3, *supra* note 6; Government Exhibit 4, *supra* note 6; Government Exhibit 5, *supra* note 6.
12. Government Exhibit 4, *supra* note 6, at 3; Government Exhibit 5, *supra* note 6, at 1.
13. Applicant Exhibit D (Stipulation of Dismissal filed with court, dated November 17, 2005) at 1.
14. Applicant Exhibit E (Copy of Judgment of Dismissal, dated June 6, 2005) at 1.
15. Applicant Exhibit H (Stipulation of Dismissal, dated December 31, 2004) at 2.

16. Tr. at 36, 70-73, 83-84, Applicant Exhibit D, *supra* note 13, at 1; Applicant Exhibit E, *supra* note 14, at 1; Applicant Exhibit H, *supra* note 15, at 2.
17. Tr. at 44-45, 65-66, 68, 74, 79, 81, 89.
18. *Id.* at 98-103, 107; Government Exhibit 6 (Arbitration decision, dated December 27, 2001) at 7-9.
19. Directive, Enclosure 2, ¶ E2.2.1.1. through E2.2.1.9.
20. ISCR Case No. 96-0277 at 2 (App. Bd., July 11, 1997).
21. ISCR Case No. 97-0016 at 3 (App. Bd., December 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
22. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
23. ISCR Case No. 94-1075 at 3-4 (App. Bd., August 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
24. ISCR Case No. 93-1390 at 7-8 (App. Bd. Decision and Reversal Order, January 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
25. *Egan*, 484 U.S. at 531.
26. *Id.*
27. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
28. Executive Order No. 10865 § 7.