

March 19, 1997

In RE:

SSN:

Applicant for security clearance

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DOHA OSD Case No. 96-0110

**DECISION OF ADMINISTRATIVE JUDGE**

**RICHARD A. CEFOLA**

Appearances

FOR THE GOVERNMENT

Martin H. Mogul

Department Counsel

FOR THE APPLICANT

Jeffrey A. Kopczynski

Applicant's Counsel **STATEMENT OF CASE**

On February 26, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed the reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The SOR is attached.

Applicant filed an Answer to the SOR on or about April 22, 1996.

The case was received by the undersigned on November 26, 1996. A notice of hearing was issued on December 4, 1996, and the case was originally set for hearing on January 28, 1997. Pursuant to a request from Applicant's counsel; and for good cause shown, the case was continued to, and heard on, March 4, 1997. The Government submitted documentary

evidence, and called one witness to testify. Testimony was taken from the Applicant. The transcript was received on March 14, 1997. The issue raised here is whether the Applicant's financial difficulties militate against the granting of a security clearance.

## FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 54 years of age, has a Master of Science in Electrical Engineering, and is employed as a Senior Engineer. He currently has a Secret security clearance, and his employer seeks retention of that level clearance on the part of the Applicant.

### Criterion F - Financial Considerations

The Applicant is admittedly indebted to five different banking creditors in a total amount in excess of \$44,000. At present, he has no intention of paying these debts (Transcript (TR) at page 23 line 18 to page 27 line 15). These debts were incurred in 1991 (TR at page 29 line 24 to page 30 line 2), and the Applicant has made no scheduled payments towards satisfying these debts since "the late part of '91 or the first part of '92." (TR at page 27 line 24 to page 28 line 1).

These debts were incurred through a failed real estate transaction. The Applicant owned a parcel of land which he subdivided into three separate housing sites in 1989. He found a builder, with whom he would split the profits, and a mortgage company which would fund the project (TR at page 53 line 11 to page 54 line 20). The first house was completed, but because of **a down turn in the housing market**, it was sold at cost (TR at page 55 lines 18~22). The second house was also completed, and the profits "folded over into the third house" (TR at page 55 line 23 to page 56 line 7). **The financial difficulties arose when the mortgage company "backed out" of the funding** (TR at page 56 lines 8~11). In response to a question from his counsel, the Applicant explained his subsequent difficulties in the following terms:

Q. Now, what happened with respect to the third house?

A We sold it to a guy that -- and we continued building using my credit cards. And when we -- and at the same time we started a refinance, and the buyer got nervous. So, he thought that we weren't going to be able to complete it, because he didn't think we had the financial wherewithal. And, so, he filed a lawsuit that, essentially -- he put a lien on the property that, essentially, stopped me from borrowing any money to finish the third house. And, so, we continued using credit cards to try and get it done, to get rid of the lien. And from there it just fell apart. (TR at page 56 line 16 to page 57 line 3, *see also* page 30 line 12 to page 31 line 6.)

Next, the builder left the project (TR at page 57 lines 4~9). The Applicant subsequently filed a suit against the mortgage company, but received no compensation (TR at page 57 line 10 to page 58 line 1). The Applicant, initially, paid off those creditors who would accept a reduced payment, but failed to pay those remaining "because I couldn't do it [make reduced payments] unless all of them did it, and then -- as a whole, because otherwise I had the same problem." (TR at page 28 line 21 to page 29 line 14).

In July of 1996, the Applicant filed a petition for bankruptcy under Chapter 13 of the Bankruptcy Code (Applicant's Exhibit (AppX) I at page 1). On his Schedule F, he listed all of the creditors that appear on the SOR (AppX I at pages 13~15). As to his personal property, on Schedule B, the Applicant listed, in part, that he had "\$100" in cash, when in fact at that time he had closer to \$20,000 as a cash reserve (TR at page 72 line 10 to page 75 line 6). The Chapter 13, as presented, was under funded; and as a result, the Applicant was advised to file a Chapter 7 petition for bankruptcy (TR at page 60 at line 9 to page 64 line 21). The Applicant has since filed his Chapter 7 petition (AppX L, *see also* TR at page 65 line 2 to page 65 lines 2~17), and has further amended his Schedule B to reflect \$20,000 in cash as part of his personal property (AppX M at page 2).

### Mitigation

The Applicant is obviously very competent in his position (AppXs A~F, *see also* TR at page 44 line 12 to page 49 line 20). Other than the debts that arose from the construction project, the Applicant is able to meet his financial obligations

(TR at page 67 lines 2~5).

## POLICIES

Enclosure 2 and Section F.3. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. The conditions should be followed in every case according to the pertinent criterion, however, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security clearance case presents its own unique facts and circumstances, it should not be assumed that these conditions exhaust the realm of human experience, or apply equally in every case. Conditions most pertinent to evaluation of this case are:

### Financial Considerations

#### Condition that could raise a security concern:

(3) inability or unwillingness to satisfy debts.

#### Conditions that could mitigate security concerns:

(1) the behavior was not recent;

(2) it was an isolated incident;

(3) the conditions that resulted in the behavior were largely beyond the person's control (e.g., . . . a business downturn . . .)

As set forth in the Directive, "[e]ach clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future.

The Administrative Judge, however, 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.

The Government must make out a prima facie case under Criterion F (financial considerations) which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct, is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places.

## **CONCLUSIONS**

The past due debts in issue are the unfortunate result of a real estate venture, "gone sour," as a result of a downturn in the real estate market, and also the result of the unexpected departure of both the builder and mortgage company from the project. The Applicant tried, as best he could, to save the project by using his credit cards, but this only led to his present financial difficulties. This isolated incident, the failed attempt at finishing the third of three houses, occurred more than five years ago, and the Applicant has averred that he has no future interest in any such ventures (TR at page 67 lines 6~9). Furthermore, by petitioning the U. S. Bankruptcy Court for its aid in addressing these unsecured financial obligations, he will no longer be at risk of compromising classified information in order to generate funds to pay these debts. I therefore conclude that these financial difficulties are not of present security significance.

Considering all the evidence, the Applicant has rebutted the Government's prima facie case regarding his financial difficulties. The Applicant has thus met the mitigating conditions of Criterion F, and of Section F.3. of the Directive. Accordingly, he has met his ultimate burden of persuasion under Criterion F.

## **FORMAL FINDINGS**

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: FOR THE APPLICANT

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.
- d. For the Applicant.
- e. For the Applicant.
- f. For the Applicant.
- g. For the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

## **DECISION**

In light of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant or continue a security clearance for the Applicant.

Richard A. Cefola

Administrative Judge