

DATE: February 10, 1997

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In Re:

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SSN: -----

Applicant for security clearance

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DOHA CASE No. 96-0226

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

Carla Conover, Esq.

Department Counsel

FOR THE APPLICANT

*Pro se*

STATEMENT OF CASE

On May 22, 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 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 Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked. The SOR is attached. Applicant filed his Answer to the SOR on June 2, 1996.

The case was received by the undersigned on July 9, 1996. A notice of hearing was issued on September 10, 1996, and the case was heard on September 17, 1996. The Government and Applicant submitted documentary evidence. The Government called one witness. Testimony was taken from Applicant. The transcript was received on September 30, 1996.

RULINGS ON PROCEDURE

At the hearing, the Government moved to amend subparagraphs 2b and 2c of the SOR by adding two additional statutory references which are Title 26 USC 6011 and Title 26 USC 6012. The motion was granted. Also, Applicant was given until September 20, 1996 to furnish post-hearing documentation supporting his testimony. Except for one document, all documentation was submitted in a timely fashion. Although one document was not received until November 16, 1996, it shall be grouped with the other post-hearing documents and admitted in evidence as Applicant's Exhibit B. [\(1\)](#)

## FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents (identified by GE and number of exhibit; Applicant's exhibits identified by alphabetical letter), the transcript (Tr.) and the live testimony. The SOR alleges financial problems (Criterion F) and criminal activity (Criterion J). Applicant admitted all allegations of the SOR except subparagraph 1d which he denied.<sup>(2)</sup>

Applicant is 36 years old and employed as a ----- by a defense contractor. He seeks a secret clearance.

Applicant admitted he was charged in July 1994 with intent to defraud by false pretenses, a felony. He pled guilty to a reduced charge (misdemeanor) of worthless check on November 3, 1994. (GE #8). Applicant received deferred adjudication on condition he make restitution (approximately \$7518 and processing costs of \$26 for the worthless check) by November 4, 1996. The charges would then be dismissed upon payment of restitution and compliance with the law for the two year period. (GE #8).<sup>(3)</sup>

Applicant was discharged in bankruptcy for approximately \$50,648 on June 22, 1995.<sup>(4)</sup> In his petition, he incorrectly included the delinquent federal tax debts he owed for years 1990, 1991, and 1992.<sup>(5)</sup>

Applicant is indebted to the IRS for tax years 1990, 1991, and 1994.<sup>(6)</sup>

Applicant admitted all allegations under paragraph 2. He acknowledged the criminal but unintentional nature of his conduct alleged in subparagraph 1a. He admitted he did not file tax returns for 1992 and 1993.<sup>(7)</sup>

Applicant attributes his financial problems to being unfamiliar with criminals who take advantage of persons who do not know what to do with their money. (Tr. 69).<sup>(8)</sup> According to GE #2, pages 6 to 29, and his testimony, he invested \$30,000 in July 1991 and another \$25,000 in November 1991 to an investor who claimed to finance international developers at high rates of interest. (Tr. 61). He received \$3000 as return on his investment every 60 days until the returns stopped coming in March 1992. After several inquiries about the missing returns in February or March 1993, the investor gave Applicant a check for \$7500 in March 1993 which Applicant deposited. After five days, Applicant wired \$7200 of the check to pay other bills. Applicant was informed on March 8, 1993 the check was returned to the bank marked insufficient funds and Applicant would have to cover the check or face some kind of action. Applicant kept communication channels open with the investor because he wanted his money and he could pass any information to the proper legal authorities. (Tr. 63). Applicant made repeated requests for payment of the \$7500 to cover Applicant's indebtedness to the first bank. (GE #2, affidavit). A short time later, the investor said he had more than \$200,000 in bonds. After a face to face meeting where some kind of documents were signed, the investor told Applicant that \$16,000 had been wired to Applicant's second bank account. (GE #2, affidavit). Worried about the first worthless check, Applicant wrote a check for \$ \$9500 to the first bank (to cover the first worthless check) on the second bank account where he thought the \$16,000 had been wired to. Because the \$16,000 check had never been deposited, the \$9500 check did not clear either.

Applicant stated he would make restitution for the worthless check in six to eight months from January 1995. (GE #2, p.6) He testified he could not make any payments but he planned to combine a \$5000 family loan from his family with his own wages to pay the restitution. (Tr. 55). Later in his testimony, Applicant indicated the loan was actually a gift from his mother which constituted most of the money he loaned her for making monthly payments on her car he purchased for her in 1992. (Tr. 56-58).

In September 1994, Applicant satisfied the qualifying exam for post-college education. A letter written by Applicant's mother in July 1994 describes his outstanding academic achievements. Applicant is described as a good communicator. In 1995, he received two certificates of achievement for scholastic accomplishments. Applicant was interviewed by the local newspaper in early 1994 concerning the demands and challenges for minority students in striving for post-graduate school training.

In addition to the bad investment, Applicant's financial problems (identified in Answer) were caused by other factors

including his separation from his wife, financial support of his mother and three children, and loss of employment. Applicant believes in hard work and leading by example. He paid off his school loan in 1989. (Tr. 79). He has never attempted to obtain something through illegal avenues. See, Answer. He always paid his bills (on approximately 20 separate accounts) on time between 1986 and 1991. (Tr. 80).<sup>(9)</sup>

## **POLICIES**

Enclosure 2 of the Directive set forth policy factors which must be given binding consideration in making security clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors are in no way 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 case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in this case are:

### **Financial Problems**

#### Factors Against Clearance:

1. A history of not meeting financial obligations;
2. deceptive practices such as check fraud....
3. inability to satisfy debts;

#### Factors for Clearance:

None.

### **Criminal Conduct**

#### Factors Against Clearance:

1. any criminal conduct, regardless of whether the person was formally charged.

#### Factors for Clearance:

None.

### **General Policy Factors (Whole Person Concept)**

Every security clearance case must be evaluated under the factors that make up the whole person concept. Those factors (found page 2-1 of Enclosure 2 of the Directive) include: (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; and, the likelihood of continuation of the conduct.

### **Burden of Proof**

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information 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.

The Government must establish all the factual allegations under Criterion F (financial considerations) and Criterion J (Criminal conduct) 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 the 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 repeat itself and Applicant presently qualifies for a security clearance.

### CONCLUSIONS

The Government has established a case under Criterion F. Applicant's history of not meeting financial obligations is demonstrated by financial problems in 1986 and 1989. Even after his bankruptcy discharge from more than \$50,000 debt in June 1995, Applicant continued to have financial problems as evidenced by the failure to make any restitution for the \$7500 worthless check until November 1996. Applicant's ongoing financial problems also demonstrated by his tax debt of more than \$17,000.

The chronology of events leading to Applicant's plea to the worthless check crime in November 1994, activates the application of disqualifying factor #2 (check fraud) under Criterion F. Having discovered over a nine month period he had not been receiving any returns on his investment since March 1992, and having found out the first check (\$7500) was returned to the first bank marked insufficient funds, and stating one of his reasons he repeatedly asked the investor for his money (in addition to trying to get his money back) was to pass important information over to law enforcement, Applicant should have known this investment venture was falling apart. Even though Applicant was concerned about his \$55,000 investment, he used poor judgment when he wrote a second worthless check to cover the first worthless check, based on the investor's false assurances that the investor had placed \$16,000 in Applicant's second bank account. Applicant could have easily called the second bank to determine whether the \$16,000 had been deposited before writing any additional checks.

Generally, a bankruptcy discharge does not raise security concerns unless the circumstances show an applicant continuing to have financial problems even after his qualifying debts are discharged. The record reflects that after bankruptcy in June 1995, Applicant owed more than \$17,000 to the IRS and as of September 20, 1996, Applicant still owes more than \$17,000. After the bankruptcy in June 1995, Applicant owed full restitution to the first bank for the worthless check. Not until November 1996, did Applicant finally satisfy the debt with a gift from his mother.

Applicant's plea of guilty to criminal conduct occurred in November 1994. His decision to write a second worthless check with the warning indicators he was aware of, establishes doubt concerning Applicant's judgment reliability and trustworthiness. Applicant's willful failure to file his 1992 and 1993 tax returns raises even more doubt about Applicant's overall judgment and whether he understands his responsibility to file and pay his taxes.

Applicant's claim of financial stability between 1986 and 1991 is not supported by the record. Applicant received 3 wage garnishments in 1986 and a tax lien in 1989. Although Applicant paid the wage garnishments promptly in 1986, the tax lien was not satisfied until 1991, and he still owes federal taxes for 1990 and 1991 even though he received a substantial monetary settlement in 1991 of more than \$90,000. Applicant's claim of handling 20 creditor accounts during the period and always paying his bills on time is unsubstantiated. In addition, there is insufficient evidence indicating how Applicant plans to avoid his past and present financial problems in the future. After he received his settlement in 1991, Applicant apparently made commendable choices about continuing his education and financially helping his family in one way or another. The fact that Applicant has filed his federal returns in May 1996 represents evidence in Applicant's favor. However, there is no inadequate support in the record for Applicant's claim he paid \$200 for four months as a part of tax debt repayment plan.

Applicant's character evidence concerning his impressive scholastic achievements and qualifications has been

thoroughly considered but fails to address how Applicant plans to pay off his federal tax debt and prevent present financial problems from recurring in the future. Applicant's repayment of the worthless check in November 1996 weighs in Applicant's favor. However, regardless of whether the money used to pay most of the restitution was a loan or a gift from his mother or from the family, the surrounding circumstances of the restitution payment demonstrate another example of satisfying obligations under crisis conditions rather than making systematic payments over a sustained period of time.

Considering Applicant's financial problems caused by the worthless check and continuing financial problems following his discharge in bankruptcy in 1995, and the criminal consequences of Applicant writing the worthless check, together with Applicant's failure to file tax returns for 1992 and 1993, and the lack of independent evidence demonstrating a good-faith effort to satisfy all his debts in a timely manner, Applicant's evidence in rehabilitation and mitigation falls short of establishing his ultimate burden of persuasion under the specific mitigating factors and general policy factors.

### **FORMAL FINDINGS**

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

Paragraph 1: AGAINST THE APPLICANT.

- a. Against the Applicant.
- b. Against the Applicant.
- c. Against the Applicant.
- d. Against the Applicant.
- e. Against the Applicant.

Paragraph 2: AGAINST THE APPLICANT.

- a. Against the Applicant.
- b. Against the Applicant.
- c. Against the Applicant.

Factual support and reasons for the foregoing findings are set forth in FINDINGS OF FACT and CONCLUSIONS above.

### **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 as security clearance for Applicant.

Paul J. Mason

Administrative Judge

1. The one page document is correspondence from the bank indicating full restitution was made by Applicant for the worthless check (subparagraph 1a). While the document was received after the time allowed for post-hearing submissions, the document shall be admitted nonetheless to permit the development of a full record. (Directive, Enclosure 3, Section 19).

2. However, he acknowledged the debt but claimed the debt would be smaller than alleged in subparagraph 1d. Subparagraph 1d alleges an amount of approximately \$7400 while Applicant's Exhibit B (IRS document) reflects a debt

for 1991 of approximately \$7800 as of arch 2, 1996.

3. On November 14, 1996, according to Applicant's Exhibit B, Applicant satisfied the amount of the worthless check.

4. Applicant accused the Special Agent of directing him to file for bankruptcy to improve his financial record and to make it appear he was less susceptible to pressure. (Applicant's Answer). The evidence fails to warrant a finding the Special Agent directed or advised Applicant to file bankruptcy. (Tr. 28-33, 45, 48). Even assuming the Agent did somehow influence Applicant's decision, her influence is irrelevant to Applicant's financial problems after he was discharged in bankruptcy in June 1995.

5. Applicant blamed his bankruptcy attorney for telling him that federal tax debts could be discharged if they were more than 2 years old. (Tr. 50). Although he stated in his Answer he would have set up a repayment plan earlier if he had known he could not discharge the federal tax debt, he stated in GE #2 (January 1995) he lacked the funds to establish a repayment plan.

6. According to Applicant's Exhibit B, he owes \$7412 for tax year 1990 and \$7816 for tax year 1991. He admitted he owes approximately \$1474 for tax year 1994.

7. According Applicant's Exhibit B, Applicant filed the 1992 and 1993 tax return in May 1996. He testified he had been paying the IRS \$200 a month for four months. He did not file the 1992 return because of the bad investment, lack of income, pressures of being in graduate school, and the belief the IRS would file a return for him. He did not file the 1993 tax returns because he did think he owed anything and that IRS would automatically file for him.

8. Applicant had received approximately \$96,000 in 1991 in settlement of a personal injury he suffered in a traffic accident in the summer of 1990.

9. Yet, GE #1 reflects financial problems in early 1986 (3 wage garnishments which was satisfied in February 1986) and in 1989 (a tax lien which was satisfied in 1991).