

DATE: _September 4, 1997

In Re:

Applicant for Security Clearance

ISCR OSD Case No. 97-0053

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

Appearances

FOR GOVERNMENT

Pamela C. Benson, Esq.

Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On February 5, 1997, 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 granted, continued, denied or revoked.

Applicant responded to the SOR on April 23, 1997 and elected to have his case decided on the basis of the written record. Applicant was furnished copies of the File of Relevant materials (FORM) on May 28, 1997 and is credited with receiving them on June 16, 1997. He provided no written response within the time permitted (30 days) by the Directive. The case was assigned to this Administrative Judge on June 24, 1997.

STATEMENT OF FACTS

Applicant is 49 years of age and has been employed by his current defense contractor (Company A) since March 1973. He seeks to retain his security clearance at the level of secret.

Summary of Allegations and Responses

Applicant is alleged to have experienced financial problems that are reflected in accumulated outstanding debts to numerous creditors covered in allegations 1.a through 1.s of the SOR. The SOR is attached hereto and incorporated herein by reference.

For his response to the SOR, Applicant admits without explanation each of the covered allegations, except for allegations 1.s covering his listed debt to creditor S (for \$27,249.00), which Applicant claims to have been assigned to his spouse who currently lives in the house.

Relevant and Material Factual Findings

Applicant experienced on setting financial problems in the early 1990s for no explicable reasons that can be discerned from Applicant's signed, sworn statement. Between 1991 and 1996, he incurred numerous debts (some 17 in all) aggregating in excess of \$15,000, exclusive of the mortgage indebtedness with A Bank in the amount of \$27,249.00, which Applicant claims to have assigned to his estranged wife, who took over possession of the home secured by the same mortgage debt. His mortgage debt continues to be reflected in his credit report (FORM, item 8) as a joint obligation and is characterized as such, absent any documentation to the contrary in the record.

On March 23, 1994, Applicant petitioned for Chapter 13 wage earner's relief in the bankruptcy court districted in State A. His submitted plan (filed on April 12, 1994) called for his payment of \$325.00 monthly to the trustee for a period of 55 months, or longer if needed to pay all of his scheduled claims. The trustee filed an objection to Applicant's plan on May 20, 1994 claiming that he needed \$691.00 from the debtor. Notwithstanding, Applicant's plan was confirmed on June 30, 1994.

Over the course of the ensuing six months, Applicant experienced difficulties in meeting his scheduled monthly payments to the trustee. His payment defaults prompted the trustee to seek dismissal of Applicant's Chapter 13 petition in December 1994. The bankruptcy court denied the trustee's petition, but without prejudice to the trustee to renew his dismissal in the event petition failed to comply with his established payment schedule.

Applicant filed two motions on January 27, 1995: One for a court approved moratorium on his missed payments for the months of November through January 1995 and the other for court approval of his petition for amended Chapter 13 plan, which provided for reduced monthly trustee payments (*i.e.*, from \$325.00 to \$175.00 a month). The court approved both petitioner requests, but subject to reserved dismissal in the event Applicant failed to make his scheduled January 1995 monthly payment.

Applicant quickly fell behind in his monthly payment terms, citing financial strains attributable to his ongoing divorce at the time, child support payments and payment of accrued legal fees. During this period of experienced financial stress (*i.e.*, on or about July 26, 1995), he passed a post-dated check to one of his creditors for \$50.00. He was eventually charged with issuing a fraudulent check and released from custody upon his posting bond in the amount of \$94.00. Applicant was later ordered to pay restitution. Rather than pay the court-ordered restitution directly, Applicant simply forfeited his \$94.00 bond (*see* FORM, items 3, 4, 5 and 7).

In September 1995, the trustee asked the court to dismiss Applicant's revised wage earner's plan. Acting on the trustee's dismissal request, the bankruptcy court dismissed Applicant's revised payment plan on September 27, 1995. The court's September 27 order precludes any further plan filings until such time as Applicant pays his filing fee. To date, he has not attempted to file any additional wage earner's plans or otherwise seek the protection of the bankruptcy laws.

Since the dismissal of his Chapter 13 payment plan, Applicant has failed to take any cognizable steps to reduce his old debts. Even with his claimed net monthly remainder of \$664.13 in his personal financial statement executed on November 19, 1996 (FORM, item 5), he has been unable or unwilling to make any discernable reduction in his remaining debit balances. Having provided assurances in his DIS statement of his intention to set up a monthly payment plan with a local financial consulting service in February 1997, Applicant failed to document any undertaken efforts to set up such a plan, or make any payments towards the discharge of any of his covered debts.

POLICIES

The Adjudication Guidelines of the Directive (Change 3) lists "binding" policy considerations to be made by Judges in the decision making process of most all DOHA cases. The term "binding," as interpreted by the DOHA Appeal Board, requires the Judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. It does not require the Judge to assess these factors exclusively in arriving at a decision. In addition to the relevant adjudication guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in F.3 of Enclosure 2 of the Directive, as

well as the Directive's preamble to Change 3, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Financial Considerations (Criterion F)

Disqualifying Conditions

1. A history of not meeting financial obligations.
2. Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust.
3. Inability or unwillingness to satisfy debts.

Mitigating Conditions

1. The behavior was not recent.

Burdens of Proof

By dint of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's suitability for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Put another way, the Judge cannot draw inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controversial fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a nexus to the applicant's inability to obtain or maintain a security clearance. The required showing of nexus, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of accessible risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of proof shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSION

Applicant presents with a record of recurring financial difficulties which have produced a spate of unpaid debts and an unsuccessful Chapter 13 wage earners plan within the past 7 years. Seeking the protection of the Federal bankruptcy laws is, of course, not cause for taking adverse action on an employee's security clearance. The Federal Bankruptcy Code (11 U.S.C. Sec. 525) prohibits any governmental retaliatory or discriminatory treatment against a federal employee "that is or has been a debtor" under the Bankruptcy Code, or insolvent before the commencement of a case under the Code. At issue in this proceeding is Appellant's reliability and trustworthiness in light of his history of financial troubles that led to his seeking Chapter 13 protection, his ensuing failure to meet the payment terms of his plan, and his continuing failures to craft arrangements to discharge his debts after the dismissal of his Chapter 13 petition in September 1995.

Excessive debt accumulation and failure to address mounting obligations before they careened out of control are the apparent root causes of Applicant's experienced financial crises in the early 1990s. Whether Applicant might have

avoided the debt problems that culminated in his 1994 Chapter 13 wage earner's petition is not established in the record. Excessive debt accumulations and competing financial pressures both prompted his ensuing 1996 wage earners petition and contributed to his inability to fulfil the plan's payment terms. Applicant's inability and/or unwillingness to discharge his debts responsibly have and continue to raise material questions about his reliability and trustworthiness; even if these actions do not appear to place Appellant at any immediate risk to pressure or coercion. As such, Applicant's actions invite the coverage of Adjudicative Guidelines: DC 1 (history of not meeting financial obligations), DC 2 (embezzlement and fraud related) and DC 3 (inability or unwillingness to satisfy debts). And Applicant's past debt problems (which include his of issuance of a check without sufficient funds) do raise material security concerns about his reliability and trustworthiness to access classified information. Government carries its initial proof burden.

Tangible mitigation efforts are sketchy in this record. Applicant's initiated efforts to complete and implement his approved wage earner's plan represented a positive first step in taking control of his debt overload and held the potential, at least, for resolving his financial troubles over the 55 months allotted for discharge of the plan. But Applicant fell quickly behind in his payments under the first plan, and failed altogether in meeting his trustee payment obligations under his approved amended plan. With a more concerted and consistent repayment effort, Applicant was positioned to make a solid repayment effort. Unable to meet his imposed monthly repayment demands, he soon faced (*i.e.*, in September 1995) the determined default of his plan's repayment terms and ensuing dismissal of his petition at the hands of the local bankruptcy court.

Applicant provides no probative documentation of any undertaken efforts to seek financial counseling or rework his subject debts. His is a field of broken commitments to himself, the bankruptcy trustee, and Agent A. Favorable extenuation and mitigation considerations covered by the Adjudication Guidelines are for the most part unavailing to Applicant on the basis of the current record. His accumulated debts are neither isolated nor the result of conditions beyond his control. And he can claim no tangible counseling initiatives or good faith efforts to repay his debts. That his debts may be dated (covered by MC 1) is not enough to enable him to claim any meaningful extenuation/mitigation benefits under either the Adjudicative Guidelines or the more general F.3 considerations in the Directive.

Financial risk assessment in the context of a clearance appraisal must take account of not only aggregate of incurred debts, but the circumstances of their creation, and most importantly what steps the person has taken to deal with them. Making predictive judgments about an applicant's indicated ability to avert financial pressures in the future must necessarily encompass the applicant's past behavior and restorative efforts. In Applicant's case, evidence of credible restoration is generally lacking. Without more in the record to corroborate his multiple repayment assurances in recent years, Applicant is not in a position to mount any substantial mitigation showing. Tangible corrective efforts, not merely repeated intentions, are necessary to absolve an applicant of nascent coercion/reliability risks associated with significant and persistent debt arrearages (as here). Even if his still outstanding debts have not rendered him vulnerable to coercion and pressure (natural risks associated with financial difficulties), as he claims, these debts continue to subject him to doubts about his reliability and trustworthiness. So dependent is a person's cleared access to classified information on presumed reliability and trust that margins for departure from strict accountability standards are necessarily small. Applicant's failures to affirmatively address his debt portfolio since the dismissal of his bankruptcy petition in September 1995 preclude him at this time from fully absorbing all the risks associated with his ongoing financial difficulties. Applicant fails to carry his evidentiary burden, and unfavorable conclusions warrant with respect to sub-paragraphs 1.a through 1.s.

In reaching my decision, I have considered the evidence as a whole, including each of the factors considered in F.3 of the Directive and the Directive's Change 3 Guidelines in the preamble.

FORMAL FINDINGS

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS listed above, this Administrative Judge makes the following FORMAL FINDINGS:

CRITERION F: AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

Sub-para. 1.d: AGAINST APPLICANT

Sub-para. 1.e: AGAINST APPLICANT

Sub-para. 1.f: AGAINST APPLICANT

Sub-para. 1.g: AGAINST APPLICANT

Sub-para. 1.h: AGAINST APPLICANT

Sub-para. 1.i: AGAINST APPLICANT

Sub-para. 1.j: AGAINST APPLICANT

Sub-para. 1.k: AGAINST APPLICANT

Sub-para. 1.l: AGAINST APPLICANT

Sub-para. 1.m: AGAINST APPLICANT

Sub-para. 1.n: AGAINST APPLICANT

Sub-para. 1.o: AGAINST APPLICANT

Sub-para. 1.p: AGAINST APPLICANT

Sub-para. 1.q: AGAINST APPLICANT

Sub-para. 1.r: AGAINST APPLICANT

Sub-para. 1.s: AGAINST 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 Applicant's security clearance.

Roger C. Wesley

Administrative Judge