

DATE: _September 9, 1997

In re:

Applicant for Security Clearance

ISCR OSD Case No. 97-0303

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR THE GOVERNMENT

Michael H. Leonard, Esq.

Department Counsel

FOR THE APPLICANT

Timothy M. Mauser, Esq.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11382 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 3) issued a Statement of Reasons (SOR) dated April 24, 1997, to the 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 the Applicant and recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked.

A copy of the SOR is attached to this Decision and included herein by reference.

On May 20, 1997, Applicant responded to the allegations set forth in the SOR and requested a hearing. The case was assigned accordingly to this Administrative Judge on June 20, 1997, and on July 10, 1997, a hearing was scheduled for August 14, 1997. At the hearing held as scheduled, four Government exhibits and three Applicant exhibits were admitted into evidence. Testimony was taken from the Applicant. The transcript of the hearing held on August 14, 1997, was received on August 26, 1997.⁽¹⁾

On Applicant's motion, the record was ordered held open following the hearing for Applicant to submit records pertaining to his pending bankruptcy.⁽²⁾ By letter dated August 22, 1997, Applicant's counsel forwarded a pacer document of the bankruptcy court current through the start of business on August 22, 1997. The Government having filed no objection thereto, that document was marked and admitted into the record as Applicant Exhibit D.

By letter dated September 2, 1997, which was received by the undersigned on September 5, 1997, Applicant's counsel submitted for consideration the order of discharge in bankruptcy dated August 25, 1997. On September 5, 1997, Department Counsel indicated the Government had no objection to admission of the court order. Whereas the imminence of the discharge order was not reasonably anticipated by the Applicant and the Government filed no

objection to its consideration, the bankruptcy record was marked and admitted into the record as Applicant Exhibit E.

FINDINGS OF FACT

After a thorough review of the evidence in the record, and upon due consideration of same, this Administrative Judge renders the following findings of fact:

Applicant is a 53 year old lithotech operator and expeditor who has worked for his current employer, a defense contractor, since March 1967. He seeks to retain a Secret security clearance which was granted to him on December 10, 1972, by the Defense Industrial Security Clearance Office in connection with his defense-related employ.

Applicant overextended himself on credit cards, taking cash advances, purchasing consumer items and charging car repairs/service.⁽³⁾ His income, which has varied over the last five years from \$40,000.00 to \$50,000.00 per year depending on overtime work, was no longer sufficient to meet his monthly minimum payments on his credit cards and commencing in early 1995, he stopped paying on his credit card accounts, as follows:

Applicant's individual revolving credit card account with creditor #1 (SOR subparagraph 1.a.), opened in February 1994, became delinquent in September 1994 with an outstanding balance of \$2,239.00. Applicant's last payment on the account was sometime between January and March 1995, and the account was canceled by the creditor in about October 1995. As of May 1997, he owed \$2,055.00 to the creditor.

In November 1993, Applicant opened a joint revolving credit card account with creditor #2 (subparagraph 1.b.). High credit on the account was \$2,000.00. The account became delinquent with \$2,025.00 owing as of September 1994 and it was charged off to profit and loss. As of May 1997, Applicant owed \$1,824.00 to the creditor.

Applicant opened a revolving joint credit card account with creditor #3 (subparagraph 1.c.) in January 1994. The account was termed delinquent in July 1995 with a \$3,782.00 balance owed. That balance remained due as of May 1997.

Another revolving credit card account, which was opened in January 1991 with creditor #4 (subparagraph 1.d.), also became delinquent in July 1995. A \$5,808.00 outstanding obligation was written off to profit and loss. As of May 1997, Applicant owed \$5,448.00 on the account.

Applicant opened a credit card account with creditor #5 (subparagraph 1.e.) in October 1988. High credit on the account was \$963.00. Applicant stopped making payments on this card. As of May 1997, he owed creditor #5 \$805.00.

Applicant was co-maker on a revolving credit card account opened with creditor #6 (subparagraph 1.f.) in June 1993. High credit on the account was \$3,000.00. Applicant could no longer manage the minimum monthly payments and \$3,303.00 was charged off to profit and loss in January 1996. As of May 1997, Applicant owed an estimated \$3,125.00 on the account.

In September 1993, Applicant opened a VISA card account with creditor #7 (subparagraph 1.g.). Credit limit on the account was \$1,400.00. The account subsequently became delinquent and approximately \$1,330.00 was charged off in March 1996. As of May 1997, Applicant owed at least \$1,225.00 to the creditor.

In February 1986, Applicant purchased a two bedroom townhouse for \$53,717.00. He has two mortgages on the property, the first for \$32,342.00 owed to a bank mortgage company which requires monthly payments of \$465.15, including real estate taxes. Applicant has remained current on his mortgage payment. The second mortgage, which is in the amount of \$19,375.00 and held by a local development corporation, requires no monthly payment. Applicant will owe nothing on the second mortgage provided he remains in the property for twelve years.

In early 1995, Applicant withdrew \$11,000.00 from his 401K account in an effort to reduce his credit card indebtedness. He paid some monies on each of his delinquent accounts, but that amount was not sufficient to restore him to financial solvency. In October/November 1995, Applicant concluded that his only option was to file for bankruptcy. Sometime prior to June 27, 1996, Applicant consulted with an attorney about filing bankruptcy.

In early 1997, Applicant was behind on his electric bill between \$800.00 and \$1,000.00. As of August 1997, his utility bill was again current.

On May 14, 1997, Applicant filed jointly with his spouse a petition in bankruptcy under Chapter 7, listing \$53,717.00 (the mortgages on his residence) in secured debt and \$18,317.00 in unsecured credit card debt,⁽⁴⁾ including the credit card obligations to creditors #1, #2, #3, #4, #5, #6 and #7.⁽⁵⁾

Applicant reaffirmed his two mortgage debts. On May 15, 1997, Applicant filed an amendment to the bankruptcy petition adding two creditors with outstanding financial obligations of \$7,600.00 to a credit union and \$4,179.00 to a credit company, respectively. Assets claimed exempt in the bankruptcy include a 1992 mercury sable automobile with 110,000 miles which is paid for, \$25.00 cash, \$319.00 in checking and savings, \$600.00 worth of clothing, \$1,000.00 in household goods, and a life insurance policy with a value of \$887.00. On July 7, 1997, the trustee issued a report of no distribution to the creditors, as Applicant had no property available for distribution from the estate over and above that exempted by law. As of August 18, 1997, the deadline for creditors to file their objections to the bankruptcy discharge, neither the creditors nor the assigned Chapter 7 bankruptcy trustee had filed any objection. On August 25, 1997, Applicant was granted a discharge in bankruptcy, releasing him from all dischargeable debts.

Applicant earned wages from his employment in 1994 of \$40,000.00, in 1995 of \$42,000.00 and in 1996 of \$50,901.00. His spouse had no income. As of May 1997, his net monthly take home pay amounted to \$1,911.00 with expenditures (not including any payments on his credit card debt) of \$1,832.00. Applicant's income is sufficient to meet his present living expenses.

Applicant never sought out financial services counseling as he felt he did not need it. Since filing for bankruptcy, Applicant has incurred no new debt. Applicant and his spouse no longer have any credit cards and he does not plan to obtain any credit cards in the future.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the seriousness, recency, frequency and motivation for an applicant's conduct; the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the circumstances or consequences involved; the age of the applicant; the absence or presence of rehabilitation, the potential for coercion or duress, and the probability that the conduct will or will not recur in the future. *See* Directive 5220.6, Section F.3. and Enclosure 2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

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.

Conditions that could raise a security concern and may be disqualifying include:

(1) a history of not meeting financial obligations

(3) inability or unwillingness to satisfy debts

Conditions that could mitigate security concerns include:

None.

* * *

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the Applicant.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of those who testified, this Judge concludes that the Government has established its case with regard to criterion F.

Criterion F refers to financial indebtedness which is incurred or left unsatisfied under circumstances which suggest the debtor is irresponsible, avaricious, or under financial duress likely to cause action contrary to the national interest. As of August 22, 1997, Applicant was indebted to ten different creditors⁽⁶⁾ in the approximate aggregate amount of \$33,662.00. While Applicant submits that his financial problems began in early 1995 when he withdrew \$11,000.00 from his 401K account, this was instead a desperate act to resolve the financial difficulties caused by his excessive use of credit over previous years. That \$11,000.00 was not sufficient to restore him to solvency reflects the extent to which Applicant and his spouse had overextended themselves financially. In assessing the current security significance of the aforesaid indebtedness, this Administrative Judge must consider the Adjudicative Guidelines pertaining to financial considerations set forth under Enclosure 2 to the Directive. Disqualifying conditions (DC) 1. (history of not meeting financial obligations) and 2. (inability to satisfy debts) are pertinent.

Applicant proffers in mitigation that by virtue of his discharge, he is no longer legally responsible for those debts listed on his bankruptcy petition which was filed on May 14, 1997, and amended on May 15, 1997. Indeed, the legal effect of the Chapter 7 discharge entered on August 25, 1997, is that his creditors are enjoined from instituting or continuing any action to collect on the debts. While Applicant has been recently afforded a "fresh start" and is no longer responsible for repayment of those debts alleged in the SOR, the manner in which he handled his finances in the past may nonetheless

[\(7\)](#)

preclude the affirmative finding that he is security worthy. Whereas Applicant's indebtedness was the result of irresponsible expenditure,⁽⁸⁾ he bears a particularly heavy burden to demonstrate that he can be counted on to adhere to his legitimate financial responsibilities in the future.

With respect to the pertinent mitigating conditions (MC), none apply in his favor. As reflected in the seven credit card accounts listed in the SOR, Applicant's financial difficulties stemmed largely from the misuse of credit extended to him. His financial problems were not limited to his credit card accounts, moreover, as Applicant was between \$800.00 and \$1,000.00 delinquent on his electric bill in early 1997. His financial problems were too recent and too extensive for favorable consideration of MCs 1. or 2. MC 3. contemplates the situation where one suffers an unforeseen catastrophic event or loss which requires the outlay of substantial funds or where one experiences a decrease or loss of income. As the cash advances and credit purchases were primarily for day to day living expenses and merchandise, the delinquencies were not due to factors beyond his control. MCs 4. and 6., in contrast, address the actions undertaken by the debtor to reform his financial habits. A Chapter 7 bankruptcy discharge is not viewed as a good-faith effort to resolve his debts. The legal effect of the discharge in this no asset case is that the creditors are not repaid. To Applicant's credit, he did not completely disregard his creditors, as evidenced by his futile attempt in early 1995 to regain solvency by using \$11,000.00 of his 401K funds. The ameliorative impact of this good-faith effort to satisfy his creditors is undermined by his subsequent financial difficulties, however.

With the creditors enjoined from instituting any collection attempts, Applicant's present financial crisis is resolved. To his credit, Applicant no longer has any credit cards and he has not incurred new debt since filing under Chapter 7. Nonetheless, there is no clear indication that Applicant will manage his financial matters more responsibly in the future. Despite an annual income of \$50,901.00 in 1996 and a comparable salary this year, Applicant did not remain current on his utility payments, as evidenced by his \$800.00 to \$1,000.00 delinquency on his electric bill as of early 1997. This Administrative Judge can find no reasonable justification in the record for Applicant failing to remain current on his utility bill. Applicant was not paying on any of his credit card delinquencies. His housing costs (mortgage and condo fee) amount to only \$625.00 per month. There is no evidence that he was providing support for other than himself and his non-working spouse.

Security clearance decisions are not designed to punish applicants for past wrongs but instead involve an assessment of future risk, *i.e.*, whether one can be counted on to adhere to his security responsibilities. Given the extent of Applicant's financial irresponsibility, it is not enough that Applicant intends to manage his financial matters more responsibly in the future. There must be sufficient demonstration of a favorable change in circumstances. While he is no longer using credit cards, he has not received any financial counseling which could provide him with the tools to budget his family expenses more wisely. Again, as recently as early 1997, he exhibited a failure to manage his financial obligations. Applicant's thirty year history of defense-related employ is viewed favorably, but it does not excuse his serious misuse of the credit extended to him. Subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e., 1.f. and 1.g. are thus resolved against the Applicant.

FORMAL FINDINGS

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1. Criterion F: AGAINST THE APPLICANT

Subparagraph 1.a.: Against 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

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.

Elizabeth M. Matchinski

Administrative Judge

1. The transcript index is incomplete in that it fails to reflect the admission into evidence of Applicant exhibits B and C. Pages 24 and 28 of the transcript itself clearly reflect the admission of exhibits B and C, respectively.
2. Any additional documentation was due on or before close of business on August 29, 1997 with the Government's response to any submission due on or before September 3, 1997.
3. Applicant used the cash advances for gasoline, shopping, clothes purchases. (Tr. p. 46).
4. The extent of the debt to creditor #3 was mistakenly reported on his bankruptcy petition as \$216.00. Applicant's obligation to this creditor instead was about \$3,782.00 which would make his unsecured debt in actuality at least \$21,883.00. There is no evidence that the creditor filed a proof of claim with the bankruptcy court to the effect that the amount listed on Schedule F was incorrect.
5. The \$18,317.00 in listed unsecured debt includes one joint credit card debt of \$3,619.00 which was not alleged in the Statement of Reasons (SOR). The two additional debts of \$7,600.00 to a credit union and \$4,179.00 to a credit company listed on the amendment were also not included in the SOR.
6. *See* footnote 5. In addition to the seven debts listed in the SOR, Applicant owed three other creditors (not including his mortgage), bringing the aggregate amount of his indebtedness to \$33,662.00.
7. Applicant has a legal right to discharge of his debts in bankruptcy and in that vein, the resort to bankruptcy itself is not regarded as a negative factor. The manner in which Applicant incurred the debts and his repayment history remain relevant considerations, however.
8. Applicant testified to having experienced no unexpected living expenses apart from some service on his automobile. Even with respect to his automobile expenses, within the last three years he had no unexpected problems apart from a change of brakes and new tires. Transcript pp. 46, 48. He did not adequately explain where most of his \$40,000 to \$50,000 income went to.