

Date: \_October 10, 1997

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0352

**DECISION OF ADMINISTRATIVE JUDGE**

**JEROME H. SILBER**

**APPEARANCES**

**FOR THE GOVERNMENT**

Michael H. Leonard, Esq.

Department Counsel

**FOR THE APPLICANT**

*Pro se*

**STATEMENT OF THE CASE**

On May 19, 1997, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding 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 determine whether a clearance should be granted, continued, denied, or revoked. In a sworn written statement, dated June 16, 1997, the Applicant responded to the allegations set forth in the SOR and requested a hearing. A copy of the SOR is attached to this Decision and incorporated herein by reference.

The undersigned Administrative Judge received the case assignment on July 28, 1997. The undersigned held a hearing on September 9, 1997. The Department Counsel presented twelve exhibits ("Exhs") and the testimony of no witnesses. The Applicant's case consisted of the presentation of nine exhibits and the testimony of no witnesses besides his own. A tenth exhibit, identified as exh. J, consisting of 17 pages of miscellaneous documents provided on September 22 and 23, 1997, by facsimile, was admitted without objection. The undersigned Administrative Judge received the transcript ("Tr") of the hearing on September 30, 1997.

**RULINGS ON PROCEDURE**

SOR ¶ 1.g. was amended at the hearing to correct the spelling of the creditor's name, and SOR ¶ 1.k. was amended at the hearing to correct the date of the filing of certain notices of assessments and liens to May 31, 1984. Tr pages 114-116, 190, 248-251. An eleventh exhibit, identified as exh. K, consisting of five pages of miscellaneous documents provided on October 1, 1997, by facsimile, was excluded from the evidentiary record upon objection by the Department Counsel

on the basis that the record was closed as of September 23, 1997. Tr pages 142-146.

### FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following single criterion: paragraph 1, Criterion F (financial considerations). The Applicant has admitted with explanations the factual allegations contained in ¶¶ 1.a. through 1.c., inclusive, ¶ 1.f., and ¶¶ 1.h. through 1.j., inclusive. of the SOR. Except as noted herein, the Applicant's admissions are hereby incorporated as findings of fact.

The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following additional Findings of Fact:

The Applicant is a 45-year-old computer-assisted exercise coach employed by a U.S. Government contractor. The Applicant seeks to retain a Secret personnel security clearance.

The Applicant graduated from college in 1974 with a bachelor's degree in business administration. He married in 1978 and then adopted his wife's twin 5-year-old daughters. The couple have a son born in 1980 with a seizure disorder. Their financial difficulties started in 1987 when the Applicant's wife was handling their checkbook, and their debts exceeded \$30 thousand. They succeeded in completely paying off their creditors during 1987-91 through Consumer Credit Services. However, they were unable to pay their Federal income tax obligations in full for tax years 1988, 1989, 1990, 1991, and 1995. Together with interest and penalties, their past due Federal income tax obligations total about \$35 thousand. In September 1997, they made an offer in compromise to pay \$265.38 a month to pay off the tax indebtedness, but the IRS has not yet accepted their offer. Exh. C. Tr pages 147-151. His wife persuaded the Applicant to make the offer in compromise at that time. Tr pages 160-167.

In addition to major medical treatment and psychiatric costs and private schooling expenses incurred for the Applicant's son, who has been diagnosed with depression and attention deficit disorder, the Applicant also continues to have recurring psychiatric expenses for his wife, who was diagnosed in 1990 with multiple personality disorder. The Applicant quit his job in 1990, erroneously thinking that he would be called up from the reserves for Operation Desert Storm. Tr pages 121-122. He and his wife separated in about the 1990-91 period on the advice of her therapist. During the four month separation she ran up a \$10 thousand consumer debt, apparently acting in the personality of one who was a rich person. She attempted suicide sometime in 1991-92, and their son attempted suicide in October 1996. Tr pages 91-93, 138-139. When the Applicant's wife reconciled with the Applicant in 1991, she entered college and ultimately graduated--with substantial state financial aid--in December 1995 with a bachelor's degree in nursing. Tr page 169. She is presently working on her master's degree in nursing as well as holding a full-time nursing job at a hospital. The Applicant and his wife have also incurred college expenses for their twin daughters in the early 1990's. They also paid for the weddings of each of their daughters in July 1996 and April 1997, which cost about \$5 thousand each.

In March 1997 the Applicant's wife had a relapse in which she bounced some checks and ran up a \$3 thousand consumer debt (using one of her daughter's credit cards) before the Applicant discovered it in May 1997. Her psychiatrist told her that she was a "spending addict." Tr pages 90, 152, 176. Whenever she goes off on a spending binge, the Applicant eventually discovers it and pays off--or tries to pay off--the debts and bounced checks. Tr page 148. Since 1994 the Applicant and his wife have lived in different cities during the work week and live together on weekends. Tr pages 98-105. He pays \$60 monthly for his cable TV and \$31 monthly for her cable TV. He bought a used 1996 automobile for his wife in June 1997 and is obligated to make a \$360 monthly car loan payment. He gives about \$100 a month to his church. Tr pages 125-132. The Applicant still owes almost \$1 thousand for a city street improvement assessment, including interest and penalties, that dates back to 1984. He last made a partial payment on the assessment sometime in 1993-95. Tr pages 135-136. <sup>(1)</sup> After the hearing on September 9, 1997, the Applicant paid \$220 to settle one past due bill dating from July 1994 and also paid a \$115 medical bill from 1994. <sup>(2)</sup> His son was admitted to a treatment facility from September 17 to September 22, 1997.

The Applicant acknowledges that he is responsible financially for his wife's spending and debts. Tr pages 182-183. Because she has a larger income than he has, he defers to her on some financial matters and continues to allow her to write checks on their joint checking account. Tr pages 232, 235, 242-245. The couple have an estimated current annual

gross income of \$80+ thousand and a net estimated annual take-home pay of \$56+ thousand (excluding, *inter alia*, their tax-deferred 401(k) and 403(b) retirement contributions). Exh. D. Tr page 235.

## POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluating an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The criteria, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

### **CRITERION F - 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:**

- (3) the conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation);
- (6) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section F.3:

- 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 consequences involved.
- e. Absence or presence of rehabilitation.
- f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct

The circumstances surrounding the conduct, to include knowledgeable participation

The frequency and recency of the conduct

The individual's age and maturity at the time of the conduct

The voluntariness of participation

The presence or absence of rehabilitation and other pertinent behavioral changes

The motivation for the conduct

The potential for pressure, coercion, exploitation, or duress

The likelihood of continuation or recurrence

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security 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 may only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial [of a security clearance] by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations.

*Dept. of the Navy v. Egan*, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go to the minimum *quantum* of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence -- rather than as an indication of the Court's tolerance for error below. <sup>(3)</sup>

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the Government's case or through evidence of affirmative defenses. Assuming the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a security clearance. <sup>(4)</sup>

### CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of the Applicant who testified, the undersigned concludes that the Government established its case with regard to Criterion F.

The Applicant has had a lengthy history of not meeting his financial obligations and at times an inability to pay his debts in a timely manner--at other times an unwillingness to contact his creditors and arrange to pay past due debts. This conduct falls within the scope of DC #1 and DC #3, which are identified at page 4 *supra*. Paying past due debts after an SOR is issued, or on the very eve of a hearing to determine his security clearance eligibility, or otherwise when one is pressed "to the wall" or "under the gun," does little to satisfy the mitigating circumstance of a good faith ("*bona fide*") efforts to resolve past due debts *See* MC #6, which is identified on page 5 *supra*. Security clearance eligibility requires a reasonable degree of fidelity to one's creditor by contacting the creditor and by attempts to arrange a payment schedule,

a reduction in the total amount owed, and/or partial payments as a priority within one's resources. A modest life-style and appropriate changes in one's financial habits to accommodate the discharge of one's past due debts would contribute to a demonstration of such good faith efforts. Here the Applicant continues to allow his wife to write checks on a joint checking account, for which he acknowledges he is financially obligated, even though he knows that she has had a history of spending binges and "relapses" and has proven that she cannot handle finances responsibly.

The Applicant put off dealing with the IRS on his large past due income tax obligations until after he had paid for his daughters' weddings. Exh. 4. He has been steadily employed since November 1994 in his present job, yet he owes the IRS about \$4 thousand in income tax for tax year 1995. Exh. 2. He has taken what amounts to "forced loans" from the IRS during tax years 1988-91 by not paying the tax balances due.

Failure to pay one's income taxes in a timely fashion to the government may be a significant indication of an individual's sense of his civic duty, which in turn has considerable relationship to that individual's security clearance eligibility. Failure to contact the IRS to make an offer in compromise and arrange a payment schedule until his personnel security clearance dangles in his face in the balance does not show the sense of obligation required of those entrusted with classified information. Indeed, the magnitude of the Appellant's debts are not disproportionate to his current income. He simply put off his creditors until "a sunny day."

The Applicant has had a series of medical expenses, some of which were not covered by insurance. He has had to pay for private schooling of his disabled son without financial assistance from the local school district. This raises the question of the applicability of MC #3, which is identified at page 4 *supra*. However, these recurring financial problems cannot be concluded to be wholly unexpected or aberrational in the sense of being impossible to save or plan for. The Applicant and his wife each have medical insurance through their places of employment. Circumstances beyond a person's control may mitigate the government's financial concerns where the individual has taken appropriate steps to respond the circumstances in a responsible and reasonable manner. Here the Applicant allowed medical bills from several years ago to remain unpaid. Based on the evidence in the record, the Applicant has not sustained his burden of persuasion that the government's financial concerns are fully mitigated.

The Directive requires that the factors listed in Section F.3 and enclosure 2 to the Directive, identified on page 5 *supra*, be considered, as appropriate, in making this decision. The nature and seriousness of the Applicant's debt is considerable. The duration and currency of that debt is significant, and the probability of its continuance or recurrence is likely. The Applicant worked his way out of \$30+ thousand in debts through Consumer Credit Services in 1987-91. He knew how to do so again if and when he was able, but he largely failed to pay his creditors or otherwise resolve his debts, particularly his past due income tax obligations, until his security clearance eligibility was placed in the balance. Accordingly, Criterion F is concluded adversely to the Applicant.

### **FORMAL FINDINGS**

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item 25 of Enclosure 3 of the Directive are:

Paragraph 1. Criterion F: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Subparagraph 1.i.: Against Applicant

Subparagraph 1.j.: Against Applicant

Subparagraph 1.k.: Against Applicant

### **DECISION**

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

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Jerome H. Silber

Administrative Judge

1. The Applicant testified that he wasn't "strong enough" to force his wife to pay the assessment. Tr page 180.
2. The Applicant testified that his wife claimed that she had paid this medical bill previously, but he cannot trust her honesty at times and must make her prove her claims with documentary evidence. Tr page 142, 146-147, 189-195. She has enrolled in a 12-step debtor's program. Tr page 209.
3. The rule has been restated as requiring "that security clearances should be revoked [*sic*] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D.Cal. 1992). *Cf.* with regard to the *quantum* of evidence the DISCR Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:  
  
[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the [DISCR] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.  
  
Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. §556(d).
4. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).