

DATE: March 27, 1998

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 97-0646

**DECISION OF ADMINISTRATIVE JUDGE**

**JEROME H. SILBER**

**APPEARANCES**

**FOR GOVERNMENT**

Matthew E. Malone, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**STATEMENT OF THE CASE**

On October 2, 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 written statement notarized by appended jurat on December 12, 1997, the Applicant responded to the allegations set forth in the SOR and requested a hearing.

The undersigned Administrative Judge received the case assignment on January 23, 1998, and held a hearing on March 2, 1998. The Department Counsel presented five exhibits ("Exhs") and no witnesses. The Applicant's case consisted of five exhibits and his testimony and the testimony of one witness. The record was left open until March 13, 1998, for the submission of supplemental evidence by the Applicant. An additional exhibit was submitted by the Applicant on that date. The undersigned Administrative Judge received the transcript ("Tr") of the hearing on March 13, 1998.

**RULINGS ON PROCEDURE**

On March 17, 1998, the Department Counsel objected to the admissibility of four of the five documents that the Applicant submitted on March 13, 1998. Each objection was overruled by order, dated arch 24, 1998. All exhibits were admitted into evidence on or before March 24, 1998.

**FINDINGS OF FACT**

The Statement of Reasons (SOR) consisted of allegations predicated on the following criterion: paragraph 1, Criterion F (financial considerations). The SOR alleged ten past due debts totaling \$12,428.94. The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes

the following Findings of Fact:

The Applicant is a 38-year-old transportation clerk employed by a U.S. Government contractor as a shipping/receiving specialist (material handler) for the last ten years. The Applicant seeks to retain a Secret personnel security clearance issued originally in 1990.

Although he believes that he has a learning disability and has trouble dealing with mathematics, the Applicant is a high school graduate. Tr pages 7, 135-137. He has been married once and has no children. During his marriage (1987-91), his wife had an income roughly comparable to his, and she handled all the family finances responsibly, including the writing of all checks. Tr pages 64-65, 69-70, 75-77, 92. After his divorce, the Applicant had to ask his parents how to balance a checkbook, and he received similar assistance from a firm that consolidated his debts in August 1993. Tr pages 102-103. The Applicant readily acknowledges that he has a problem controlling his credit card purchases and on meeting financial obligations because unforeseen priority financial requirements keep preempting his good intentions. Tr pages 92, 97-98, 103, 105, 114, 126-127, 130, 139, 158-159, 162.

The Applicant was divorced in April 1991. At that time, he assumed sole responsibility for about \$11,000 of joint debts (except the loan for her Toyota) while his ex-wife relinquished all claim to their house and furnishings. Tr pages 99-102. He chose to remain in the house alone, even though he no longer had her income to help meet the mortgage payments; he still lives in the house. Tr pages 65-66, 70, 76-79, 90, 98-99. The house is presently estimated to have a market value between \$85,000 and \$98,000, with about \$84,000 of first and second mortgage debt. Tr pages 67, 106-113. His mortgage payments total over \$1,000 a month. Exhibit 3; tr pages 98-99.

The oldest past due debt identified in the Statement of Reasons is a personal credit card debt of \$334 that was charged off by the creditor in September 1992. Tr page 144. The Applicant consolidated his debts in August 1993. In 1994 he met his present live-in girl friend and her two teenage daughters. She is separated from her husband and receives some child support sporadically from him. The Applicant refinanced his mortgage debt in 1994 to include her automobile, reducing his mortgage payments by about \$100 a month. He bought her an engagement ring in June 1995 and gave it to her that Christmas. He stopped making payments on the ring after he made several monthly payments "when something else came up." The \$1,754 balance due on the ring was charged off by the creditor in March 1996. The Applicant's live-in girl friend earns less income than did his ex-wife. Tr pages 79-81, 86-88, 91-92, 97, 99, 104-105, 108-110, 114-115, 123-127, 132-133, 147-148, 155-156, 159.

The Applicant's employer arranged to have a credit card issued to him for corporate purposes, such as buying gasoline for his delivery truck. He understood that other employees used similar cards for personal expenses for which they did not seek reimbursement from the company--although the Applicant had signed a document for the company when the card was initially issued in which he agreed to use the card only for corporate purposes. The Applicant used the card to consolidate previous personal debts and for personal expenditures for himself and his household. Tr pages 60-62, 82-85, 97, 127. He used the card, for example, to pay for his father's emergency travel to his brother's funeral in 1994. His employer canceled the credit card in October 1995, with about a \$5,300 outstanding balance, and suspended him for a week without pay. Tr pages 129, 149-150; exhibit 3. His employer notified the Defense Department about this incident in August 1996. Exhibit 1. The Applicant received an offer from the credit card issuer to settle the debt for 50% in November 1997, but failed to accept the offer within the two-week period that the offer was open. Tr pages 112-113, 150-151, 163-164; exhibit F.

In his answer in December 1997 to the October 1997 Statement of Reasons, the Applicant admitted that he owed each of the alleged debts, but declared that several involved disputed amounts or amounts that should have been paid by insurance. He said that he plans to refinance his house to obtain the equity in it to pay off all his debts or to seek a further debt consolidation payment plan. He approached a debt consolidating firm in November 1997 for that purpose, but has not contacted it since December because he has been too preoccupied with work, *etc.* Tr pages 62-63, 74-75, 105-107, 112, 131, 135, 140-141, 150-151, 155, 157-158, 160-162.

The Applicant earns \$11.90 an hour and time-and-a-half for 7 or 8 overtime hours a week on average. Tr page 68, 134. In May 1997 he estimated that he grossed \$2,800 a month and that his live-in girl friend contributed about \$900 a month towards their living expenses. Exhibit 3; tr page 135. At that time he said he would pay off an inadvertently bounced

check he wrote to a grocery store for \$144 within the next two months, but has forgotten to do so. Tr pages 148-148.

The Applicant is security conscious in his job, and testified that he would never do "anything wrong" involving classified information to solve his debt problems. Tr pages 98, 137-139. His superiors trust him with delivery of expensive corporate property as well as sealed classified information, credit him with a dependable work ethic, and consider him highly trustworthy. He and his company are proud of his skill as a hockey player on the company team and his enthusiastic support for local adults and kids involved with the sport.

## **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);
- (4) the person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control;

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. [\(1\)](#)

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. [\(2\)](#)

## 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, the undersigned concludes that the Government established its case with regard to Criterion F.

The evidence shows a six-year history of financial difficulties attributable only in part to truly unforeseeable demands

for money. The Applicant has shown a verbal "willingness" to satisfy his debts but an irresolute ability to do so. The equity in his house is barely enough to cover the debts cited in the SOR. Refinancing under these conditions is a dubious prospect. This evidence falls within the scope of DC #1 and DC #3, which are identified on page 4 *supra*.

While it is true that some of his difficulties with money arose from his divorce and his brother's unexpected death, the same cannot be said for his decision in 1991 to remain in his house with only half the income to meet the mortgage payments or to expand his household expenses by welcoming in his girl friend and her daughters a few years later. The mitigation described in MC #3, identified on page 4 *supra*, is therefore not completely applicable to the Applicant's situation. Neither is the mitigation described in MC #4 on page 5 *supra*. Though he has received assistance from debt consolidators in the past and half-heartedly sought counseling last fall after receiving the SOR, he has not followed-up his intentions with actions. There is no clear indication that his financial problem is being resolved or is under control.

Each case decision is required to consider, as appropriate, the factors listed in Section F.3 and enclosure 2 to the Directive. Those factors are identified on page 5 *supra*. The Applicant has a serious and continuing problem with controlling credit and in dealing with financial matters. He candidly admits this. His maturity at this time and the voluntary nature of his acquisition of debt with little regard demonstrated towards his creditors count heavily against him. His loyalty to his company and his friends in the company weighs, however, in his favor as does his unblemished record of safeguarding physical security. His announced aversion to bankruptcy is laudable, though, perhaps, misguided.

### **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

### **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.

---

Jerome H. Silber

Administrative Judge

1. 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).

2. 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).