

DATE: April 14, 1998

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0783

DECISION OF ADMINISTRATIVE JUDGE

ROBERT R. GALES

APPEARANCES

FOR GOVERNMENT

Carol A. Marchant, Esquire, Department Counsel

FOR APPLICANT

Robert Aaron Greenberg, Esquire

STATEMENT OF THE CASE

On January 2, 1998, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*," dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, "*Defense Industrial Personnel Security Clearance Review Program*" (Directive), dated January 2, 1992, as amended and modified, 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 a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated January 16, 1998, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was initially assigned to Administrative Judge Claude R. Heiny II on February 19, 1998 but, due to caseload considerations, was subsequently reassigned to, and received by, this Administrative Judge on February 25, 1998. A notice of hearing was issued on March 2, 1998, and the hearing was held before me on March 31, 1998. During the course of the hearing, three Government exhibits and six Applicant exhibits, and the testimony of three Applicant witnesses (including Applicant), were received. The transcript was received on April 10, 1998.

FINDINGS OF FACT

Applicant has denied the one conclusory allegation pertaining to financial considerations under Criterion F, and failed to address the one factual allegation pertaining thereto.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Applicant is a thirty-six year old male employed by a defense contractor, and he is seeking to retain a SECRET security clearance initially granted to him in June 1985.

In July 1990, Applicant purchased a residence for \$97,000.00,⁽¹⁾ and financed it with a Department of Veteran's Affairs (VA) mortgage which required monthly payments of approximately \$1,000.00.⁽²⁾ During the early 1990's, Applicant began living beyond his means.⁽³⁾ He frequently dined out and spent his salary primarily on his motorcycle and anything but his mortgage.⁽⁴⁾ As a result, after paying his mortgage routinely for about one year, Applicant began falling behind in making those mortgage payments. Eventually, Applicant simply stopped making payments, and ignored telephone calls and written notices regarding his overdue mortgage. At one point, before the situation got out of hand, he inquired about making a partial payment, but was advised that only full payment would be acceptable.⁽⁵⁾ The residence was eventually seized, and the mortgage was foreclosed in about December 1992.⁽⁶⁾ The entire foreclosure process left a deficiency balance of approximately \$36,094.02⁽⁷⁾ for which Applicant remained responsible.

Within a few months of the foreclosure, Applicant sought legal advice to review his options. He met with an attorney for 10 minutes.⁽⁸⁾ Thereafter, and continuing until 1997, Applicant made no effort to resolve the outstanding financial obligation. He never called the VA or the original mortgage holder or anyone else to set up a payment plan, and never offered any payments.⁽⁹⁾ Applicant was interviewed on two occasions in 1997 (April and September) by an agent with the Defense Security Service, then known as the Defense Investigative Service. Sometime after the second interview, in September 1997, Applicant contacted the VA and found out that partial payments would be acceptable.⁽¹⁰⁾ Nevertheless, he chose to take no further action in that regard.

On January 29, 1998--nearly three weeks after receiving the SOR, and one week after responding to it, Applicant filed for bankruptcy under Chapter 7, claiming an inability to pay existing debts, and seeking a discharge from them.⁽¹¹⁾ The only liability listed in the bankruptcy filing was that of the indebtedness pertaining to the foreclosure.⁽¹²⁾ Applicant had no creditors holding secured claims or unsecured priority claims. He claimed assets of slightly over \$19,000.00, including a motorcycle worth \$10,000.00, and stock worth about \$5,668.00.⁽¹³⁾ No final action had yet been taken with regard to the bankruptcy petition, as of the closing of the record. Since the bankruptcy filing, Applicant sold the motorcycle.⁽¹⁴⁾

Applicant's annual salary in calendar year 1997, including base salary and a daily cost of living adjustment, was about \$60,000.00.⁽¹⁵⁾ He was promoted earlier this year and received a monthly salary increase of about \$370.00,⁽¹⁶⁾ which increased his annual salary to \$64,440.00. Applicant currently resides with his fiancée, supports her, and pays her monthly mortgage payment of \$1,000.00.⁽¹⁷⁾ He is current in all other accounts.

Applicant has been employed by his current employer since June 1985. He had previously served on active military service from December 1978 through December 1984. Applicant's supervisor and a co-worker have characterized him in very positive terms, referring to him as trustworthy, reliable, and diligent. His performance reviews have his performance level rated as "outstanding," the highest of six different levels.⁽¹⁸⁾ In addition, Applicant has been the recipient of several letters of appreciation, as well as one award for excellence.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Factors) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Factors).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision--an expansion of the factors set forth in Section F.3. of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all

available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

[Financial Considerations - Criterion F]: 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:

- (2) it was an isolated incident.

Since the protection of the national security is the paramount determinant, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security,"⁽¹⁹⁾ or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded that both standards are one and the same. In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences that are grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate that it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's loyalty and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than loyalty and patriotism. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied decision as to Applicant's loyalty or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of the witness testimony, demeanor, and credibility, and after application of all appropriate legal precepts and factors, including those described briefly above, I conclude the following with respect to the allegation set forth in the SOR:

With respect to Criterion F, the Government has established its case. Applicant has been characterized as a person who is financially overextended, with a history of one bad debt, and who, until recently, has displayed an indifference to, or disregard of, that financial obligation, with little or no apparent or voluntary effort to satisfy it. Based on the evidence, I conclude that the characterization is accurate.

Applicant's initial financial difficulty commenced sometime in 1991-92 when he started living beyond his means and spending his salary primarily on his motorcycle and everything but his mortgage. His cavalier attitude towards his financial responsibility pertaining to the payment of his monthly mortgage eventually resulted in the residence being foreclosed in December 1992, and Applicant becoming responsible for the accelerated remainder of the deficit balance. Thereafter, and continuing until January 1998--a period of over five years, Applicant made no effort to enter into a payment arrangement with the creditor, or to set aside money in an escrow account for subsequent payment to the creditor. In fact, he took no steps to resolve his outstanding financial obligation, and exhibited absolute indifference to his responsibilities.

While Applicant may have consulted with an attorney for 10 minutes in December 1992-early 1993, to review his options, and those options were not revealed during the hearing, it appears that one of those options was simply to ignore his responsibilities. He continued to do so until DIS revealed an interest in his finances. In September 1997, when Applicant found out that partial payments would be acceptable to the creditor, Applicant chose the option he had previously selected--total avoidance of the situation. In fact, his indifference continued for another few months until he received the SOR. And then, Applicant filed his petition for bankruptcy under Chapter 7, claiming an inability to pay existing debts.

Applicant has been gainfully employed by the same employer since long before he began experiencing financial difficulties. During 1997, despite an annual salary of about \$60,000.00, a \$10,000.00 motorcycle, and stocks worth about \$5,668.00, Applicant failed to take any action to satisfy his outstanding financial obligation. Instead, he paid the \$842.00 monthly mortgage payment for his fiancée, and spent \$1,062.00 each month for car expenses, repairs, gasoline, transportation, and entertainment. His assets during prior years were little changed from 1997. In light of Applicant's salary, and the status of his assets, Applicant's overall conduct pertaining to his outstanding financial obligation clearly falls within Financial Considerations Disqualifying Factor (DF) 1 and DF 3. In this instance, Applicant's actions were seemingly based more on an unwillingness to pay rather than an inability to do so.

Although there is some evidence that Applicant may have modified his financial habits by resolving any other overdue debts he may have had as a result of his period of "wasting" money, there is undisputed evidence that his indifference towards this one old indebtedness continues to this day. Applicant's position seems to be that so long as no effort is made to collect the debt, he will make no effort to pay it. However, now that the issue is of substantial interest to the Government, Applicant would rather simply walk away from his responsibility and have it discharged in bankruptcy--regardless of his ability to pay. In light of that long-standing attitude of indifference, as well as his apparent liquidation of assets with the recent sale of his motorcycle and refusal to apply the proceeds of such sale towards the debt, Applicant's recent action of filing for discharge in bankruptcy is viewed as something other than a "good-faith" effort to resolve his debt. Thus, neither Financial Considerations Mitigating Factor (MF) 4 nor MF 6 apply.

The parties have argued as to whether or not Applicant's behavior is recent. While Applicant's behavior in "wasting" money may now be considered "stale," and hence no longer recent, his behavior regarding indifference to the indebtedness and his unwillingness to satisfy it continues. Accordingly, it does not fall within MF 1. The same cannot be said for the isolated nature of the conduct. Applicant owes one debt. It may be the same debt which has remained over a lengthy period of time, but the characterization as being isolated is unavoidable. Accordingly, it does fall within MF 2.

I had ample opportunity to evaluate the demeanor of Applicant, observe his manner and deportment, appraise the way in which he responded to questions, assess his candor or evasiveness, read his statements, listen to his testimony, and

watch the interplay between himself and those around him. Upon consideration of all of these contributing elements, I have come away with the feeling that Applicant is committed to the avoidance, at any cost, of paying off this deficit balance. He has managed to smoothly handle his other financial affairs, as well as to undertake responsibility for those of his fiancée. In a way, nothing has changed, for Applicant is still actively spending his money on everything but his mortgage.

I do not take this position lightly, but based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my evaluation of the evidence, and my application of the pertinent factors under the Adjudicative Process, I believe that Applicant has failed to mitigate or overcome the Government's case. The alternative leaves me with grave questions and doubts as to Applicant's continued security suitability. Accordingly, allegation 1. of the SOR is concluded against Applicant.

For the reasons stated, I conclude Applicant is not suitable for access to classified information.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1. Criterion F: 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.

Robert R. Gales

Chief Administrative Judge

1. *See* Transcript (Tr.) at 49.
2. *Id.* at 50.
3. *See* Government Exhibit 2 (Statement of Subject, dated April 30, 1997) at 1.
4. *See* Tr. at 52. Applicant characterized his actions regarding his money as "wasting" it.
5. *Id.* at 53.
6. *See* Government Exhibit 2, *supra* note 3 at 2.
7. *See* Applicant's Exhibit A (Voluntary Petition, dated January 29, 1998) at Schedule F - Creditors Holding Unsecured Nonpriority Claims.
8. *See* Tr. at 56-60.
9. *Id.* at 84.
10. *Id.* at 83.
11. *See* Applicant's Exhibit A, *supra* note 7, at 2.
12. *Id.* at Summary of Schedules.

13. *Id.* at Schedule B - Personal Property.

14. *See* Tr. at 51-52.

15. *Id.* at 66.

16. *Id.* at 75.

17. *See* Government Exhibit 2, *supra* note 3 at 2; and *id.* at 78.

18. *See* Applicant Exhibit B (Salaried Performance Review from June 1995 to June 1996) and Applicant Exhibit C (Salaried Performance Review from January 1997 to January 1998).

19. *See*, Executive Order 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995. However, the Directive uses both "clearly consistent with the national interest" (*see*, Sec. B.3; Sec. C.2.; and Sec. D.2.; Enclosure 3, Sec. 1.; and Sec. 25), and "clearly consistent with the interests of national security" (*see*, Enclosure 2 (Change 3), Adjudicative Guidelines, at 2-2).