

DATE: 05/07/98

In Re:

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Applicant for Security Clearance

ISCR Case No. 98-0083

**DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

**APPEARANCES**

**FOR GOVERNMENT**

Carol A. Marchant, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 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 January 27, 1998, 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. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on a history of delinquent debts (criterion F) and a wilful failure to file federal individual income tax returns for tax years 1993, 1994, 1995 and 1996 (criterion J).

On February 20, 1998, Applicant responded to the allegations set forth in the SOR and requested a hearing. The case was assigned to me on March 10, 1998, to conduct a hearing in accordance with the provisions of the Directive, and on March 23, 1998, a hearing was scheduled for April 21, 1998. At the hearing, six Government and one Applicant exhibit were admitted into evidence and testimony was taken from the Applicant and his apartment mate. A transcript of the hearing was received by this office on May 4, 1998.

**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 49 year old designer who has worked for his current employer, a defense contractor, since February 1994. He seeks to retain a confidential security clearance which he has held since October 1994.

In March 1992, Applicant was laid off from his work as a designer with another defense contractor. Applicant accepted an offer from the Federal Government to be re-trained for another career field, and to that end, he pursued

technical/vocational training in computer repair at an electronic computer programming institute from April 1992 to February 1993. He completed the course with better than a 3.25 grade point average and was awarded a diploma, but was unable to find a job opportunity in that field. Until May 1993 when he found work as a designer with a marine company, his income consisted solely of unemployment compensation at a rate of \$200.00 per week. At the time providing support for two minor children and his girlfriend, he lacked the financial means to honor those credit obligations which he had incurred prior to the layoff. Accounts became delinquent and were charged off and/or placed for collection as follows:

In August 1991 Applicant co-signed on a loan obtained by his girlfriend from a credit union (creditor #1). The loan was to educate his girlfriend's daughter who is deaf. His girlfriend's earnings as a waitress in seasonal employ were not sufficient to make the payments. After he got laid off, he was not able to make payment either and in April 1993, a judgment was obtained against him and in favor of the credit union in the amount of \$910.71 with interest at 17.75% from August 20, 1992 until paid plus \$17.00 costs. As of his hearing in April 1998, the debt remained unsatisfied.

In December 1989 Applicant opened a revolving charge account with creditor #2. High credit on the account was \$1,000.00. The account became delinquent and a \$1,132.00 outstanding balance was charged off in August 1993. Applicant has made no effort to settle the debt.

In November 1993 a judgment was entered against Applicant in the amount of \$605.57 with interest at 9% until paid for delinquent real estate taxes owed to the local municipality (creditor #3) for the periods July to December 1992 and January to June 1993. A second judgment was filed in favor of creditor #3 in October 1994 in the amount of \$668.00. The creditor has not been satisfied in full as of April 1998, although Applicant had reduced his debt to creditor #3 to about \$600.00 as he had been making some payments. [\(1\)](#)

Applicant's credit card account with a nationwide department store (creditor #4), opened in October 1987, became delinquent in the amount of \$80.00 circa December 1993. The debt remains unpaid.

In January 1994 a bank (creditor #5) obtained a judgment against Applicant in the amount of \$1,544.00 to recover the balance of an outstanding personal loan. Reported due balance as of February 1997 was \$1,571.00. Applicant has made no effort to satisfy the debt.

In January 1990 Applicant financed the purchase of a used van through an automobile loan with a bank (creditor #6). Applicant had owned the vehicle for eighteen months when his girlfriend was involved in an automobile accident. The van was damaged beyond repair and he was without automobile insurance. Applicant stopped paying on the automobile loan shortly after the accident. In late arch 1994, the creditor was awarded a judgment in the amount of \$5,402.70 to recover monies owed. Applicant made no payments toward the judgment and in November 1996 the court ordered garnishment of Applicant's wages at his current employ to recover the balance of the outstanding judgment plus interest, costs and fees for a total due of \$9,156.32. The amount of \$100.00 per week was deducted from Applicant's wages from November 30, 1996 to January 18, 1997, until he had the garnishment stopped because he had not been properly notified. As of early December 1997, Applicant owed approximately \$8,356.00 to the creditor.

Applicant has been indebted since December 1993 in the amount of \$96.00 to a hospital (creditor #7) for medical services rendered him for a sprained ankle. Applicant thought his health care plan would cover the entire amount of the services.

Two separate credit accounts, a revolving charge opened in October 1989 and an installment account opened in August 1990 with a nationwide department store (creditor #8) became past due in the amounts of \$1,166.00 and \$623.00, respectively, and were referred for collection in the total amount of \$1,789.00 in about September 1995. Applicant has not repaid the delinquency.

Applicant did not remain current on his cable television bill and a bad debt of \$65.00 was placed for collection to creditor #9 in March 1994. Applicant thought his girlfriend had paid the debt in June 1994 but the debt was reported as still outstanding as of February 1997.

Applicant is the father of two children, a son born to him and his former spouse in March 1978 and a daughter born to

him and his current girlfriend in February 1982. Applicant got behind some \$3,000.00 in his child support payments for his son when he was unemployed during the 1992/93 time frame. His wages were garnished by the state (creditor #10) in the amount of \$82.80 per week from September 1994 to May 1997 to collect the child support. In May 1997, he was released from the obligation.

In February 1994, Applicant went to work for his present employer earning about \$24,000.00 per year. In connection with his application for a security clearance, Applicant was interviewed by a Special Agent of the Defense Security Service (DSS), then known as Defense Investigative Service, in September 1994. At that time, Applicant acknowledged the debts owed to creditors #1, #2, #3, #5, #6, #7 and #8 and attributed the delinquencies to his unemployment. He stated an intent to settle the debts now that he was gainfully employed. Applicant reported his wages had been attached in the amount of \$82.80 per week by creditor #10 for child support and indicated creditor #6 would be satisfied via a debt consolidation. He prepared a Personal Financial Statement (PFS) on which he reported his net monthly income exceeded his monthly expenditures by \$274.00, exclusive of any payments on the delinquencies owed to creditors #1, #2, #3, #5, #6, #7 and #8.

Applicant thereafter did not seek counseling from a debt management service or obtain a debt consolidation loan, although he contacted a lawyer for advice when one of the creditors demanded payment. He still had not satisfied these debts by December 3, 1997, when he was re-interviewed by a DSS Special Agent. Applicant admitted he had not made any payments on the debts discussed in his prior interview with the exception of creditor #3 where he had reduced his obligation to approximately \$600.00. He disclosed his wages had been garnished by creditor #6 from November 30, 1996 to January 18, 1997, thereby reducing his obligation from \$9,156.00 to about \$8,356.00 and by creditor #10 at the rate of \$82.80 per week until May 1997 when he was released from his child support obligation. In addition, he acknowledged a past due debt of \$80.00 to creditor #4, but contended that the \$65.00 owed creditor #9 had been paid in June 1994 by his girlfriend. Applicant stated his belief that a debt consolidation loan was now no longer feasible, but he planned to contact a consumer credit counseling service to work out a payment plan to settle all his debts. According to a Personal Financial Statement prepared by Applicant in conjunction with this interview, he was making monthly payments on three accounts: \$330.00 for a \$19,000.00 automobile loan obtained by him in September 1997 for the purchase of a new automobile; a personal loan assumed in November 1996 in connection with a credit repair seminar where for \$1,200.00 paid in monthly installments of \$52.00 he was given two credit cards with a \$200.00 spending limit on each to use in an effort to re-establish good credit; and \$20.00 on a VISA credit card with a \$60.00 balance. As of his hearing, he was about two months behind on his monthly payments for the loan assumed at the credit repair seminar.

Due to his present employment situation, Applicant has lived apart from his girlfriend and daughter since February 1994. In addition to the costs associated with maintaining a separate residence, Applicant sends his girlfriend about \$350.00 per month for the care of their daughter. With monthly expenditures of \$1,321.00 and debt payments totaling \$402.00, he has a positive net monthly remainder of \$177.00. Applicant has generally put this money away in case he is laid off by the end of 1998. He made no effort to contact a consumer credit counseling service because his discretionary income after expenses would not be enough to satisfy all his bills.

Applicant has not filed his federal individual income tax returns for tax years 1993 to date. During calendar year 1993, Applicant was employed for five months, from May 1993 to September 1993, when he worked as a designer for a marine company.<sup>(2)</sup> Unemployed for four months thereafter, Applicant in February 1994 relocated to pursue his current job opportunity. Applicant subsequently lost the wages and earnings statement (W-2) from his employ with the marine company when he changed residences in the new locale. Since he did not have his W-2, he elected not to file an individual federal income tax return for 1993. In 1994, Applicant earned some \$24,000.00 for his work with his present employer with some increase in subsequent years. He did not file a federal individual income tax return for tax years 1994 through 1996 even though he had the W-2 forms from his employer because of fear of repercussions from not filing for the year prior in each case. Applicant has not made an accounting of his taxes for those years, but is of the opinion he is due refunds for the tax years at issue. He intends to contact an accountant for assistance in filing the overdue forms because he could use the anticipated refund monies. As of his April 21, 1998, hearing, he had not filed his 1997 tax return which was due the week before.

## **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:

- (3) the conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment)

#### CRIMINAL CONDUCT

**A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.**

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

- (1) any criminal conduct, regardless of whether the person was formally charged

Conditions that could mitigate security concerns include:

None.

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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 of those who testified, this Judge concludes the following with respect to criteria F and J:

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. Over the 1992/93 time frame, Applicant got behind on his child support obligation in the amount of approximately \$3,000.00 and on accounts held with nine other creditors. While his child support obligation to his son was satisfied via garnishment of his wages, he remains indebted to the nine other creditors in the approximate aggregate amount of \$14,617.00, exclusive of interest calculations on the unpaid judgments. Furthermore, as of his hearing, he was two months behind on a loan assumed in November 1996 at a credit repair seminar. Disqualifying conditions (DC) 1. (a history of not meeting financial obligations) and 3. (inability or unwillingness to satisfy debts) of the adjudicative guidelines pertaining to financial considerations are applicable in this case.

Applicant maintains his indebtedness was isolated to the 1992/93 time frame and related to his job layoff. As set forth in mitigating condition (MC) 3, the Directive provides for mitigation where debts are caused by unforeseen circumstances beyond an individual's control such as loss of employment. Whereas the delinquencies were largely incurred while he was out of work during the periods arch 1992 through April 1993 and October 1993 through January 1994, Applicant's indebtedness can reasonably be attributed to a significant decrease in financial resources due to unemployment. Recognizing that Applicant found himself in a financial bind due to the layoff, security concerns nonetheless persist because of his failure to address responsibly his old debts over the last four years during which time he has been gainfully employed by a defense contractor, especially since May 1997 when his wages were no longer subject to garnishment in the amount of \$330.00 per month for child support for his son.

In September 1994, Applicant indicated his intent to satisfy his past due accounts, and with a reported \$274.00 positive monthly balance, he had some monies at his disposal which could have been directed to repayment of a debt consolidation loan. Shortly thereafter, the Department of Defense placed its trust in him via the grant of a confidential security clearance. By the time of his re-interview in December 1997, Applicant's child support obligation for his son had been satisfied through creditor #10's garnishment of his wages at the rate of \$82.80 per week, and he had made sporadic payments toward reduction of the judgment debt owed creditor #3 for back real estate taxes. However, he had not made even a minimal effort to repay his remaining creditors. While he has \$97.00 less in discretionary monthly funds than he had in September 1994, he could have used at least some of the \$177.00 left over each month to repay his delinquent debts.<sup>(3)</sup> The decrease in monies available for his old debts is directly attributable to his purchase on credit of a new \$19,000.00 automobile and to his efforts to re-establish credit by buying use of two credit cards at a cost of \$1,200.00. Understandably, Applicant needs reliable transportation since he visits his daughter every six to eight weeks and he credibly testified his intent was to purchase a used car four or five years old for nothing over about \$2,500.00 to \$3,500.00. When he did not qualify for a loan for the used car due to his poor credit history, he allowed the car salesman to talk him into financing the purchase of a new car at a cost of \$19,000.00. It was irresponsible on his part to incur this substantial financial obligation in September 1997 when faced with unpaid legal judgments.<sup>(4)</sup> Of the opinion that

resolution of his financial problems through debt consolidation was no longer possible, Applicant informed the DSS Special Agent in December 1997 of his intent to contact a consumer counseling service to work out a payment plan to satisfy his delinquent accounts. Apart from seeking legal advice when one of the creditors was demanding payment, Applicant in the past few months made no effort to seek an accommodation with his creditors. While he attended a credit repair seminar in November 1996, it only served to increase his indebtedness as he entered into an agreement to pay \$1,200.00 for two credit cards to be used to regain a favorable credit rating.

In Applicant's favor, he does not maintain an extravagant lifestyle. To the contrary, in an effort to reduce expenses he moved in August 1996 to an apartment where utility costs are covered and he shares this apartment with a co-worker who testified favorably to Applicant's character and reliability, especially with respect to providing regular support for his minor daughter. This positive evidence is not sufficient to overcome the security concerns engendered by his failure to make good-faith efforts to repay his overdue creditors, however. Accordingly, adverse findings are warranted with respect to subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e., 1.f., 1.g., 1.i., 1.j. and 1.k. of the SOR. Subparagraph 1.h. is found for Applicant as he got behind on his child support due to his unemployment rather than to deliberate disregard and the obligation has been satisfied, albeit through garnishment.

With respect to criterion J, Applicant has not filed his federal individual income tax returns for tax years 1993 through at least 1996.<sup>(5)</sup> The Government submits that he committed thereby what amounts to misdemeanor violations of federal law, citing Title 26, Section 7203 of the United States Code.<sup>(6)</sup> There is no evidence Applicant sought to evade payment of his income taxes. Applicant has had monies withheld for taxes by his employer and believes he is owed refunds for the aforesaid tax years. Yet, the obligation to file is independent of whether Applicant was entitled to refund of monies withheld. Under Section 6012 of Title 26 of the United States Code, a return is not required in the case of an unmarried person or head of household if his gross income is less than the sum of the exemption amount plus the basic standard deduction. Although the record is silent as to the amount of Applicant's earnings during his five months of employment in 1993 with the marine company, when coupled with his \$200.00 per week in unemployment compensation for the remainder of the year, it is likely his gross income was greater than the sum of the exemption amount plus the basic standard deduction applicable to him. Applicant earned approximately \$24,000.00 in wages for tax year 1994 with increases in succeeding years for his work with his present employer. Applicant therefore being required to file federal individual income tax returns for tax years 1993 through 1996 as alleged, he has the burden of demonstrating that his actions were not knowing and willful.

Applicant testified that he did not file for 1993 because he lost the W-2 form for his work with the marine company when he relocated and that he did not file for subsequent years as he feared potential repercussions from his initial non-filing in 1993. Clearly, he was aware of his obligation to file and has made no effort to date to file the returns. Following an initial effort to contact corporate headquarters to request another W-2 form from the marine company, he has made no further attempt after the first proved unsuccessful. Fear of adverse consequences or even the fact that he may be entitled to refunds does not excuse his non-filing. Applicant's disregard of this obligation casts doubt as to whether he can be counted on to adhere to security responsibilities. DC 1. (any criminal conduct) of the pertinent adjudicative guidelines is apposite as his conduct constitutes repeated misdemeanor violations of federal law, irrespective of the fact he has never been formally charged criminally. None of the corresponding mitigating conditions work to Applicant's benefit. Whereas he has not filed the returns as of the hearing, his criminal conduct is ongoing in addition to being repeated. Applicant was placed on notice on receipt of the SOR that his non-filing of required tax returns for 1993 through 1996 was of concern. He made no recent effort to obtain the lost W-2 or even to file his 1997 federal income tax return which was due the week before the hearing. Although he submits he will eventually file the delinquent returns, it is too soon to tell whether he will comply with this obligation in future years. Subparagraphs 2.a., 2.b., 2.c. and 2.d. are thus resolved against him.

## **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

Subparagraph 1.h.: For the Applicant

Subparagraph 1.i.: Against the Applicant

Subparagraph 1.j.: Against the Applicant

Subparagraph 1.k.: Against the Applicant

Paragraph 2. Criterion J: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: Against the Applicant

Subparagraph 2.d.: 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 credit bureau report dated February 25, 1997, (Govt. Ex. 4) reflects two judgments awarded creditor #3. During his September 1994 subject interview, Applicant acknowledged the judgment awarded the municipality for unpaid real estate taxes in the amount of \$605.00. In his recent interview of December 3, 1997, Applicant referenced a December 1996 delinquent real estate tax in the amount of \$2,500.00 which he believed concerned the judgment obtained against him as discussed in September 1994. It is unclear whether this \$2,500.00 represents a separate unpaid balance or is the amount due on the unpaid judgment(s) awarded during the 1993/94 time frame. At the hearing, Applicant testified about two and a half years ago, he ran up a debt for unpaid real estate taxes which he believes is satisfied as he made a \$1,000.00 payment plus paid it down. (Transcript p. 50). However, he presented no evidence of satisfaction and the Government's evidence reflects an outstanding judgment.

2. Applicant testified he worked for the company for only about two months (Transcript p. 57), yet on his security clearance application he reported dates of employment there from May 1993 to September 1993.

3. Despite a net monthly increase in income of \$141.00 from what it had been September 1994 and a decrease of \$25.00 in monthly expenditures, Applicant has \$97.00 less in discretionary income in December 1997 because of monthly payments on two recently incurred loans: \$330.00 for the car and \$52.00 for the use of the credit card.

4. Applicant testified that he put down \$1,000.00 on the car which he borrowed from friends (Transcript p. 66). The status of that debt owed his friends is not clear in the record.

5. The Government alleged non-filing only through 1996. Applicant testified at the hearing that he had not yet filed his 1997 tax return and had not filed for an extension of time. This Judge cannot base a decision on conduct not alleged, but his non-filing of the 1997 tax return does have a bearing on the issue of reform and can be considered for that purpose.

6. Pursuant to Title 26, Section 7203 of the United States Code, "Any person required under this title. . .to make a return, keep any records, or supply any information, who willfully fails to make such return. . .at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$25,000. . .or imprisoned not more than 1 year, or both, together with the costs of prosecution. . ." While this section merely provides the sanctions for failure to file and does not establish the predicate requirement to file, at the request of Department Counsel, the undersigned also took official notice of Section 6011 which sets forth the general requirement to file returns and Section 6012 which establishes the persons required to make returns of income.