



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:	)	
	)	
-----	)	ISCR Case No. 08-06727
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Michael Lyles, Esq., Department Counsel

For Applicant: Michael Edward Lee, Esq.

January 30, 2009

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**Decision**

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MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant certified a security clearance application, Electronic Questionnaires for Investigations Processing (e-QIP), on April 1, 2008. On July 23, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns regarding financial considerations (Guideline F). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised Adjudicative Guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

On August 6, 2008, Applicant signed a notarized document in which he admitted five of eight allegations raised in the SOR. A hearing before an Administrative Judge was requested. I was assigned the case on September 28, 2008, and the parties agreed to a hearing date of October 22, 2008. A Notice of Hearing was issued on

October 6, 2008, to that effect. Due to scheduling conflicts, the hearing was moved to October 23, 2008, pursuant to an Amended Notice of Hearing, issued October 9, 2008.

The hearing was timely convened. Department Counsel introduced eight documents, accepted into the record without objection as exhibits (Exs.) 1-8. Applicant gave testimony and offered three documents, accepted into the record without objection as Exs. A-C. Two witnesses gave testimony on behalf of the Applicant. Applicant was given until November 4, 2008, to submit any additional documents for consideration. The transcript (Tr.) was received on October 31, 2008. No additional documents were forwarded for admission. The record was closed on November 7, 2008. Based upon a review of the case file, testimony, and exhibits presented, Applicant failed to carry his burden and mitigate financial considerations security concerns. Clearance is denied.

### **Findings of Fact**

Applicant is a 76-year-old architect and businessman who was raised and educated in the same region in which he resides today. He has been married for nearly 50 years and the two have lived in the same city throughout their marriage. As a resident, Applicant is a widely respected member of his community.<sup>1</sup> He is recognized for his civic activities, having served in important capacities for his church, the local hospital, symphony, and other organizations.

Applicant received a bachelor's degree in building technology in 1955 and a second bachelor's degree in civil engineering about a decade later. After several years working as a consultant in the areas of architecture, engineering, and land development, Applicant went into business for himself in the mid-1960s as a civil engineering consultant. His area of expertise was in hydro-engineering. In this capacity, he has been regularly hired by state, regional, and municipal entities to design water supply, storage, and distribution systems, sewage collections systems, and water purification systems.<sup>2</sup>

Such jobs are considered long term projects, entailing months of design before months of production and completion.<sup>3</sup> Payment for the assignments usually takes place around the time actual construction begins. To fund his business until payment began, he generally would rely on a line of credit issued by a local bank. By the time the bank issued him a check on his line of credit, preliminary, pre-construction work on the project would have commenced and money already obligated to employees, suppliers, and to himself. As a consequence of this arrangement, Applicant developed long-standing relationships with at least one local bank. Another consequence of this arrangement is that Applicant's business regularly reflected varying amounts of

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<sup>1</sup> Tr. 67.

<sup>2</sup> Tr. 29-30.

<sup>3</sup> Tr. 30.

outstanding debt on one or more projects. Such running debt is typical in this particular industry.<sup>4</sup>

Applicant operated his business in this manner from 1965 until the early 1990s. During that time, he was highly reliant on the banks for balancing his accounts.<sup>5</sup> It was the banks, not Applicant, apparently, that reconciled credit extended and income earned.<sup>6</sup>

In 1993 or 1994, an electrical fire burned down Applicant's office. All the business' records were lost. As he endeavored to get his business back on track, Applicant underwent a triple by-pass operation. As an integral component of each project, this invasive procedure interrupted Applicant's direct involvement in his business. Progress on projects was slowed, but Applicant was able to continue making debt service payments with the financial help of his wife. None of his creditors sued or instituted foreclosure proceedings during this time. Slowly, Applicant regained his health and rebuilt his business.

In 2003, Applicant suffered a heart attack. By that time, Applicant's business faced increased competition from entities located outside his hometown and region. The number of his competitors grew from about five to around 25.<sup>7</sup> While business became less vigorous, Applicant continued with his projects and the management of both his business finances and running debt. Seeking a way to generate more income, Applicant received a license as a home inspector in 2006. He opened a home inspection business as an extension of his engineering business license.<sup>8</sup> This extension, however, was ill timed. It coincided with the slowing of the national economy and a downward trend in the local real estate market.<sup>9</sup>

Despite the addition of the home inspection business, the slowing economy hindered Applicant's ability to stay timely on his accounts. Applicant contemplated filing for bankruptcy protection. He rejected filing Chapter 7 personal bankruptcy. As a life-long resident of the region, he wanted to "clear up" his name and honor his creditors.<sup>10</sup> Consequently, he and his wife chose to file for Chapter 11 bankruptcy protection in 2007, thus invoking a more rigorous process which could ultimately lead to the

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<sup>4</sup> Tr. 31.

<sup>5</sup> Tr. 72.

<sup>6</sup> *Id.*

<sup>7</sup> Tr. 35.

<sup>8</sup> Tr. 36.

<sup>9</sup> Tr. 36-37.

<sup>10</sup> Tr. 38.

reorganization of his business.<sup>11</sup> As part of that process, Applicant retained an attorney and both Applicant and his wife received financial counseling.<sup>12</sup>

The Chapter 11 filing is detailed. Included in the Chapter 11 package is a list of creditors holding the largest unsecured claims. The completed reorganization plan includes approximately \$15,000 owed to Applicant's state for overdue taxes. It also includes approximately \$144,000 to the Internal Revenue Service (IRS) from Form 1040 for years 1999, 2000, and 2002.<sup>13</sup> Applicant failed to file for these periods because he was "discombobulated" following his office fire and health concerns.<sup>14</sup> Otherwise, Applicant's taxes are current.<sup>15</sup> He stated that he ultimately filed for the years at issue and was making payments on both debts by the time he filed for bankruptcy, but he failed to provide copies of such filings.<sup>16</sup> Applicant's reorganization plan is awaiting confirmation by the bankruptcy judge, pending Applicant's acquisition of employment.<sup>17</sup>

Applicant is also in debt to two banks. He owes the first bank approximately \$345,000 for the balance due on a promissory note. Based on his 40 year working relationship with this bank, Applicant, with the approval of the bankruptcy court, has entered into an agreement under which he is currently making adequate protection payments in the amount of \$1,844 per month. The proposed reorganization plan provides for payment of this claim in full to this bank.

Applicant owes a second bank approximately \$241,361 for the balance due on a promissory note. This claim is secured by commercial property with a value exceeding the balance of the claim. That property is currently generating rental income for the bank in accordance with the terms of the original note. The Chapter 11 plan proposes payments of \$2,300 per month until the debt is paid.

General unsecured claims in the approximate amount of \$505,410 exist for unpaid debts.<sup>18</sup> The proposed Chapter 11 plan would establish payments of \$2,200 per month for 36 months to the creditors included in this class of claims.

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<sup>11</sup> Tr. 11, 38.

<sup>12</sup> Ex. A (Bankruptcy Petition).

<sup>13</sup> Tr. 41; Ex. A (Bankruptcy Petition); Exhibit B (Disclosure Statement and Plan).

<sup>14</sup> Tr. 54.

<sup>15</sup> Tr. 41.

<sup>16</sup> Tr. 54-55.

<sup>17</sup> Tr. 42.

<sup>18</sup> Ex. B (Disclosure Statement and Plan) at 6.

Not included in the bankruptcy is a judgment against Applicant for approximately \$8,991. The judgment was filed in Applicant's county court in June 2003.<sup>19</sup> This account was not noted in Applicant's bankruptcy paperwork. Applicant has no recollection of the debt.<sup>20</sup> Applicant does, however, acknowledge that he has had a credit card with this entity.<sup>21</sup> Not having ever reviewed a credit report, Applicant has no basis for knowing about this entry except for its reference in the SOR.<sup>22</sup> No evidence was introduced showing what, if any, investigations were made to discern the origin of this entry on his credit report after he received notice it was an issue in the SOR.

As well, a collection effort on behalf of a bank for an obligation of approximately \$64,323 is not included in the bankruptcy action.<sup>23</sup> Applicant testified that his attorney's secretary investigated this entry and "found no record of this,"<sup>24</sup> but he failed to offer any documentary evidence of such communication or such a conclusion. There is no evidence of any other inquiry as to this credit report entry. It is unknown whether the account was ultimately disputed with the credit reporting agency or the named creditor.<sup>25</sup>

Applicant is currently earning approximately \$5,500 to \$6,000 per month. His wife does not work. After living expenses and adequate protection payments to the one bank, Applicant has a net remainder of approximately \$1,200. Should he be granted a security clearance, Applicant will assume a position, earning about \$115,000 per year.<sup>26</sup>

### **Policies**

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny

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<sup>19</sup> Ex. 5 (Credit Report, dated April 9, 2008).

<sup>20</sup> Tr. 42-43.

<sup>21</sup> Tr. 46; Ex. 5 (Credit Report, dated April 9, 2008) at 7, 11.

<sup>22</sup> Tr. 46-47, 50-51.

<sup>23</sup> Ex. 5 (Credit Report, dated April 9, 2008) at 14.

<sup>24</sup> Tr. 48.

<sup>25</sup> Tr. 49-53

<sup>26</sup> Tr. 23.

of a number of variables known as the “whole person concept.” The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”<sup>27</sup> The burden of proof is something less than a preponderance of evidence.<sup>28</sup> The ultimate burden of persuasion is on the applicant.<sup>29</sup>

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the 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.

Section 7 of Executive Order 10865 provides that 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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>30</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>31</sup> It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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<sup>27</sup> See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

<sup>28</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

<sup>29</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>30</sup> *Id.*

<sup>31</sup> Executive Order 10865 § 7.

## Analysis

Based upon consideration of the evidence, I find Guideline F (Financial Considerations) to be the most pertinent to the case. Under that guideline, failure or an inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Conversely, an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.<sup>32</sup> The AG sets out several potential disqualifying conditions.

By occupation, Applicant managed a business in which payment for a project was generally tendered after Applicant's work had commenced. He used an interim line of credit to fund operations until actual payment was made. Consequently, he regularly incurred and carried debt on each project until certain progress was made. Due to ill health, increased competition, and a souring economy, however, Applicant ended up with debt that he could no longer manage without resort to bankruptcy.

Cumulatively at issue in the SOR is over \$1,300,000 in delinquent debt. Applicant's 2007 bankruptcy reorganization has been placed on hold. Payment is only currently being made to one creditor, a bank with which Applicant has a long-standing relationship. Consequently, Financial Considerations Disqualifying Condition (FC DC) AG ¶ 19(a) ("inability or unwillingness to satisfy debts") and FC DC AG ¶ 19(c) ("a history of not meeting financial obligations") apply. With such conditions raised, the burden is placed on Applicant to overcome the case against him and mitigate security concerns.

In 1993 or 1994, Applicant's office burned down. All papers related to the businesses projects and accounts were lost. Shortly thereafter, Applicant received a medically necessary triple by-pass. These incidents provided a double blow to Applicant's business, impacting both his immediate income and his ability to keep pace with his running debt. A decade later, in 2005, Applicant suffered a heart attack at a time when competition in his region had increased five-fold and shortly before the beginning of an economic downturn. Under such circumstances, Financial Considerations Mitigating Condition (FC MC) AG ¶ 20(b) ("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) and the individual acted responsibly under the circumstances") applies.

Applicant's business is predicated on carrying a certain amount of debt until a project has been designed, developed, and under construction. When payments are made on a project, any incurred debt can be satisfied and profits realized. Such a business is not conducted without some degree of financial risk, nor is it insulated from

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<sup>32</sup> Revised Adjudicative Guideline (AG) ¶ 18.

economic forces. More importantly, the success of his business is directly linked to him, his personal participation, and his reputation within the community.

Applicant's business first faced obstacles in 1993 or 1994 with the office fire and his triple by-pass surgery. A little over a decade later, increased competition, a heart attack, and an economic decline all contributed to the business' economic troubles. Applicant's business has been vulnerable to both external forces and those affecting Applicant, himself, on at least two occasions. Although Applicant continued to conduct himself and his business ethically and in accordance with industry practices, there is little evidence that his business will be henceforth insulated from such forces in the future. Therefore, Financial Considerations Mitigating Condition (FC MC) AG ¶ 20(a) ("the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment") does not apply.

When faced with an unwieldy amount of debt as the country faced an economic downturn, Applicant solicited the aid of an attorney and filed for Chapter 11 bankruptcy protection. To his credit, he chose Chapter 11 protection to help assure that his obligations would be honored. Applicant maintains that he is in repayment with one bank and states he has made agreements with regard to his taxes. He has introduced evidence of his Chapter 11 petition and reorganization plan. That petition, however, was initiated in 2007 and no evidence of current payments toward any of his creditors was introduced. FC MC AG ¶ 20(d) ("the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts") does not apply. Similarly, although Applicant received financial counseling as part of the bankruptcy process, it is premature to determine the applicability of FC MC AG ¶ 20(c) ("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").

Conducting a business such as that conducted by Applicant demands a considerable amount of good faith and interaction with the banks. Applicant's reputation in the community and decades of successful projects brought him that good faith. It is his express intention to maintain his solid reputation and honor his obligations. To that end, Applicant's attorney has well demonstrated what efforts have been made in filing for Chapter 11 bankruptcy and developing Applicant's reorganization plan. Such action was originally initiated in, however, in 2007. Approval of the reorganization plan is presently on hold. This is troubling. Delay in seeking the bankruptcy judge's approval on the reorganization plan may be tactical and, at least in part, predicated on Applicant's eligibility for a new job. This does not, however, overcome the fact that progress is currently at a relative standstill with the majority of the obligations at issue.

Similarly worrisome are the minimal efforts exerted to mitigate concerns regarding a judgement for nearly \$9,000 and a collection effort for approximately \$64,500. The burden is on Applicant in this proceeding to explain, extenuate, or mitigate allegations established by the Government. The sum of \$73,500 may seem minor in light of the total amount of debt at issue. Without evidence that these accounts were not, at least, disputed through the credit reporting agency, however, it is hard to



conclude proper diligence and appropriate judgement was exercised in addressing the security concerns set forth in the SOR.

### **Whole Person Concept**

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): "(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 extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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." Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a public trust position must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case, as well as the "whole person" factors. Applicant is a mature, educated, and articulate man with significant work experience. He is a pillar of his community, both as a businessman and as a civic-minded citizen. The record shows that he applies honor and integrity in both his professional and personal life. It similarly shows he is highly reliant on his bankers and legal counsel.

Applicant's business is one which is highly vulnerable to market conditions and his vigorous participation. He has twice experienced financial downturns. While he recovered from professional and personal blows in the early 1990s, the current economic climate was less forgiving to blows received in the 2000s. In 2007, he sought Chapter 11 bankruptcy protection. That petition and the related reorganization plan have been poised for approval by the bankruptcy judge, but have remained in limbo. Following numerous recitations by the Appeal Board, however, it has become axiomatic that promises to pay in the future do not mitigate security concerns with regard to financial considerations. Such promises are not a substitute for a track record of paying debts in a timely manner and otherwise acting in a financially responsible manner.<sup>33</sup>

Particularly troubling was Applicant's failure to carry his burden and provide documentary evidence in several areas. For example, Applicant stated he has worked out agreements with regard to his state and federal taxes, but no such agreements were presented. Similarly, there was no discussion of any exhibits detailing his current payment or debt satisfaction arrangements with the banks. Glaringly, no evidence was admitted with regard to efforts undertaken to refute or dispute two of the seven obligations set forth in the SOR which, combined, represent nearly \$75,000 in

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<sup>33</sup> See, e.g., ISCR Case No. 99-0012 at 3 (App. Bd. Dec. 1, 1999); ISCR Case No. 08-08291 (App. Bd. Aug. 26, 2008).

delinquent debt. There is no question that Applicant is a gentleman of integrity and significant achievement. Through such failures, however, he has failed to mitigate financial considerations security concerns. Clearance is denied.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline 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

### **Conclusion**

In light of all of the facts and circumstances presented by the record in this case, it is not clearly consistent with national security to determine Applicant eligible for a security clearance. Clearance is denied.

ARTHUR E. MARSHALL, JR.  
Administrative Judge