

DATE: June 20, 2001

In Re:

SSN: -----

Applicant for ADP Position

ADP Case No. 00-0064

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Some \$3,500 in six past due debts were mitigated by payment in full of five and substantial payment of the last debt through systematic savings program and by the conditions that resulted in the debts that were largely beyond the Applicant's control. Trustworthiness determination granted.

STATEMENT OF THE CASE

On March 9, 2000, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, ¶ 3-601 and ¶ 3-614 of DoD 5200.2-R, and § 2.4 of 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 make or continue a trustworthiness determination for the Applicant or a determination that she is eligible to occupy a noncritical-sensitive position, and recommended referral to an Administrative Judge to determine whether such a determination should be made, continued, denied, or revoked. In a sworn statement, dated April 20, 2000, the Applicant responded to the allegations set forth in the SOR and waived a hearing. The Applicant received a complete copy of the file of relevant material (FORM), dated August 28, 2000, on March 12, 2001, and received an opportunity to file objections and submit material in refutation, extenuation, or mitigation. The Applicant's response to the FORM, dated March 21, 2001, requested a hearing in lieu of a decision on the record.

The undersigned Administrative Judge received the case assignment on April 17, 2001, and a notice of hearing was issued on April 24, 2001. The undersigned held a hearing on May 22, 2001. The Department Counsel presented four exhibits ("exhs") but no witnesses. The Applicant's case consisted of the presentation of six exhibits and the testimony of two witnesses besides her own testimony. The record in this case closed on May 22, 2001. The undersigned Administrative Judge received the transcript ("tr") of the hearing on June 8, 2001.

SOR AMENDMENTS

For purposes of accuracy the SOR was amended at the hearing without objection to refer to "Guideline F" rather than "Criterion F" and to revise the opening paragraph to read:

A review of your eligibility for occupying an Information Systems position designated ADP-II to support a contract with the Department of Defense has been made, pursuant to Paragraph 3-614, DoD Regulation 5200.2-R, and Section 2.4, DoD Directive 5220.6, dated January 2, 1992 as amended. This office recommends that your case be submitted to an Administrative Judge for a determination whether or not you are eligible for occupying such a position. This recommendation is based on the following reasons:

Tr pages 15-17. ADP-II is identified at Appendix K, DoD Regulation 5200.2-R. Tr pages 27-28, 79.

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following sole guideline: paragraph 1, Guideline F (financial considerations). 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 32-year-old computer operator (level two) employed by a U.S. Government subcontractor. The Applicant seeks to obtain an Automated Data Processing (ADP) II position.

SOR ¶ 1 alleged that the Applicant had past due indebtedness as of February 1999 to six creditors, two of which referred the unpaid accounts to collection agencies (total \$530), the remaining creditors having charged off the unpaid amounts as bad debts (total \$2,946). SOR ¶ 2 alleged that the Applicant's personal financial statement (PFS) as of March 1999 reflected a monthly net remainder of \$1,162 after monthly expenses that did include repayment of any of the six creditors.

The Applicant's SOR response alleged that (1) she was paying the first creditor \$25 monthly and enclosed a \$20 receipt, (2) she had arranged to have deducted \$10 each pay period to be deposited automatically in a saving account until she had accumulated enough to pay the second creditor off in full, (3) she was paying the third creditor \$43.40 a month and enclosed a \$5 receipt, (4) she was paying \$25 a pay period to the fourth creditor and enclosed a \$5 receipt, (5) she had arranged to pay the fifth creditor \$5 per pay period and enclosed a \$5 receipt, and (6) she had contacted the sixth creditor and was awaiting an answer and the address to which she could send periodic part payments.

At the hearing the Applicant submitted a receipt from the first creditor (exh. E) that showed a zero balance due, an accounting from the second creditor (exh. D) that showed a zero balance due, a receipt from a collection agency regarding the 19 debts totaling \$2,308⁽¹⁾ to the third creditor (exh. A) showing a \$50 payment and a \$1,334 balance outstanding, a receipt from the fourth creditor (exh. B) showing a zero balance due, a receipt from the fifth creditor (exh. F) showing a zero balance due, and a receipt from the collection agency for the debt owed to the sixth creditor (exh. C) showing a zero balance due.

The Applicant was married in March 1991 and has three sons, the second of which has an active chronic case of sickle cell disease and requires extensive medical treatment. Exhs. 1 and 3. She did not have medical insurance. Tr page 42. Her husband separated from her and her children from 1994 to to spring of 1998 (with one reconciliation from March 1997 to November 1997). He was addicted to crack cocaine. Tr pages 53, 55, 58, 89. When out of the home her husband did not provide any child support or financial contributions toward household expenses.⁽²⁾ She had been earning close to minimum wage in her hourly temp job. Since November 1998 she became a permanent full-time employee⁽³⁾ and is authorized sick leave to care for her second son. Exh. 3; tr page 94. At the time she signed her sworn statement for a Defense Security Service (DSS) agent in March 1999 (exh. 3), she included her husband's net salary (equal to 170 % of her net salary) on her personal financial statement (PFS).⁽⁴⁾ After she signed her personal financial statement in March 1999, she discovered that her husband's addiction actually resulted in a net loss of household income rather than an increase as she predicted on her PFS. He left the home again at her demand in June 1999, and she is now seeking a divorce and court-ordered child support for her teenage sons. Tr pages 42, 53, 55-58-61, 70-71.

Aside from the past due debts listed in the SOR, the Applicant has no other outstanding debts aside from her mortgage

and car loan. Tr pages 54, 77. A number of creditors were paid off through accumulated forced savings; the Applicant did not borrow money to pay off and/or pay down the listed debts. Tr pages 49-51, 68-69. She terminated cable television service that was ordered by her husband when he had returned to the home and was supposed to pay for it. Tr page 70. She has no credit cards, debit cards, or department store revolving charges. Tr pages 77-78.

The Applicant was promoted in August 2000 from computer operator (level one) , earning about \$15,000 a year, to computer operator (level two) and currently earns about \$23,000 annually. She is very active in her church. Tr pages 75-76. Her immediate supervisor believes the the Applicant is generally compliant with work rules. Tr page 86. Her second-level supervisor appreciates her "good, strong work ethic." Tr page 93.

POLICIES

The Composite Health Care System Program Office, the Directorate for Industrial Security Clearance Review (now Defense Office of Hearings and Appeals), and the Assistant Secretary of Defense for Command, Control, Communications and Intelligence entered into a memorandum of agreement (MOA), effective April 9,1993, under which the Defense Office of Hearings and Appeals (DOHA) is authorized to adjudicate trustworthiness cases involving contractor personnel working on unclassified automated systems in ADP-I and ADP-II sensitivity positions as defined in DoD Regulation 5200.2-R. This Administrative Judge has jurisdiction by virtue of the MOA, Department of Defense Directive 5220.6, dated January 2, 1992 (as amended), and DoD Regulation 5200.2-R, dated January 1987 (as amended). Under the MOA, the procedural provisions of the DoD Directive 5220.6 are applied by DOHA in processing trustworthiness cases. See ADP Case No. 30-1130 (January 4, 2001) at p. 2.

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

GUIDELINE 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:

[1st] A history of not meeting financial obligations;

[3rd] Inability or unwillingness to satisfy debts;

Conditions that could mitigate security concerns include:

[3rd] 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);

[6th] The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

The Adjudicative Guidelines contained in enclosure 2 of the Directive provide in part:

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.

(Emphasis added.) The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section 6.3:

- 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 knowledge-able 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 draw only 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. ⁽⁵⁾

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. ⁽⁶⁾

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 Applicant successfully rebutted and overcame the Government's case with regard to Guideline F.

The Applicant had a period of time in the 1990's in which she had a few past due debts that she was unable to pay. This falls within the scope of DC #1 and DC #3, which are identified on page 5 *supra*. This situation was, however, almost wholly attributable to conditions beyond her control: low wages, unforeseeable medical bills for her children, and marital difficulties (*e.g.*, lack of child support, drain on the household finances due to her husband's drug addiction, and separation). This falls within the scope of MC #3, which is identified on page 5 *supra*.

Further mitigation is found in the recent payment in full of debts to five of the six creditors listed in the SOR and the pay down of the debt to the last creditor by nearly fifty per cent. The fact that some of the creditors refused to make a payment schedule with the Applicant, thereby postponing the repayment, cannot be held against her. She showed good faith in putting part of her meager salary into systematic and automatic savings in order to accumulate the funds needed to ultimately pay off those creditors. This falls within the scope of MC #6, which is also identified on page 5 *supra*.

Each clearance decision is required to take into consideration pertinent factors set forth in Section 6.3 of the Directive and in the adjudicative process discussion at enclosure 2 to the Directive. These factors are identified on pages 5-6 *supra*. The extent of the former indebtedness was not especially serious, and the circumstances surrounding the creation and perpetuation of the indebtedness further abate the present security concern. The fact that the Applicant's personal financial statement reflected an abnormal and highly optimistic financial outlook--having been prepared shortly after her permanent full-time employment (and inclusion of her husband's salary) and shortly before she realized that her husband's drug addiction resulted in a net loss to the household finances--cannot be weighed heavily against her.

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. Guideline F: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Paragraph 2.: FOR 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 clearly consistent with the national interest to make or continue a trustworthiness determination for the Applicant and a determination that she is eligible to occupy a noncritical-sensitive position.

Jerome H. Silber

Administrative Judge

1. As identified on the Applicant's credit report, Feb. 1999 (exh. 4). *But see* SOR ¶1.c. Tr pages 71-74.
2. While her husband was out of the home, her mother-in-law gave her \$200 a month after-school child care and \$250 a month child support. Exh 3; tr pages 63-65.
3. Her income jumped from \$240 to \$350 biweekly when she became a permanent full-time employee. Tr page 54.
4. The Applicant was current on her \$25,000 mortgage loan from Habitat for Humanity (\$35,000 real estate value) and was current on her \$7,700 loan for her 1992 car. Exh. 3. She currently drives another 1992 car because her husband took the earlier car and totaled it. Tr pages 66, 76.
5. 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 DOHA 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 [DOHA] 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).
6. 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).