

DATE: November 20, 2001

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 01-08410

## **DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Matthew E. Malone, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant with a history of delinquent debts, including child support arrearage, assures he will be unable to address his consumer debts until he receives a pay raise or eliminates his child support arrearage. With his debts still outstanding and no reliable means to address them in the near future, he fails to demonstrate financial stability sufficient to absorb security risks associated with pattern debt delinquency. Nor he is able to surmount poor reliability and trustworthiness implications attributable to his prior assault conviction in 1995 and contempt citation of 1998 arising out of his child support arrearage. Clearance is denied.

### **STATEMENT OF THE CASE**

On May 9, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, 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 clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on June 25, 2001, and requested a hearing. The case was assigned to this Administrative Judge on August 6, 2001, and scheduled on August 14, 2001, for hearing. A hearing was convened on September 5, 2001, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny or revoke Applicant's security clearance. At hearing, the Government's case consisted of eighteen exhibits; Applicant relied on six witnesses (including himself) and two exhibits. The transcript (R.T.) of the proceedings was received on September 14, 2001.

### **PROCEDURAL ISSUES**

Prior to the close of the hearing, Applicant requested leave to supplement the record with documentation of payments

made on his court-ordered child support. There being no objection, and good cause showing, Applicant was afforded an additional three (3) days to supplement the record with documented payments. Within the time permitted Applicant provided documentary evidence of his federal credit union's withholding of bi-weekly payments to his ex-wife to satisfy his court-approved settlement he made with his ex-spouse. There being no objection from Department Counsel, and good cause being shown, Applicant's post-hearing submission is accepted as exhibit C.

### **STATEMENT OF FACTS**

Applicant is a 41-year old applications analyst who seeks a security clearance at the level of secret.

#### **Summary of Allegations and Responses**

Applicant is alleged to have financial difficulties arising from accumulated credit card debt delinquencies and child support delinquencies over an extended number of years, consisting of: five delinquent credit card debts, totaling in excess of \$28,000.00 and child support obligations in the amount of \$16,150.00, as the result of both charged and court found contempt for failure to pay child support, for which Applicant was sentenced to 12 months of jail, release-conditioned on an August 11, 1998 settlement requiring Applicant to pay a lump sum, attorneys fees and monthly child support, plus payment on the arrearage, and subject to reinstatement of balance of 12-month jail sentence in the event of Applicant's failure to comply with the settlement terms.

Additionally, Applicant is alleged to have received a special court martial from the Navy under Article 134 of the UCMJ, with two specifications of indecent assault. He is alleged to have been found guilty in February 1995 of two specifications of assault consummated by a battery, a lesser included offense under Article 128, and sentenced to forfeit \$881.00 pay for one month and be reduced from grade E-7 to grade E-4. Applicant is alleged to have been discharged from the Navy as a result of his conviction under honorable conditions as a chief petty officer, and was not permitted to re-enlist.

For his response to the SOR, Applicant admitted each of his delinquent credit card debts and child support charges, conviction and disposition. In explanation, he explained his financial difficulties began in March 1995 after he was discharged from the Navy and could not find work. He moved his family (including his new wife) to Italy in June 1995 to work and attend classes and to had little success in working out payment arrangements with his creditors for the small residue of resources he had left for his creditors after first satisfying his family expenses and child support for his children by his first wife. He consulted with a credit consolidation agency upon his return to the US, but to no avail given the high consistent monthly minimum recommended to him (\$500.00) for setting up to pay his creditors. Applicant assures it takes all of his current pay just to meet his scheduled monthly child support payments pursuant to his court-approved agreement and take care of his current family expenses (to include his current wife and three children). He looks, alternatively, to a pay increase and/or completion of his child support arrearage (which he expects to complete in about two years) to free up more money to begin addressing his old creditors.

Concerning his court-martial on two specifications of assault and battery in February 1995, Applicant collaterally attacks the conviction. Without denying he ever inappropriately touched his accusers, he implicitly denies the severity of his contacts with them, and attributes his conviction to his lawyer's inability to impugn the integrity of his accusers due to a court imposed gag rule against any character attacks of the complainants.

Applicant insists his assault/battery incidents reflected isolated judgment lapses that occurred at a time when his life was at a very stressful time, from which he has learned valuable lessons and made great positive steps of improvement. He cites his strong marriage and family, church devotion and civic commitments as more indicative of his current judgment and reliability.

#### **Relevant and Material Factual Findings**

The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

#### **Financial history**

Applicant encountered financial problems with his credit card debts in the early 90s following his divorce from his first spouse in 1989. Unable to control his finances following his marriage to his current spouse in October 1992, he became increasingly delinquent in all of his credit card accounts, which by January 1995 amounted to the following: his savings bank accounts in excess of \$10,000.00, his CB account of \$4,143.00, his AMEX account of \$6,533.59, and his BNA account of \$8,081.50 (*see* exs. 16 and 17). His financial troubles escalated in June 1995 following his involuntary separation from the Navy under honorable conditions, albeit, barred from re-enlistment. By virtue of his separation and divorce from his first wife in 1989, Applicant became obligated to make child support payments to his former spouse and two children by his first marriage. Unable to stay up with his child support payments, he fell considerably behind in these payments, which by July 1998 amounted to \$16,150.00.

Applicant's financial problems continued to plague him following his involuntary discharge from the Navy in June 1995. Unable to find steady work for several years following his 1995 Navy discharge, or obtain a reduction in his child support obligations, Applicant let his old credit card debts continue to lapse. For the ensuing three years following his discharge, he also failed to make his child support payments to his first spouse. By the time he was arrested in July 1998 and charged with contempt of court for failure to pay child support, Applicant had accumulated \$16,150.00 in child support arrearage. After being court-found guilty of contempt and sentenced to 12 months in jail, he was able to obtain funds from a relative to defray part of the arrearage, and with this contribution assured, he arranged a settlement agreement with his ex-wife that called for a specified up-front lump sum payment, attorneys fees and monthly child support plus payment of the arrearage. The monthly payment agreed to was \$650.00 a month: allocated between child support (\$450.00) and arrearage (\$200.00). This agreement was incorporated into a consent order in August 1998 (*see* ex. 2; R.T., at R.T., at 78-82, 90-91). Applicant has been consistently compliant with the terms of his agreement (*see* ex. C).

With his limited income, Applicant has been unable to address his remaining credit card debts. He inquired of a credit counseling service around January 1999 about his prospects for establishing a payment plan to pay his old creditors over an agreed period of time. His creditors had rebuffed his individual payment overtures and insisted on full payment, which he could not do with his available income. However, the counseling service indicated he would need to set aside \$546.00 a month to apportion his creditors under the scheduled plan they set up for him. Unable to meet this monthly minimum payment with the \$181.00 of net remainder available to him, he declined.

Applicant hopes to receive a 15 per cent annual pay raise in the near future in recognition of his outstanding service to his contractor employer, but has no guarantees at this time. His only other option for freeing up additional money to address his old creditors is the elimination of his child support arrearage, which he expects to accomplish in about two years (*see* R.T., at 126-27). Having rejected bankruptcy as an option for discharging his debts, he has no current means of paying down his old debts, certainly not with all of his current remainder income being used to pay toward his child support and arrearage (*see* R.T., at 129-31).

### **Prior assault incidents**

While on active military duty, Applicant was accused by two separate complainants, each of subordinate rank to Applicant, of sexually assaulting them. CI was the first to accuse Applicant of assaulting her. She charged him with sexual assault on two separate occasions: one in the winter of 1990 and a second in July 1992. C1's detailed account to the Naval Criminal Investigative Service (NCIS) is quite specific and includes her relating her assault by Applicant to the latter's current spouse (S2), who reiterated the same in her account to NCIS. CI summarized the incident in a statement given to NCIS in February 1994. CI described her work relationship with Applicant, which began in 1988, and social relationship that developed. According to C1, Applicant (who was dating C1's friend at the time) and CI would get together from time to time with their respective friend and spouse. These social exchanges suddenly turned exploitative according to C1, in the winter of 1990, when Applicant entered her office and began to embrace and grope her. Fearful he was about to rape her as she struggled to escape his forceful advances, she was able to finally push him away and let herself out of the office (*see* ex. 13). She later told a friend of the incident but did not report it. Sometime later (in July 1992), C1 encountered Applicant again and exchanged phone numbers. She responded affirmatively to his follow-up telephone request to come over to his house to meet his children. Once she reached his home, C1 (according to her account) was forcibly embraced, groped and partially disrobed by Applicant. She claimed he made overt physical attempts to rape her. Only after Applicant's oldest son entered the room to Applicant's surprise was C1 able to muster

enough strength to break free of Applicant's grasp (ex. 13). Like the first incident, C1 didn't report this one to the police.

After a chance meeting with Applicant and his spouse (his girlfriend at the time of the July 1992 incident) in February 1994, the spouse (who according to C1 had detected some nervousness in Applicant during their meeting) called C1 to inquire of any sexual affairs C1 might have had with Applicant. C1 confirmed to S2 that Applicant had sexually assaulted the former on the two occasions she recited to the NCIS (*see* ex. 13). S2, in turn, corroborated C1's account..

A second accuser (C2) claimed Applicant sexually assaulted her as well (*see* exs. 12 and 13). C2 claimed to have been invited aboard ship for a tour by Applicant in July 1993. Once aboard ship, she was escorted to Applicant's office, where she was forcibly embraced, partially disrobed and groped by Applicant. After she was able to free herself and return to her ship, she told some friends of her experience with Applicant but made no police report until interviewed by NCIS in August 1993 and re-interviewed in February 1994 (ex. 13).

While Applicant admitted to sexually-related exchanges with both C1 and C2, he denied sexually assaulting either enlistee. Acknowledging his encounter with C1 to be of a sexual nature, he assured his acts were mutually consensual in his statements to NCIS in November 1993, and again in March 1994 (ex. 13). Countering the accusations of his accusers, he attacked their credibility, something he was barred from doing at his court martial (*see* R.T., at 71-74; ex. 3).

To accept Applicant's denials would require a disregard of his convictions by a convened special court-martial who heard the respective accounts of Applicant and his accusers and resolved the differences adversely to Applicant. While the conviction itself (*see* ex. 14) is certainly not dispositive, it was admitted in evidence and is relevant. Not only are the accounts of Applicant's accusers and current spouse (S2) recited in exhibits 12 and 13 highly detailed and plausible, but they were accepted by the court martial panel who heard the individual accounts and returned a conviction on two specifications of the lesser included offense of assault consummated by battery under Article 128 of the UCMJ. In doing so, the court martial panel accepted the claims of Applicant's accusers over Applicant's denials (*see* ex. 14). The assault accounts of C1 and C2 are accepted over Applicant's repeated denials, taking into account both the raw accounts contained in the admitted exhibits and Applicant's explanations provided at hearing.

Applicant enjoyed an otherwise meritorious Naval career, which is partially documented by the numerous awards and citations he is credited with receiving over his 17-year active military career (*see* ex. 14), and reinforced by Applicant himself (*see* ex. A). Applicant is highly regarded by his current supervisor as a valued member of his contractor team, who characterizes him as prompt, efficient and knowledgeable (*see* ex. B).

### **Service separation**

Applicant's duty tour was scheduled to end prior to February 1995, but because of his impending court martial, his duty tour was involuntarily extended (*see* ex. 15). He subsequently received his discharge (in March 1995) under honorable conditions at his E7 pay grade, but subject to an RE-4 code, which barred his re-enlistment.

### **POLICIES**

The Adjudicative Guidelines of the Directive (Change 4) list "binding" policy considerations to be made by Judges in the decision making process covering DOHA cases. The term "binding," as interpreted by the DOHA Appeal Board, requires the Judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the Judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

### **Financial Considerations**

Concern: An individual who is financially overextended is at risk at having to engage in illegal acts to generate funds. Unexplained influence is often linked to proceeds from financially profitable criminal acts.

### **Disqualifying Conditions**

DC 1. A history of not meeting financial obligations.

DC 3. Inability or unwillingness to satisfy debts.

### **Mitigating Conditions**

MC 1. The behavior was not recent.

MC 3. The conditions that resulted in the behavior were largely beyond the person's control (*e.g.*, loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation).

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

### **Criminal Conduct**

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

### **Disqualifying Conditions:**

DC 2 A single serious crime or multiple lesser offenses.

### **Mitigating Conditions:**

MC 1 The criminal behavior was not recent.

MC 2 The crime was an isolated incident.

MC 6 There is clear evidence of successful rehabilitation.

### **Burden of Proof**

By dint of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate the facts proven have a nexus to the applicant's eligibility to obtain or maintain a security clearance. The required showing of nexus, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

## CONCLUSIONS

Applicant comes to these proceedings with a history of security-significant problems: troubled credit-card delinquencies and child support arrearage that resulted in a contempt conviction and sentencing to jail time that was cut short only by Applicant's agreeing to repayment arrangements. These collective financial problems create judgment and reliability issues germane to appraising his eligibility to access classified information. Security concerns are also raised over Applicant's assault and battery conviction by a convened Navy court martial panel in February 1995 on two specifications of indecent assault against Applicant. For these assault convictions, Applicant was sentenced to forfeit \$881.00 pay for one month and to be reduced in grade from grade E-7 to grade E-4. With his court martial proceedings resolved, he was discharged from the Navy under honorable conditions as a chief petty officer, without permission to re-enlist.

### **Financial Issues**

Over an extended period (beginning as far back as 1991) following his divorce from his first spouse (S1), Applicant became delinquent in a number of his debts: most credit-card related, but one involving a history of defaulted child support. He made no appreciable payments on these debts after he was involuntarily discharged from the Navy under honorable conditions in March 1995. After encountering difficulties finding gainful employment, Applicant experimented for a while with supplemental part time jobs before giving them up to spend more time with his spouse and children. He repeatedly deferred addressing his delinquent debts until he was financially able to address them, but promised DSS over and over to do so. To date, he has not, except for his delinquent child support, which he has been paying in accordance with his court-approved agreement with S1.

Not only has Applicant avoided each of his old credit card debts since at least 1995, he has managed to let most of these debts go to collection. To date, he has not only rejected bankruptcy but he has discounted credit consolidation as a repayment option, having previously consulted credit counseling specialists and failed to accept their recommended minimum monthly payment.

At issue in this proceeding is not only Applicant's reliability and trustworthiness in light of his longstanding delinquent credit card debts (in excess of \$28,000.00), but also his unwillingness or inability to seriously address them. Security determinations have never confined risk considerations to the elimination of debts that result from collection action and write offs, but rather they have looked to the applicant's overall financial history to shed light on his most recent conduct as an indicator of recurrence risks. From Applicant's history of covered financial difficulties come implicit judgment/trust concerns, not easily extenuated or mitigated without manifest repayment proofs.

Although Applicant cannot be faulted for incurring all of his consumer debts and child support obligations, some judgement imprudence must be imputed to him for not making more concerted efforts to address them when he had the apparent ability to do so. Security concerns justifiably attach to Applicant's failure to make earnest efforts to repay his old creditors, either through individual work-out efforts, or collective debt consolidation. Appraising the security significance of Applicant's financial deficiencies, several Disqualifying Conditions (DC) of the Adjudicative Guidelines (for financial) apply: DC 1 (history of not meeting financial obligations) and DC 3 (inability or unwillingness to satisfy debts).

While some of Applicant's child support arrearage might be extenuated by his employment-related exigent circumstances following his sudden Navy discharge in March 1995, none warrant total extenuation, or mitigation, given the extent of his neglect of his child support obligations and his considerable history of consumer debt even before his discharge. Without some tangible indicators of his addressing his consumer debt delinquencies, as he is credited with undertaking with his child support responsibilities, too many doubts remain about his ability to resolve his debts to enable safe predictive judgments about his future financial stability. Unfavorable conclusions warrant, accordingly, with respect to the allegations covered by sub-paragraphs 1.a through 1.e and 1.g of Guideline F. Only with respect to Applicant's child support payments, which Applicant demonstrates faithful payment under the court-approved settlement plan he arranged with his former spouse (S1), does he sufficiently mitigate to absorb security-related pressure and judgment risks.

## **Assault Issues**

Applicant's 1995 court martial conviction on two specifications of assault consummated by battery arose out of separate sexually related incidents with two complainants: C1 and C2. While each of these assaults occurred over five years ago, they remain security significant incidents of criminal conduct by virtue of both their seriousness under the controlling UCMJ and their multiple occurrence, in conjunction with his more recent (1998) contempt citation arising out of his child support arrearage.

Applicant's only defense to C1/C2s' claims that he sexually abused them on different occasions is that he harbored no sexual purpose in his embracing and touching them, mistaken as he was in his efforts to be simply friendly and sociable with them. Having steadfastly denied abusing C1/C2, he admits to no physical or psychological abuse of either complainant. Essentially, Applicant urges anew his innocence from any form of assault and battery on C1/C2 and seeks collateral relief from the security implications of his conviction, citing erroneous attributions made to him in the NCIS report and testimony admitted at is court martial. Absent any clear indicators that the assault and battery offenses he was convicted of were of a felony quality, he would not be barred by collateral estoppel from contesting the offenses anew, as he does here. *See* ISCR Case No. 96-0525 (June 17, 1997); ISCR Case No. 94-1213 (June 7, 1996). Nonetheless, the evidence is against Applicant on his attempts to refute them. Having chosen to pursue this course of denial, Applicant is in no credible position at this time to offer persuasive extenuation or mitigation of his assault and battery conviction.

Applicant's assault and battery conviction is sufficient alone to attribute serious criminal misbehavior to him and warrant the application of the Adjudicative Guidelines (for criminal conduct): DC 2 (a single serious crime or multiple lesser offense). They involve not only serious assaults on two female members of his Navy command, but assaults on younger female subordinates, who by his senior rank and experience he was duty-bound to protect and respect. Applicant's proven assault/battery transgressions are still too recent, given the seriousness of the conviction, compounded by his more recent contempt citation, to consider them mitigated under any of the pertinent mitigating conditions of the Adjudicative Guidelines. Unfavorable inferences warrant with respect to the allegations covered by Criterion J as well.

## **FORMAL FINDINGS**

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS listed above, this Administrative Judge makes the following FORMAL FINDINGS:

### **GUIDELINE F (FINANCIAL CONSIDERATIONS): AGAINST APPLICANT**

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

Sub-para. 1.d: AGAINST APPLICANT

Sub-para. 1.e: AGAINST APPLICANT

Sub-para. 1.f: FOR APPLICANT

Sub-para. 1.g: AGAINST APPLICANT

### **GUIDELINE J (CRIMINAL CONDUCT): AGAINST APPLICANT**

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: AGAINST 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 Applicant's security clearance.

Roger C. Wesley

Administrative Judge