

DATE: March 2, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21085

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 39-year-old engineer has worked for a major defense contractor for more than two years. Applicant filed for Chapter 7 bankruptcy protection in August 2002. The debts were discharged in early 2003, but Applicant has chosen to reassume all of them and has either paid them off or is current in resolving all of them. Her problems at her previous employer have not been shown to have been the result of any intentional improper conduct on her part. She has had no problems of record during the more than two years of her current employment. Mitigation has been established. Clearance is granted.

STATEMENT OF THE CASE

On July 9, 2003, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On July 31, 2003, Applicant responded to the allegations set forth in the SOR and elected to have a determination made after a hearing before a DOHA Administrative Judge. The case was assigned to me on September 17, 2003. A Notice of Hearing was issued on October 29, 2003, and the hearing was conducted on November 17, 2003. At the hearing, the Government did not call any witnesses but introduced six exhibits, which were marked and admitted as Government Exhibits (GX) 1 - 6. Applicant testified and offered two exhibits, which were marked for identification and admitted as Applicant's Exhibits (AX) A and B. On November 23, 2003, Applicant timely submitted an additional post hearing exhibit of nine pages, which were admitted without objection as AX C, collectively. The transcript was received at DOHA on December 3, 2003.

In his response, Applicant admitted, with explanations, all of the allegations in the SOR. Each of these admissions is incorporated herein as a finding of fact.

FINDINGS OF FACT

Applicant is a 40-year-old computer technician, and has worked for her present employer since 2001. The SOR contains one allegation under Guideline F (Financial Considerations), three allegations under Guideline M (Misuse of Information Technology), and three allegations under Guideline E (Personal Conduct). In her response, Applicant admits the single Guideline F allegation. She denied, with explanations, all three Guideline M allegations and, although she does not specifically address the Guideline E allegations, I deem them to have been denied since they refer to the three Guideline M allegations she has denied. Applicant's factual admissions, as cited above, are incorporated herein as Findings of Fact.

After considering the totality of the evidence derived from Applicant's testimony and all exhibits, I make the following additional FINDINGS OF FACT as to each SOR allegation:

Guideline F (Financial Considerations)

1.a. - On August 2, 2002, Applicant filed for bankruptcy protection under Chapter 7 of the U.S. Bankruptcy Code. She listed total assets of \$8,205.00 and total liabilities of \$58,971.75. Applicant filed to avoid a lawsuit by one of her major creditors. A discharged was granted on March 18, 2003 (GX 4) but Applicant subsequently reassumed responsibility for all of the debts. A letter from a financial management consulting company, dated April 22, 2002, states that 13 of the delinquent debts covered by the now discharged Chapter 7 filing had been "paid off . . . in full" and that delinquent debts relating to student loans had been consolidated into one (AX B, dated June 11, 2003) and were now being paid off (AX A). Consequently, I find that Applicant is no longer financially overextended.

Guideline M (Misuse of Information Technology)

2.a. - It has not been established that Applicant stored pornographic pictures and jokes on her office computer or that she knowingly violated Company A's Sexual Harassment Policy.

2.b. - It has not been established that Applicant violated Company A's policy against using company property for personal use by "chatting" on the Internet.

2.c. - Applicant's employment with Company A *was not* terminated because of or when Applicant became verbally abusive to the President of Company A after receiving a policy memorandum regarding a violation of office procedures. The evidence does not establish that Applicant was verbally abusive. Her termination of employment was not connected to the matters alleged in SOR 2.a and 2.b.

Guideline E (Personal Conduct)

3.a., 3.b., and 3.c. - the evidence alleged under SOR 2.a., 2.b., and 2.c., *does not* establish violations of Guideline E, or the exercise of poor judgment, unreliability, and untrustworthiness.

Since July 2001, Applicant has been employed by a major defense contractor. She has documented her periodic evaluations since then (AX C1). No problems of any kind are noted and her performance has been graded with five "1"s (Superior) and one "2" (Distinguished) assessments.

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of

continuation or recurrence (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above 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, I find the following specific adjudicative guidelines to be most pertinent to this case:

GUIDELINE F (Financial Conduct)

The Concern: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

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

1. A history of not meeting financial obligations;
3. Inability (but not unwillingness) to satisfy debts.

Conditions that could mitigate security concerns:

3. The conditions that resulted in the behavior were largely beyond the person's control.
4. 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.
6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

GUIDELINE M (Misuse of Information Technology)

The Concern: Noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's trustworthiness, willingness, and ability to properly protect classified systems, networks, and information.

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

1. Illegal or unauthorized entry into any information technology system, but it has not been shown that Applicant knowingly did so.
3. Removal (**or use**) of hardware, software, or media from any information technology system without authorization, but it has not been established that Applicant did so.

Conditions that could mitigate security concerns:

1. Any misuse was not recent or significant.
2. The conduct, if improper, was unintentional or inadvertent.

GUIDELINE E (Personal Conduct)

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or

unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information;

Condition that could raise a security concern and may be disqualifying:

1. Reliable, unfavorable information provided by associates, employers, co-workers, neighbors, and other acquaintances.

Condition that could mitigate security concerns:

1. The information was not substantiated or not pertinent to a determination of judgment, reliability, or trustworthiness.

None of the other mitigating conditions are relevant under our specific facts and circumstances.

Eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the Directive's "whole person" concept, I am not permitted to speculate, but can only draw those inferences and conclusions that 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.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an applicant for a security clearance, in his or her private or work life, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by an applicant's admissions or by other evidence) and establishes conduct that creates security concerns 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 conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

I have considered the evidence in light of the appropriate legal standards and factors, and have assessed Applicant's credibility based on the entire record.

Applicant is a 39-year-old single mother of a 13-year-old child. She lives frugally, in an apartment renting for \$825 per month. She is paying \$200 per month and \$210 per month to the two biggest creditors (Tr at 47). She receives some financial help from her mother, once or twice a year (Tr at 48). She has no credit cards and no subsequent loans (Tr at 49).

Financial Considerations

The only allegation made under this guideline concerns Applicant's August 22, 2002 Chapter 7 bankruptcy filing and

the March 18, 2003 discharge. The \$58,971.75 figure cited in SOR 1.a. comes from Applicant's bankruptcy filing documents (GX 5), so that after the discharge, the listed debts had been discharged except for the student loan debts (GX 4). \$39,000 was "School loans" that have been paid back and/or consolidated (Tr at 30). Notwithstanding the bankruptcy, which Applicant says was filed to stop a pending lawsuit by one of her major creditors, she has reassumed responsibility for all of the listed debts; has paid off many of them and has begun making payments on her consolidated student loan debt, in a manner satisfactory to the major creditor (AX B).

Bankruptcy is a long used and legally recognized means of escaping from debt. Filing for Chapter 7 prevents covered creditors from suing or seeking to collect on the debts owed them, but it is not until the Bankruptcy Judge signs the Discharge document that legal responsibility to pay the debts ends. While Bankruptcy is a legal way of avoiding debt, it may nonetheless be considered in evaluating an individual's suitability for a security clearance. Adverse inferences may reasonably be drawn if the bankruptcy laws are abused, such as by multiple filings, or where there is an indication that an applicant incurred debts with the intent at the time to later seek bankruptcy protection. None of these concerns are suggested by the record.

The stated concern for Guideline F is that excessive debt places a person at risk of having to engage in illegal acts to generate funds. This concern does not appear to be applicable in this case, considering Applicant's greatly improved financial condition. The debt problems arose when she left another city to move to a new job in State A and the job suddenly was no longer there (Tr at 41 - 44). The manner in which she has assumed responsibility for debts she no longer was legally required to pay indicates a high level of integrity rather than poor judgment. While Disqualifying Conditions (DC) 1 and 3 are applicable, the evidence in mitigation establishing the applicability of MC 3, MC 4, and MC 6 overrides the concerns expressed in the SOR. Consequently, the Guideline F allegation is found for Applicant.

Misuse of Information Technology and Personal Conduct

The evidence on which the three allegations made under each guideline is found in documents obtained from Applicant's former employer, Company A (GX 3). Page 1 of that exhibit is a February 27, 2001 letter from the Controller of Company A. It provides the company's view of the circumstance behind Applicant's resignation from Company A on November 9, 2000, after Applicant's receipt of a negative memorandum based on "improper lockup procedures." (The record does not explain what the "lock up procedure" was or how Applicant violated it). The memorandum also describes Applicant as "verbally abusive and very upset" toward the Company president, Mr. X (*Id.*, at pages 2, 3). The memo then describes a post termination review of Applicant's office computer that turned up "several personal items" and "several pictures and jokes that were violations of pornography" (*Id.*, at page 2) The memorandum concluded that "Due to our Sexual Harassment policy that exists in our company, this is a direct violation of company rules" (*Id.*).

SOR 2.a., 2.b., 3.a., and 3.b. - the record does not contain any copies of the Company Sexual Harassment Policy or of the pictures and jokes that were considered by the Company to be in violation of its Sexual Harassment Policy, nor was any representative from Company A at the hearing. In her response to the SOR, Applicant denied the conduct in question, making the issue a controverted one and therefore placing on the Government the obligation and burden to prove the accuracy of the allegations. Government Exhibit 3 established what Company A said, but it does not provide any proof as to what Company A's Sexual Harassment Policy is/was at the times in question, what the pictures portrayed or why and how the pictures and jokes violated that policy.

I have carefully considered Applicant's first explanations, in her July 31, 2003 Response to the SOR. I have also considered her hearing testimony in which she explained her contributions to the company and the problems that arose when the owner/president began telling "dirty jokes, racist jokes" that she found to be humiliating to herself and other employees (Tr at 32 - 39, 53 - 62). This is not the more typical case where the Government's evidence clearly establishes a prima facie case of a violation of one or more Directive Guideline and Applicant then carries the heavy burden of establishing mitigation or extenuation.

Applicant's response put the Government on notice as to Applicant's contrary view of what happened, including allegations of improper conduct on the part of the company president. The response gave the Government an opportunity to seek and obtain witnesses or documents that would clarify the validity of its allegations. In the absence of such evidence from Company A, the totality of the record evidence does not establish that Applicant did anything she

knew or should have known was in violation of explicit written company policy. In fact, the documents from Company A (GX 3) show that the pictures and jokes in question were found after Applicant left the company, so she was not put on notice about them or that they were considered to be in violation of company policy.

I am impressed by her two subsequent years of employment at a major defense contractor. She has positive work evaluations and no problems of record, specifically none of the type alleged in the SOR. I have had an opportunity to hear and observe Applicant at the hearing. I find her to be a credible. On this basis, whatever Applicant may have done in using her company computer, the evidence does not establish that she exercised unacceptable and/or questionable judgment, or that she was unreliable or untrustworthy.

SOR 2.c. and 3.c. - The same problem exists as to these allegations. The Government's evidence on point, GX 3, cites verbal abuse and profanity, but does not otherwise explain or describe the language and/or circumstances. Applicant's response to the SOR contends that it was the company president who had acted improperly toward Applicant, and adds considerable detail. This allegation also being controverted, the burden was on the Government to establish the validity of its case. In the context of all the evidence of record, the evidence is insufficient to establish that Applicant's employment was terminated for the reasons stated in the SOR. .

In summary, I conclude that the Government has not established a *prima facie* or initial case as to (1) SOR 1.a., because there has been no substantial basis shown (by an admission and/or independent evidence) for an adverse inference being drawn from Applicant's Chapter 7 filing and discharge. Likewise, as to SOR 2.a. - 2.c. and 3.a. - 3.c., the Government has not established that Applicant actually violated a specific company policy or that the manner of her exit from Company A demonstrates unacceptable conduct at a level which reasonably raises a risk that she may not properly safeguard the nation's secrets.

Based on the totality of the evidence, I conclude that the Government has not established the applicability of any of the possible disqualifying conditions under Guidelines F, M, or E. Consequently, all three Guidelines are found in favor of the Applicant

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline F (Financial Considerations) For the Applicant

Subparagraph 1.a. For the Applicant

Guideline M (Misuse of Information Technology) For the Applicant

Subparagraph 2.a . For the Applicant

Subparagraph 2.b. For the Applicant

Subparagraph 2.c. For the Applicant

Guideline E (Personal Conduct) For the Applicant

Subparagraph 3.a. For the Applicant

Subparagraph 3.b. For the Applicant

Subparagraph 3.c. For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent

with the national interest to grant or continue a security clearance for Applicant.

BARRY M. SAX

ADMINISTRATIVE JUDGE