

DATE: February 6, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-22742

## **DECISION OF ADMINISTRATIVE JUDGE**

**ROGER C. WESLEY**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Erin C. Hogan, Department Counsel

#### **FOR APPLICANT**

Rock Grundman, Esq.

### **SYNOPSIS**

Applicant, who with her husband had historically relied on their two incomes to sustain their finances and good credit, encountered severe setbacks associated with her husband's medical issues, work layoff and ensuing set backs in his startup commercial fishing enterprise. Despite their limited income, Applicant has shown persistent good faith efforts in addressing her old debts and finally paying off the last ones with funds obtained from her 401(k) retirement fund. Applicant is highly regarded by her employer and coworkers and extenuates and mitigates the Government's security concerns associated with her debt delinquencies. Further, she successfully refutes Government claims she deliberately omitted some of her debts from her SF-86. Clearance is granted.

### **STATEMENT OF THE CASE**

On June 10, 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, 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 July 23, 2003, and requested a hearing. The case was assigned to me on September 13, 2003, and was scheduled for hearing on October 28, 2003. A hearing was convened on October 28, 2003, 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 5 exhibits; Applicant relied on six witnesses (including herself) and 10 exhibits. The transcript (R.T.) was received on November 5, 2003.

### **SUMMARY OF PLEADINGS**

Under Guideline F, Applicant is alleged to have four delinquent debts, which exceed \$35,000.00 in total. Under

Guideline E, she is alleged to have falsified her security clearance application (SF-86) of January 31, 2001, by omitting her debts covered by sub-paragraphs 1.b, 1.c and 1.d of the SOR.

For her response to the SOR, Applicant admitted three of her alleged delinquent debts: her debts covered by sub-paragraphs 1.a, 1.c and 1.d, but denied the debt covered by sub-paragraph 1.b was ever her debt. Applicant denied any intent to falsify her January 31, 2001 SF-86. In explanation, she claimed her debts resulted from her husband's layoff over medical complications and ensuing difficulties in starting a commercial fishing business. She claimed a preference for paying off her debts over bankruptcy and cites to considerable progress in paying off her joint debts with reduced income. She claimed unfamiliarity with one of the listed debts (*i.e.*, the debt covered by sub-paragraph 1.b) and her understanding the creditor has no record of such an account. She claimed she provided details of her debts as she was able to obtain details of them and will seek professional help to address her remaining financial obligations.

### **PROCEDURAL ISSUES**

Before the close of the hearing, Applicant requested the record be kept open to permit her the opportunity to supplement the record with documentation of her utilizing funds from her 401(k) retirement account to satisfy her remaining two listed creditors. Upon considering Department Counsel's objections to holding the record open to facilitate Applicant's exploration of arrangements to pay off her remaining creditors, and finding good cause for holding the record open (*see* R.T., at 77-96), Applicant was afforded an additional 17 days to supplement the record with documentation of her resolving her two remaining debts. Government was granted 4 days to respond. Within the time permitted, Applicant supplemented the record with her affidavit and two attachments documenting her addressing of her two remaining delinquent debts. There being no objection from Department Counsel on the admission of this affidavit, Applicant's affidavit and attachments were admitted as Applicant's exhibit J.

### **STATEMENT OF FACTS**

Applicant is a 49-year-old senior engineering specialist for a defense contractor who seeks to retain her security clearance. 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.

Applicant grew up in a Navy environment: Her father was a Navy test pilot. Before graduating from college in 1967 with a degree in aerospace engineering, she married her first husband (H1) and had a child. She and H1 were always able to manage their finances without difficulty before their divorce in 1981.

Applicant met her current husband (H2) while teaching a local college course. She was a single mother at the time with two children, and he was one of her students. She married H2 in 1983. By 1986, Applicant had returned to her current employer; H2 took a job as an engineering specialist with the same employer in May 1987.

Until about 1997, Applicant and her husband were able to live comfortably within their means as a double income family. H2 was earning over \$54,000.00 in 1997, while Applicant was earning slightly more, at \$64,000.00 a year. Together they earned about \$118,000.00 a year (R.T., at 25). While they had accumulated credit card debt, a mortgage and car payments, they encountered no problems in remaining current with their debts. In December 1996, though, H2 was diagnosed with colon cancer. Surgery ensued, which was followed by a lengthy convalescence. When he returned to work, he encountered problems with his supervisor who tracked his movements. Unable to work out their differences, H2 was removed from his project lead, and ultimately accepted a layoff in the summer of 1998. As a middle-aged person who had just emerged from a major illness, H2 experienced difficulty in finding employment. With the support of Applicant, he turned to self-employment.

Determined to enter the commercial fishing business, H2 (with Applicant's backing) capitalized his fishing venture with the sale of the family home. The results to date have been discouraging. H2 has barely been able to meet expenses and netted little this past year. While Applicant continues to work for her same employer, with pay raises that have enhanced her income, H2 continues his struggle to gain profitability in his out-of-state commercial fishing business (R.T., at 104, 107). For the past five years, each has lived with his and her respective parents: their reasons for this arrangement is to facilitate their ongoing collective efforts to save on expenses and pay off their debts.

Both Applicant and H2 have wanted to avoid bankruptcy and have been able to make progress in paying off their debts and keeping current on two cars, four credit cards and a farm tractor (paid off earlier this year). Besides addressing her own debts, she has had to earmark some of her available income to keeping H2's commercial business afloat. After paying her current accounts with her available income, she has tried to focus on paying or settling one of her old debts each year. She was able to pay off two of her old debts (none covered in the SOR) in 1999 and 2001, respectively. However, she incurred setbacks in her repayment efforts when one of the creditors with whom she worked out a reduced settlement reported the difference to the IRS, which assessed her additional taxes on what the Service considered deemed income. These tax liabilities were finally paid in April 2002. Applicant suffered still further setbacks in her repayment plans when she was involved in a vehicular accident in October 2002 and had to go out and purchase a replacement vehicle to get her and back and forth to her work site. Her efforts to work out modest payment plans with her listed creditors after her car wreck failed over creditor demands for larger lump sum payments (R.T., at 66, 72-75).

Of the four listed debts in the SOR, Applicant documents payment of the first debt (covered by sub-paragraph 1.a) in September 2003 (*see ex. A*). Unfamiliar with the account covered by sub-paragraph 1.b (reported in the Government's credit report of October 2001, *ex. 3*), she checked with the creditor who had no record of such an account (R.T., at 62). She has since obtained the removal of this debt from her credit reports (*see exs. F and G*). The two remaining accounts covered by sub-paragraphs 1.c and 1.d, respectively, are documented to have been satisfied in full, through funds obtained from her 401(k) retirement fund, in the materials covered by Applicant's post-hearing affidavit attachments (*see ex. J*).

Asked to answer question 38 of her January 2001 SF-86, Applicant omitted three debts attributed to her by her 2001 credit report: creditors 1.b, 1.c and 1.d. Creditor 1.d was covered by an obtained judgment, and this debt Applicant listed separately under question 37 (inquiring about unpaid judgments). No intent to conceal this debt is attributed to Applicant. Likewise, no intent to conceal the debt covered by sub-paragraph 1.b can be attributed to Applicant. On the basis of both her testimony and her latest credit reports reflecting deletion of this debt, she convinces that this was not her debt. The only debt with this same creditor that is identified as hers is in current status (*see exs. F and G*). This leaves the debt covered by sub-paragraph 1.c as the lone debt she is deemed to have omitted when answering question 38. Without a credit report to assist her, she missed this debt as one she was responsible for. Her claims of mistake are accepted as to this debt. No inferences of falsification are warranted as to this omission from her answer to question 38.

Similarly, no inferences of falsification of question 39 are warranted, since in addition to Applicant's mistaken failure to identify her creditor 1.c debt, the debts called for in question 39 (*i.e.*, Applicant's creditor 1.a debt) overlap the same debts covered by question 38 in Applicant's case. Applicant's assured assumption she did not think she had to list creditor 1.a again (having listed it when responding to question 38) is a reasonable one and entitled to acceptance. No inferences of falsification can be attributed to her with respect to her failure to list her creditor 1.a debt again when responding to question 39.

When interviewed by a DSS agent in February 2002, Applicant acknowledged all of her outstanding debts (including the debt covered by creditor 1.c) when asked about them. While Applicant brought an updated credit report to her interview to aid her in answering questions about her debts, she cannot remember whether she volunteered details about her previously omitted creditor 1.c debt or was first shown a credit report with the reported debt by the interviewing DSS agent. No factual inferences can be drawn one way or the other based on Applicant's testimony and review of her February 2002 DSS statement (*ex. 2*).

Applicant is highly regarded by her supervisor, project security custodian, and coworkers as an employee who is honest, conscientious, and reliable. Applicant is characterized by her colleagues who have worked with her for many years as a team member with an excellent reputation for patriotism, loyalty and trustworthiness.

## POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require 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.

### **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.

**Disqualifying Conditions:** None

**Mitigating conditions:** None

### **Burden of Proof**

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's 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 that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, 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.

### **CONCLUSION**

Applicant and H2 accrued considerable debt, much of it credit card-related, which became delinquent as a result of H2's 1998 layoff and ensuing difficulties in finding work, and turning his commercial fishing enterprise into a profitable business. Before experiencing these setbacks, Applicant and his wife made out quite well financially as a two-income family. With their more limited income they have been hard pressed to pay off all of their old debts, despite persistent good-faith efforts to do so.

Applicant's outstanding debts as of the date of the hearing comprised the two debts (one an outstanding judgment) covered by subparagraphs 1.c and 1.d. Of the other two listed creditors, one (creditor 1.a) was documented to have been paid before the hearing; while the other (creditor 1.b) was documented not to be her debt. On the strength of the evidence presented, two of the Disqualifying Conditions (DC) of the Adjudicative Guidelines for financial considerations apply: DC 1 (history of not meeting financial obligations) and DC 3 (inability or unwillingness to satisfy debts).

Since the conclusion of the hearing, Applicant was able to document payment in full of her two remaining listed creditors: creditor 1.c and creditor 1.d. Based on Applicant and H2's testimony and the documentation they provided, Applicant's covered debts are both extenuated and mitigated by the special circumstances that gave rise to his debt delinquencies and her earnest repayment efforts. That Applicant valued her credit and security status enough to invade her 401(k) to obtain the funds to repay her last two unpaid creditors is especially indicative of the premium she placed on bringing her accounts current and restoring her good credit. Applicant's documented repayment of her debts identified to be her own are entitled to credit as credible documented repayment efforts worthy of mitigation. Her extenuation and mitigation efforts warrant the application of several mitigating conditions of the Adjudicative Guidelines for financial considerations: MC 1 (behavior not recent), MC 3 (conditions largely beyond the person's control) and MC 6 (initiated good-faith effort to repay overdue creditors).

Taking into account all of the circumstances surrounding Applicant's accumulated delinquent debts and steps she has taken to repay all of her identified creditors, favorable conclusions warrant with respect to the allegations covered by Guideline F.

Posing potential security concern as well is Applicant's omission of one of her three determined debt delinquencies (*viz.*, her creditor 1.c debt) from her January 2001 SF-86. Her omission warrants no applicability of DC 2 (deliberate omission, concealment, or falsification of relevant and material facts) of the Guideline for personal conduct in view of the drawn inference her omission was not deliberate. In the same vein, given her listing of her two identified delinquent debts in responding to questions 37 and 38, respectively, no inferences of deliberate omission were drawn from her denial of any delinquencies of 90 or days or more when she responded to question 39. So, under all of the circumstances considered, Applicant's omissions were not substantiated to be the result of deliberate falsification. Favorable conclusions warrant with respect to subparagraphs 2.a and 2.b of the allegations covered by Guideline E.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the E 2.2 factors enumerated in the Adjudicative Guidelines of the Directive.

### **FORMAL FINDINGS**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE F (FINANCIAL): FOR APPLICANT

Sub-para. 1.a: FOR APPLICANT

Sub-para. 1.b: FOR APPLICANT

Sub-para. 1.c: FOR APPLICANT

Sub-para. 1.d: FOR APPLICANT

GUIDELINE E (PERSONAL CONDUCT): FOR APPLICANT

Sub-para. 2.a: FOR APPLICANT

Sub-para. 2.b: FOR 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 Applicant's security clearance. Clearance is granted.

Roger C. Wesley

Administrative Judge