

DATE: September 22, 2005

In re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-24392

## **DECISION OF ADMINISTRATIVE JUDGE**

**ROBERT ROBINSON GALES**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Juan J. Rivera, Esquire, Department Counsel

#### **FOR APPLICANT**

Ronald C. Gladney, Esquire

### **SYNOPSIS**

In 2002, Applicant resorted to trespassing when she entered her ex-husband's residence, over his objections, to retrieve a computer her friend had loaned her son. Her ex-husband's overreaction in denying her possession of the computer and in grabbing her against her will, and holding onto her until he fell out of his wheelchair, through no fault of Applicant, according to the police, constituted domestic assault. She was convicted only of criminal trespass. In 2003, she was convicted of DUI when, after drinking with her second husband for several hours and having a dispute with him, she drove her automobile into a car carrying him. Following a March 1986 drug-related arrest, all charges were dropped. She is considered fully rehabilitated. The questions and doubts as to her security eligibility and suitability have been satisfied. Clearance is granted.

### **STATEMENT OF THE CASE**

On December 7, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR 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 a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated December 30, 2004, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to me on March 10, 2005. A notice of hearing was issued that same day, scheduling the hearing for March 29, 2005, and the hearing was held as scheduled. Four government exhibits and the testimony of three Applicant witnesses (including the Applicant) were received. The transcript (Tr.) was received on April 8, 2005.

### **FINDINGS OF FACT**

Applicant has admitted most of the factual allegations pertaining to criminal conduct under Guideline J (subparagraphs 1.b. and 1.c.). Those admissions are incorporated herein as findings of fact. She denied the remaining allegation.

After a complete and thorough review of the evidence, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 37-year-old employee of a defense contractor, and she is seeking to obtain a security clearance, the level of which has not been divulged. She had previously been granted a SECRET security clearance in 1988 in connection with her active military service. <sup>(1)</sup>

Applicant was married to her first husband in April 1988 and divorced in October 2000. <sup>(2)</sup> They have two children. <sup>(3)</sup> She was married to her second husband in January 2003 <sup>(4)</sup> and divorced sometime following the filing in December 2004. <sup>(5)</sup> Applicant's relationships with both husbands were volatile and tempestuous, and involved a degree of marital discord and domestic abuse, including two incidents which resulted in criminal charges being brought against her.

On July 31, 2002, Applicant was arrested and charged with (1) Trespass of Real Property and (2) Nonviolent Family Offenses (referred to as Domestic Assault) stemming from an incident at the residence of her first ex-husband. <sup>(6)</sup> She eventually pled guilty to the trespass charge <sup>(7)</sup> and was sentenced to 60 days in jail (suspended), one year bench probation, and ordered to pay court costs. <sup>(8)</sup> The domestic assault charge was dismissed. <sup>(9)</sup>

The events which culminated in the incident started when Applicant was picking up her two children who were, at that time, visiting with her ex-husband in another state. <sup>(10)</sup> After settling the children in her automobile, Applicant returned to her ex-husband's residence to retrieve a computer she had previously obtained from a friend for her son to borrow while with his father. <sup>(11)</sup> As she was picking up the computer, her ex-husband--confined to a wheelchair since an automobile accident after their divorce <sup>(12)</sup>--ordered her to leave his residence and not take the computer. <sup>(13)</sup> When she persisted, he grabbed her around the waist from behind and struggled with her as she attempted to free herself. <sup>(14)</sup> He would not let go and was pulled out of his wheelchair onto the floor. <sup>(15)</sup> Applicant neither touched nor grabbed her ex-husband during the entire incident. <sup>(16)</sup>

The second incident involved Applicant's second husband. On March 13, 2003, Applicant was arrested and charged with (1) Driving Under the Influence (DUI) and (2) Criminal Mischief stemming from an incident at a local restaurant. She eventually pled guilty to a reduced charge of Reckless Driving <sup>(17)</sup> and was sentenced to 12 months supervised probation, 50 hours of community service, ordered to attend victim awareness classes, and ordered to pay court costs and fines. <sup>(18)</sup> The DUI and criminal mischief charges were dismissed.

The events which culminated in the incident started when Applicant was informed that she had been hired for a new position, and she and her second husband went out to celebrate. <sup>(19)</sup> During the period 8 pm until after 11:30 pm, they ate dinner and Applicant consumed about four or five rum and coke mixed drinks. <sup>(20)</sup> Her husband became angered when a stranger walked up to Applicant and offered her a single rose. <sup>(21)</sup> Applicant's husband refused to get into the car to return home, so Applicant got behind the wheel to do so. She became very upset to see him getting into the car of one of his friends, and in her anger, drove up to and bumped the front bumper of the other car three times. <sup>(22)</sup> Her actions did not cause much damage, but were observed by the police. <sup>(23)</sup>

While there were no other marital/domestic violence issues identified, there was one other criminal incident, and it took place in 1986. On March 31, 1986, Applicant was arrested and "booked" for Unlawful Possession of a Controlled Substance. <sup>(24)</sup> She was eventually released without further legal action being taken against her. <sup>(25)</sup>

The events which culminated in the arrest started when Applicant, at the time 18-years-old, accompanied her stepbrother's girlfriend (the girlfriend) to the local courthouse to take care of some unspecified business. Applicant and

another person remained in the car and awaited the return of the girlfriend. Two undercover police officers assigned to the local Bureau of Drug Enforcement, Division of Criminal Investigation, approached Applicant and apparently inquired about a possible purchase of marijuana. <sup>(26)</sup> Based on the ensuing conversation, one of the officers presented the girlfriend one \$20.00 bill in exchange for a \$15.00 "clear baggie of brownish green vegetation." <sup>(27)</sup> The three individuals were arrested and the vehicle was searched. Brownish green vegetation was found in clear baggies in the girlfriend's jacket and in a plastic cup underneath the passenger seat, both of which were claimed by the girlfriend as belonging to her. <sup>(28)</sup> The only substances found following a search of Applicant were 6 pills labeled "Advil," and 28 capsules labeled "Rugby, #3490," <sup>(29)</sup> a substance not otherwise identified or classified.

Applicant has not been involved in any other criminal or drug-related incidents, <sup>(30)</sup> and since the age of 16, has never used any illegal drugs. <sup>(31)</sup>

Applicant has been employed by the same government contractor since March 2003, where she is now an engineer. <sup>(32)</sup> A co-worker speaks very highly of her character and performance. <sup>(33)</sup> She previously served on active duty with the U.S. Air Force, including a tour as an Airborne Surveillance Technician during Operation Desert Shield. <sup>(34)</sup>

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision set forth in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (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 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

### **Criminal Conduct-Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.**

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, are set forth and discussed in the Conclusions section below.

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national security," <sup>(35)</sup> or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. 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.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an 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.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance 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." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

### CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of witness credibility, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

The government has established its case under Guideline J. Domestic quarrels may cause normally reasonable people to do peculiar things, especially if the emotions get the best of them. Situations may get out of hand when the parties resort to verbal threats or intimidation or actual physical abuse, or when one party uses the court system to gain an advantage, especially in domestic or child custody disputes. In this instance, both Applicant and her first ex-husband allowed their mutual anger to cloud their perspectives regarding the welfare of their children and their continuing relationship with each other. Charges of child kidnapping were leveled by Applicant against her former husband and not acted upon by the local police, <sup>(36)</sup> and countercharges of criminal trespass and domestic assault were made by the ex-husband against Applicant. The atmosphere was electric with anger, and neither party handled the situation in a reasonable manner. Applicant resorted to trespassing when she returned to her ex-husband's residence, over his objections, to retrieve the computer her friend had loaned her son. Her ex-husband's overreaction in denying her possession of the computer and in grabbing her against her will, and holding onto her until he fell out of his wheelchair, through no fault of Applicant, constituted assault, but not domestic assault by Applicant against her ex-husband--a fact apparently overlooked by the local police, but not by the court.

Applicant's response to her second husband's reaction to her receiving a rose from a stranger in March 2003, was likewise clouded by her volatile emotions as well as by alcohol. Applicant's criminal conduct, including those two incidents, along with the March 1986 drug-related arrest, clearly fall within Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*) and CC DC E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*).

A person should not be held forever accountable for actions from the past if there is a clear indication of subsequent reform, remorse, or rehabilitation. In this instance, Applicant's two abusive marital relationships have terminated and she has successfully completed the court-mandated probations and community service, as well as attended victim awareness classes. She claims the experiences taught her valuable lessons and as a result, she has modified her conduct and behavior. Time heals many emotional scars, and Applicant has apparently overcame the turmoil of marriages gone

sour. In this regard, CC MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*), CC MC E2.A10.1.3.3. (*the person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*), and CC MC E2.A10.1.3.4. (*the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*) would seem to apply. In terms of pressure or voluntariness, I am not suggesting individuals directed or forced Applicant to do what she has been accused of doing. Instead, I believe the emotional turmoil of marriages gone sour exerted such pressure on her that it caused her to act inappropriately, and none of those pressures are now present.

To the extent there was criminal conduct involving possession of illegal substances--and much of it is disputed or explained by Applicant, as seemingly corroborated by further inaction by the courts--it should be considered aberrant behavior which is inconsistent with Applicant's normal demeanor, and not likely to recur. Even if Applicant was actively involved in drug possession as alleged by the arresting police officers in 1986, these circumstances raise CC MC E2.A10.1.3.1. (*the criminal behavior was not recent*), and CC MC E2.A10.1.3.2. (*the crime was an isolated incident*). Consequently, I conclude that Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case with respect to Guideline J. Accordingly, allegations 1.a. through 1.c. of the SOR are concluded in favor of Applicant.

For the reasons stated, I conclude Applicant is eligible for access to classified information.

### **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 J: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.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. Clearance is granted.

Robert Robinson Gales

Chief Administrative Judge

1. Government Exhibit 1 (Security Clearance Application (SF 86), dated March 18, 2003), at 8.
2. *Id.*, at 3.
3. Tr., at 30.
4. Government Exhibit 1, *supra* note 1, at 3.
5. Tr., at 43.
6. Government Exhibit 3 (Sheriff's Office Records - Arrest Report, dated July 31, 2002), at 1.
7. Tr., at 33.
8. Response to SOR, dated December 30, 2004), at 2.

9. *Id.*

10. *Id.*; Government Exhibit 2 (Statement, dated September 25, 2003), at 2; Tr., at 33, 46. The evidence is inconsistent as to whether the children were "visiting" Applicant's ex-husband or if he had temporary custody of them at that time. Applicant contends the former, while her ex-husband, through the deputy sheriff, contends the latter. Government Exhibit 3 (Sheriff's Office Records - Incident Report, dated July 31, 2002), at 2. It appears she received "full custody" at the time of the divorce in October 2000, but her ex-husband was granted "continued visitation" pending a hearing on Applicant's application to the court requesting permission to relocate the children out of state. Tr., at 46-52. Her application was granted in January 2003. Tr., at 52.

11. Tr., at 33.

12. Government Exhibit 2, *supra* note 10, at 1; Tr., at 34.

13. Government Exhibit 3, *supra* note 10, at 2.

14. *Id.*; Tr., at 34.

15. *Id.*, Government Exhibit 3.

16. Tr., at 34.

17. Response to SOR, *supra* note 8, at 2.

18. Government Exhibit 2, *supra* note 10, at 3.

19. *Id.*, at 2.

20. *Id.*

21. *Id.*

22. *Id.*, at 3; Tr., at 44.

23. *Id.*

24. Government Exhibit 4 (Police Department Investigative Report, dated April 11, 1986), at 3, 5-7; Tr., at 44.

25. Response to SOR, *supra* note 8, at 1.

26. Government Exhibit 4, *supra* note 24, at 4-5.

27. *Id.*, at 5.

28. *Id.*, at 5-6.

29. *Id.*, at 6.

30. Tr., at 45.

31. Government Exhibit 1, *supra* note 1, at 7.

32. *Id.*, at 2.

33. Tr., at 27-28.

34. Response to SOR, *supra* note 8, at 3.

35. Exec. Or. 12968, "*Access to Classified Information*," as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.)

36. Government Exhibit 2, *supra* note 10, at 2.