

KEYWORD: Personal Conduct; Criminal Conduct; Financial

DIGEST: Applicant is 34 years old and previously served on active military duty for seven years. While in the military service she was disciplined under the Uniform Code of Military Justice (UCMJ) for forging a set of Permanent Change of Station orders. After leaving the armed forces she worked for a private company for about five years, when she was terminated for allegations of misappropriating funds that she denied. In 2003, she completed a security clearance application and inadvertently failed to disclose the military discipline. Over a period of time she encountered financial difficulties, which have been resolved. She mitigated the security concerns raised by her personal conduct, criminal conduct, and financial considerations. Clearance is granted.

CASENO: 04-07708.h1

DATE: 02/24/2006

DATE: February 24, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-07708

**DECISION OF ADMINISTRATIVE JUDGE**

**SHARI DAM**

**APPEARANCES**

## **FOR GOVERNMENT**

Julie R. Edmunds, Esq., Department Counsel

## **FOR APPLICANT**

*Pro Se*

## **SYNOPSIS**

Applicant is 34 years old and previously served on active military duty for seven years. While in the military service she was disciplined under the Uniform Code of Military Justice (UCMJ) for forging a set of Permanent Change of Station orders. After leaving the armed forces she worked for a private company for about five years, when she was terminated for allegations of misappropriating funds that she denied. In 2003, she completed a security clearance application and inadvertently failed to disclose the military discipline. Over a period of time she encountered financial difficulties, which have been resolved. She mitigated the security concerns raised by her personal conduct, criminal conduct, and financial considerations. Clearance is granted.

## **STATEMENT OF THE CASE**

On June 22, 2005, the Defense Office of Hearings and Appeals (DOHA) under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial 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 under Guidelines E (Personal Conduct), J (Criminal Conduct), and F (Financial Considerations) why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On July 1, 2005, Applicant filed her Answer and requested a hearing. She admitted many of the allegations in the SOR and denied others. The case was assigned to me on October 20, 2005. A Notice of Hearing was mailed on November 1, 2005, setting the case for hearing on December 1, 2005. At the hearing the Government entered Exhibits (GX) 1-9 into evidence. Applicant submitted seven exhibits that were marked as Applicant Exhibits (AX) A-G and admitted into evidence. Applicant testified in her case-in-chief. DOHA received the Transcript (Tr.) on January 26, 2006.

## FINDINGS OF FACT

Based on the entire record, including Applicant's admissions in her Answer to the SOR and at the hearing, I make the following findings of fact:

Applicant is 34 years old and works as an executive assistant for a federal contractor. She is married and has one child. From 1990 until 1997, she was on active duty in the military.<sup>(1)</sup> She held a security clearance throughout her years in the service.<sup>(2)</sup> At the time she was discharged in 1997, she received 30% disability pay from the government as a result of an automobile accident. Today she receives 70% disability payments, totaling \$973.00 per month.<sup>(3)</sup>

While in the service, Applicant received a Non-Judicial Punishment in December 1996, under Article 15 of the Uniform Code of Military Justice (UCMJ) for a violation of Article 123-Forgery. She fabricated a set of Permanent Change of Station orders and submitted them to her landlord at an apartment complex in an effort to exercise the standard military clause and break her lease. As punishment she performed extra duty for seven days. She wanted to break her lease because of the high crime rate in the area and her fear of living there alone. She realizes she made a serious mistake and should have consulted a military lawyer for help.<sup>(4)</sup> She was 25 years old at the time.

After leaving military service Applicant took a secretarial position with a private company in 1998, earning approximately \$2,400.00 a month.<sup>(5)</sup> She worked there until December 2002, when she was terminated for allegations of misappropriating company funds. Prior to being terminated, she signed a promissory note for \$14,000.00, payable to the employer.<sup>(6)</sup> She subsequently paid off the note through a loan from her mother-in-law.<sup>(7)</sup> Applicant strongly denies that she misappropriated any monies and contends that she had authorization from her employer to request pay advances from the payroll office. The \$14,000.00 represented the company's accounting for her pay advances, a loan, and purchases she made, some of which were personal and others for the company for which she could not produce receipts.<sup>(8)</sup> A disagreement about some of these monies arose a year prior to the termination, and after her husband spoke to her employer about the company's management style and the reduction of her hours.<sup>(9)</sup> The employer never prosecuted her criminally or civilly.<sup>(10)</sup> During her employment she and her husband were experiencing financial difficulties.<sup>(11)</sup> After leaving that position, Applicant was out of work for three months and unable to pay her debts. Applicant admits that she made mistakes while working for this employer, but asserts she did nothing illegal.<sup>(12)</sup>

In February 2003, Applicant started a new job with a federal contractor and completed a security clearance application (SCA). In executing that form, she certified that her answers were "true, complete, and correct" to the best of her knowledge and belief. In response to Question 25. Your Police Record - Military Court (*In the last 7 years, have you*

been subject to a court martial or other disciplinary proceedings under the Uniform Code of Military Justice? (Include non-judicial, Captain's Mast, etc.)), she answered "No." This answer was incorrect. As the incident occurred in December 1996 and she completed the SCA in February 2003, it fell within the seven-year requirement (between February 1996 and February 2003) and should have been disclosed. Applicant said she inadvertently excluded the incident from the SCA because she miscalculated the seven years and thought it had passed.<sup>(13)</sup> I find her explanation credible.

After she began her new position, Applicant established a plan to pay off all of her debts, including some of those alleged in the SOR, which she has done.<sup>(14)</sup> As of the date of this hearing all of the debts alleged in Paragraph 3 of the SOR have been paid in full. She settled the \$608.00 owed to a credit card company (§ 3.a).<sup>(15)</sup> The \$2,197.00 owed to another credit card company was paid sometime in 2004 (§ 3.b).<sup>(16)</sup> The \$12,316.00 owed to a credit card company is paid in full (§ 3.c).<sup>(17)</sup> The credit card debts alleged in §3.d. for \$2,241.00, and § 3.e. for \$489.00 have been paid in full.<sup>(18)</sup> As of May 2005, the credit cards debts of \$11,790.00 (§ 3.f.), and \$1,916.00 (§3.g.) are also satisfied.<sup>(19)</sup> Her present credit score is in the low 600's, which is above the 400 range her score was while working for her previous employer.<sup>(20)</sup>

Presently Applicant and her husband have a net monthly income of approximately \$8,000.00, which includes her disability payment.<sup>(21)</sup> After expenses are paid, they have about \$3,000.00 left, some of which they are investing in order to remodel their home. They have two credit cards with a current balance of \$300.00.<sup>(22)</sup> Applicant is determined not to make similar financial mistakes in the future.<sup>(23)</sup> She believes the college classes she is taking in business administration will assist her in managing her personal finances.<sup>(24)</sup>

Applicant submitted evaluations from her employers, covering the last two and a half years of her employment. All of the evaluations document a high level of achievement.<sup>(25)</sup> Her current employer is very satisfied with her work performance.<sup>(26)</sup>

## **POLICIES**

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth criteria which must be evaluated when determining security clearance eligibility. Within those adjudicative guidelines are factors to consider in denying or revoking an individual's request for access to classified information (Disqualifying Conditions), and factors to consider in granting an individual's request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence in order to reach a fair, impartial and common sense decision.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Section E2.2. of Enclosure 2 of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the disqualifying and mitigating conduct an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not only the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information.<sup>(27)</sup> The decision to deny an individual a security clearance is not necessarily a judgment about an applicant's loyalty.<sup>(28)</sup> Instead, it is a determination that an applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information.<sup>(29)</sup> The Directive presumes a rational connection between past proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability.<sup>(30)</sup>

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence in refutation, extenuation, or mitigation sufficient to overcome the position of the government.<sup>(31)</sup> An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his clearance."<sup>(32)</sup>

Based upon the allegations contained in the SOR and a consideration of the evidence as a whole, the following adjudicative guidelines are pertinent to an evaluation of the facts of this case:

Guideline E - Personal Conduct: A security concern may exist when 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.

Guideline F - Financial Considerations: A security concern may exist when 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.

Guideline J - Criminal Conduct: A security concern may exist when a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

The disqualifying and mitigating conditions, raising either security concerns or mitigating security concerns applicable to this case, are set forth and discussed in the Conclusions section below.

## CONCLUSIONS

After consideration of all the facts in evidence, an assessment of credibility, and the application of the appropriate legal standards, I conclude the following with respect to the allegations set forth in the SOR:

### Guideline E: Personal Conduct

The Government established a case under Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.1. (*Reliable, unfavorable information provided by associates, employers, coworkers, neighbors and other acquaintances*). In 1996, Applicant was disciplined while serving in the military. In 2002, she was terminated from an employment position for allegations of improper conduct. In both instances the employers provided unfavorable information about her, such that the allegations contained in SOR ¶ 1.a. and ¶ 1.b. fall within the guideline and raise a security concern. The Government alleged in SOR ¶ 1.c. that Applicant deliberately falsified her SCA by failing to disclose the 1996 Non-Judicial Punishment. Based on her credible explanation that the omission was inadvertent and resulted from a miscalculation of

ten months, this allegation is concluded in favor of the Applicant.

I considered all of the mitigating conditions under Guideline E, in particular Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.5. (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*), and conclude it applies. Applicant expressed remorse about the disciplinary proceeding that occurred nine years ago, and acknowledged mistakes happened with her former employer three years ago. Since leaving her former job, she has established a successful work-performance record and achieved financial stability. Hence, Applicant has mitigated the allegations contained in SOR ¶ 1.a. and ¶ 1.b. Accordingly, Guideline E is concluded in favor of Applicant.

#### Guideline J: Criminal Conduct

Based on the Non-Judicial Punishment imposed in 1996, the Government established a case under Criminal Conduct Disqualifying (CC DC) E2.A10.1.1. (*A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness*), as alleged in SOR ¶ 2.a. However, it did not meet its burden to prove the allegation contained in SOR ¶ 2.b., which asserted that Applicant's termination from her employment for accusations involving the misappropriation of funds constituted a criminal violation of a state statute. Throughout this proceeding Applicant consistently denied any wrongdoing and argued that all salary advances and purchases were done with the employer's knowledge. The only evidence submitted by the Government on this allegation was a promissory note made payable to the former employer. Given her explanation of the circumstances surrounding the accusations, the absence of any legal proceeding related to the allegations, the lack of any evidence by the Government to support a criminal violation, and her adamant denial of illegal conduct, it is not plausible to infer criminal intent and conclude she violated a state criminal code without more evidence.<sup>(33)</sup> Hence, this allegation is concluded in favor of Applicant. The allegation contained in SOR ¶ 2.c. that claimed Applicant's falsification of her SCA constituted a felony under federal law, is also concluded in her favor based on the previous determination that she did not deliberately omit the information. Accordingly, Guideline J is concluded in favor of the Applicant.

#### Guideline F: Financial Considerations

The Government established its case under Guideline F. For several years Applicant incurred substantial debt and was unable to meet her financial responsibilities, such that Financial Consideration Disqualifying (FC DC) E2.A6.1.2.1. (*A history of not meeting financial obligations*), and FC DC E2.A6.1.2.3. (*Inability or unwillingness to satisfy debts*) apply.

I considered all of the mitigating conditions under this Guideline, especially Financial Consideration Mitigating Condition (FC MC) E2.A6.1.3.6. (*The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts*), and conclude it applies. After starting a new job in February 2003, Applicant initiated a payment plan for her delinquent debts. As of October 2004, some of her debts were paid, by May 2005, other debts were resolved, and by

the date of the hearing all of the debts were paid or settled. She and her husband are now financially stable and debt free. As a result of her efforts over the last couple years, she has mitigated the financial concerns raised in the SOR. Accordingly, Guideline F is concluded in her favor.

I have further considered the totality of the evidence in this case, including Applicant's age at the time of the military punishment, her motivation for committing the offense, and her remorse about the incident, her acknowledgment of additional mistakes, the resolution of all debts, and her current ability to manage her financial situation, as well as a determination not to repeat previous errors. I have also reviewed the circumstances underlying these security concerns, and conclude they are unlikely to recur. Therefore, I am persuaded by the totality of the evidence that it is clearly consistent with the national interest to grant Applicant a security clearance.

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 as follows:

Paragraph 1: Guideline E (Personal Conduct) FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Paragraph 2: Guideline J (Criminal Conduct) FOR THE APPLICANT

Subparagraph 2.a.: For the Applicant



Subparagraph 2.b.: For the Applicant

Subparagraph 2.c.: For the Applicant

Paragraph 3: Guideline F (Financial Considerations FOR THE APPLICANT)

Subparagraph 3.a.: For the Applicant

Subparagraph 3.b.: For the Applicant

Subparagraph 3.c.: For the Applicant

Subparagraph 3.d.: For the Applicant

Subparagraph 3.e.: For the Applicant

Subparagraph 3.f.: For the Applicant

Subparagraph 3.g.: For the Applicant

### **DECISION**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Clearance is granted.

Shari Dam

## Administrative Judge

1. Tr. 46.
2. Tr. 49.
3. Tr. 39.
4. GX 5 at 2-3.
5. Tr. 42.
6. GX 6.
7. Tr. 53-54.
8. Tr. 61, 71; GX 3 at 2.
9. Tr. 23.
10. Tr. 64.
11. Tr. 53.
12. Tr. 67.
13. Tr. 17.
14. Tr. 25.
15. AX H at 3.
16. AX E.
17. AX H at 2.
18. GX 8 at 2-3.
19. GX 9 at 2-3.
20. Tr. 35.
21. Tr. 42-42.
22. Tr. 45-46.
23. Tr. 67.
24. Tr. 43.
25. AX A, B, C, D and G.
26. AX F.
27. Directive, Enclosure 2, ¶ E2.2.2.
28. Executive Order 10865, § 7.

29. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

30. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

31. ISCR Case No. 01-20700 at 3 (App. Bd., Dec. 19, 2002); Directive, Enclosure 3, ¶ E3.1.15.

32. *Id.*

33. The Government cited a criminal code in the SOR, but did not provide a copy of the statute or any other evidence to show that Applicant violated it.