Date: December 30, 1996

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In re:

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SSN: ----------

Applicant for Security Clearance

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ISCR OSD Case No. 96-0277

**DECISION OF ADMINISTRATIVE JUDGE**

**KATHRYN MOEN BRAEMAN**

**APPEARANCES**

**FOR THE GOVERNMENT**

Matthew E. Malone, Esq.

William Fields, Esq.

Department Counsel

**FOR THE APPLICANT**

*Pro Se*

## STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on June 10, 1996. (Copy attached.) The SOR detailed reasons why the Government could not make the preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.(1) The SOR consists of allegations based on Criterion D (sexual behavior) in paragraph 1 and Criterion F (financial considerations) in paragraph 2. Applicant responded to the allegations set forth in the SOR in a written Answer, dated July 24, 1996, and chose to have a hearing.

This matter was assigned to me on August 26, 1996. It is my role as administrative judge to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On September 6, 1996, the case was set for a hearing scheduled for and held on October 1, 1996. At the open hearing the Government submitted eleven exhibits [Government's Exhibits ("GE") 1 through 11], but called no witnesses. The Applicant testified and submitted six documents into evidence [Applicant's Exhibits ("AE") A through F.] The transcript (TR) was received on October 15, 1996.

## PROCEDURAL RULINGS

At the hearing the Government moved to amend the SOR at 1.f., 1.g. and at 2.b. With respect to 1.f. he moved to rename it as subparagraph 1.e. and with respect to 1.g., he moved to rename it as 1.f. because of typographical errors in the original SOR. TR 13. As the Applicant did not object, those amendments were accepted.

With respect to allegation 2.b. the Government moved to delete the third sentence which reads, "As of March 1996, a proposed plan regarding this petition has not been confirmed." TR 13. The Applicant did not object so 2.b. was amended by deleting that sentence. TR 14.

He was given an additional week until October 8, 1996, to submit additional documentation on his bankruptcy petition, but he did not do so. TR 123-124.

## FINDINGS OF FACT

The Applicant admitted in his Answer the factual allegations contained in subparagraphs 1.c., 1.d, 2.a., and 2.b. of the SOR; and he admitted in part subparagraphs 1.b., 1.e., and 1.f. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional Findings of Fact:

The Applicant, a 54-year old employee of a defense contractor (Company #1), has a secret security clearance granted on August 2, 1994, after he began work there. GE 1, TR 8.

He previously had held a security clearance granted on November 4, 1986, when he was employed by Company #2 from September 26, 1986, to August 23, 1994, as the manager, security and document control. In that position he was to manage the mailroom and document reproduction facilities and direct two employees and to serve as the company security officer. AE A, TR 89-95. His rating at Company #2 from October 1992 to November 1993 was satisfactory, and he was found to have exceeded requirements in his "highly competent handling of security issues." His rating from June 1991 to October 1992 was satisfactory, and he was found to have exceeded requirements in his handling of security issues. His rating from July 1990 to July 1990 was satisfactory. His July 1991 rating ranged from satisfactory to above satisfactory; his communication style was described as "typically effective" but "sometimes rough around the edges." His rating from July 1988 to July 1989 was outstanding and he was considered "an invaluable member" of the staff. He received three letters of commendation in 1993. AE A. He had one letter of appreciation in 1989 and two certificates of appreciation. AE B, C, and D.

Company #2 first documented an incident of sexual harassment by Applicant in August 1993 where Applicant made "inappropriate sexual commentary." This woman's supervisor (who was also Applicant's supervisor) advised Applicant that his conduct was a "significant problem" after the supervisor received a complaint from a woman staff member[(2)]; subsequently, his supervisor documented that Applicant had "agreed that sexual comments were inappropriate in the workplace and that he would conduct himself in a more professional manner in the future." GE 3 at 4; TR 95-97.

Another complaint against him for sexual harassment was received by Company #2 on January 5, 1994, from a temporary agency as their employee reported she was being sexually harassed by Applicant who was her on-site supervisor. During an interview Applicant admitted he had made comments about her physical appearance and other comments of a sexual nature, so Company #2 found the allegations to have been substantiated.[(3)] TR 101-102. As they noted two complaints had been received earlier about his sexual harassment in the previous 21 months and he had been warned to avoid such comments, he was then advised in a letter of January 20, 1994, that Company #2 "policy lists sexual harassment as a reason for discharge."

The company gave him "one last opportunity to preserve" his job. GE 2 at 3. He then signed a statement in January 1994 that he would not engage in harassment again (detailed below). He was then removed as a supervisor of the reception desk and required by Company #2 to get counseling for the problem which he did obtain.[(4)] TR 103. After he had had this counseling, he conceded that his actions were "probably" sexual harassment. TR 99.

However, in April 1994 some employees of Company #2 filed charges of sexual harassment against him; he was sent home in June and subsequently terminated. GE 2; TR 104-107. After Applicant was terminated for cause on August 23, 1994, Company #2 filed a report with DISCO on November 29, 1994, and advised them that the basis was his "violation of agreement signed 1/20/94 regarding sexual harassment." [(5)] This termination letter of advised of a company internal investigation into allegations of sexual harassment against him and the company's conclusion that he violated the terms

[(6)]

of an agreement signed on January 20, 1994, where he had agreed as follows:

- You will make NO comments of a sexually harassing nature to any employee, including the receptionists, or to anyone else you encounter while on [Company #2] business on or off the premises.

GE 3 at 2. The company's internal investigation "substantiated that you in fact made comments of a sexually harassing nature since the execution of the January 20, 1994 document and in addition have violated the terms and conditions of the June 29, 1994 agreement." *Id*. (No evidence was submitted on the June 29, 1994, agreement.)

In August 1994 the company and Applicant were sued by four former employees alleging sexual harassment in a civil action filed in U.S. District Court.(7) GE 6. Company #2 settled this legal action, and the case was dismissed with prejudice. The action against Applicant was dismissed without prejudice.(8) GE 3, 6. The amount of money the company paid to settle the suit is confidential, but the Applicant did not pay any settlement money and is still subject to suit. TR 120.

Based on evidence in the record from Company #2 documenting their conclusions that Applicant did indeed engage in sexual harassment, I do not find credible Applicant's denials of any offensive sexual harassment. His actions in the work place reflect a lack of discretion and/or judgment.

Since he has been at Company #1, Applicant vows he has not had any problems with any women that he has worked with at any of the company's locations.(9)

Applicant completed a National Agency Questionnaire (NAQ) on February 16, 1995, and revealed he was seeking Chapter 11 bankruptcy relief after he was terminated from his position in 1994. TR 43. He filed for bankruptcy on August 22, 1994, under Chapter 13, which was dismissed; and he filed for Chapter 11 Bankruptcy on October 3, 1994. GE 3 at 1, 7, 8, 9; TR 56-59. When both he and his wife were working in the early 1990's, they were making approximately $100,000. TR 43, 80. Applicant's financial problems began in 1992 when his wife was out of work for eighteen months. TR 64, 68, 84. They worsened when he was terminated from his job where he made $49,200 at Company #2. AE A, TR 79. He now makes $7.25 per hour. TR 66. Their combined income now is approximately $40,000. TR 87.

Applicant and his wife are required to make timely payments under the bankruptcy plan and have filed Cash Disbursements Summary Reports under Chapter 11. GE 10 and 11. On September 6, 1996, Applicant's bankruptcy counsel filed with the court under Chapter 11 a Final Report and Motion for Final decree that detailed the "substantial consummation of the Plan confirmed by the Court on March 25, 1996." He reported that Applicant and his wife have made the additional monthly payment on their mortgage and are paying Creditor #18 $23 per month for 24 months. The debt to the Internal Revenue Service (IRS) of $5,793.00 for 1992 income taxes was to be discharged by monthly payments of $100 for five years, and they have paid a total of $238.56 to IRS.(10) Eight remaining creditors with unsecured claims totally $21,800 were to get quarterly payments over 60 months totally approximately 88% of the amount owed, and they have paid $2,000.93. AE F.

Applicant served in the Army from 1960 to 1963; he received an honorable discharge. GE 1.

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole in evaluating this case, I weighed relevant Adjudication Guidelines as set forth below :

**Criterion D - Sexual Behavior**

Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, subjects the individual to undue influence or coercion, or reflects lack of judgment or discretion.(11)

(Sexual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person's eligibility for a security clearance)

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

(4) sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

**Conditions that could mitigate security concerns include:**

None

**Criterion F - Financial Considerations**

**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.**

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

(1) a history of not meeting financial obligations;

**Conditions that could mitigate security concerns include:**

(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);

(6) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance.

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In reaching determinations under the Directive, careful consideration is given to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information in the future.

## CONCLUSIONS

**Criterion D: Sexual Behavior**

Having considered the evidence of record in light of the appropriate legal precepts and facts, I conclude that the Government established its case with regard to Sexual Behavior (Criterion D). Sexual behavior of a public nature, such as here in the workplace, is a legitimate security concern when it reflects a lack of judgment and discretion. In this case Appellant was found by Company #2 to have repeatedly engaged in conduct which they deemed sexual harassment. This company took several actions to address Applicant's problem with sexual harassment: they insisted that he get counseling to advance his awareness of appropriate and inappropriate behavior in the work place; they put him on notice that sexual harassment was a reason for discharge; and they gave him an opportunity to pledge that he would not repeat his conduct. Nevertheless, women again complained that he engaged in sexual harassment. Thus, the company found ultimately that he indeed had violated a January 20, 1994, agreement not to make any comments of a sexually harassing

nature: their internal investigation substantiated that he in fact had done so and they terminated him on August 23, 1994.

Having been put on notice repeatedly by women and the company that his conduct fell within the realm of sexual harassment, Applicant showed poor judgment under Criterion D to repeat this sexual behavior. His behavior consequently falls within a condition that could raise a security concern and may be disqualifying: "(4) sexual behavior of a public nature and/or that which reflects lack of discretion or judgment."

While Applicant denies that his conduct was of such a nature, I cannot overlook the finding by Company #2 that they had put him on notice of the company policy against sexual harassment and ultimately found after investigation that his conduct was of a sexually harassing nature. Company #2 then explicitly stated that as the basis for his termination. (While the lawsuit allegations in the complaint were offered in evidence, since the case was not tried on the merits but instead settled by the company with confidentiality provisions, I can give no weight to those allegations which Applicant denies.) But based on the company investigation that he had violated their policy against sexual harassment, I cannot accept Applicant's bald assertion that these women were merely upset after getting laid off from work nor his contention that, because one woman gave him a picture of her child, that his relationship with her was at all times friendly.

Applicant has the burden under the Directive to substantiate his case in mitigation and to demonstrate persuasively that it is clearly consistent with the national interest to continue his clearance. Since he chose to rely only on his own denials and his favorable work record and commendations at company #2 regarding SOR paragraph 1 allegations, I find this evidence while helpful to establish him as a satisfactory, and at times good employee of Company #2, is insufficient to refute the sexual harassment allegations.

Further, while he himself asserts that he has not subsequently engaged in any sexually harassing conduct at Company #1, he offered no evaluations or letters of reference from that company to support his assertion. And even if he had submitted such evidence, Applicant could not yet meet mitigating condition "(2) the behavior was not recent and there is no evidence of subsequent conduct of a similar nature." I consider his 1994 sexually harassing conduct still too serious and too recent to mitigate. Consequently, after also considering the Adjudicative Process factors, I find against Applicant under paragraph 1 and subparagraphs 1.a, 1.b., 1.c, 1.d, 1.e. and 1.f.

**Criterion F - Financial Considerations**

Having considered the evidence of record in light of the appropriate legal precepts and facts, I conclude that the Government established its case with regard to financial considerations, Criterion F: Applicant's conduct involved a history or pattern of failing to meet financial obligations which creates doubt about his judgment, reliability and trustworthiness. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. He admits he filed for bankruptcy (initially Chapter 13, which was dismissed) and that the debts listed under the Chapter 11 petition allegation are ones that he was liable for paying. These conditions could raise a security concern and may be disqualifying: (1) a history of not meeting financial obligations.

However, I do not accept the Government's thesis that these petitions for bankruptcy were only filed to avoid liability for a sexual harassment lawsuit. Indeed it was not until he filed an amendment that he listed the names of the four plaintiffs at their law firm's address. I do find Applicant believable on this point and accept Applicant's assertion that first his wife's unemployment for eighteen months and then his unemployment and underemployment, largely led him to take this step of filing for bankruptcy, a legitimate legal remedy, to resolve his financial problems. The evidence shows that their combined incomes fell precipitously from $100,000 per year to $40,000 per year. Applicant made almost $50,000 per year at Company #2 and he now makes only $7.25 per hour at Company #2.

The Applicant seems now to have turned his life around financially and is consistently making payments under the Chapter 11 bankruptcy plan with regular cash disbursement reports to the court. While he failed to submit in evidence the final action of the court, he did submit his lawyer's filing with the court for a motion for a final decree based on "substantial consummation of the Plan confirmed by the Court on March 25, 1996." This motion enumerates how Applicant and his wife have been paying creditors, including the IRS. Consequently, I conclude that his efforts to resolve these financial concerns constitute mitigation under considerations: (3) the conditions that resulted in the behavior were largely beyond the person's control, *e.g.*, loss of employment, and (6) he has initiated a good-faith effort

to repay overdue creditors or otherwise resolve debts. Consequently, after also considering the Adjudicative Process factors, I find for the Applicant under Paragraph 2 and subparagraphs 2.a. and 2.b.(1) through 2.b.(20).

## FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Criterion D: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Paragraph 2. Criterion F: FOR APPLICANT

Subparagraph 2.a. For Applicant

Subparagraph 2.b. For Applicant

Subparagraph 2.b.(1) For Applicant

Subparagraph 2.b.(2) For Applicant

Subparagraph 2.b.(3) For Applicant

Subparagraph 2.b.(4) For Applicant

Subparagraph 2.b.(5) For Applicant

Subparagraph 2.b.(6) For Applicant

Subparagraph 2.b (7) For Applicant

Subparagraph 2.b.(8) For Applicant

Subparagraph 2.b.(9) For Applicant

Subparagraph 2.b.(10) For Applicant

Subparagraph 2.b.(11) For Applicant

Subparagraph 2.b.(12) For Applicant

Subparagraph 2.b.(13) For Applicant

Subparagraph 2.b (14) For Applicant

Subparagraph 2.b (15) For Applicant

Subparagraph 2.b.(16) For Applicant

Subparagraph 2.b.(17) For Applicant

Subparagraph 2.b.(18) For Applicant

Subparagraph 2.b.(19) For Applicant

Subparagraph 2.b.(20) For 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 a security clearance for the Applicant.

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Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), and as amended by Change 3 dated February 16, 1996.

2. Applicant submitted a picture of this woman's child to document his friendly relationship with this woman. Exhibit E. However, as it was not dated, I do not accept his premise that her having given him this picture equates with his never having sexually harassed her. Neither do I accept his other justifications ( he could not afford a defense; all "four ladies in this case have all seemed to disappear") as reasoned bases for accepting his simple, but repeated, denials that he did not sexually harass any of these women. Nor do I accept his bare assertion that they brought charges based on a company cutback and there was "nothing going on." TR 42, 44-45, 52-53. His Chapter 11 bankruptcy petition was amended to list the four women (c/o of the law firm that filed the law suit) as creditors on November 7, 1994. Exhibit 10 at 12-14.

3. At his hearing Applicant denied he did more than compliment her on her provocative clothes. TR 53-54.

4. Allegation 1.d. asserts that he was also placed on "two weeks of unpaid administrative leave" but there is no such evidence in the record.

5. I do not accept Applicant's view is that he was not fired for sexual harassment and that he was simply fired because he did not abide by the letter of January 20, 1994, as that agreement required him not to engage in sexual harassment. TR 108-109.

6. SOR subparagraph 1.g. mistakenly lists the date as January 29, 1994.

7. Applicant denies all allegations in the complaint which asserts, for example, that during this period Applicant subjected her to "sexual comments and innuendos. . . including sexist jokes, comments about anatomy and appearance, comments about sexual relations. * * * Over time [Applicant's] comments escalated to grossly obscene and graphic comments concerning her anatomy, the anatomy of other female employees, extremely obscene and offense hand movements. . . and specifics of his sex acts with his wife. . , provocative questions directed at plaintiff about her private life and her relations with her husband, speculations about how plaintiff and others would respond to defendant while having sex, and myriad other grossly obscene remarks and gestures." GE 6 at 6.

8. Applicant denies all the allegations contained in the suit with regard to lewd remarks; but based on the company investigation that found he had engaged in sexual harassment, I do not accept his assertion that these women filed suit only because they were upset over getting laid off from work at Company #2. TR 109-120.

9. However, Applicant submitted no evidence from Company #1 -- either evaluations or letters of recommendation.

10. No explanation was provided as to how this minimal payment met the requriements of regular monthly payments of $100.

11.

[0] The adjudicator should also consider guidelines pertaining to criminal conduct (criterion J); or emotional, mental, and personality disorders (criterion I), in determining how to resolve the security concerns raised by sexual behavior.