

November 12, 1996

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In Re:

SSN:

Applicant for Security Clearance

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ISCR OSD Case No. 96-0315

## **DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL KIRKPATRICK**

### Appearances

#### FOR THE GOVERNMENT

Martin H. Mogul, Esq.

Department Counsel

#### FOR THE APPLICANT

*Pro Se*

### STATEMENT OF THE CASE

On May 6, 1996, 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 the attached 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 the Applicant, and which recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR in writing on June 3, 1996. This case was assigned to the undersigned on August 19, 1996, and a Notice of Hearing was issued on August 29, 1996.

A hearing was held on October 3, 1996. During that hearing, the Government called one witness (Applicant), and presented eight documentary exhibits. The Applicant testified on her own behalf, and presented one documentary exhibit. Official notice was taken of Title 18, U.S. Code, Sections 152 and 1001.

The transcript was received on October 15, 1996.

### FINDINGS OF FACT

In her Answer to the SOR, Applicant admitted the material facts alleged in every subparagraph of the SOR, and those admissions are hereby incorporated herein as findings of fact. The following additional findings of fact are entered as to each paragraph and subparagraph in the SOR:

Applicant is 38 years old. She is married, and she has three children, whose ages are 19, 16, and 14. She is a high school graduate, and she has taken computer courses at a junior college for one year. She is employed by a defense contractor

as a -----, and her employer desires that she have a secret-level security clearance in order to perform her duties. She does not presently have a security clearance. The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the attached Statement of Reasons (SOR).

Paragraph 1 (Criterion F - Financial Considerations.) The Government alleges that the Applicant is ineligible for clearance because she is financially overextended, and therefore at risk of having to engage in illegal acts in order to generate funds.

Applicant has been having recurring financial difficulties since 1981. (Govt.Ex. 2.) Her husband has not had a steady job since 1985, so Applicant has had to try to pay all of her family's expenses since then. (Govt.Ex. 2.)

Applicant was unemployed from October of 1991 until July of 1992, so she was unable to pay rent for three months at the residence where she lived at that time, resulting in a \$1,820.13 judgment against her in May of 1994. (Govt.Ex. 2; Tr., p. 33.) Her car was repossessed by the lender in 1991, because she did not pay the monthly installment payments. (Govt.Ex. 2; Tr., p. 24.) She wrote non-sufficient funds checks. She was unable to pay medical bills. She "overcharged and overspent on credit accounts" which she could not repay. (Govt.Ex. 2.) She was unable to pay her income taxes, so the taxing authorities garnished her wages. (Govt.Ex. 2.) She did not repay a student loan. (Govt.Ex. 2.) She was unable to pay restitution of \$1,759.00 which the court ordered her to pay as part of a sentence for a criminal conviction for welfare fraud. (Govt.Ex. 2.) She was unable to pay fines of \$482.00 which the court ordered her to pay for traffic offenses, and a \$750.00 bench warrant was therefore issued for her arrest. (Govt.Ex. 2; Tr., p. 40.)

On February 14, 1991, Applicant filed an individual Chapter 13 petition for relief in the United States Bankruptcy Court, listing \$1,706.00 in net monthly income, \$1,488.00 in monthly expenses, 12 creditors, and \$14,954.00 in debts. That petition was dismissed on May 13, 1991, on motion of the Chapter 13 Trustee, because Applicant failed to attend the creditors' hearing. (Govt.Exs. 2 and 6; Tr. p. 31.)

On March 25, 1994, Applicant and her husband filed a joint Chapter 7 petition for relief in the United States Bankruptcy Court, listing her gross monthly income as \$1,960.83, her net monthly income as \$1,408.33, zero income for her husband, \$1,411.00 in monthly expenses, 16 creditors, a \$3,000.00 priority debt to the Internal Revenue Service, and \$27,690.75 in unsecured, nonpriority debts. Those debts were discharged on July 26, 1994. (Govt.Exs. 2, and 5; Tr. p. 31-32.)

Subsequent to July of 1994, Applicant has had financial difficulties. In January of 1996, She wrote two checks that "bounced." Those checks were written to pay utility bills. (Tr., pp. 24-30.) On April 11, 1996, a lender obtained a judgment of \$788.00 against Applicant in small claims court because her check for repayment of a cash advance "bounced," and in August of 1996 that judgment creditor began garnishing her wages to collect the judgment. (Govt.Ex. 8; Tr., pp. 27-30.)

Applicant's present monthly gross income is approximately \$2,100.00, and her net monthly income is approximately \$1,800.00. Her monthly rent is \$1,100.00, and her car payment is \$333.00 per month. (Tr., pp. 47-48.) Her husband earns approximately \$1,440.00 per month, and he pays half of the monthly rent. (Tr., p. 48-49.) She pays all of the other bills. Applicant's utility bills are approximately \$350.00 per month. (Tr., pp. 49-50.)

Paragraph 2 (Criterion E - Personal Conduct.) The Government alleges that the Applicant is ineligible for clearance because she has engaged in conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations, which could indicate that she may not properly safeguard classified information.

On July 26, 1993, Applicant signed a National Agency Questionnaire (NAQ), certifying that her answers were true and complete and accurate, and acknowledging that any knowing and willful false answers on that form could be punished by fine or imprisonment pursuant to Title 18, U.S. Code, Section 1001. In listing her residences on that form, she intentionally omitted the residence for which she failed to pay rent for three months during 1991 and 1992. (Govt.Ex. 2; Tr., pp. 32-33.) In describing her motive for omitting this information, she stated, "I failed to list this address on my National Agency Questionnaire (NAQ) because I wanted to conceal that I owed back rent." (Govt.Ex 2, at page 2.)

Applicant and her husband have been married approximately 15 years. Approximately three years before they were

married, when her husband was living and working in another state, he became a plaintiff in some sort of class action lawsuit against a former employer. Applicant was informed, and believed, that she had no marital or community property claim to whatever sums of money that her husband might receive for that pre-marital, contingent claim. (Tr., p. 42-45.) In approximately September of 1993, Applicant heard from her mother, who lived in that other state, that, after more than a decade, there might be a settlement of some sort in that lawsuit, and her husband might be receiving some money. (Govt.Ex. 2; Tr., pp. 34- 35, 42-45.) In March of 1994, when Applicant and her husband filed their joint Chapter 7 Bankruptcy Petition, they were required to list their assets. Applicant did not have an attorney to assist her, but rather tried to prepare the forms herself. She tried to act as her own attorney, and to represent herself. She did not list her husband's contingent claim as an asset in the Chapter 7 Bankruptcy petition. (Govt.Ex. 5; Tr., pp. 34-35, 42-45.) In August of 1994, after they had discharged their debts in the bankruptcy proceeding, Applicant's husband received \$19,000.00 in settlement of his claim. Applicant testified credibly that she did not know that her husband was going to receive the settlement check until he actually received it, and even then she did not believe that she was entitled to any share of that money. When her husband received the money, he took all of the money and left home, leaving Applicant to care for herself and two of her sons. A few months later, after he spent all of the money, he returned home, and they were reconciled. (Tr., pp. 30-31, 34-35, 42-45.) I find that Applicant's failure to list her husband's 18 year old, pre-marital, contingency claim as an asset in her bankruptcy petition was the result of her lack of knowledge of the facts, and her lack of knowledge of bankruptcy law, at the time that she prepared and filed the petition, and that she therefore did not knowingly or fraudulently conceal from the Bankruptcy Court, or the from the Chapter 7 Trustee, information pertaining to her husband's settlement funds. Therefore, SOR subparagraphs 2.b. and 3.d. will be found in favor of Applicant.

Paragraph 3 (Criterion J - Criminal Conduct.) The Government alleges that Applicant has a history or pattern of criminal activity which creates doubt about her judgment, reliability, and trustworthiness.

From 1981 to September of 1985, Applicant and her husband applied for the state's Aid to Families of Dependent Children (AFDC), pursuant to the state's welfare statutes, representing under penalty of perjury that they were eligible for such welfare payments because they were both unemployed and receiving no other income. At the time that they initially applied for AFDC, their application was honest and correct, because they were both unemployed. Pursuant to the state's welfare statutes, they were required to periodically sign and submit additional applications for renewal of welfare payments. By December of 1994, both Applicant and her husband had obtained employment. In Applicant's case, she obtained a job that was supposed to be only a temporary, three-day job. However, it lasted for three months, and then she obtained permanent employment. Nevertheless, Applicant and her husband continued to submit monthly applications for renewal of AFDC, falsely stating that they were both unemployed and receiving no other income. Applicant was arrested on September 30, 1985, and charged with four felony counts of welfare fraud. On April 17, 1986, Applicant pled guilty to one felony count of welfare fraud. She was sentenced to three years probation, 15 days of public service, and ordered to make restitution in the sum of \$1,759.00. She never made the restitution payments. (Govt.Exs. 2 and 3; Tr, pp. 35-38, 46-47.)

Applicant's driver's license had been suspended as part of her sentence for a traffic offense. Nevertheless, she continued to drive. In April of 1991, she was arrested and charged with driving with a suspended license, and with having a suspended registration. She pled guilty, and was ultimately fined \$482.00. Applicant never paid the court-ordered fine, and a \$750.00 bench warrant was issued for her arrest. She continues to drive her car, despite the fact that her driver's license has been suspended, and she still has not paid the fine. Her intention is to wait for enough time to pass so that "everything gets off the computer," and the unpaid fines are no longer a part of her record, and then she expects to become eligible to obtain another driver's license. Because she cannot afford to do so, she does not intend to pay the fines. (Govt.Ex. 2; Tr, pp. 38-41.)

As discussed in more detail under the topic of "Paragraph 2 (Criterion E - Personal Conduct)," above, I find that Applicant knowingly and willfully omitted a residence when answering a question in her 1993 NAQ, because she wanted to conceal from the Government the adverse information that she did not pay rent to her landlord at that residence. She has admitted that when she signed that NAQ, certifying that her answers were true and complete, she knew that her answer was not true and complete. The Government alleges that this same conduct also constitutes a violation of Title 18, U.S. Code, Section 1001, a Federal criminal statute. I have taken official notice of that statute. I find that the omitted information was material, in that it had the potential to influence her background investigation and

her eligibility for a clearance. I further find that her omission of the information was intentional and willful, within the meaning of the statute, and that her conduct was in violation of Title 18, U.S. Code, Section 1001. (Govt.Ex. 2; Tr., p. 33.)

As discussed in more detail under the topic of "Paragraph 2 (Criterion E - Personal Conduct)," above, I find that when Applicant filed her 1994 Chapter 7 Bankruptcy Petition she omitted from her schedule of assets her husband's pre-marital, contingent claim as a member of a plaintiff class in a class action lawsuit instituted in another state more than a decade prior to Applicant's 1994 Chapter 7 Bankruptcy petition. The Government alleges that such conduct is in violation of Title 18, U.S. Code, Section 152, a Federal criminal statute. Although the SOR alleged that such conduct was also in violation of Title 18, U.S. Code, Section 3571, at the hearing the Department Counsel stated that said statute was inapplicable. (Tr., p. 50-51.) I have taken official notice of Title 18, U.S. Code, Section 152, which requires as an element of the offense that the defendant "knowingly and fraudulently conceals" from the Chapter 7 Trustee property belonging to the bankruptcy estate. As described above, I find that Applicant's omission of the information resulted from her lack of knowledge of the facts, and from her lack of knowledge of the law, at the time she filed her petition, so that she neither knowingly nor fraudulently concealed from the Chapter 7 Trustee an asset of her bankruptcy estate. Therefore, SOR paragraph 3.d is found in favor of Applicant. (Govt.Exs. 2 and 5; Tr., pp. 30-31, 34-35, 42-45.)

### Mitigation.

Applicant was unemployed for periods of time from 1981 to 1985, and her husband has been frequently unemployed, contributing to her financial problems. Although her husband received a judgment of \$19,000.00, he left Applicant alone for several months to care for two of her three sons, and he spent all of the money before he returned home, further exacerbating her financial problems. He has given her bad advice concerning some financial matters. Applicant Exhibit A is a photocopy of two utility bills which went unpaid, in part because of incorrect advice from Applicant's husband.

Applicant is doing well at work, and her performance evaluations are outstanding. (Tr., p. 53.)

### POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines and policies for determining eligibility for access to classified information, and these guidelines and policies must be given consideration in making security clearance determinations. The following adjudicative guidelines and policies are found to be applicable in this case:

#### Criterion F (Financial Considerations.)

Conditions which could raise a security concern:

1. A history of not meeting financial obligations;
2. Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust;
3. Inability or unwillingness to satisfy debts.

Conditions which could mitigate security concerns:

(None of the Directive's Criterion F mitigating concerns apply to the facts of this case.)

#### Criterion E (Personal Conduct.)

Condition which could raise a security concern:

2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment

qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

5. A pattern of dishonesty or rules violations.

Conditions which could mitigate security concerns:

(None of the Directive's Criterion E mitigating concerns apply to the facts of this case.)

Criterion J (Criminal Conduct.)

Conditions which could raise a security concern:

1. Any criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Conditions which could mitigate security concerns:

(None of the Directive's Criterion J mitigating conditions apply to the facts of this case.)

In addition, the general adjudication policies expressed at Paragraph F.3. of the Directive and in Enclosure 2 of the Directive have been considered as to each criterion in this case. Enclosure 2 provides, in pertinent part, as follows: "The adjudication process is the careful weighing of a number of variables known as the whole person concept. All available information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following factors:

"The nature, extent, and seriousness of the conduct.

"The circumstances surrounding the conduct, to include knowledgeable participation.

"The frequency and recency of the conduct.

"The individual's age and maturity at the time of the conduct.

"The voluntariness of participation.

"The presence or absence of rehabilitation and other pertinent behavioral changes.

"The motivation for the conduct.

"The potential for pressure, coercion, exploitation, or duress.

"The likelihood of continuation or recurrence."

In DOHA cases the Government has the initial burden to go forward with persuasive evidence in support of the factual and conclusionary allegations in the SOR. If the Government meets this initial obligation, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficiently persuasive to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance

**CONCLUSIONS**

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately

concerned where available information indicates that an Applicant for clearance is financially overextended, or has engaged in conduct involving questionable judgment and unreliability, or has engaged in criminal conduct. In this case, I have found that Applicant's failure to include in her 1994 Chapter 7 Bankruptcy Petition schedule of assets her husband's pre-marital, contingent claim as a member of a plaintiff class in an old class action lawsuit was neither willful nor fraudulent, and neither intentional falsification as alleged in SOR subparagraph 2.b. nor fraudulent criminal conduct as alleged in SOR subparagraph 3.d. However, the Government has met its initial burden of proving by prima facie evidence all of the other paragraphs and subparagraphs of the SOR.

The Government has met its obligation of proving by prima facie evidence the SOR Criterion F allegations that Applicant has had excessive debts and recurring financial difficulties since 1981. Her financial difficulties have included lawsuits against her by creditors, judgments entered against her, wage garnishments by creditors to collect judgments, the repossession of a car for failure to pay the monthly installment payments, writing nonsufficient funds checks, failure to pay income taxes, failure to repay a student loan, failure to pay restitution as ordered by the court as part of her sentence for a criminal conviction, intentional failure to pay court-ordered fines for traffic offenses, the filing of a Chapter 13 Bankruptcy Petition in 1991, and the filing of a Chapter 7 Bankruptcy Petition in 1994. Even though in July of 1994 she obtained in the U.S. Bankruptcy Court the discharge of over \$30,000.00 in debts, so that her present debts are not large in the aggregate, she continues to have financial difficulties. In January of 1996 she wrote two checks which "bounced", and in April of 1996 a judgment creditor garnished her wages. Even as of the date of the hearing, Applicant had not paid the court-ordered restitution for her welfare fraud conviction nor the fines resulting from her traffic offenses, and she expressed no credible intention to do so.

The Applicant has not introduced sufficient, persuasive evidence to refute or mitigate the SOR Criterion F allegations of financial difficulties. The evidence clearly depicts that she has a long history of not meeting financial obligations, and that she has been unreliable in satisfying her debts. There is no evidence that Applicant has undertaken any good-faith efforts to repay overdue debts or to otherwise resolve debts. She has been employed for several years now, and it cannot be credibly argued that all of her financial problems were beyond her control. The weight of the evidence is that Applicant has not acted responsibly in financial matters.

The Government has also met its burden of proving by prima facie evidence the SOR Criterion E allegation that Applicant deliberately omitted from her 1993 NAQ, thereby willfully and intentionally concealing from the Government, the relevant and material adverse information pertaining to her former residence for which she owed nearly \$2,000.00 in unpaid rent. The Applicant has not presented evidence in explanation, refutation, or mitigation sufficient to overcome the Government's evidence. There is no evidence that Applicant made any prompt, good-faith efforts to correct the information prior to being confronted with the truth, or that her false answer was caused by improper advice of authorized personnel. To the contrary, Applicant admits that she made an intentional decision to falsify the NAQ, in order to conceal the adverse information.

The Government has met its burden of proving by prima facie evidence the SOR Criterion J allegations that Applicant was convicted of the offense of welfare fraud, a state felony and a crime of dishonesty, that she has intentionally refused to pay the restitution ordered by the judge in that case, that she was convicted of the offense of driving on a suspended license, that she has intentionally refused to pay the fines ordered by the judge in that case, and that her falsification of her 1993 NAQ was in violation of Title 18, U.S. Code, Section 1001. Applicant has not introduced sufficient evidence in explanation, rebuttal or mitigation to overcome the Government's case against her. Her criminal behavior was relatively recent, and was not merely one, isolated incident. Her criminal conduct was voluntary, and it involved dishonesty. She continues to drive without a valid driver's license, in violation of the law, and she has ignored the courts' orders to make restitution and to pay fines, displaying indifference to the courts' orders. Such conduct has obvious adverse security clearance significance. There is no evidence of rehabilitation.

Applicant's history of indifference to her financial obligations, her dishonesty in answering a 1993 NAQ question as part of her employment and security clearance application process, her criminal conduct of welfare fraud, her refusal to comply with her criminal sentence in that case by making restitution, and her refusal to comply with the court's order to pay traffic fines, all demonstrate poor judgment, untrustworthiness, unreliability, and unsuitability for a security clearance. On balance, I conclude that Applicant has failed to overcome the Government's adverse information opposing her request for a security clearance.

## **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1 (Criterion F): Against the Applicant.

Subparagraph 1.a.: Against the Applicant.

Subparagraph 1.b.: Against the Applicant.

Subparagraph 1.c.: Against the Applicant.

Paragraph 2 (Criterion E): Against the Applicant

Subparagraph 2.a.: Against the Applicant.

Subparagraph 2.b.: For the Applicant.

Paragraph 3 (Criterion J): Against the Applicant.

Subparagraph 3.a.: Against the Applicant.

Subparagraph 3.b.: Against the Applicant.

Subparagraph 3.c.: Against the Applicant.

Subparagraph 3.d.: For the 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 be grant or continue a security clearance for the Applicant.

Michael Kirkpatrick

Administrative Judge