

DATE: April 28, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR OSD Case No. 96-0640

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR THE GOVERNMENT

Matthew E. Malone, Esquire

Attorney Advisor

FOR THE APPLICANT

Jeffrey S. Sawtelle, Esquire

STATEMENT OF THE CASE

On October 15, 1996, 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 by Change 3, dated February 13, 1996, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make a preliminary determination that it was clearly consistent with the national interest to grant or continue a security clearance for her.

A copy of the SOR is attached to this Decision and included herein by reference.

Applicant responded to the SOR in writing on November 14, 1996, and requested a hearing before a DOHA Administrative Judge. The case was reassigned to this Administrative Judge on December 30, 1996 after having been previously assigned to another Administrative Judge on December 2, 1996. On February 21, 1997, a hearing was convened for the purpose of considering whether it was clearly consistent with the national security to grant, continue, deny, or revoke Applicant's security clearance. The Government's case consisted of eleven exhibits and no witnesses; Applicant relied on her own testimony and five exhibits. A transcript of the proceedings was received on March 4, 1997.

FINDINGS OF FACT

Applicant has admitted, without explanation, the factual allegations set forth in the SOR, except for the factual allegation set forth under subparagraphs 1.e., 1.j., 1.m., 1.n., 1.p., and 1.q. which she has denied. I have accepted Applicant's admissions and incorporate them as part of my 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:

Applicant is 36 years old and has been employed by her current employer since June 1995. She is seeking to retain the secret clearance which was granted to her in 1992. A preliminary determination could not be made because of financial considerations.

Applicant first encountered financial problems in the mid-1980's. Fiscal mismanagement had caused her to fall behind in her monthly home mortgage payments. On September 10, 1985--three days before a scheduled foreclosure on her house--she filed for bankruptcy under Chapter 13.⁽¹⁾ Under a court-ordered plan, Applicant's employer was required to withhold \$394.30 from her salary each month--for 38 months--for payment directly to the Trustee of the Bankruptcy Court. On December 21, 1988 after all payments to the Trustee had been made, Applicant's Chapter 13 Petition was discharged.⁽²⁾

In July 1989, Applicant was laid off by the employer for whom she had worked the previous nine years. She again fell behind in her mortgage payments. In order to avoid foreclosure on her home, she filed a second Chapter 13 petition on March 27, 1990. This petition was dismissed at Applicant's request on June 21, 1990. She had succeeded in protecting her home from foreclosure in 1985 and 1990, but she would eventually lose it to foreclosure at a later date (Tr. 53).

While Applicant was focusing on saving her home from foreclosure, she was neglecting and/or falling behind in other obligations. She owed money on her 1985 and 1986 federal income taxes.⁽³⁾ This obligation had ballooned to \$18,220.00 by the time the SOR was issued. She had incurred--and still owes--\$2492.00 on a credit card. She had incurred--and still owes--an indebtedness of \$908.00 to her former employer. A judgement for \$1,115.00 was entered against her in 1989 for unpaid medical bills. Another judgement in the amount of \$2150.00 was entered against her in 1993 by County N for unpaid property taxes. Nine smaller obligations totaling \$1287.25 had been incurred at various times during the past ten years, and were delinquent when the SOR was issued.

Applicant has experienced periods of unemployment, as well as periods of underemployment during the past ten years. She was unemployed from January to April of 1990, and from July 1992 to March 1993, she was working part-time for two different temporary employment agencies at a rate of remuneration that was significantly less than she had earned previously (Tr. 45-46).

When she was first interviewed by the DIS in October 1991, Applicant confidently reported that she was "getting back on (her) feet now." She had paid back the money which her parents had loaned her and was working part-time "until (she) can clean up all accounts" (Gov. Exh 5). Four and one-half years later, Applicant would sound the same optimism in another signed, sworn statement to the DIS. She had moved back in with her family to save on expenses, and had met with a counseling service to set up a payment plan. She stated that it was her intention to pay all of her obligations, except those where she disputed the amount, or did not know the origin of the debt. In the Personal Financial Statement (PFS) which is included with her statement, she indicated a remainder of \$725.00 each month after meeting other obligations (Gov. Exh. 4). In a statement to the DIS one month later (April 1996), Applicant sought to appease the concerns raised by her unpaid traffic fines by promising to have them "paid within a month" (Gov. Exh 3).

At her administrative hearing, Applicant presented evidence that she had met with a consumer counseling service and had worked out a payment plan--less than one month prior to the hearing (Applicant's Exh. A). She presented evidence that she had paid her traffic tickets the morning of the hearing (Applicant Exh. E). In addition to the traffic tickets, Applicant has paid of a debt of \$119.00 (Applicant's Exh. B) in the ten months since her last DIS interview, and she claims that she had paid her father the \$4,000.00 which she owed him (Tr. 75).⁽⁴⁾ However, since she had made these payments in cash, she did not have any evidence that the payments were made.

POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations with reasonable consistency that are clearly consistent with the interests of national security. In making those overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines but in the context of the factors set forth in

section F.3. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate that the facts proven have a nexus to an applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter.

FINANCIAL CONSIDERATIONS

(Criterion F)

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

- (1) A history of not meeting financial obligations;
- (3) Inability or unwillingness to satisfy debts;

Conditions that could mitigate security concerns:

None Applicable.

Burden of Proof

The Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to the applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates that it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands that Court's rationale, doubts are to be resolved against an applicant.

CONCLUSIONS

Having considered the record evidence in accordance with the appropriate legal precepts and factors, this Administrative Judge concludes that the Government has established its case with regard to Criterion F. In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section F.3, as well as those referred to in the section dealing with the Adjudicative Process, both in the Directive.

The Government has met its burden with respect to Criterion F. The evidence establishes that Applicant has had serious financial problems for more than ten years. Because of overspending and fiscal mismanagement, she fell behind in making mortgage payments on her home in 1985. Through a court-ordered plan under Chapter 13, which required her employer to withhold a portion of her salary each month--for 38 months--for payment to the Trustee of the bankruptcy court, Applicant was able to temporarily resolve her financial obligations. However, less than two years after the first petition was discharged, she was again behind in her mortgage payments, and again she resorted to Chapter 13. Three months later, after she had saved her home from foreclosure, the court dismissed her petition pursuant to her request. However, Applicant subsequently fell behind in her mortgage payments yet again and lost her home to foreclosure.

Additional evidence of Applicant's inability or unwillingness to live within her means and pay her financial obligations when they become due, is found in the other debts which are alleged in the SOR--and admitted by Applicant in her answer. Some of these obligations were incurred more than ten years ago, and Applicant has done nothing to satisfy them until shortly before the hearing. Less than one month before the hearing, she finally sought the assistance of a

credit counseling service; and the day of the hearing, she finally paid the traffic tickets which she had promised to pay ten months earlier.

The periods of unemployment or underemployment identified by Applicant were not of sufficient duration to explain or excuse her current situation. She was only unemployed from January to April of 1990. And she has had almost four years to recover from the period of underemployment between July 1992 to March 1993. Any financial setback which may be attributed to periods of less than full employment are more than offset by Applicant's personal circumstances. She is unencumbered by the financial obligations which typically descend on someone her age. She is currently earning a satisfactory income⁽⁵⁾ and has been earning a more than adequate income for most of the past fifteen years.⁽⁶⁾ Although she is taking medication for high blood pressure, there is no indication of extensive medical bills which have not been covered by insurance, and there is no evidence that she has experienced a catastrophic loss of any kind during the relevant time period. She has never been married and does not have any dependents who look to her for support; she currently lives with a relative and does not pay rent or have a mortgage payment.

Applicant is credited with satisfying the terms of the court-ordered plan which was imposed incident to the bankruptcy petition filed by her in 1985. She was able to pay off her creditors, rather than having her debts discharged in bankruptcy. Similarly, Applicant is credited with requesting dismissal of the Chapter 13 petition which she filed in 1990. Again, she did not abandon her obligations by seeking a discharge from them through bankruptcy. Subparagraph 1b. and 1.g. are concluded for Applicant.

Applicant has presented little else in the way of mitigation. What she has presented has been too little, too late. Although the Personal Financial Statement which she prepared in March 1996, showed a monthly gross salary of \$3086.00, and a monthly remainder of more than \$700.00 after meeting her current obligations, she had applied only \$119.49 of that amount toward satisfying the long overdue debts identified in the SOR until the date of the hearing. While she is credited with satisfying the debts identified in Subparagraphs 1.p. and 1.q. of the SOR, she did not make these payments under circumstances where she can be credited with initiating a good-faith, all-inclusive effort to satisfy her other overdue obligations.

Less than a month before her hearing, Applicant finally sought assistance from a consumer credit counseling service. The plan which the counseling service has prepared for her is a voluntary arrangement which has been in place for less than a month (Applicant's Exh. A). Applicant has not been making payments under this plan for a sufficient period of time for this Administrative Judge to conclude that her financial problems are being resolved. As it currently stands, it is a plan and a promise which is not substantially different from the confident assurances Applicant had previously made in her three signed, sworn statements to the DIS.

Applicant testified that since March 1996, she has paid her father \$4000.00 which she owed him. However, this obligation was incurred more recently than the \$2490.00 debt she owed to the credit card company, or the \$908.00 which she owed her former employer, and should have been given a lower priority--for repayment--than the judgment against her by County N, or her indebtedness to the IRS. In October 1991, Applicant told the DIS that she had paid her father "all" of the money she owed him, so the \$4000.00 debt paid during 1996 was a more recent obligation than her indebtedness to the IRS, County N, her former employer, or the credit card company. While loans from family members are binding and valid obligations, Applicant should not expect accolades for financial responsibility because she has given the loan from her father higher priority--for repayment--than the long-standing debts owed to other creditors. Criterion F is concluded against Applicant.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7, of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 (Criterion F) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. For the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. Against the Applicant

Subparagraph 1.g. For the Applicant

Subparagraph 1.h. Against the Applicant

Subparagraph 1.i. Against the Applicant

Subparagraph 1.j. Against the Applicant

Subparagraph 1.k. Against the Applicant

Subparagraph 1.l. Against the Applicant

Subparagraph 1.m. Against the Applicant

Subparagraph 1.n. Against the Applicant

Subparagraph 1.o. Against the Applicant

Subparagraph 1.p. For the Applicant

Subparagraph 1.q. For the Applicant

Subparagraph 1.r. Against 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 continue Applicant's security clearance.

John R. Erck

Administrative Judge

1. Title 11, United States Code.

2. Contrary to the information in the SOR and in Applicant's signed, sworn statement to the Defense Investigative Service (DIS) in March 1996, her indebtedness of \$45,794.74 was **not** discharged on December 21, 1988. She was discharged from the Chapter 13 Petition under which her employer had been withholding \$394.30 of her salary each month for payment to the Trustee of the Bankruptcy Court. See Government Exhibit 7. The Chapter 13 Petition had been discharged but she was not out of debt. During this time period, she had sold one house and purchased another. See Government Exhibits 1 and 8.

3. Applicant explained that she fell behind on her federal income taxes because she had increased her withholding--on the advice of her accountant (Tr. 70-71). It is not clear how much of her current indebtedness to the IRS (\$18,220.00) is attributable to Applicant's increasing her withholding in 1985, and how much is attributable to penalties and accrued interest.

4. The loan from her father is not listed on the SOR.

5. Applicant is currently earning \$41,301.00 annually according to Applicant's Exh. C.

6. Applicant was employed by the same company from 1980 to July 1989. According to Gov. Exhs. 7 and 8, she earned \$22,000.00 in 1984, \$33,609.00 in 1988, and \$39,154.00 in 1989.