



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
-----) ISCR Case No. 02-26033
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Department Counsel
For Applicant: Virginia M. Gomez, Attorney At Law
McKenna Long & Aldridge

December 11, 2008

Decision On Remand

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted her Security Clearance Application (SF 86), dated January 19, 2001 On August 31, 2006, 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 a Statement of Reasons (SOR) to the 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 recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR on September 29, 2006, and she requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on February 21, 2008. A notice of hearing was originally issued on March 11, 2008, scheduling the hearing for March 27, 2008. On March 20, 2008, Applicant's attorney requested a continuance based upon good cause. A continuance was granted, and a notice of hearing was re-issued on March 25, 2008, scheduling the hearing for April 22, 2008. At the hearing the Government presented three exhibits, referred to as Government Exhibits 1 through 3. The Applicant presented eleven exhibits, referred to as Applicant's Exhibits A through K. Applicant testified on her own behalf. Upon

agreement of the parties, the record was left open for 20 days, until May 12, 2008, for the submission of additional documentation, if obtainable. Pursuant to the Government's request and without objection from the Applicant's Attorney, the record was re-opened for submission of additional documentation. A second hearing was held on June 9, 2008. The Government submitted three additional exhibits, referred to as Government's Exhibits 4, 5 and 6. Applicant's counsel objected to each of the documents and was overruled. (June 18, 2008, Transcript (Tr.) p. 9). The Applicant submitted one additional exhibit, referred to as Applicant's Exhibit L, that was admitted without objection. (June 18, 2008, Tr. p. 14). The official transcripts were received on May 20, 2008 and June 18, 2008.¹

A decision in this matter was issued on July 24, 2008, denying the Applicant's access to classified information. The matter was remanded to the undersigned Administrative Judge on November 17, 2008, to decide the case on the Adjudicative Guidelines in effect at the time of the issuance of the Statement of Reasons.

FINDINGS OF FACT

The following Findings of Fact are based on the Applicant's Answer to the SOR, the testimony and the exhibits. The Applicant is 49 years old and twice divorced. She has a Ph.D in Aeronautics and Astronautics. She is employed by a defense contractor as a Director of Network Systems Technology and is seeking to maintain a security clearance in connection with her employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). After a complete and thorough review of the evidence in the record, and upon due consideration of the same, the following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because she intentionally falsified material aspects of her personal background during the clearance screening process.

Paragraph 2 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because she has a history or pattern of criminal activity that creates doubt about her judgment, reliability and trustworthiness.

The Applicant was born in Taiwan in 1959, and grew up in Indonesia. She attended an international high school in Indonesia with many American students whose parents worked for embassies throughout the world. English was the predominant language taught at the school and a large percentage of the students were from the United States. Being highly ambitious by nature, in 1977, at the age of seventeen, she came to the United States as a student on a F-1 visa. After obtaining her Masters degree, in 1986, she met a man who was a naturalized United States citizen and a pilot. Being impressed with his ability to fly, among other things, and knowing him for less

¹ All references to the transcript, except as noted, refer to the May 20, 2008, hearing.

than a year, in 1987, they were married in a civil ceremony. When the Applicant began full time employment, she failed to renew her F-1 visa or to obtain a work visa. Her lapse in renewing her visa got the attention of the Immigration and Naturalization Service (INS).

In 1988, the Applicant was investigated by the INS, and became the subject of a deportation proceeding for allegedly committing a fraudulent marriage in order to obtain a green card and United States citizenship. She obtained legal representation and in February 1989, she prevailed in the case, and received her green card. In 1990, the Applicant and her husband divorced. She became a naturalized United States citizen in June 1994.

The Applicant began working for her current company or its predecessor in 1995. She met her second husband at the company that same year. They worked in the same group and their relationship evolved. They were married in 1996, and in 2000, they divorced.

She completed an electronic Security Clearance Application (SF-86) dated January 19, 2001, wherein in response to question 8, which asked what is your current marital status, the Applicant answered, "Divorced" and listed her husband from her second marriage. She did not list her marriage to her first husband in 1987. The Applicant contends that her failure to list her first marriage and divorce was totally unintentional and she misunderstood the question. (Tr. p. 70). She also states that it might have also been an oversight on her part, as she had just come out of a divorce in 2000. (Tr. p. 71).

The Electronic Personnel Security Clearance (SF-86) worksheet that was in use at the time the Applicant completed her application specifically requests that all marriages and all divorces be listed. Module 8 of the worksheet requests former spouse information, and ends with the line "Other Marriages: Use the Continuation Sheet at the end of this worksheet." (See Government Exhibit 4).

The instructions for the Electronic Personnel Security clearance application, Section 13/15 specifically requests information concerning current and former spouse(s), including the full name of the spouse and the date married. (See Government Exhibit 5, pp. 22-23).

A sample computer popup screen of the Electronic Personnel Security Clearance Application version completed by the Applicant indicates that once information about a marriage or divorce is inserted, in order to proceed further, the person is prompted by another question, "Do You Want to Enter Another Marriage?". (See Government Exhibit 6, p. 3).

The Applicant was notified in three separate documents to list her entire marriage history, and she did not do so. It is not reasonable to assume that the Applicant did not understand the question or that she did not see the question. (See Government Exhibit 4, p. 16 -17 and Applicant's Exhibit L). By only listing her second marriage and divorce, and not her first one, the Applicant failed to accurately answer the question. It appears strategic on her part in order to avoid discussing her first marriage, given the fact that it

involved a federal litigation proceeding. The Applicant knew or should have known to reveal all of her marriages and divorces, including her first marriage that was the subject of the immigration and naturalization deportation hearing. Under the circumstances, I find that the Applicant intentionally sought to conceal this information from the Government.

With respect to the other allegations, the evidence is not as clear. There was some confusion in the record as to whether the Applicant was interviewed on May 1, 2002 or on May 2, 2001, or on both dates, concerning her first marriage. The Applicant contends that she does not remember being interviewed concerning her background on May 2, 2001. There is no evidence in the record to establish that this interview occurred.

During an interview on May 1, 2002, with an authorized investigator of the Department of Defense, the Applicant did not disclose her marriage to her first husband in 1987. The Applicant admits that she was interviewed on this date, but contends that she was not the subject of an interview, but that the interview concerned her ex-husband who was applying for a security clearance. (Tr. p. 86). Without a sworn statement or an investigative report of the interview there is no evidence in the record that establishes that the Applicant was interviewed concerning her own security clearance application on this date or what questions she was specifically asked.

During a telephone interview on March 3, 2006, with an authorized investigator of the Department of Defense, the Applicant was given an opportunity to correct any omissions on her security clearance application. The Applicant failed to disclose her first marriage, or the charge of marriage fraud by the Immigration and Naturalization Department. The Applicant explained that during this interview she was only asked about travel and nothing concerning her marriage history. She states that she did not omit anything purposefully.

In response to interrogatories dated August 9, 2006, submitted to the Applicant by the Department of Defense, the Applicant was asked to list all marriages, explain the circumstances of the marriage, and identify any investigative/legal/administrative actions. The Government alleges that the Applicant failed to reveal that she was charged with marriage fraud by the Immigration and Naturalization Department in 1988 concerning her first marriage. Question 5, of the interrogatories asked, "Please explain the circumstances of the marriage, e.g., explain if they were related to your desire to become a United States citizen. The Applicant stated, "I was already a U.S. citizen when I married in 2001; and I also have specialized skills with Ph.D. "Circumstance" Marriage was for Love and Family". We "had" common goals and vision for our future, but unfortunately could not the resolve the differences." (See Government Exhibit 2, p. 2). The Applicant's answer to the question was hyper-technical, but not complete. However, I cannot find that she intentionally falsified her answer.

Letters of recommendation from the Applicant's professional colleagues and friends, including the Senior Vice President of Engineering, Operations & Technology and Chief Technology Officer, the Vice President of Engineering and Information Technology at her company, and a Senior Research Scientist at NASA, give glowing references and attest to her integrity, trustworthiness, efficiency, reliability and

conscientiousness. She is also said to be brilliant, focused and hardworking. (See Applicant's Exhibits A, B, C and D).

POLICIES

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline E (Personal Conduct)

E2.A5.1.1. *The Concern.* 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.

E2.A5.1.2 Conditions that could raise a security concern:

E2.A5.1.2.2. 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;

E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination.

E2.A5.1.3. Conditions that could mitigate security concerns:

None.

Guideline J (Criminal Conduct)

E2.A10.1.1. *The Concern.* A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2.1. Conditions that could raise a security concern:

E2.A10.1.2.1. allegations or admission of criminal conduct, regardless of whether the person was formally charged;

E2.A10.1.2.2. a single serious crime or multiple lesser offenses.

E2.A10.1.3. Conditions that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- E2.2.1.1. The nature, extent, and seriousness of the conduct;
- E2.2.1.2. The circumstances surrounding the conduct, to include knowledgeable participation;
- E2.2.1.3. The frequency and recency of the conduct;
- E2.2.1.4. The individual's age and maturity at the time of the conduct;
- E2.2.1.5. The voluntariness of participation;
- E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavior changes;
- E2.2.1.7. The motivation for the conduct;
- E2.2.1.8. The potential for pressure, coercion, exploitation or duress;
- E2.2.1.9. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

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 per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for

clearance may be involved in dishonesty that demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient 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 her a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in dishonesty (Guideline E) and by doing so violated a federal criminal statute (Guideline J). The totality of this evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with her security clearance eligibility.

Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case under Guidelines E and J of the SOR.

Whether the Applicant deliberately or intentionally omitted material facts concerning her former spouse to an investigator of the Department of Defense during interviews on May 1, 2002, or May 2, 2001, or March 3, 2006, or in her interrogatories of August 9, 2006, has not been established. Accordingly subparagraphs 1(a), 1(c), 1(d) and 1(e) are found for the Applicant.

On the other hand, with respect to the Applicant's security clearance application dated January 19, 2001, the evidence shows that the Applicant was not honest with the Government concerning her marriage history and that she deliberately failed to reveal the full truth. The instructions that accompany the security clearance application, the security clearance worksheet, and a sample computer screen shot of the actual (e-QIP) document, all indicate that the Applicant was consistently asked to list all former spouses. (See Government Post-Hearing Exhibits 4, 5 and 6). She did not. By concealing this information from the Government, she has also violated Title 18, United States Code which is a felony.

Under Guideline E, Personal Conduct, disqualifying conditions E2.A5.1.2.2., *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*; and E2.A51.2.3., *Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination* apply. The Government relies heavily upon the integrity and honesty of clearance holders. It is a negative factor for security clearance purposes when an Applicant has deliberately provided false information about material

aspects of her personal background. None of the mitigating factors set forth in the Directive under Guideline E apply.

Under Guideline J, Criminal Conduct, disqualifying conditions, E2.A10.1.2.1., *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; E2A10.1.2.2., *A single serious crime or multiple lesser offenses apply. None of the mitigating factors apply.* Here the Applicant concealed material information from the Government on her security clearance application. She committed a violation of federal law, Title 18, United States Code, Section 1001, a felony.

I have also considered the “whole person concept” in evaluating the Applicant’s eligibility for access to classified information. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, support a whole person assessment of questionable judgement, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard classified information. The question here is whether a reasonable person under the circumstances understood the questions and how to answer them accurately. The Applicant is highly intelligent, and very well versed in the English language. She has been educated at some of the most prestigious universities in the country, and has obtained her Doctorate Degree in Aeronautics and Astronautics as well as other advanced training. She cannot use the excuse that she did not understand the question or that she did not see it. Based upon the evidence presented, I find that the Applicant deliberately concealed material information from the Government concerning her first marriage on her security clearance application. By doing so, she has made a series of poor decisions that adversely effect her ability to obtain a security clearance.

I have carefully considered the Applicant’s testimony in this case. For the reasons stated at length in this decision, I do not find her to be a credible witness. This Applicant has not demonstrated that she is trustworthy, and does not meet the eligibility requirements for access to classified information. Accordingly, I find against the Applicant under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct).

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing her request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the SOR.

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: Against the Applicant.
 - Subpara. 1.a.: For the Applicant.
 - Subpara. 1.b.: Against the Applicant.
 - Subpara. 1.c.: For the Applicant.
 - Subpara. 1.d.: For the Applicant.

Subpara. 1.e.: For the Applicant.

Paragraph 2: Against the Applicant.

Subpara. 2.a.: 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 grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson
Administrative Judge