

DATE: July 14, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-02046

REMAND DECISION OF ADMINISTRATIVE JUDGE

WILFORD H. ROSS

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

On Remand. The Applicant has mitigated the security significance of the three alleged criminal acts in her past. One was distant, one had insufficient evidence to prove that it occurred and the third was mitigated by successful rehabilitation. The evidence failed to show that the Applicant is currently suffering from a mental, emotional or personality disorder that effects her ability to safeguard classified information. Adverse inference is overcome. Clearance is granted.

STATEMENT OF THE CASE

On December 9, 2002, this Administrative Judge issued a Decision in this case finding that it was clearly consistent with the national interest to grant the Applicant access to classified information. The Government appealed this Decision and, on May 22, 2003, the Appeal Board of the Defense Office of Hearings and Appeals (Appeal Board) remanded the Decision to this Administrative Judge with instructions stating, "The Judge must issue a new decision, consistent with the requirements of Additional Procedural Guidance, Items E3.1.35 and E3.1.25 that adequately explains his findings and conclusions in light of the record evidence as a whole. The Judge's new decision should consider all of the four expert exhibits using a uniform analytical framework." (Appeal Board Decision and Remand Order (Appeal Board Decision) at 8.)

FINDINGS OF FACT

The Applicant is 43 and single. She is employed by a defense contractor as an office duplicator operator, and she seeks to retain a Secret-level DoD security clearance previously granted in connection with her employment in the defense sector.

The Government opposes the Applicant's request for a continued security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because she has engaged in criminal acts.

The Applicant's first marriage was to an abusive man. On July 10, 1984, the Applicant and this man got into an argument. The Applicant eventually took her husband's pistol and fired at his car. The Applicant's husband was accidentally hit. The Applicant was arrested for this incident, but was never charged. She and her first husband were subsequently divorced in 1986. A court order of expunction was entered concerning this case in 1988. (Government Exhibit 2 at 1; Applicant's Exhibit Q; Transcript at 60-69, 106-109.)

The Applicant remarried, and had several children. She and her second husband divorced, and have had contentious relations since then concerning custody and visitation of the children. (Applicant's Exhibits E and F, Transcript at 95.) In February 1999, the Applicant was arrested and charged with Inflicting Injury on a Minor, specifically her daughter. The Applicant has admitted that she was charged, but has always denied that she injured her daughter in any way. (Government Exhibit 3 at 3-4.) In April 2000 the Applicant's second husband filed an Affidavit of Non-Prosecution with the court and the case was dismissed. (Applicant's Exhibit D, Transcript at 69-77.) As of the date of the hearing, over two years later, the State had not elected to continue with the prosecution. There is no testimony by the Applicant, or documentary evidence, about the circumstances surrounding the arrest.

By 1999, the Applicant was no longer the custodial parent of her children. Pursuant to a court order, she was required to pay \$167.02 a week in child support to her second ex-husband. In October 1999, she was unable to pay three weeks of support due to being off work for medical reasons. In February 2000 the Applicant was found to be in criminal contempt for her failure to pay the support. An order of commitment to county jail was suspended and the Applicant was placed on probation and required to pay her child support as well as the arrearage and her ex-husband's attorney fees. (Government Exhibit 6.) The Appellant paid the arrearage in full and was released from probation in September 2001. (Applicant's Exhibit P, Transcript at 77-83.)

Paragraph 2 (Guideline I - Emotional, mental and personality disorders). The Government alleges in this paragraph that the Applicant is ineligible for clearance because she has an emotional, mental and/or personality disorder which may indicate a defect in judgment, reliability or stability.

There is considerable, conflicting, documentary evidence concerning the Applicant's mental state. There was no expert testimony by either side at the hearing in this case.

In October 1998, a clinical psychologist evaluated the Applicant pursuant to a court order concerning child custody. (Government Exhibit 4.) On page 5 of Exhibit 4 the psychologist states concerning the Applicant:

Generalized anxiety as well as inherent personality traits present in [the Applicant] result in episodes of emotional distress. She is at times over-sensitive and rigid and there are historic problems working on interpersonal relationships. She tends to exaggerate her feelings and it is obvious that she is suspicious and highly distrustful of many people in her life. At times, this exaggeration of her emotions leads to outbursts of anger, difficulties in social situations and chronic feelings of resentment. It is my opinion that she has only limited insight into her behavior and there appears to be a complete lack of flexibility in dealing with new situations. This lady presents with a low tolerance for frustration, an intolerance of others and typically uses coping mechanisms of repression, denial and transfer of blame. I am of the opinion that when she becomes emotionally aroused, the resulting behaviors tend to be somewhat hostile and belligerent. At times, her thinking may be irrational; at times her thinking may be frankly paranoid. Historically, she has exhibited impulsive behaviors and I believe that behavior continues into the present.

In his recommendations, the psychologist states, "I find indications from the present evaluation that [the Applicant] displays significant elements of emotional difficulties and in all likelihood these difficulties are going impact her children. I suggest that she institute and maintain a regular therapeutic relationship with a licensed psychiatrist and follow his recommendations for treatment, including medication." (Government Exhibit 4 at 10.)

The Applicant has continually and vehemently disagreed with the above psychologist's report. (Applicant's Exhibit K, Transcript at 87-88.)

Pursuant to another court order, the Applicant was later assessed during seven sessions by a different clinical and forensic psychologist. These assessments took place between May and August 2001. This psychologist stated in an undated report his "Psychological Assessment Results" as follows, "The results of the psychological assessment of [the Applicant] revealed no significant signs of psychological dysfunctioning. Personality data revealed a valid profile. The profile was reliable, that is, if retested the salient characteristics were expected to remain the same." (Applicant's Exhibit A at 2.)

The Applicant was evaluated by DoD psychiatric consultants on October 26, 2001. (Government Exhibit 5.) As a result of this evaluation, the consultants opined that the Applicant was suffering from a "Depressive Disorder; Not Otherwise Specified" and a "Personality Disorder; Not Otherwise Specified, with Hysterical, Compulsive, and Narcissistic Traits." The consultants were asked if the condition was of a transient or continuing nature. They replied:

It is likely that [the Applicant's] emotional distress related to *current* life stress will respond to psychotherapy and her medication regimen, and is therefore transient. However, the personality profile that has emerged indicates that her personality structure and deficits in her interpersonal skills may exacerbate her social difficulties-this pattern is likely to continue. Based on extensive case history, she has been able to manage her stress in ways that have allowed her to maintain occupational success. This is evident by her decades of continuous career stability and reports of supervisory satisfaction with her performance and attitude at work. (Emphasis in original.)

The Air Force medical personnel were also asked if the condition was then causing or would cause a significant defect in the Applicant's judgment or reliability. The report states, "Her presentation to us, psychological testing, her own and other witnesses' accounts and narratives indicate the presence of personality traits likely to result in defects in judgment of a personal liability, but remain outside of a work environment. It is unlikely this will change in the future."

The consultants were further asked if the condition was then causing or may cause in the future a significant defect in her psychological, social or occupational functioning. They state:

It is our opinion that [the Applicant] is likely to be less functional in her personal life, which presents less predictability. Her personality style and choices tend to create unsatisfactory intimate relationships. She possesses a low level of insight into her own contribution to life stresses, thus it is unlikely that her personality profile and judgment with regards to personal relationships would change in the future. As above, these issues may possess a personal liability but remain outside of a work environment.

Finally, the consultants stated that the conditions were not in remission at the time of the report.

The Appellant's current psychologist vehemently disagrees with the above report. In a letter dated March 9, 2002, she responds in depth to Government Exhibit 5. (Applicant's Exhibit B.) She states, "In my work with [the Applicant] from 3/23/99 to present, I observed no diagnosis other than depression and acute stress due to her circumstances. She is receiving medications and therapy for these." The Applicant's psychologist also attacks the methodology of the DoD consultants. Specifically, she was concerned that they drew their conclusions after a short acquaintance with the Applicant. In addition, she states, "The diagnosis of [the DoD psychiatric consultants] is so broad as to be nearly meaningless. They were unable to find even one clear personality disorder." Finally, the Applicant's psychologist states, "Rather, aside from psychological testing, our best measure of whether a person should be seen as suspect lies in her history. [The Applicant] has worked for [her employer] for 23 years. If this long history has not revealed problems, while she has been under acute stress and struggling with depression, it is doubtful she would breach security in the future."

Mitigation. The Applicant's witness is a lay person who has been assisting her in her conflicts with her ex-husband and his new wife. His extensive testimony, and the Applicant's documentary evidence, indicate that her ex-husband and his new wife have extensive emotional problems of their own. (Applicant's Exhibits E, F, H and I.; Transcript at 28-58.) In addition, there is evidence that the Applicant's concerns over persecution are not without basis in fact. For example, the Applicant's probation officer, an obviously unbiased person, stated in Applicant's Exhibit P:

I had no problems with [the Applicant] or her behavior while she was on probation. She was always cooperative and

pleasant. She discussed numerous problems she had with her former husband and his wife (more from the wife, who is the ex-wife of [the Applicant's] present husband). I have had several conversations with the [Applicant's ex-husband's new wife] and have been very concerned over her obvious obsession with [the Applicant] and her husband.

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Guideline J (Criminal conduct)

Conditions that could raise a security concern:

- (1) Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
- (2) A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns:

- (4) the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;
- (6) there is clear evidence of successful rehabilitation.

Guideline I (Emotional, Mental and Personality Disorders)

Conditions that could raise a security concern:

- (1) An opinion by a credentialed mental health professional that the individual has a condition or treatment that may indicate a defect in judgment, reliability or stability;
- (2) Information that suggests that the individual's current behavior indicates a defect in his or her judgment or reliability.

Conditions that could mitigate security concerns:

- (1) There is no indication of a current problem;
- (2) Recent opinion by a credentialed mental health professional that an individual's previous emotional, mental, or personality disorder is cured, under control or in remission, and has a low probability of recurrence or exacerbation;
- (3) The past emotional instability was a temporary condition (e.g., one caused by a death, illness, *or a marital breakup*), the situation has been resolved, and the individual is no longer emotionally unstable. (Emphasis supplied.)

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 factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct

- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

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

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 may be involved in criminal acts or be suffering from an emotional, mental or personality disorder that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a 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

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 him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has committed several criminal acts (Guideline J); and that she may be suffering from an emotional, mental or personality disorder (Guideline I).

The Applicant, on the other hand, has successfully mitigated the Government's case. Turning first to the allegations of criminal conduct. The 1984/85 incident concerning the accidental shooting of her first husband is mitigated because of the time from that incident to the date of the hearing.

The evidence concerning the charge of Injury to a Child is mixed, at best. There is no police record in the file, no statements from the child, and the Applicant has consistently denied the event took place. Added to this is the considerable, and credible, evidence of animosity between the parties and the Applicant's ex-husband's decision to file an "Affidavit of Non-Prosecution" with the court. Based on the state of the record, I cannot find with any degree of certainty that the Applicant inflicted injury on her daughter as alleged in the SOR.

The Applicant was found guilty in criminal contempt for failing to pay less than \$600 in child support. She paid off the debt in September 2001, nine months before the hearing, and has maintained timely payments ever since. While of concern, I believe there is considerable evidence of successful rehabilitation. Accordingly, this allegation is found for the Applicant as well.

Turning next to the allegations of the Applicant suffering from emotional, mental or psychiatric disorders. It is obviously true that there has been considerable personal turmoil in the Applicant's life. It is also equally true that the Applicant has not been the sole, or even the primary, agent of this turmoil. The question then becomes whether the turmoil has reached the status of a personality disorder and, if it has, whether that disorder is of a nature to make her ineligible for a security clearance. I do not believe it does.

In reviewing the expert evidence in this case, several principles of law have been stated by the Appeal Board. They have stated, "The trier of fact is not required to accept even uncontradicted testimony of an expert. *See, Parilla-Lopez v. U.S.*, 841 F.2d 16, 19 (1st Cir. 1988). Such evidence must be considered along with the evidence as a whole. *See, Directive*, Section [6.3]." DISCR OSD No. 89-0820 (February 25, 1992). The Appeal Board has further stated, "It is the [Administrative Judge], not the Applicant or an expert witness, who is the trier of fact and responsible for deciding the case. *See, Del Mar Avionics, Inc. v. Quinton Instrument Co.*, 836 F.2d 1320, 1325 (Fed. Cir. 1987." DISCR OSD No. 86-3039 (March 28, 1989), at 8.

In a 1999 case, the Appeal Board stated:

The Judge is not bound to give full or decisive weight to testimony merely because it comes from expert witnesses. The Judge's responsibility to consider and weigh the record evidence as a whole is not diminished by the presence of expert opinions. *See, e.g., Rohm and Haas Co. v. Brotech Corp.*, 127 F.3d 1089, 1092 (Fed. Cir. 1997) (trier of fact not required to accept expert opinion); *Powers v. Bayliner Marine Corp.*, 83 F.3d 789, 797 (6th Cir. 1996) (jury free to weigh expert's testimony and accept it or reject it), *cert. denied*, 117 S.Ct. 481 (1996); *United States v. Jackson*, 19 F.3d 1003, 1007 (5th Cir. 1994) (trier of fact is responsible for considering credibility and weight of expert opinion testimony, and such testimony is not conclusive because it is uncontradicted), *cert. denied*, 513 U.S. 891 (1994).

ISCR OSD No. 98-0265 (March 17, 1999), at 4. (*See, also*, ISCR OSD No. 99-0288 (September 18, 2000). This case specifically states that Administrative Judges are not compelled to accept the diagnosis of DoD psychiatric consultants.)

I have reviewed all four of the psychological reports in the record in relation to the evidence as a whole. I have weighed them against each other, as well as with and against the testimonial and other documentary evidence in the record. In reviewing the psychological reports, I have not considered any extraneous material in them, concerning myself only with the statements with relevance to the Applicant's current condition.

The Applicant has been depressed. The breakup of her second marriage obviously affected her. It is also obvious that the Applicant has a personality, outside of work, which causes her social distress.

The evidence is not just mixed but directly contradictory as to whether she has a personality disorder. The Applicant's experts state clearly that she is not suffering from a personality disorder. The clinical and forensic psychologist, after seven meetings in four months, found "no significant signs of psychological dysfunctioning." (Applicant's Exhibit A at 2.)

Government Exhibit 4, the oldest exhibit and prepared during a very nasty divorce and custody proceeding, states that the Applicant may be delusional. While the report is extensive, there were only two clinical interviews with the Applicant. There is little or no evidence in the record to support this, and the DoD psychiatric consultants did not make an equivalent finding two years later.

The DoD psychiatric consultants found that the Applicant may have a personality disorder, but they specifically state that it results "in defects of judgment of a personal liability, but remain outside of the work environment." (Government Exhibit 5.)

Her current attending psychologist, who had worked with her for three years as of the date of the hearing, also prepared a report. This psychologist states that the Applicant is able to control her depression with medication and that she is receiving treatment for it. (Applicant's Exhibit B at 1.)

Finally, it is worth noting that the Applicant represented herself in these proceedings. Her pleadings were cogent and intelligent. She presented considerable relevant and material documentary evidence. She testified believably, credibly and coherently. The Applicant was in control of herself and maintained a professional demeanor during her presentation, as well as during extensive cross-examination.

After weighing all of the evidence, giving each due weight, and looking at it as a whole, I find that the Applicant is not currently suffering from a personality disorder that affects her ability to safeguard classified information. I specifically find that Mitigating Conditions 1, 2 and 3 all apply to this case.

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

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: For the Applicant.

Subparagraphs 1.a. through 1.c.: For the Applicant.

Paragraph 2: For the Applicant.

Subparagraph 2.a.: For the Applicant.

DECISION

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

Wilford H. Ross

Administrative Judge