

DATE: May 31, 2002

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-06870

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant had been arrested for, charged with, and convicted of domestic violence in June 1998, after she scratched her husband in self defense during a domestic dispute. Although she omitted information of this arrest from her SF 86 (*Security Clearance Application*), the omission is not found to be pertinent to a determination of her judgment, trustworthiness, or reliability because of Applicant's persuasive, exculpatory account of the facts and circumstances surrounding her arrest and conviction.

STATEMENT OF THE CASE

On November 5, 2001, 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 Personal Security Clearance Review Program*" (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary finding under the Directive that it is clearly consistent with the national interest to grant a security clearance for Applicant and recommended referral to an Administrative Judge to determine whether a security clearance should be granted, denied or continued.

Applicant answered the SOR in writing on November 26, 2001, and requested a hearing before a DOHA Administrative Judge. The case was assigned to this Administrative Judge on January 28, 2002. On May 7, 2002, a hearing was convened for the purpose of considering whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of three exhibits. Applicant relied on her own testimony and three exhibits. A transcript (Tr.) of the proceeding was received on May 20, 2002.

FINDINGS OF FACT

The Statement of Reasons (SOR) alleges Applicant was arrested for criminal domestic violence in June 1998, and that she omitted information of this arrest from the *Security Clearance Application* (SF 86) she completed in August 2000.

In her answer to the SOR, Applicant admitted (with explanation) her arrest for domestic violence in June 1998, and that she had omitted information of this arrest from the SF 86 she completed in August 2000. I accept Applicant's admissions and after a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following additional findings of fact.

Applicant is a 23-old-married female who has been employed by her current employer, for more than two years. She has not previously applied for a security clearance.

In October 1997, Applicant married a member of a U.S. military service whom she did not know well; he soon began to mentally and physically abuse her. Early in the marriage, Applicant has indicated her husband was removed from their home for a couple of days by his commanding officer because of his abusive behavior; he was "told" to attend counseling and anger management classes at the family service center. (See Applicant's answer to SOR). The counseling did not help; the abuse continued. Applicant was not allowed to work outside the home, and since they had only one car, she was not allowed to go anywhere unless her husband was with her.

Applicant's ex-husband was 2 or 3 years older than her; he weighed 180 to 190 pounds; and he was physically fit because of having to take regular PT tests. Applicant was/is 67 inches tall and weighs 145 pounds (Gov. Exh. 1).

In June 1998, Applicant's husband became very upset and abusive when he came home and found she (Applicant) had not folded his laundry correctly. Applicant locked herself in the bedroom after he started yelling at her. He kicked down the door and continued to come after Applicant, "swinging his fists with all of his strength." Applicant tried to defend herself by reaching for his hands. In so doing she scratched his neck and then "ran out of the house" to allow her husband to cool off. Meanwhile, the neighbors heard the disturbance and called the police. When Applicant returned, the police took her into custody. Applicant has explained she was taken into custody because her husband, not she, had a scratch on his neck.

Applicant was charged with criminal domestic violence. One week later, she appeared before a municipal judge and unassisted by counsel, pleaded guilty to the charge. She was sentenced to 30 days confinement (suspended) and advised (by the judge) to attend marital and victim's counseling. A short time later while her husband was on a training assignment, she packed her personal belongings, left her husband, and went back to live with her parents.

Back home in the familiar surroundings where she had grown up, Applicant asked a friend, who was employed by the local sheriff's department, to check if she (Applicant) had a criminal record. This check, using Applicant's social security number, was run in both her maiden and married names, and disclosed no criminal record.

Applicant was hired by her current employer in December 1999. In August 2000, her employer requested her to complete an SF 86 (*Security Clearance Application*). She completed this form and certified:

My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both.

Yet in answer to question 26 which asked Applicant if she had been arrested for, or charged with any offense (not listed in response to questions 21, 22, 23, 24, or 25) in the last 7 years, she answered "no" (Gov. Exh. 1).

Later when Applicant was questioned by the Defense Security Service (DSS) in November 2000 and confronted with information of the arrest for domestic violence⁽¹⁾, she admitted her June 1998 arrest for domestic violence. In a signed, sworn statement (prepared by the DSS special agent), Applicant provided the account of the circumstances surrounding her arrest which is set out above. She explained she had not listed the arrest on her SF 96 because she did not think her arrest was a matter of record--as a result of her friend's computer search of the records. The typed statement also includes the following statement: "I also thought that I possibly wouldn't get the job as federal contractor if the arrest was listed" (Gov. Exh 2).

Based on Department Counsel's cross examination, there is no indication the DSS ever attempted to obtain the police or court records of Applicant's arrest or conviction. Nor is there an indication the DSS attempted to question Applicant's

ex-husband or obtain records of his counseling for anger management.

In her answer to the SOR, Applicant repeated her account of being an abused spouse who was arrested when she scratched her ex-husband while trying to defend herself. She added that she was arrested rather than her military, ex-husband because the local jurisdiction was sensitive to the problems her husband (as a service member) would have experienced if he had been arrested and charged with domestic violence.

Applicant provided a consistent account of the events which preceded her arrest and her completion of the SF 86, in her testimony at her administrative hearing⁽²⁾. She denied that she "deliberately lied" when she answered "no" to question 26 (Tr. 24). She admitted she may not have read the question carefully. Applicant also credibly denied stating (to the DSS special agent) that she had withheld information of her arrest because she did not think she would get a job with a federal contractor if she told the truth. She had already been employed by a federal contractor for more than 8 months when she completed the SF 86.

Applicant remarried in March 2001. A co-worker described Applicant as a trustworthy and dependable employee with a positive attitude. Friends who have known her for more than five years state that she is an honest, loyal and trusting person who was taken advantage of by her first husband.

POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judge on a case by case basis with an eye toward making decisions with reasonable consistency that are clearly consistent with the interests of national security. In making these 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 also in the context of the factors set forth in Section 6.3 of the Directive. In that vein, the Government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to Applicant's lack of security worthiness.

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

CRIMINAL CONDUCT

(Guideline J)

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

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

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

Conditions that could mitigate the security concerns include:

E2.A10.1.3.1. The criminal behavior was not recent;

E2.A10.1.3.2. The crime was an isolated incident;

E2.A10.1.3.3. The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life;

E2.A10.1.3.4. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;

E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

PERSONAL CONDUCT

(Guideline E)

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.

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

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.

Conditions that could mitigate security concerns include:

E2.A5.1.3.1. The information was unsubstantial or not pertinent to a determination of judgment, trustworthiness, or reliability;

Burden of Proof

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

A person who seeks access to classified information enters a fiduciary relationship with the Government predicated upon trust and confidence. When the facts proven by the Government raise doubt about Applicant's judgment, reliability, or trustworthiness, Applicant has a heavy burden of persuasion to demonstrate 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 security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against an Applicant.

CONCLUSION

Having considered the record evidence in accordance with the appropriate legal precepts and factors, this Administrative Judge concludes the Government has established its case with regard to Guideline J and E. In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section 6.3, as well as those referred to in the section dealing with Adjudication Process, both in the Directive.

A security concern is raised by Applicant's arrest for, and conviction of criminal domestic violence. A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

Mitigating Applicant's criminal conduct are the circumstances of her arrest and conviction. In spite of what is disclosed in the public records maintained by the Federal Bureau of Investigation (FBI), Applicant has consistently and credibly maintained she was the victim, not the perpetrator of domestic violence. Having had an opportunity to observe Applicant's appearance and demeanor, I found her account of the relationship with her ex-husband to be entirely credible. She did not impress me as someone capable of being the dominant and aggressive party in a relationship. Had she been the dominant and aggressive party, rather than the aggrieved party, it is unlikely she would have left this relationship to go home and live with her parents.

Further mitigating Applicant's misconduct was its occurrence almost four years ago, E2.A10.1.3.1. The misconduct was an isolated incident; Applicant had never been involved in misconduct prior to this incident and has not been involved in any misconduct in the past four years., E2.A10.1.3.2. Because of her ex-husband's physical abuse and aggressive

behavior, she was pressured into acting in self defense, E2.A10.1.3.1. Given the fact her marriage to her ex-husband has ended, it is unlikely the factors leading to the violence will recur, E2.A10.1.3.4. Guideline J is concluded for Applicant.

A security concern is raised by Applicant's failure to admit she had been arrested in response to question 26 of the *Security Clearance Application*. A lack of candor or dishonesty could indicate the person may not properly safeguard classified information.

While the Applicant was not truthful in answering question 26, the evidence does not establish she deliberately lied to the United States Government because she knew she would not receive a security clearance if she told the truth. An individual who has recently been arrested for drug possession, or who has recently been treated for drug abuse, knows--in all likelihood--this information will adversely affect his/her being granted a security clearance. A victim of domestic violence, even if she has been arrested, does not have the same knowledge about the likely impact of their past on the security clearance process. She does not have the same motive to conceal her past. Applicant saw herself as a victim of spouse abuse; she was/is ashamed about that time of her life, but there is no credible evidence she believed her arrest for domestic violence would bar her from obtaining a security clearance.

Having had an opportunity to observe the demeanor and appearance of Applicant, I found her account of the events that preceded her arrest and conviction to be credible. Not only was she personally credible, her account of the events is consistent with common sense and experience. It is an unfortunate reality that a 19-year-old woman, providing an account of abuse by a service member husband, 2 or 3 years her senior, is probably telling the truth. In this case Applicant's ex-husband had abused her previously; he had attended anger counseling and been removed from their home on one occasion. Also aiding Applicant's credibility is the fact the sentence imposed by the court is not the sentence imposed on an individual who has been found to be dangerous and violent.

Further investigation may have confirmed or refuted Applicant's testimony: that she was the victim of an abusive spouse and a legal system more sensitive to a soldier's career than to the welfare of his abused spouse, and that she pleaded guilty to domestic violence because she was too scared and too naive to avail herself of competent representation. However, there is no police report, no court records, and there is no indication an attempt was made to interview Applicant's ex-husband or obtain records of the anger counseling he received. Not only is Applicant's account of the events credible and consistent with common sense and experience, it is the only account in the record.

Because I find Applicant and her account of the events credible, I have concluded the information which she omitted from her SF 86 was not pertinent to a determination of her judgment, trustworthiness, or reliability (E2.A5.1.3.1.). Guideline E is concluded for 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 (Guideline J) FOR THE APPLICANT

Paragraph 1.a. For the Applicant

Paragraph 1.b. For the Applicant

Paragraph 2. (Guideline E) FOR THE APPLICANT

Paragraph 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 Applicant's security clearance.

John R. Erck

Administrative Judge

1. This information was contained in an FBI report (Gov. Exh 3).
2. Based on Department Counsel's cross examination, it does not appear DSS ever attempted to obtain the police or court records of Applicant's arrest or conviction. Nor is there an indication DSS attempt to question Applicant's ex-husband or obtain records of his counseling for anger management.