

DATE: April 12, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ADP II/III Case No. 01-17679

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On April 9, 1993, the Composite Health Care System Program Office (CHCSPO), the Defense Office of Hearings and Appeals (DOHA), and the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASD C³I) entered into a memorandum of agreement for DOHA to provide trustworthiness determinations for contractor personnel employed in Information Systems Positions as defined in DoD Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987.

On November 5, 2001, the DOHA issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding that it is clearly consistent with the national interest to make or continue a determination of trustworthiness, suitability, and eligibility for Applicant to hold a sensitive Information Systems Position (ADP-I). The Applicant responded to the SOR in writing on November 20, 2001, and requested an administrative hearing. This case was assigned to the undersigned Administrative Judge on January 28, 2002, to determine whether a determination of trustworthiness should be made or continued, denied or revoked. A Notice of Hearing was issued on February 11, 2002, and the hearing was scheduled for March 5, 2002. Applicant requested a continuance that was denied. A hearing was held on March 5, 2002, at which the Government presented four exhibits. The Applicant presented twenty-three exhibits, and called two witnesses. He also testified on his own behalf. He also submitted one Post Hearing Exhibit, received in this office on arch 15, 2002, that was not admitted into evidence, as it was submitted after the record was closed.

The official transcript was received on March 13, 2002.

FINDINGS OF FACT

The Applicant is 49 years old, has a high school diploma, some junior college and many years of training in the United States Navy. He is employed as a GFE Property Coordinator by a defense contractor. He is applying for a an ADP-II/III position and access to sensitive personal information in connection with his employment.

The Government opposes the Applicant's request to for a determination of trustworthiness and access to personal sensitive information on the basis of allegations set forth in the SOR. The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for a determination of trustworthiness and access to sensitive personal information because he has engaged in criminal conduct.

From July 1987 until October 1998, the Applicant was married to his first wife, who suffered from a mental illness. During their marriage they had two children. The Applicant testified that on one occasion in June 1991, when his youngest daughter was three months old, he was giving her a bath inside the tub, when she started to fall. He grabbed her legs, to keep her from falling. He apparently fractured her leg, and did not know it. The following day, his wife called the police. She reported that there were bruises on the child's legs. Both children were removed from the home, and placed in the custody of the state.

On one previous occasion, the Applicant admitted that when the baby was about two months old, after having bathed her, he stumbled and tripped, and he dropped her on the carpet floor. He did not take her to the hospital for an examination.

On July 12, 1991, the Applicant and his wife separated, and she moved out of the home.

In October 1991, the Applicant learned that he was not the biological father of the youngest child. Her biological father was awarded custody while the children were in foster care, and the child has never returned to the Applicant's home.

On March 10, 1992, the Applicant was charged with (1) Corporal Injury to a Child, a felony, and (2) Child Abuse - Willful Cruelty to a Child, a felony. On October 5, 1992, he pled guilty to count 2, and count 1 was dismissed. On November 5, 1992, the Applicant was sentenced to 365 days in jail to be served on work furlough, and placed on five years probation. He was ordered to pay probation costs of \$888.00, and ordered to complete an Anger Management program, as well as Parenting classes, and any other recommended counseling by his probation officer. He was fined \$200.00, and ordered to make restitution in the amount of \$100.00. After successfully completing a one year probation, the charge was reduced to a misdemeanor, Child Endangerment. (*See, Applicant's Exhibit L*). Since then the Applicant has complied with all of the court's sentencing requirements. In addition, his oldest daughter was returned to the home in June 1994, and he regained sole physical custody and joint legal custody of her in January 1995. (*See, Applicant's Exhibit I*). The Applicant has since divorced his first wife, remarried, and had another child. He now maintains a stable lifestyle.

The Applicant has engaged in no other criminal conduct either before or after the conviction.

Paragraph 2 (Guideline B - Foreign Influence). The Government alleges in this paragraph that the Applicant is ineligible for a determination of trustworthiness and access to sensitive personal information because he may be subject to foreign influence that could result in its compromise.

In 1998, the Applicant met his previous girlfriend from Thailand over the internet. He traveled to see her in August 1998, during his two week vacation. He gave her \$50.00 while he was visiting her. On at least one other occasion, he sent her \$100.00. Since 1998, he has had no contact with her, or with anyone else in Thailand.

The Applicant's wife is from Indonesia. He met her over the internet on January 1, 1999. He married her in April 1999, and she first came to the United States in August 1999. She is not a citizen of the United States. The Applicant states that she intends to apply for United States citizenship when she becomes eligible.

Paragraph 3 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for a determination of trustworthiness and access to sensitive personal information because he has engaged in conduct involving questionable judgment, untrustworthiness and unreliability.

The Applicant served in the United States Navy from October 1974 until April 1993. As a result of his criminal

conviction, he was discharged from the military with a General Discharge Under Honorable Conditions due to Misconduct - Convicted by a Civil Court for an offense occurring during current Term of military service. The Applicant testified that he went through an Administrative Discharge Board, at his request, to try to stay in the Navy, however, the Board recommended that he be discharged. At the time he was discharged from the Navy, he was still serving time in the County Work Furlough program.

Mitigation.

The Applicant's performance appraisals from January 1998 through March 2000, show that he is a good employee with an exceptional ability to generate accurate data with extraordinary attention to detail. (*See*, Applicant's Exhibit F).

The Applicant's long time friend testified that the Applicant is a very caring person who is extremely responsible and meticulous to detail. (Tr. p. 58).

The Applicant's new wife testified that the Applicant is a good father to his oldest daughter, and is very good with their new baby. (Tr. p. 120).

During his military career, the Applicant received three good conduct medals. (Tr. p. 89).

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, etc.

Considering the evidence as a whole, the following adjudicative policy factors are most pertinent to this case:

Guideline J (Criminal Conduct)

Conditions that 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 that could mitigate security concerns:

1. The criminal behavior was not recent;
2. The crime was an isolated incident;
3. There is clear evidence of successful rehabilitation.

Foreign Influence

A security risk may exist when an individual's immediate family, including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are: (1) not citizens of the United States or (2) may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Conditions that could raise a security concern:

1. An immediate family member, or person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country;
2. Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists.

Conditions that could mitigate security concerns:

1. The immediate family member is not an agent of the foreign power or in a position to be exploited by the foreign power in a way that could force Applicant to choose between loyalty to the immediate family member and the United States.

Guideline E (Personal Conduct)

Conditions that could raise a security concern:

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:

- a. The nature, extent, and seriousness of the conduct and surrounding circumstances
- 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 behavioral changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress; and
- i. The likelihood of continuation or recurrence.

The eligibility guidelines established in the DOD Directive identify personal characteristics and conduct that 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 sensitive personal 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 eligible for a security clearance. Eligibility for access to sensitive personal information is predicated 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 a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence that 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."

Initially the Government must prove controverted facts alleged in the SOR. If the Government meets that burden, the

burden of persuasion then shifts to the Applicant establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest for a determination of trustworthiness and access to sensitive personal information.

CONCLUSIONS

In this case the Government has met its initial burden of proving that the Applicant has engaged in criminal conduct (Guideline J). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant.

The evidence shows that the Applicant was charged and convicted of an egregious felony in 1992, that was subsequently reduced to a misdemeanor. He served honorably in the United States Navy for 18 ½ years before his conviction. Following this conviction, he was punished by both the civil and military justice system. He has successfully completed the work furlough program, undergone both individual and group counseling, and Anger Management courses. He has satisfied all of the other sentencing requirements, including paying the probation costs, fines, and restitution. He successfully completed the five year probationary period in November 1997. The criminal conduct is isolated, not recent, and occurred over ten years ago. Based upon the fact that the the Applicant has led an exemplary lifestyle since his conviction, I conclude that there is little or no chance that Applicant will exercise poor judgment and engage in criminal conduct or poor personal conduct in the future. Accordingly, Guidelines J and E are found for the Applicant.

With respect to the allegations set forth under Guideline C, there is no evidence that the Applicant's wife is an agent of a foreign power or that she is in a position to be exploited by a foreign power. I find no security significance to the allegations without additional evidence. Accordingly, Guideline C is found for the Applicant.

Considering all of the evidence, the Applicant has introduced persuasive evidence in rebuttal, explanation or mitigation, which is sufficient to overcome the Government's case.

On balance, it is concluded that the Applicant has overcome the Government's case opposing his request for a determination of trustworthiness. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1, 2 and 3 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.

Subpara. 1.a.: For the Applicant.

Paragraph 2: For the Applicant.

Subpara. 2.a.: For the Applicant.

Subpara. 2.b.: For the Applicant.

Paragraph 3: For the Applicant.

Subpara. 3.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 make or continue a determination of trustworthiness, suitability and eligibility for Applicant to hold a sensitive Information Systems Position (ADP-II/III).

DARLENE LOKEY-ANDERSON

Administrative Judge