

DATE: October 14, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-25416

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco J. Mendez, Esq., Department Counsel

**FOR APPLICANT**

J. Allen Brinkley, Esq.

**SYNOPSIS**

Applicant submitted a security clearance application on December 20, 2000 in which she intentionally failed to disclose financial delinquencies and civil court actions as required. Her knowing and willful certification of that form with the intentional falsifications contained therein constitutes an offense under 18 U.S.C. § 1001. Applicant has failed to mitigate the security clearance concern caused by her personal conduct and the related criminal conduct in providing false information. Clearance is denied.

**STATEMENT OF THE CASE**

On September 8, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline E (personal conduct) and Guideline J (criminal conduct). Applicant submitted a sworn answer to the SOR that was received by DOHA on October 28, 2003, and denied all SOR allegations. Applicant requested a hearing.

The case was assigned to me on April 26, 2004. A notice of hearing was issued on May 18, 2004, scheduling the hearing for June 8, 2004. An amended notice of hearing was issued on June 3, 2004, changing the time and location of the hearing, although in the same city and on the same date as originally scheduled. The hearing was conducted as rescheduled.

The government submitted thirteen documentary exhibits that were marked as Government Exhibits (GE) 1-13. Applicant's attorney initially interposed but later withdrew objections to GE 3, 8, and 9. All government exhibits were then admitted into the record without objection. Applicant testified at the hearing and submitted one documentary exhibit that was marked as Applicant Exhibit (AE) 1, and admitted into the record without objection. The transcript was received on June 18, 2004.

**PROCEDURAL ISSUES**

On June 20, 2004, I received a document entitled *Government's Objection to Additional Matters Submitted by Applicant* signed by Department Counsel with proof of service upon myself and Applicant's counsel. That document has been marked as Appellate Exhibit (App. Ex.) A, and has

been included in the record. Attached to App. Ex. A was a memorandum addressed to me signed by the same individual who authored AE 1, apparently the Applicant's supervisor. The attachment has been marked as AE 2. App. Ex. A contained a section entitled *Notice to Applicant* requesting that any response to the Government's objection be received by June 28, 2004 or such later date as I may grant. No response or request for additional time to submit a response was received by me.

Department Counsel objects to the admission of AE 2 on the basis that: 1) AE 2 was submitted after the close of the record in this cause without a request having been made to leave the record open for such purpose; 2) AE 2 contains Applicant's hearsay statements made after the close of the hearing; and 3) certain portions of AE2 are irrelevant, lack a foundation, contain speculation, and would have been subject to rebuttal evidence that would have been presented by the Government had they been presented during the course of the hearing.

The hearing in this case was adjourned and the record closed at 4:00 p.m. on June 8, 2004. Prior to closing the record, I asked Applicant's attorney if he had any additional evidence to submit on behalf of Applicant, and he answered "No." (Tr. p. 32) Applicant did not request the record remain open for the submission of additional evidence, nor did he object to closing the record and adjourning the hearing. I did not receive any post-hearing submission from Applicant requesting the record be reopened or seeking leave to submit AE 2. Department Counsel's objection on the basis that AE 2 is an improper post-hearing submission is well-founded and sustained.

Department Counsel is also correct in his objections to the hearsay statements of Applicant contained in AE 2, and that the speculative nature of the declarations of the author of AE 2 constitute inadmissible opinion evidence. Further, admission of AE 2 would deprive Department Counsel of the right to subject the author of AE 2 to cross-examination as mandated by Directive, Enclosure 3, Item E3.1.16. Department Counsel's objections based upon these rules of evidence are well-founded and sustained.

AE 2 will not be admitted in evidence, made a part of the record, nor will it be considered by me in arriving at a decision in this case.

### **FINDINGS OF FACT**

After a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 48 years old, married, and has been employed in an administrative staff position by a defense contractor since November 1997. She was previously employed as a junior analyst by defense contractors from June 1997 to November 1997, and as an office automation assistant by the government from March 1992 to August 1997.

She was previously married in August 1976, and that marriage ended in divorce in February 1986. She was married a second time in August 1989, and that marriage ended in divorce in September 1992. She has two adult children, ages 22 and 21, who reside on their own. She has held a security clearance since 1992, without any complaints ever being made alleging she has mishandled classified material. The memorandum she submitted from her apparent supervisor, AE 1, asserts "she is a stellar employee, who has demonstrated high loyalty, performance, trust, and dedication . . ." to her employer's mission. The author strongly recommends that Applicant's security clearance be reinstated.

Applicant signed and submitted a security clearance application (SF 86) on December 20, 2000. The application included the following certification above her signature:

#### **CERTIFICATION BY PERSON COMPLETING FORM**

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. (See section 1001 of title 18, United States Code).

SOR subparagraph 1.a. alleges Applicant falsified the SF 86 she submitted in December 2000 by failing to disclose she had filed for bankruptcy in April 1993 in response to question 33: *Your Financial Record - Bankruptcy - In the last 7 years, have you filed a petition under any chapter of the bankruptcy code (to include Chapter 13)?* Because more than seven years had elapsed between the filing of the bankruptcy and submission of the SF 86, Applicant was not required to disclose the bankruptcy filing.

In the SF 86, Applicant answered "No" to question 38: *Your Financial Delinquencies - 180 Days - In the last 7 years, have you been over 180 days delinquent on any debt(s)?* The SOR alleges seven debts that Applicant failed to list in response to this inquiry. The debt listed in SOR subparagraph 1.b.(4) was placed for collection in September 1999, and the debt listed in SOR subparagraph 1.b.(5) was a judgment entered against her in October 1999. Those accounts clearly should have been listed. The remaining accounts were either submitted for collection or had a judgment entered on the account less than 180 days prior to submission of the SF 86 or there is no indication when they became delinquent. No conclusion can be drawn as to whether they were required to be listed or not.

In the SF 86, Applicant also answered "No" to question 40: *Public Record Civil Court Actions - In the last 7 years, have you been a party to any public record civil court actions not listed elsewhere on this form?* She had been a party to six civil court proceedings between January 1994 and

October 2000 that were required to be disclosed in response to this question. The last court action in the case listed in SOR subparagraph 1.c.(7) occurred on June 11, 1993 according to the information contained in GE 11, and was outside the seven-year period being inquired into by question 40.

Applicant submitted a signed and sworn statement on July 8, 2002 (GE 2) in which she explained the above omissions from the SF 86 as follows:

**Omission of financial delinquencies (debt listed in SOR subparagraph 1.b.7.)**

I do not recall omitting information about this debt. My handwritten answers to the questionnaire (EPSQ) was (sic) submitted to the Facility Security Officer (company name and name of FSO omitted). (She) entered data into an electronic system, I signed the printed hard copy on 20 Dec 00 without reading it. The hard copy I provided was not retained in my personnel folder only the electronic copy I signed and without handwritten answers I am not sure if the electronic response was entered incorrectly. I did not intentionally omit answering this question correctly.

**Omission of civil suits**

I do not recall omitting information about these civil suits. My handwritten answers to the questionnaire (EPSQ) was (sic) submitted to the Facility Security Officer (FSO) [company name and name of FSO omitted]. (She) entered data into an electronic system, I signed the printed hard copy on 20 Dec 00 without reading it. The hard copy I provided was not retained in my personnel folder only the electronic copy I signed and without handwritten answers I am not sure if the electronic response was entered incorrectly. I did not intentionally omit answering this question correctly.

Applicant provided a different explanation for the omissions during the hearing. She testified that she stopped by her company's office to sign the SF 86 on December 20, 2000, and was told by the receptionist that a man was looking for her to deliver flowers. She looked out the office window at that time and observed that her automobile was in the process of be towed because she was late on her car payments. At that instant the FSO came running out of her office and told Applicant to sign the SF 86. Applicant did so without reading the document.

Applicant also testified the FSO prepared the SF 86 without any input from Applicant. She was vigorously cross-examined about how the SF 86 was prepared, and was adamant in her answers that she did not provide a handwritten form to be used in preparing the application, nor did she sit down with anyone and provide information as they entered it into a computer. However, she could not explain how personal information that would have only been known to her came to be inserted into the SF 86.

**POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline E, pertaining to personal conduct, and Guideline J, pertaining to criminal conduct, with their respective DC and MC, are most relevant in this case.

**BURDEN OF PROOF**

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>(2)</sup> The government has the burden of proving controverted facts.<sup>(3)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence<sup>(4)</sup>, although the government is required to present substantial evidence to meet its burden of proof.<sup>(5)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(6)</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>(7)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(8)</sup>

No one has a right to a security clearance<sup>(9)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(10)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>(11)</sup>

**CONCLUSIONS**

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Applicant failed to disclose six civil court actions and at least two delinquent accounts in the SF 86 she submitted in December 2000. She provided a statement attempting to explain the omissions that was emphatically

contradicted by her incredible testimony.

Disqualifying Condition (DC) 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 applies in this case.*

Applicant's false answers and the contradictory explanations she has provided in an attempt to mitigate the omissions or relevant and material facts from the SF 86 raise significant security concerns and severely undermine the ability to place trust and confidence in her at the present time.

I have considered all Mitigating Conditions under Guideline E and none apply. Guideline E is decided against Applicant.

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

The government has established its case against Applicant under Guideline J. The false answers she gave in the SF 86 constitute an offense under 18 U.S.C. § 1001. DC 1: *Allegations or admissions of criminal conduct, regardless of whether the person was formally charged* and DC 2:

*A single serious crime or multiple lesser offenses apply in this case. I have considered all Mitigating Conditions under Guideline J and none apply. Guideline J is decided against Applicant.*

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has failed to overcome the case against her and satisfy her ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline E: Against the Applicant

Subparagraph a: For the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

SOR ¶ 2-Guideline J: Against the Applicant

Subparagraph 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 Applicant. Clearance is denied.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15

9. *Egan*, 484 U.S. at 528, 531.

10. *Id* at 531.

11. *Egan*, Executive Order 10865, and the Directive.