

DATE: February 23, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-09631

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

Sabrina Redd, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 29-year-old data entry clerk who worked for a government contractor and her government manager recommends her highly. Her previous employer was a law firm for two years until fired for being late to work. She was injured on the job in an accident when several boxes were spilled on her requiring therapy causing her absence. Applicant was arrested in 1994 for grand larceny, pled guilty, and was sentenced to one year, suspended, two years probation, and community service. She did not report either the conviction or the discharge on her application for a security clearance and this omission is charged as criminal conduct. The Personal Conduct has not been mitigated but there is no proof of criminal conduct. Clearance is denied.

STATEMENT OF CASE

On October 7, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel 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 affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On October 15, 2004, Applicant responded to the SOR allegations, and requested a hearing. The matter was assigned to me on December 22, 2004. A notice of hearing was issued on January 5, 2005, and a hearing was held on January 18, 2005. Four government exhibits and two exhibits for Applicant were admitted into evidence. A security investigator testified for the government and the Applicant testified. The transcript was received on January 26, 2005.

FINDINGS OF FACT

Applicant admitted with explanations the two specific SOR allegations regarding omissions of information from her application for a security clearance (SF 86). After a complete review of the record, I make the following additional findings of fact:

Applicant is a 29-year-old data entry clerk who has worked for a government contractor assigned to work at the Department of State on security issues. The employment lasted over three years until terminated as a result of this proceeding. Her government manager speaks highly of her work and dedication to the job (Exh. A).

Before working for the government contractor she was employed by a law firm for two years as a quality control specialist. She was fired for being late to work several times. While employed at the law firm she was injured on the job in a freak accident when another firm employee or a private contractor spilled several boxes on her that required her to have medical treatment.

In 1994, when she was 18 years old, Applicant was arrested in Virginia for grand larceny of a coat from a department store, pled guilty, and was sentenced to one year confinement, suspended, with two years probation, and 100 hours of community service plus a fine and costs. She did not report either the conviction or the discharge on her SF 86 submitted in May, 2002. In December, 2004, she requested information from the District of Columbia on her criminal record and information came back to her stating that she had no record (Exh. B).

Applicant discussed both of the omissions with a security investigator on November 19, 2002 (Exh. 4). The investigator's report indicates failure to fully reveal the reasons for the discharge and a theory that there was no record of the conviction (Exh. 4).

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position that will give that person access to such information." *Id.* at 527.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information *See Egan*, 484 U.S. at 531. The applicant then bears the burden of demonstrating it is clearly consistent with the national interest to grant or continue a security clearance. "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b).

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to all allegations set forth in the SOR:

Under Guideline E (Personal Conduct) of the Directive, questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate the person may not properly safeguard classified information. (E2.A5.1.1.) The Government has established that Applicant has been involved in a pattern of rule

violations (E2.A5.1.2.5.) and has failed to give complete and accurate information on her SF 86. (E2.A5.1.2.2.) The allegations include the fact that these willful omissions constitute a violation of 18 U.S.C. 1001, a felony.

Applicant stated that she believed the discharge did not need to be reported since she had intended to resign when the issue of tardiness was raised by her employer and thus did not report it as a firing. She stated that she believed she was not required to report the larceny since she believed when the sentence was served no record existed of the crime. She offered the District of Columbia report in evidence to substantiate the reasonableness of her belief although it does not establish the fact. She denied she deliberately withheld the information and noted that she voluntarily discussed both issues with the investigator.

Guideline J (Criminal Conduct) is also applicable to Applicant. The Government has established a sufficient basis that Disqualifying Condition E2.A10.1.1. is applicable to Applicant in that she withheld information on the SF 86 that was a possible violation of 18 U.S.C. Sec. 1001 making such deliberate withholding a criminal offense. It could be mitigated by application of the facts in the case to certain of the Mitigating Conditions (MC) if the conduct was not deliberate. While withholding the information was done deliberately, I do not find that it rises to the level required to conclude that it was criminal in nature, but only that it was in violation of Guideline E.

All the criminal conduct with which she was charged and convicted occurred over 11 years ago and she has not had any criminal record since that time. The discharge from the law firm was seemingly over very minor matters particularly in view of the fact that the proximate cause of the problem was as a result of medical attention for an accident occurring in the workplace from negligence by either an employee or contractor of the law firm.

In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security concerns of the nation. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information.

The "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Although Applicant is an impressive person of talent who has risen in her last employer's company to a responsible position, her failure to fully report adverse information on two instances leads me to the conclusion that it is premature to grant a security clearance. While she expresses regret for the conduct and the omissions on the SF 86 she has offered excuses that are not sufficient to justify a clearance under the guidelines.

After considering all the evidence in its totality, and as an integrated whole to focus on the whole person of Applicant, I conclude Applicant's record of conduct justifies a finding that it is not clearly consistent with the national interest to grant a security clearance.

FORMAL FINDINGS

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2. Guideline J: FOR APPLICANT

Subparagraph 2.a.: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national

interest to grant or renew a security clearance for Applicant. Clearance is denied.

Charles D. Ablard

Administrative Judge