

DATE: June 29, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 04-07070

DECISION OF ADMINISTRATIVE JUDGE

ERIN C. HOGAN

APPEARANCES

FOR GOVERNMENT

Nichole Noel, Esq., Department Counsel

FOR APPLICANT

Michelle L. Perry, Esq.

SYNOPSIS

Between June 1991 and January 1999, Applicant was arrested on four occasions. The charges consisted of two shoplifting offenses, driving under the influence, and assault. Three of the arrests occurred between October 1998 and January 1999 during the break up of her first marriage. She has remarried, enjoys her job and has a stable family life. She has had no subsequent arrests. Her failure to list a 1998 assault charge in response to question 21 on her security clearance application was not deliberate. The criminal conduct and personal conduct concerns have been mitigated. Clearance is granted.

STATEMENT OF THE CASE

On May 5, 2005, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. This action was taken under Executive Order 10865, dated February 20, 1960, as amended and DoD Directive 5220.6, dated January 2, 1992, as amended. The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline J, Criminal Conduct and Guideline E, Personal Conduct.

In a sworn statement dated June 15, 2005, Applicant responded to the SOR allegations and requested a hearing. The case was assigned to me on March 2, 2006. A notice of hearing was issued on arch 16, 2006, scheduling the hearing for May 3, 2006. The hearing was conducted on that date. The government submitted Government Exhibits (Gov. Ex.) 1-4 which were admitted into the record without objection. Applicant testified on her own behalf, submitted no exhibits and presented two witnesses. DOHA received the hearing transcript (Tr.) on May 12, 2006.

FINDINGS OF FACT

In her SOR response, Applicant admits the allegations in SOR ¶¶ 1.a, 1.b, 1.c and 1.d. She denies SOR ¶ 2.a. Applicant's admissions are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is employed as an assistant management administrator with a Department of Defense contractor. She is applying for a SECRET security clearance. She has worked for the same Department of Defense contractor since 1998. (1) She is 39 years old. (2) A first marriage ended in divorce in early 1999. She remarried in 2001 and has three children, two boys, ages 11 and 17 and a 17 month-old daughter. (3)

On June 7, 1991, Applicant was shopping at a military exchange with her brother. Her brother dared her to steal a \$40 blouse. She placed the blouse in her purse. A store detective saw her and detained her when she left the store. Her brother was detained also since he shoplifted two items as well. After being read her rights, she admitted to taking the blouse. She had the money to pay for the blouse. As a result of this incident, she was excluded from the military installation for two years. (4)

In October 1998, Applicant and her first husband were having marital problems. Her first husband is six feet tall and weighs about 230 pounds. She is five feet two inches tall and weighs about 120. On October 4, 1998, they got into a heated argument. Her husband was threatening her and would not let her go. She ran into the kitchen and grabbed a knife. She admits to swinging the knife and telling her husband "This is my space. Get away from me." She had never seen her husband so angry before. She was able to eventually get into her car. She drove around for a few hours in order to cool off. She returned home in hopes of reconciling with her husband. When she returned, he called the police and she was arrested and charged with assault, 1st degree, a felony, and assault, 2nd degree. The charges were later dismissed at the request of her husband. (5)

About a week later, on October 12, 1998, Applicant met a girlfriend at a restaurant. Applicant drank two margaritas. She asked her girlfriend if she could stay at her place since she had not eaten and did not want to drive after two drinks. She woke up around 4:00 a.m. and thought she was able to drive home. She was pulled over for speeding on her way home and was subsequently arrested for driving while under the influence. She pled guilty to the offense and served all the terms of her sentence which consisted of a \$100 fine and attending a first offender's class. This was her first and only alcohol-related arrest. (6)

In January 1999, Applicant and her first husband divorced. (7) That same month, she went grocery shopping with her former sister-in-law. Without her knowledge, her sister-in-law placed a package of prime rib in Applicant's purse which was in the shopping cart. When she went to check out, she opened up her purse and discovered the prime rib in the purse. She and her sister-in-law were arrested for shoplifting. Her sister-in-law asked her to take the blame for the shoplifting offense. She agreed to take the blame because she felt she owed it to her sister-in-law because she was the only person who took her and her son in during the divorce. Applicant pled guilty to the offense and served between three-five days in jail. She served jail time rather than pay a fine based on the advice of her attorney. She claims she had no intent to shoplift on the day she was arrested. (8)

On December 20, 2002, Applicant submitted a security clearance application. (9) She did not list her October 4, 1998 arrest for assault-1st degree, a felony, and assault-2nd degree in response to question 21. Your Police Record - Felony Offenses which asks:

Have you ever been charged with or convicted of any felony offense? (Include those under the Uniform Code of Military Justice.) For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607. (10)

Applicant did not list her arrest for assault in response to any other question on her security clearance application. She listed her arrest for Driving While Under the Influence in response to question 24 and her January 1999 shoplifting offense in response to question 26. She was not required to list the 1991 shoplifting offense since it occurred more than seven years ago. She did not list her October 4, 1998, arrest for assault in response to question 21 because she did not realize she was charged with a felony. (11) She did not list the arrest elsewhere on the security clearance application because she believed she did not have to since the charges were dismissed. (12)

Since January 1999, Applicant has not been arrested.⁽¹³⁾ Between February and December 1998, she attended computer school. She is certified in several computer programs, among them Cisco and Microsoft. Her job has allowed her to progress and advance professionally. She re-married in 2001.⁽¹⁴⁾ She enjoys her family life and participates in church activities in her spare time.⁽¹⁵⁾

Applicant's husband testified during the hearing. He is a graduate of the United States Naval Academy and served in the Navy for approximately five years. He met his wife through a blind date arranged by his mother. They have been married over four years and have one child together (the 17 month old girl). He describes their lifestyle as the typical American family. They go to church and participate in a lot of family activities. His wife has told him about her past arrests. She has never acted aggressively towards him. He has never seen her drink and drive and he has never seen her shoplift. He describes his wife as a very trustworthy person.⁽¹⁶⁾

Applicant's former co-worker and friend testified on her behalf. He is a senior principal engineer with a Department of Defense contractor. He is also a Captain in the United States Navy Reserves. He holds a security clearance. He has known Applicant for seven years. Between 2000 and 2001, he had daily contact with her. He is aware of the SOR allegations. Applicant had disclosed her past arrest history to him when they worked closely together in 2000. He believes she learned a lesson from her past. Her performance at work has always been consistently responsible and trustworthy. He would not hesitate to grant her a security clearance.⁽¹⁷⁾

POLICIES

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."⁽¹⁸⁾ In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Guideline J, Criminal Conduct: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.⁽¹⁹⁾

Guideline E, Personal Conduct: 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.⁽²⁰⁾

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth and discussed in the conclusions below.

"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."⁽²¹⁾ An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person.⁽²²⁾ An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 pertinent 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.⁽²³⁾

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information.⁽²⁴⁾ Thereafter, the applicant is

responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts admitted by the applicant or proven by Department Counsel. The applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. ⁽²⁵⁾ Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. ⁽²⁶⁾

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. ⁽²⁷⁾ It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

CONCLUSIONS

Criminal Conduct

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline J, Criminal Conduct. In 1991, Applicant was detained for shoplifting at a military exchange. Between October 1998 to January 1999, she was arrested on three occasions. Under Guideline J, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses*) apply based on her past criminal history.

I find several Criminal Conduct Mitigating Conditions (CC MC) apply to Applicant's case. CC MC E2.A10.1.3.1 (*The criminal behavior was not recent*) applies since Applicant's last offense occurred in January 1999. It has been six years since her last arrest. I find her criminal behavior is not recent. I find that CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*) applies. Since her last arrest in January 1999, Applicant has developed both personally and professionally. She loves her job. She remarried and has a happy, stable family life. She has learned from the mistakes of her past. The 1991 shoplifting offense occurred when she was younger and immature. The three arrests between October 1998 and January 1999 occurred during the time she was going through a divorce. Based on her testimony, as well as the testimony of her husband and her co-worker, her current life is much more stable. There is clear evidence of successful rehabilitation. Applicant has mitigated the criminal conduct concern. I find Guideline J for Applicant.

Personal Conduct

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. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully.

In this case, the record evidence fails to establish Applicant deliberately omitted or concealed information about her October 4, 1998, arrest in response to question 20 on her security clearance application. Although her answer to question 20 was incomplete, Applicant successfully rebutted the allegations that she deliberately provided a false answer. At the hearing she credibly testified she did not know she was charged with a felony offense. She also believed that she did not need to list the arrest since the charges were dismissed. She did list the October 1998, driving under the influence charge and the January 1999 shoplifting charge. I conclude she did not knowingly and willfully falsify her security clearance application. Guideline E is decided for Applicant.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, common sense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

In reaching my decision, I considered all the evidence provided and also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. Applicant is a valued employee. Although, she has a history of minor criminal offenses, she has not been arrested since January 1999. Her life is much more stable since her divorce from her first husband. Therefore, I am persuaded by the totality of the evidence in this case that it is clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Paragraph 1. Guideline E: FOR APPLICANT

Subparagraph 1.a: For Applicant

DECISION

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

ERIN C. HOGAN

Administrative Judge

1. Tr. at 17-18.

2. Tr. at 17.

3. Tr. at 18-19.

4. Gov. Ex. 4.

5. Tr. at 22-27; Gov. Ex. 2 at 2-3; Gov. Ex. 3.

6. Tr. at 28-32; Gov. Ex. 2 at 1-2.

7. Gov. Ex. 1; question #8.

8. Tr. at 33-39; Gov. Ex. 2 at 3.

9. Gov. Ex. 1.

10. Gov. Ex. 1.

11. Tr. at 40.
12. Tr. at 51-52.
13. Tr. at 52.
14. Gov Ex 1, question 8.
15. Tr. at 41, 50
16. Tr. at 56-64.
17. Tr. at 65-73.
18. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).
19. Directive, ¶ E2.A10.1.1.
20. Directive, ¶ E2.A5.1.1.
21. Directive, ¶ E2.2.1.
22. *Id.*
23. *Id.*
24. Directive, ¶ E3.1.14.
25. Directive, ¶ E3.1.15.
26. Directive, ¶ E.2.2.2.
27. Exec. Ord. 10865, § 7.