

DATE: October 19, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-11075

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Sabrina E. Redd, Esq., Department Counsel

FOR APPLICANT

Kishasha B. Sharpe, Esq.

SYNOPSIS

Applicant, a fee unit supervisor for a defense contractor, seeks a clearance in conjunction with her duties. Applicant raised personal conduct concerns when she provided false information on her security clearance application denying a past felony arrest and later denying her felony arrest when interviewed by the Defense Security Service. She has failed to mitigate personal conduct concerns raised. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On December 15, 2005, under the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision-Applicant failed to meet the personal conduct (Guideline E) personnel security guideline of the Directive. Applicant answered the SOR in writing on February 14, 2006, and elected to have a hearing before an administrative judge.

On July 20, 2006, the case was assigned to me. On July 21, 2006, DOHA issued a Notice of Hearing scheduling the hearing for August 4, 2006. On August 2, 2006, DOHA issued an Amended Notice of Hearing scheduling the hearing for September 8, 2006. The case was conducted as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

At the hearing, the government offered five exhibits, which were marked as Government Exhibits (GE) 1 through 5, and admitted without objection. The Applicant offered two exhibits, which were marked as Applicant Exhibits (AE) A and B, and admitted without objection. On September 18, 2006, DOHA received the transcript (Tr.) of the proceeding.

FINDINGS OF FACT

In her Answer, Appellant denied all three SOR allegations made against her under personal conduct concerns. Her denials are incorporated into my findings. After a thorough review of the pleadings, transcript, and exhibits, I make the

following essential findings of fact:

Applicant is a 49-year-old married woman, and is a defense contract employee working as a fee unit supervisor. Since March 1996, she has held the position of fee unit supervisor with different defense contractors. She has been with her current employer since 2005. Tr. 19, 54. She seeks a security clearance as an employment requirement.

Applicant attended high school through the 12th grade, but did not graduate. She was unsuccessful in a later attempt to earn her GED. Tr. 52-53. From September 1974 to January 1990, she was married to her first husband, and that marriage ended by divorce. She has four adult children from her first marriage. Since February 1994, she has been married to her present husband with whom she has an 11-year-old son.

On January 3, 1978, Applicant was arrested for cruelty toward child-aggravated abuse, a felony. GE 3, GE 4. On May 24, 1978, she plead guilty to the misdemeanor offense of child abuse. AE A. This is the only arrest in Applicant's record. Tr. 35. She has a vague recollection of going to the hospital because her daughter had eaten styrofoam out of a bean bag.

On November 5, 1997, Applicant executed a security clearance application. She answered "No" in response to Question **"23 YOUR POLICE RECORD** For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the court 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 21 U.S.C. 844 or 18 U.S.C. 3607 **a** Have you ever been charged with or convicted of any felony offense? (Include those under Uniform Code of Military Justice)." GE 2. (SOR ¶ 1.a.)

On May 25, 2004, Applicant executed a security clearance application. She answered "No" in response to Question **"21. Your Police Record - Felony Offenses** 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 of 18 U.S.C. 3607." GE 1. (SOR ¶ 1.b.)

On June 9, 2005, Applicant was interviewed by the Defense Security Service (DSS) as part of the security clearance process. Tr. 23-24. Applicant executed a signed, sworn statement denying she had ever been arrested by her local police department, and stated she had never been arrested in any jurisdiction, and knew nothing about any charges of cruelty towards a child - aggravated abuse charge. GE 5.

Applicant testified it was her "honest belief" she was telling the truth when she denied her January 1978 felony arrest when completing her security clearance applications in November 1997 and in May 2004 and when interviewed by DSS in June 2005. Tr. 24. Applicant further testified her former husband was a drug user and physically abused her during her first marriage. Tr. 26. She added her former husband used to blow marijuana laced with cocaine up her nose while she was sleeping. Tr. 28. Applicant denied that she deliberately and knowingly lied about her January 1978 felony arrest stating "they (government) can find out anything about people. . . . So why would I intentionally do this? I wouldn't." Tr. 29.

Applicant testified she did not know she was actually charged with a felony until her attorney showed her supporting documentation. Tr. 29, 45-46. Applicant does recall going to the courthouse with her mother, but does not recall her mother posting \$3,500.00 bond after her arrest, nor being ordered to complete an outpatient evaluation. Tr. 31-32, GE 4. In short, she has no recollection of being arrested. Tr. 50.

Applicant's ability to recall other events surrounding her troublesome first marriage were quite good. Applicant's second husband credibly testified he was unaware his wife had been arrested, but was aware his wife's ex-husband wanted her to "take the blame" for something he did. Tr. 62-63.

Applicant's current performance evaluations reflect average to above average performance. She enjoys a "good reputation because of her excellent knowledge" and her "professional judgment is trusted and she is a recognized expert in her primary subject area." AE B. Applicant is a devoted spouse and mother.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by administrative judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making 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 in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. 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.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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. The President has restricted eligibility for access to classified information to "United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Initially, the Government must establish, by substantial 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. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "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 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531. Doubts are to be resolved against the applicant.

CONCLUSIONS

Guideline E- Personal Conduct

In the SOR, DOHA alleged Applicant falsified her November 1997 and May 2004 security clearance applications by deliberately omitting information pertaining to her January 1978 felony arrest for cruelty toward child - aggravated abuse (¶¶ 1.a., 1.b.), and deliberately falsifying material facts to DSS in her June 2005 signed, sworn statement (¶ 1.c.)

Under Guideline E, 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. Directive ¶ E2.A5.1.1.

The Government presented evidence that raised security concerns under this Guideline. Applicant failed to list her January 1978 felony arrest on her November 1997 and May 2004 security clearance applications and denied her felony arrest to DSS in June 2005. The government's evidence clearly established Applicant was arrested for cruelty toward child - aggravated abuse, a felony. Proof Applicant omitted this information from her security clearance applications shifted the burden to Applicant to explain the omissions sufficiently to negate a finding of knowing and deliberate falsification. *See* ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004).

Applicant was under a duty to truthfully complete her security clearance applications and provide truthful responses during her DSS interview and subsequent signed, sworn statement. It is difficult if not inconceivable to accept Applicant's explanation that she did not remember being arrested, which would have included the actual arrest, and subsequent judicial process, to include pleading guilty to a misdemeanor charge. This felony arrest is the only arrest in Applicant's record so there is no likelihood of her confusing this arrest with some other arrest. Although Applicant does not have much formal education, her talents and skills were significant enough for her to be promoted to fee unit supervisor. Such duties include attention to detail and her performance evaluations reflect average to above average performance. Given Applicant's age, experience, position as fee unit supervisor, and the significant impact of being arrested and court proceedings, I do not find her explanation credible.

The government requires those entrusted with classified information to be straightforward, honest and diligent in the information they provide. Applicant's behavior not only raises questions about her ability to protect classified information, but also raises a question about her honesty in future cases regarding the integrity of the security-clearance process. No Mitigating Conditions apply. I conclude against Applicant on this concern.

Having reached this conclusion, in fairness to the Applicant, this decision should not be construed as a determination that Applicant cannot or will not attain the state of true reform and rehabilitation necessary to justify the award of a DoD clearance, especially in light of the fact the felony arrest in question was ultimately adjudicated as a misdemeanor. Under Applicant's current circumstances a clearance is not recommended, but should the Applicant be afforded an opportunity to reapply for a security clearance in the future, she may well demonstrate persuasive evidence of her security worthiness. A clearance at this time is not warranted.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against 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 continue a security clearance for Applicant. Clearance is denied.

Robert J. Tuider

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2,

1992), as amended and modified.