

December 31, 1996

In Re:

SSN: -----

Applicant for Security Clearance

)
)
)
)
)
)
)
)
)

DOHA OSD Case No. 96-0549

DECISION OF ADMINISTRATIVE JUDGE

DARLENE LOKEY ANDERSON

Appearances

FOR THE GOVERNMENT FOR THE APPLICANT

Melvin A. Howry *Pro Se*

Department Counsel

STATEMENT OF THE CASE

On August 8, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued the attached 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 the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR in writing on August 29, 1996 in which she elected to have the case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM) to the Applicant on October 2, 1996. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received the FORM on October 9, 1996, and she submitted no reply.

This case was assigned to the undersigned for resolution on November 13, 1996.

FINDINGS OF FACT

The Applicant is 33 years old, and she is employed by a defense contractor. She seeks a DoD security clearance in connection with her employment in the defense industry.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the attached Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and criterion in the SOR:

Paragraph 1 (Criterion H - Drug Involvement). The Government alleges that the Applicant is ineligible for clearance because she abuses illegal substances.

The Applicant has admitted to abusing marijuana and methamphetamine. From September 1976 until December 1976, while in junior high school, the Applicant associated with a group of illegal drug users. During this period the Applicant experimented with marijuana on about five occasions where she took one or two puffs of a marijuana cigarette. The effects of the marijuana made her sleepy and gave her a headache. After December 1976, the Applicant moved to another school where she no longer associated with drug users and did not use marijuana. The Applicant has not used marijuana since December 1976, and has no intentions of ever using it again. (Government Exhibit 5).

In 1990, while at a party, the Applicant first used methamphetamine. The effects of methamphetamine made her feel more awake and energetic. She did not use methamphetamine again until the Summer of 1993. From the summer of 1993, until her arrest in December 1994, the Applicant used methamphetamine about every other weekend.

On December 6, 1994, the Applicant was arrested for Possession of a Controlled Substance (methamphetamine), a felony in the state in which it occurred, and Under the Influence of a Controlled Substance (methamphetamine). A baggy of methamphetamine (powder) was found in the Applicant's purse during a routine search by a guard at the front screening area in the courthouse where the Applicant was scheduled to appear on a traffic citation. As a result of this arrest, the Applicant was required to enter into a Drug Diversion Program. She was also fined \$150.00, and placed on probation for two years. (Government Exhibits 7 and 8). The Applicant completed the outpatient portion of the Drug Diversion Program on July 10, 1995. (Government Exhibit 10). Since this arrest, the Applicant has not used any illegal drug and has no intention of ever using any in the future.

The Applicant states that she accepts responsibility for the mistakes in her past and believes that she has grown from the experience. She no longer associates with individuals who use illegal drugs. The Applicant has never sold, cultivated, manufactured or trafficked any illegal drug.

Paragraph 2 (Criterion J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because she violated both a state and federal criminal statute.

The Applicant failed to timely file her State Income Tax Returns for tax years 1987, 1988, 1989, 1990, 1991, 1992, and 1993 in violation of a misdemeanor provision of the State Revenue and Tax Code. (Government Exhibits 5, 13 and 19.) The Applicant also failed to timely file her Federal Income Tax Returns for tax years 1987, 1988, 1989, 1990, 1991, 1992, and 1993 in violation of Title 26, United States Code, Section 7203, is a misdemeanor. (Government Exhibits 5 and 18). The Applicant acknowledges her responsibility to file both state and federal tax returns and attributes her failure to file her returns on being completely and totally irresponsible. The Applicant states that for a long time she claimed six exemptions in order to get more net income to help her pay her basic living expenses. This left her without money to pay her taxes. (Government Exhibit 5).

In October 1995, the Applicant contacted the Internal Revenue Service and the State Franchise Tax Board and requested paperwork to complete her delinquent tax returns. In February 1996, she filed her state and federal income tax returns for tax years 1992 and 1993. The Applicant has not filed her 1987 through 1991 federal income tax returns but plans to do so by the end of July 1996. (Government Exhibit 6). The Applicant has not yet filed her state income tax returns for

tax years 1987 through 1991. She plans to visit the State Franchise Tax Board office to obtain the appropriate W-2 statements which will enable her to file her tax returns for those years. She states that she is delaying her visit to the State Franchise Tax Board office until after tax time in order to avoid the long lines. (Government Exhibit 6).

Paragraph 3 (Criterion F - Financial Considerations). The Government alleges that the Applicant is ineligible for clearance because she has excessive debts and recurring financial problems.

Due to excessive credit card spending and simply living beyond her means, the Applicant was forced to file Bankruptcy in September 1989. (Government Exhibit 16). Although the Applicant had \$11,545.63 of unsecured debt discharged in 1990, she continues to have financial difficulties. The Applicant admits to being indebted to each of the creditors listed in the SOR. The total debt which is still outstanding is an amount in excess of \$ 40,000.00. (See, Applicant's Answer to SOR.) The Applicant states that she has not had the money to pay her debts since her wages have been under garnishment by the State Franchise Tax Board.

Subparagraph 3(a) The Applicant is indebted to a department store in the amount of \$219.21. This debt was turned over to collection in June 1987. Although the Applicant states that this debt is still outstanding, there is a possibility that it was discharged in her Bankruptcy in 1990. I therefore, find for the Applicant as to this allegation. (Government Exhibit 15).

Subparagraph 4(b) The Applicant is indebted to the State Franchise Tax Board in the amount of \$2,797.31 for back taxes owed for tax years 1987, 1988, 1989, 1993 and 1995. This debt remains outstanding, and the Applicant has made no effort to pay this bill since July 1996. (See, Applicant's Answer to SOR).

Subparagraph 4(d) The Applicant is indebted to a department store in the amount of \$218.05 for three insufficient fund checks referred for collection in December 1992. This debt remains outstanding, and the Applicant has made no effort to pay this bill. (Government Exhibit 15).

Subparagraph 4(e) The Applicant is indebted to a dentist in the amount of \$71.34 since March 1, 1994. This debt remains outstanding, and the Applicant has made no effort to pay this bill.

(See, Applicant's Answer to SOR).

Subparagraph 4(f) The Applicant is indebted to a Supermarket Grocery Chain in the amount of \$250.62 for two insufficient fund checks referred for collection in April 1994. This debt remains outstanding, and the Applicant has made no effort to pay this bill. (See, Applicant's Answer to SOR).

Subparagraphs 4(g) and 4(h) On May 9, 1995, the State Franchise Tax Board garnished the Applicant's wages in the amount of \$1,152.89 for back taxes owed for tax year 1992. On January 5, 1996, the State Franchise Tax Board garnished the Applicant's wages for back taxes owed in the amount of \$1,324.98 for tax years 1992 and 1993. At the present time, the Applicant's wages are continuing to be garnished. (Government Exhibit 12).

Subparagraph 4(i) In March 1996, the Internal Revenue Service implemented a second wage garnishment in the amount of approximately \$23,031.15 for taxes owed for tax years 1987, 1988, 1989, 1991 and 1994. (Government Exhibit 12).

POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive sets forth policy factors and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent criterion. However, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on her own common sense. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

Criterion H (Drug Involvement)

Conditions that could raise a security concern:

- (1) any drug abuse;
- (2) illegal drug possession, including cultivation, proceeding, manufacture, purchase , sale or distribution.

Conditions that could mitigate security concerns:

None.

Criterion 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

Condition that could mitigate security concerns:

None.

Criterion F (Financial Considerations)

Conditions that could raise a security concern:

- (1) a history of not meeting financial obligations:
- (3) inability or unwillingness to satisfy debts;

Conditions that could mitigate security concerns include:

None.

In addition, as set forth in Enclosure 2 of the Directive at page 2-1, "In evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature 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 behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- I. The likelihood of continuation or recurrence."

The eligibility criteria established in the DOD Directive identify personal characteristics and conduct which 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 classified 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 an acceptable security risk. Eligibility for access to classified information is predicted 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. All 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 reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which 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."

CONCLUSIONS

In DOHA cases the Government has the initial burden to go forward with prima facie evidence in support of the factual and conclusionary allegations in the SOR. If the Government meets this initial obligation, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's prima facie

case.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in repeated instances of off-duty drug abuse, criminal conduct and financial irresponsibility which demonstrates poor judgment or unreliability on the Applicant's part.

Furthermore, the Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an Applicant has demonstrated a lack of respect for the law in his or her private affairs, then there exists the possibility that he or she may demonstrate the same attitude towards security rules and regulations.

In this case the Government has met its initial burden of proving by prima facie evidence that the Applicant has used illegal drugs (Criterion H); that she has engaged in criminal conduct by failing to file her state and federal tax returns (Criterion J); and that she has been financially irresponsible (Criterion F).

The record evidence shows that the Applicant has violated the law by using marijuana in 1976, and methamphetamine in 1990 and again from 1993 to at least December 1994. With respect to the Applicant use of marijuana which last occurred in 1976, more than twenty years ago, I find that the conduct is no longer of security significance. Accordingly, allegation 1.c., is found for the Applicant.

The Applicant's use of methamphetamine is more recent and more troubling. The Applicant last used methamphetamine in December 1994, only twenty-four months ago. She was also arrested and convicted for Possessions of Methamphetamine at that time. The Applicant is commended for her recent efforts to completely abstain from illegal drugs. However, given the fact that the Applicant has only been drug free for twenty-four months there has not been sufficient time in rehabilitation to show that the Applicant will not return to her old ways. This does not, however, preclude the Applicant from applying for a security clearance at some future date when there is additional evidence to support her full rehabilitation. Accordingly, I find against the Applicant under Criterion H, (Drug Involvement).

The Applicant has also intentionally and without reasonable excuse failed to file her state and federal income tax returns for many years in violation of both state and federal statutes cited above. This conduct shows extreme poor judgment, unreliability, untrustworthiness and a clear disrespect for the law. Accordingly, the Applicant has failed to meet her

ultimate burden of persuasion under Criterion J, (Criminal Conduct).

The Applicant has failed to pay her past due debts, and has offered little, if any, evidence to demonstrate a changed lifestyle. There has been absolutely no effort on the part of the Applicant to arrange any type of payment plan or even discuss her financial problems with her creditors. Instead, she has simply ignored her creditors. Under the circumstances, the Applicant cannot be deemed to be sufficiently rehabilitated in the area of her personal finances to warrant granting her security clearance request. Accordingly, I find against the Applicant under Criterion F, (Financial Considerations).

On balance, it is concluded that the Applicant has not overcome the Government's prima facie case opposing her request for a DoD security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 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: Against the Applicant.

Subpara. 1.a.: Against the Applicant.

Subpara. 1.b.: Against the Applicant.

Subpara. 1.c.: For the Applicant.

Paragraph 2: Against the Applicant.

Subpara. 2.a.: Against the Applicant.

Subpara. 2.b.: Against the Applicant.

Subpara. 2.c.: Against the Applicant.

Subpara. 2.d.: Against the Applicant.

Subpara. 2.e.: Against the Applicant.

Subpara. 2.f.: Against the Applicant.

Subpara. 2.g.: Against the Applicant.

Subpara. 2.h.: Against the Applicant.

Subpara. 2.i.: Against the Applicant.

Subpara. 2.j.: Against the Applicant.

Subpara. 2.k.: Against the Applicant.

Subpara. 2.l.: Against the Applicant.

Paragraph 3: Against the Applicant.

Subpara. 3.a.: For the Applicant.

Subpara. 3.b.: Against the Applicant.

Subpara. 3.c.: Against the Applicant.

Subpara. 3.d.: Against the Applicant.

Subpara. 3.e.: Against the Applicant.

Subpara. 3.f.: Against the Applicant.

Subpara. 3.g.: Against the Applicant.

Subpara. 3.h.: Against the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the interest of national security to grant or continue a security clearance for the Applicant.

DARLENE LOKEY-ANDERSON

Administrative Judge