

DATE: July 23, 1997

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0131

**DECISION OF ADMINISTRATIVE JUDGE**

**DARLENE LOKEY ANDERSON**

Appearances

FOR THE GOVERNMENT

Martin H. Mogul, Esquire

Department Counsel

FOR THE APPLICANT

Pro Se

**STATEMENT OF THE CASE**

On February 5, 1997, 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 February 24, 1997. This case was assigned to the undersigned on May 8, 1997, and a Notice of Hearing was issued on June 17, 1997. On May 29, 1997, the Applicant requested a Thai or Laotian speaking interpreter for the hearing.

A hearing was held on July 3, 1997, and was interpreted from the Laotian language into English by -----, a Laotian speaking court certified interpreter. At the hearing, the Government presented three documentary exhibits. The Applicant submitted one documentary exhibit and testified on her own behalf. The Applicant also submitted one post-hearing exhibit consisting of five enclosures. The official transcript was received on July 14, 1997.

**FINDINGS OF FACT**

The Applicant is 44 years old and married, and she has an eighth grade education. She is employed by a defense contractor as an Electronic Assembler, and she seeks to obtain a security clearance in connection with her employment.

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 J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because she has engaged in criminal conduct.

The Applicant was born in Thailand and has lived in the United States since 1975. She has been an American citizen since 1983. She has attended Adult School to learn English. She has also taken classes for about a year in electronic assembly. The Appellant has been working in the United States since 1978, in the field of electronic assembly. She obtained a drivers license in 1977.

On December 12, 1993, the Applicant was involved in an accident where she "rear ended" the vehicle in front of her that was parked at a stop light. Despite that fact, the Applicant subsequently filed a claim against the victim's insurance company, and stated that the victim's vehicle had struck her car from the rear.

After the accident, the Applicant explained that she contacted an attorney to simply discuss the car accident with him. The Applicant did not meet with the attorney, but met with his assistant who came to her house. During her discussion with the lawyer's assistant, she told him that she had "rear ended" the car in front of her. The lawyer's assistant told her that she was to say that her car was "rear ended."

Before her deposition was taken, the Applicant became afraid and told the lawyer as well as his assistant that she did not want to proceed with the case. At this point, her Attorney told her that if she did not proceed with the case, the opposing party was likely to file a claim against her. Although the Applicant told the attorney's assistant that she in fact "rear ended" the other car, she did not tell the attorney.

The Applicant stated that during the taking of her deposition, under oath, she stated that the other driver had "rear ended" her car, that she had been injured, and that she had incurred medical expenses as a result of the accident. (Tr. Pg. 26). The Applicant testified that the lawyer's assistant coached her on what to say, and told her to say that she was "rear-ended." (Tr. Pg. 25). The Applicant admits that she knew at the time that she made the statements that she was not telling the truth. (Tr. Pg. 26). The Applicant testified that she takes full responsibility for her misconduct, and for filing a false claim as her car was not "rear ended," nor was she injured as a result of the accident. As a result of her claim, an investigation by the District Attorney's Office disclosed that the Applicant had in fact lied and that she had filed a fraudulent claim.

On August 15, 1995, the Applicant was arrested for (1) Presenting a False or Fraudulent Claim for Payment, a felony, and (2) Perjury by Declaration, a felony. The Applicant pleaded guilty to Count (1), and Count (2) was dismissed. The Applicant was sentenced to 120 days in jail, ordered to pay fines, fees, restitution and costs totaling \$6,647.48, and was placed on supervised probation for three years. Although she did not actually spend time in jail, the Applicant reported to three or four weeks of work furlough, and was confined to her home with a leg monitor for three or four weeks.

Since her conviction in December 1995, the Applicant arranged to pay all fines and fees as sentenced by the court at the rate of \$100.00 per month, and has been making regular monthly payments since February 1997. The Applicant presently owes a balance of \$3,521.61. She intends to continue to make regular monthly payments until the fine and fees are entirely paid off. The Applicant will remain on supervised probation until December 1998.

The Applicant seriously regrets that this incident ever occurred, and realizes that she must never lie again.

### Mitigation

Nine letters of reference from the Applicant's immediate supervisor, coworkers, and professional associates reflect that the Applicant is an exceptional employee and an excellent role model for others. She is also considered to be extremely reliable, conscientious and trustworthy. (See, Applicant's Exhibit A and Applicant's Post-Hearing Exhibit, enclosures 1 and 2). "A letter from the Vice President of Engineering states, ". . . [the Applicant] has been a model employee for the Engineering Department. She is one of the top solder assemblers in the company, and she cooperates well with her fellow employees and her Managers". He further states, ". . . [the Applicant] has done an excellent job in this position,

and has followed all the closed area procedures for handling and protecting classified hardware and information." (See, Applicant's Post-Hearing Exhibit, enclosure 1 ).

The Applicant's performance appraisal for the period September 1984 through October 1995, indicates that the Applicant's performance on the job is consistently outstanding or excellent. (See, Applicant's Post-Hearing Exhibit, enclosure 5).

### 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 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 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.

##### Conditions that could mitigate security concerns:

- (1) the crime was an isolated incident;
- (5) there is clear evidence of successful rehabilitation.

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.

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 criminal conduct which demonstrates poor judgment, untrustworthiness or unreliability.

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. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the interests of national security to grant him or her a security clearance.

Criminal Conduct reflects questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information. 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 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 engaged in criminal conduct (Criterion J). Where an Applicant engages in criminal conduct, it can be presumed that he or she will not take a serious attitude toward the important matter of protecting classified information. The Applicant, on the other hand, has introduced persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's *prima facie* case against her. Accordingly, she has met her ultimate burden of persuasion under Criterion J.

The record evidence establishes that the Applicant was arrested for filing a fraudulent claim against an insurance company which resulted in her conviction for Presenting a False or Fraudulent Claim for Payment, a felony. Except for this one arrest, the Applicant has never been arrested before, nor has she ever been in any trouble over the twenty seven years that she has lived in the United States.

The evidence also shows that at the present time the Applicant has satisfied all of the sentencing conditions except the fine. The Applicant is presently making monthly payments to pay the fine, she has not missed any payments, and she intends on paying off the debt as soon as possible. In this case, the Applicant received bad advice from her attorney's assistant, and she used extremely poor judgment by listening to him. The Applicant has learned a hard lesson, as she now carries with her a felony conviction.

There is clear evidence of successful rehabilitation. The Applicant's testimony was credible and honest. It now appears that the Applicant has gained the insight into the seriousness of her criminal conduct, and is prepared to act responsibly and is unlikely to repeat her irresponsible conduct. The Applicant expresses genuine remorse and realizes that the Department of Defense will not tolerate criminal conduct. Although the Applicant will remain on probation for this criminal offense until December 1998, I find that the Applicant's criminal conduct was isolated, in the past, and will not recur in the future. Accordingly, Criterion J (Criminal Conduct), is found for the Applicant.

On balance, it is concluded that the Applicant has overcome the Government's *prima facie* case opposing her request for a security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 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: For the Applicant.

Subpara. 1.a.: For the Applicant.

### **DECISION**

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

DARLENE LOKEY-ANDERSON

Administrative Judge