



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 14-06977

**Appearances**

For Government: Andre M. Gregorian, Esq., Department Counsel  
For Applicant: *Pro se*

06/27/2016

**Decision**

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings and exhibits, I conclude that Applicant has not mitigated security concerns regarding her drug use and criminal conduct. Eligibility for access to classified information is denied.

**History of the Case**

On August 23, 2015, Department of Defense (DOD) Consolidated Adjudication Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AGs) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on September 28, 2015, and elected to have her case decided on the basis of the written record. Applicant received the Government's File of Relevant Material (FORM) on February 9, 2016, and responded to the FORM within the time permitted with copies of her college diploma, college commendation letters, sentencing statement and guidelines, order releasing her from supervised probation, order returning her forfeiture items, and endorsement letter from her father. Applicant's submissions were admitted as Items 6-12. The case was assigned to me on March 22, 2016.

### **Summary of Pleadings**

Under Guidelines H, Applicant allegedly was arrested in July 2012, charged with felony sale and distribution of marijuana, and sentenced to five years jail time with a five year suspended sentence, fined \$1,500, inclusive of \$570 in assessed costs, and placed on indefinite supervised probation. The allegation was re-alleged as criminal conduct under Guideline J.

In her response to the SOR, Applicant neither admitted nor denied the allegations in the SOR. She relied on her detailed explanations and attached submissions (Items 6-12) for her mitigation claims.

### **Findings of Fact**

Applicant is a 31-year-old restaurant manager and consultant for a defense contractor who seeks the restoration of her security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

#### **Background**

Applicant married in February 2009 and divorced her husband in July 2012. She has no children from her marriage. (Item 2) She earned an associate's degree with honors in 2014 (Items 2 and 8), and is currently enrolled in a bachelor's program at a recognized state university. (Items 1, 9 and 10) She claimed no military service. (Items 1 and 2)

Applicant has worked for her father's company since its founding in 2003. (Item 12) Her father's company is a service disabled veteran owned company who sponsored Applicant's security clearance application. (Item 5). As the CEO and managing director of her employer, her father utilized Applicant's services in managing several of the company's programs, and she assisted him with the company's cleared personnel program until he was forced to pull her clearance following criminal charges. (Item 12)

#### **Drug possession charges and conviction**

In July 2012, Applicant was arrested and charged with possession of marijuana with intent to distribute. (Items 1, 6, and 10-12) Court records confirm that Applicant

was found guilty of possession of marijuana with the intent to distribute (a state felony) in September 2013 and sentenced to five years jail time (suspended), fined \$1,500 plus costs of \$570, and placed on indefinite supervised probation. Before pronouncing its guilty judgment, the court accepted Applicant's entered *Alford* plea. In entering an *Alford* plea, Applicant accepted the circumstances that the drugs were found in her house without admitting any previous knowledge of the discovered drugs.(Item 1)<sup>1</sup> The court accepted Applicant's *Alford* plea after a thorough review of the presented evidence, and, in turn, placed her on indefinite supervision. (Items 3-6) Before sentencing Applicant, the presiding court considered the pre-sentence report and reviewed the applicable sentencing guidelines and worksheets. (Item 1)

Preceding her July 2012 arrest and ensuing conviction, Applicant resided with her boyfriend. (Items 5, 6-7, and 12). She was served with a search warrant by investigating police officials on the strength of an unknown confidential informant who had participated in a string of purchases from Applicant's live-in boyfriend. The search warrant served on Applicant was part of an ongoing criminal investigation of her boyfriend's drug sales to confidential informants. (Item 1) Applicant's boyfriend was, at the time, an active duty U.S. Marine. (Item 12)

According to what Applicant was told by one of the police investigators who served the warrant on her, her boyfriend sold marijuana to a confidential informant employed by the county of Applicant's residence. (Items 6-7 and 12) With Applicant's assistance and admissions, police investigators were able to locate the stored marijuana in her house and identify who reportedly sold marijuana to the county's confidential informant. (Item 1-3 and 12) Although Applicant was not implicated nor named in the warrant, police arrested her on grounds of complicity in her boyfriend's drug sale.

Following her July 2012 arrest for aiding and abetting her boyfriend's marijuana sale to a confidential informant, law enforcement authorities seized the marijuana and other contraband found in Applicant's home and asked the presiding court for seizure approval. (Items 1, 6, and 11) After the state's arguments for enforcing the seizure, the presiding court denied the state's petition and ordered the return of the seized property (i.e., \$393, an Apex 40 inch LCD television, a Nikon D40 camera, and an HP laptop computer) to Applicant. (Items 1, 6, and 11)

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<sup>1</sup> In an *Alford* plea, a defendant enters a plea of guilty without making an admission of personal guilt. See *North Carolina v. Alford*, 400 U.S. 25 (1970). This enables a defendant to enter a guilty plea while maintaining his or her innocence. However, before a court can accept an *Alford* plea, the defendant must admit that there is sufficient evidence to prove his or her guilt, and the court, in turn, must satisfy itself that the plea is supported by facts sufficient to sustain a conviction. See *North Carolina v. Alford*, *supra*, 400 U.S., at 37-39; ISCR Case No. 07-03307 at 7-8 (App. Bd. Sept. 26, 2008); In ruling on the court's acceptance of an *Alford* plea, the appeals court in *Crowfoot v. U.S. Government Printing Office*, 761 F.2d 661 at 665, at n. 1 (Fed. Cir. 1985) stressed that a court that receives an *Alford* plea "must independently determine that the plea has a factual basis." *Alford* pleas differ slightly from a *nolo contendere* plea, in which the defendant agrees to accepting the court's findings and sentence without admitting guilt, and the evidence is sufficient to establish guilt.

Based on the sentencing court's review of Applicant's exhibited good behavior while under supervised probation, the sentencing court issued an order in June 2014, releasing her from future supervision, conditioned on her future good behavior, while upholding the other terms of her 2013 sentence (inclusive of continued non-supervised probation). (Items 1-6) Since the sentencing court released her from supervised probation, Applicant has been fully compliant with the terms of her probation and has been a model contributor to her father's company. (Items 6 and 12) Applicant has no prior criminal history and no previous involvement in illegal drugs of any kind.

### **Endorsements**

Applicant is highly regarded by her father, who is the chief executive officer (CEO) of a service disabled veteran owned company who sponsored Applicant's security clearance. (Item 12) He credited Applicant with always being a model contributor to his company. He characterized her as being extremely resourceful and efficient. He stressed Applicant's working two jobs while a full-time student who owns a home, cares for a homeless relative, and continues to be "a vibrant and productive person," who has learned her lesson. (Item 12)

Co-workers of Applicant at her father's restaurant praise her overseeing efforts. (Item 1) They credited her with performing multiple tasks and cited examples of her supervising quality control and interfacing with customers and vendors. They described her as organized, efficient, honest, and trustworthy with exhibited good moral character. (Item 1) Applicant's college dean extolled her solid academic achievements in her 2015 and 2016 semesters. (Item 8) Deans of her university's school of arts and sciences credited her with significant academic contributions. (Item 8)

### **Policies**

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns."

The AGs must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines

within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) 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 extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

### **Drug Involvement**

*The Concern:* Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. AG, ¶ 24.

### **Criminal Conduct**

*The Concern:* Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability to comply with laws, rules and regulations.

### **Burden of Proof**

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. *See United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a

security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. “[S]ecurity-clearance determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

### **Analysis**

Applicant currently has two jobs: one as a restaurant manager and another as a part-time consultant for her father’s business. Her father sponsored her for a security clearance and later suspended it following her 2012 arrest and ensuing felony conviction for aiding and abetting her boyfriend’s marijuana sales to a confidential informant with the intent to distribute. She has since been released from her court-ordered supervised probation, but remains subject to the probation conditions for the duration of her five-year suspended sentence.

On the strength of the evidence presented, two disqualifying conditions of the Adjudicative Guidelines for drug abuse are applicable: DC ¶ 25(a), “any drug abuse,” and DC ¶ 25(c), “illegal possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.” Because Applicant’s 2013 felony conviction is covered by her state’s criminal laws, as well as by federal laws governing the distribution of illegal drugs, DC ¶ 31(a) of Guideline J, “a single serious crime or multiple lesser offenses,” and DC ¶ 31(d), “individual is currently on parole or probation,” apply to Applicant’s situation as well

Considering the felony nature of Applicant’s 2013 sale of illegal drugs with the intent to distribute conviction based on her entered *Alford* plea and her still incomplete probation under the terms of her sentencing order, she is not eligible for mitigation credit under any of the mitigating conditions under Guidelines H and J. While she continues to assert her innocence, as she is free to do under her approved *Alford* plea, the evidence developed by arresting police was presumably enough to warrant the entered felony conviction and ensuing sentencing that included indefinite supervised probation and compliance with the court’s probation conditions associated with his suspended five-year suspended sentence.

Where an applicant remains subject to a sentencing court’s probation jurisdiction, security clearance eligibility decisions based on assessments of reliability and trustworthiness are usually premature. So, while Applicant’s progress with her work and

education are encouraging, it is still too early to make safe predictions about the level of trust and reliability required of Applicant to hold a security clearance.

From a whole-person perspective, Applicant has established insufficient probative evidence of unknowing collaboration with her boyfriend in the sale and distribution of illegal drugs from her residence. The felony conviction and ensuing sentencing reflect sustainable court findings of participation in her boyfriend's drug transactions. Applicant's claims that she did not know of her boyfriend's drug sales from her residence and was not involved in the actual transactions, while noted, are not enough to undue the presiding court's findings of her guilt. Applicant's credited employment contributions and educational achievements, while significant and encouraging, are not at this time enough to surmount the trust issues associated with her still recent felony conviction. Her felony conviction is still too recent to be outweighed by her contributions to her employers and university.

Taking into account all of the facts and circumstances surrounding Applicant's felony conviction, she fails to mitigate security concerns related to her felony drug conviction. More time is needed for applicant to demonstrate the level of durable trust and reliability required to hold a security clearance. Unfavorable conclusions warrant with respect to the allegations covered by Guidelines H and J.

### **Formal Findings**

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE H: (DRUG INVOLVEMENT):           AGAINST APPLICANT

Subpara. 1.a:   Against Applicant

GUIDELINE E: (CRIMINAL CONDUCT):        AGAINST APPLICANT

Subpara. 2.a:   Against Applicant

### **Conclusions**

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

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Roger C. Wesley  
Administrative Judge

