

DATE: February 20, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-09528

**DECISION OF ADMINISTRATIVE JUDGE**

**MARTIN H. MOGUL**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

This sixty five year old Applicant was arrested on May 1962, and charged with two counts of forgery. She plead guilty and was sentenced to serve an indeterminate term of six months to 14 years incarceration for each count. The provisions of Title 10 U.S.C. 986 apply. Applicant was also arrested and found guilty in 1958 for passing checks with insufficient funds, in 1969 she was arrested and found guilty of passing checks with insufficient funds, and in 1970 she was arrested and found guilty of receiving stolen property. Mitigation has not been shown. Clearance is denied. I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986.

**STATEMENT OF THE CASE**

On June 4, 2003, 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 a 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 Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

In a signed and sworn statement, dated July 7, 2003, Applicant responded to the SOR allegations. She requested that her case be decided on the written record in lieu of a hearing. Department Counsel submitted the Department's written case, which was prepared on September 9, 2003. A complete copy of the file of relevant material (FORM) was provided to the Applicant, and she was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant filed no response to the FORM. The case was assigned to this Administrative Judge on October 27, 2003.

In the FORM, Department Counsel offered eight documentary exhibits (Exhibits 1 - 8), which were admitted without objection. Applicant offered no documentary evidence into the record.

**FINDINGS OF FACT**

The Government opposes Applicant's request for a security clearance, based upon the allegations set forth in the SOR. In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline J (Criminal Conduct) of the Directive. The SOR contains five allegations 1.a., 1.b., 1.c., 1.d., and 1.e. under Guideline J. In her response to the SOR, Applicant admits all allegations, except 1.e. to which she does not respond. The admitted allegations are incorporated as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR and the admitted documents, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 65 years old. She is employed by a defense contractor, and she seeks to retain a DoD security clearance in connection with her employment in the defense sector.

### **Guideline J (Criminal Conduct)**

Applicant was arrested on February 1958, and charged with passing checks with insufficient funds. She plead guilty and was sentenced to three years of probation

Applicant was arrested on May 1962, and charged with two counts of forgery. She plead guilty and was sentenced to serve six months to 14 years incarceration for each count, to run concurrently.

Applicant was arrested on January 1969, and charged with forgery and passing checks with insufficient funds. She was found guilty of passing checks with insufficient funds and was sentenced to serve six months incarceration and three years of probation.

Applicant was arrested on April 1970, when she was 31 years of age, and charged with receiving stolen property. She pled guilty and was sentenced to six months incarceration and three years of probation.

### **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines that must be carefully considered in evaluating an individual's security eligibility and making the overall common sense determination required. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. 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, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

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.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (*See* Directive, Section E2.2.1. of Enclosure 2).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

### **CRIMINAL CONDUCT (GUIDELINE J)**

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

- a. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
- b. A single serious crime or multiple lesser offenses;
- c. Convictions in a Federal or State court . . . of a crime and sentence to imprisonment for a term exceeding one year;

Condition that could mitigate security concerns include:

- g. Potentially disqualifying conditions c. and., above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense . . . has granted a waiver.

### **BURDEN OF PROOF**

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

### **CONCLUSIONS**

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to guidelines J:

The Government has established its case under Guideline J. Applicant's conduct, as alleged in SOR 1.c., is criminal and did result in her receiving an indeterminate term of imprisonment from six months to 14 years. Under the provisions of Title 10 U.S.C. §986, a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment to a term exceeding one year, may not be granted or have renewed access to classified information. I resolve Guideline J against the Applicant.

Under Guideline J, I conclude that Disqualifying Conditions a, b, and c apply because Applicant's conduct did involve four criminal offenses, over several years, including the one that resulted in the sentence of six months to 14 years imprisonment. The first offense occurred when she was 19 years of age, and the last when she was 31. Applicant has not offered any evidence to rebut the Government's case regarding her criminal conduct nor has she introduced any evidence regarding her current life or employment status. No Mitigating Conditions apply.

### **FORMAL FINDINGS**

Formal Findings, as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive, are hereby rendered as follows:

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1. a.: Against the Applicant

Subparagraph 1. b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Subparagraph 1.d.: Against the Applicant

**DECISION**

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 a security clearance for Applicant. I do not recommend further consideration of this case for a waiver of 10 U.S.C.986.

Martin H. Mogul

Administrative Judge