

DATE: April 22, 2002

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-05323

DECISION OF ADMINISTRATIVE JUDGE

WILLIAM R. KEARNEY

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Approximately 27 years ago, when the Applicant was a young woman, she was charged with two counts of forgery, a felony. She pleaded guilty to these two felonies and was sentenced to two years in jail, suspended, on each charge, and she was placed on probation. There is no evidence of any other criminal conduct on her part. Under the provisions of 10 U.S.C. Sec. 986(a) the DoD is prohibited from granting a security clearance to such an offender who is presently working as a DoD contractor employee. Consideration of a waiver is recommended.

STATEMENT OF THE CASE

On October 18, 2001, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding [\(1\)](#)

it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On November 5, 2001, the Applicant answered the SOR and elected to have her case decided on the written record, in lieu of a hearing.

The Applicant was forwarded a complete copy of the file of relevant material (FORM) on January 28, 2002, and was given the opportunity to file objections and submit material in extenuation, mitigation, or refutation within 30 days of receipt of the FORM. The Applicant's response to the FORM was due on March 23, 2002. No response has been received. I was assigned the case on March 27, 2002, on which date the record herein was closed. The Department Counsel presented six (6) exhibits (Items).

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following sole guideline: paragraph 1, Guideline J (Criminal Conduct). The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following Findings of Fact:

The Applicant is a 46-year-old Program Analyst employed by a U.S. Government contractor since April 2000. The Applicant seeks to obtain a Secret personnel security clearance.

The Applicant, when completing her Standard Form 86, (security clearance application), on November 27, 2000, admitted to having been convicted of the crime of forgery. In her Answer to the SOR, the Applicant admits to the cited violation and on June 13, 1975 she pleaded guilty to two counts of Forgery and she received a sentence of two years in jail, suspended, on each charge, to run concurrently, and she was placed on probation for two years. She successfully completed probation without any incident.

The Applicant in her Answer further denies that the cited incident shows a pattern of criminal activity, as this single criminal offense occurred more than twenty five years ago. At that time, her actions were driven by immaturity, homelessness, and inexperience. Since then she states that she has been a productive and responsive member of the work force and the community.

The Applicant has successfully participated in a marriage relationship that has lasted more than twenty seven years; she has provided a stable home environment for her family; and she has successfully reared two happy, health, productive children, ages 27 and 26. One of her children is a current contractor with the FBI with a Top Secret clearance working in Virginia. The other child is a licensed insurance agent and office manager in Georgia. The Applicant is actively involved as a volunteer with her local volunteer Fire Department, and she was elected recording secretary in 2001. In addition to her other activities, she actively supports, promotes and participates in community events in her neighborhood.

The Applicant sets forth her professional accomplishments as follows:

For more than nine year she has worked as a contractor for the US Department of State. During this time she has participated in or has been entrusted with classified activities and information; She has never been cited for a security violation, nor has she ever been cited for inappropriate activities in connection with her position; She is a trusted confidant for senior management and has maintained the highest levels of security and sensitivity for a program that is classified. She performs and conducts her duties while protecting classified or sensitive information from inappropriate disclosure at all times. For more than five years she has acted as the unit security officer within her group. It was her task to oversee all aspects of physical security within her area, and she provided her group members with guidance on proper security procedures for protection and storage of classified material. During this time no security violations or incidents occurred.

ACT OF CONGRESS

On October 30, 2000, Public Law 106-398, 114 Stat. 1654 was enacted. Section 1071(a) of that statute added the following section to title 10 of the United States Code:

Sec 986. Security clearances: Limitations

(a) Prohibition

After the date of the enactment of this section [October 30, 2000], the Department of Defense may not grant or renew a security clearance for a person to whom this section applies who is described in subsection (c).

(b) Covered Persons.

This section applies to the following persons:

(1)

(2)

(3) An officer or employee of a contractor of the Department of Defense.

©) Persons Disqualified From Being Granted Security Clearances.

A person is described in this subsection if any of the following applies to that person:

(1) The person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year.

(2)

(3)

(4)

(d) Waiver Authority.

In a meritorious case, the Secretary of Defense or the Secretary of the military concerned may authorize an exception to the prohibition in subsection (a) for a person described in paragraph (1) or (4) of subsection (c). The authority under the preceding sentence may not be delegated.

(c) Annual Report

Not later than February 1 each year, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and House of Representative a report identifying each waiver issued under subsection (d) during the preceding year with an explanation for each case of the disqualifying factor in subsection ©) that applied, and the reason for the waiver of the disqualification.

On June 7, 2001, the Deputy Secretary of Defense issued a general distribution memorandum, subject, "Implementation of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2002." which interpreted 10 U.S.C. Sec. 986(c)(1) to cover sentences imposed by courts other than Federal courts as well as those imposed by "courts of the United States" in accordance with the definition in paragraph (1) of 18 U.S.C. Sec. 101(a).

A copy of the Deputy Secretary of Defense memorandum dated June 7, 2001, was provided by DOHA to the Applicant.

POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluating an individual's security eligibility. The guidelines are divided into those that may be considered

in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The guidelines, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

GUIDELINE J - CRIMINAL CONDUCT

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. Conviction in a Federal or State court, including a court-martial, of a crime and sentenced to imprisonment for a term exceeding one year (under the provisions of 10 U.S.C. 986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts-martial, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waiver of this prohibition);

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent;
- b. The crime was an isolated incident;
- f. There is clear evidence of successful rehabilitation.
- g. Potentially disqualifying conditions c. and d., above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver.

The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section 6.3:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.
- e. Absence or presence of rehabilitation.
- f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct.

The circumstances surrounding the conduct, to include knowledgeable participation.

The frequency and recency of the conduct.

The individual's age and maturity at the time of the conduct.

The voluntariness of participation.

The presence or absence of rehabilitation and other pertinent behavioral changes.

The motivation for the conduct.

The potential for pressure, coercion, exploitation, or duress.

The likelihood of continuation or recurrence.

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

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Initially, the Government has the burden of providing controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

"It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interest of the national security' test. The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government

to support the denial [of a security clearance] by a preponderance of

the evidence would inevitably shift the emphasis and involve the

Board in second-guessing the agency's national security determinations."

See *Dept. Of the Navy v. Egan*, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go the minimum *quantum* of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence-rather than as an indication of the Court's tolerance for error below.⁽²⁾

The burden of going forward with the evidence then shifts to the Applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the case or through evidence of an affirmative defenses. Assuming that the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an Applicant might deliberately or inadvertently fail to safeguard properly classified information, the Applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a security clearance.⁽³⁾

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, the undersigned concludes that the Government established its case with regard to Guideline J.

The Applicant has admitted that she was convicted in the United States of a state crime and sentenced to imprisonment of a term exceeding one year. Predicated on that evidence, Title 10 United States Code. Sec. 980 prohibits the grant of a security clearance by the Department of Defense (DOD) to her as an employee of a contractor of the Department of Defense. The statute is applicable even though the offense occurred more than 27 years ago when the Applicant was a young woman. Therefore, SOR Paragraph 1.b., is concluded adversely to the Applicant.

It is noted that the Deputy Secretary of Defense incorporated his June 7, 2001, implementation of the statute into the existing framework of the Directive and its guidelines. Consequently, Section 6.3 of the Directive is applicable to this case. That provision of the DoD regulation requires that the decision must be "a fair and impartial common sense determination" based on, *inter alia*, the guidelines at enclosure 2 of the Directive and the factors identified on pages 5 and 6 *supra*.

The evidence reveals that the Applicant committed a serious crime (forgery). This falls within the scope of DC #b, which is identified on page 5 *supra*. In mitigation, the evidence of record reveals that the criminal behavior was not recent, that it was an isolated incident, and that there is clear evidence of successful rehabilitation. These factors fall within the scope of MC #a, MC #b, and MC #f, which are also identified on page 5 *supra*. Furthermore, the SOR presents adverse evidence under only a single guideline (Guideline J). Therefore, the adjudicative guidelines contained in enclosure 2 of the Directive provide in part:

Although adverse information concerning a single criterion **may not be sufficient** for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior. (Emphasis supplied).

Clearly there is no available evidence of "recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior." Common sense dictates that the Applicant has long been rehabilitated, with regard to

criminal activity, and that she presents little identifiable *present* security risk. The Secretary of Defense should personally review this case with a view to determining whether to authorize a waiver of the prohibition in subsection (a) of 10 U.S.C. Sec. 986.

Each clearance decision is required to take into consideration pertinent factors set forth in Section 6.3 of the Directive and in the adjudicative process discussion at enclosure 2 to the Directive. These factors are identified on pages 5 and 6 *supra*. The nature of the crime committed was very serious and weighs against the Applicant. The "frequency and recency" of the criminal conduct and the Applicant's age when she committed it weigh in her favor. The presence of rehabilitation and the probability that the conduct will not recur in the future weigh decisively in her favor. Therefore, SOR Paragraph 1.a., is concluded favorably to the Applicant.

FORMAL FINDINGS

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item

25 of Enclosure 3 of the Directive are:

Paragraph 1, Guideline J AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

DECISION

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

The undersigned Administrative Judge recommends further consideration of this case and that the Secretary of Defense should personally review it with a view to determine whether to authorize a waiver of the prohibition in subsection (a) of 10 U.S.C. Sec. 986.

William R. Kearney

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

2. . The rule has been restated as requiring "that security clearance should be revoked [sic] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D. Cal. 1992). *Cf.* with regard to the *quantum* of evidence the DOHA Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:

[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the [DOHA] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.

Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. Sec. 556(d).

3. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).