

DATE: September 30, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-08565

DECISION OF ADMINISTRATIVE JUDGE

JOSEPH TESTAN

APPEARANCES

FOR GOVERNMENT

Marc Curry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

The recency of applicant's dishonest and criminal conduct precludes a finding that it is now clearly consistent with the national interest to grant her access to classified information. Clearance is denied.

STATEMENT OF THE CASE

On January 31, 2002, 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.

Applicant responded to the SOR in writing on February 27, 2002. The case was assigned to the undersigned on July 15, 2002, and a Notice of Hearing was issued on August 7, 2002. The hearing was held on September 10, 2002. The transcript was received on September 18, 2002.

FINDINGS OF FACT

Applicant is a 44 year old security officer.

SOR Allegation 1.a: Applicant completed and executed a Security Clearance Application (SCA) on January 5, 1999. Among the questions applicant was required to answer were questions 21 and 24, which appeared on the SCA as follows:

21. Your Police Record - Felony Offenses

Have you ever been charged with or convicted of any felony offense? (Include those under the Uniform Code of

Military Justice.) For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.

24. Your Police Record - Alcohol/Drug Offenses

Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.

Applicant responded "no" to both questions. These responses were false because she had been charged with a drug-related felony (Possession of a Controlled Substance - Cocaine) in 1990 (Exhibit 4).⁽¹⁾

Applicant has given different explanations for her "no" responses. In a signed, sworn statement that she gave to the Defense Security Service (DSS) in May 2000 (Exhibit 2), she stated: "I did not intentionally falsify my (SCA) because I did not realize the question on the (SCA) specified that I had to disclose this arrest even though it had been dismissed. I did not believe the question pertaining to drug related arrests applied to me because the crack cocaine was not mine and the charge had been dismissed." In her response to the SOR she stated: "It was wrong for me to falsify material facts on my (SCA). In doing so I caused and created the appearance of an unethical reputation. It was not intended as a lie because I did not realize that I had a record. The Public Defender said I would not have a record if I agreed not to go to trial. Therefore, I did not believe I had a police record for nine years . . . There is no excuse for falsifying facts. I should have answered truthfully about the arrest and explained the charges against me." At the hearing, applicant, for the first time, stated that she responded "no" to the two questions because she thought the "single exception" referenced in both questions applied to her (TR at 21-22; 40-42; 75-76). When asked why she had not mentioned this "single exception" as the reason for her "no" responses when she responded to the SOR, applicant replied, "There's no particular reason why I didn't mention it" (TR at 89-90).

Based on the evidence presented, I find that applicant intentionally provided false, material information to the Government when she responded "no" to questions 21 and 24.⁽²⁾ At the time she completed the SCA, she knew she had been charged with a drug-related felony. With this knowledge, a person of applicant's intelligence would have no difficulty understanding that "yes" was the proper response to questions 21 and 24. As to her explanation that she thought the "single exception" justified her "no" responses, this explanation was not credible. The fact that she did not mention this until the hearing seriously undercuts the credibility of this explanation, as does the fact that the "single exception" refers to the expungement of a conviction, and she knew at the time she completed the SCA that she had not been convicted of the charge.

SOR Allegation 1.b: The circumstances regarding applicant's 1990 arrest are in dispute. Applicant maintains that the crack cocaine the police found on the ground near where she was standing was not hers and was there before she ever arrived at the scene (Exhibit 2; TR at 54-57). The police maintain that applicant dropped the crack cocaine on the ground after she was asked to exit her vehicle (Exhibit 5). As noted above, although applicant was charged with Possession of a Controlled Substance (Cocaine) as a result of this incident, the charge was eventually dismissed. Viewing the evidence as a whole, I cannot find that applicant intentionally provided false information when she provided her version of events in her May 4, 2000 signed, sworn statement (Exhibit 2). Accordingly, this allegation is found for applicant.

SOR Allegation 1.c: The evidence does not support a finding that applicant used marijuana.⁽³⁾ Accordingly, this allegation is found for applicant.

POLICIES

Enclosure 2 of the Directive sets forth Guidelines (divided into Disqualifying Factors and Mitigating Factors) which must be followed by the Administrative Judge. Based on the foregoing Findings of Fact, the following Disqualifying

Factors and Mitigating Factors are applicable:

Personal Conduct

Disqualifying Factors

- 1. E2.A5.1.2.2: The deliberate omission of relevant and material facts from any personnel security questionnaire.

Mitigating Factors

None.

Criminal Conduct

Disqualifying Factors

- 1. E2.A10.1.2.2: A single serious crime or multiple lesser offenses.

Mitigating Factors

- 1. E2.A10.1.3.2: The crime was an isolated incident. (4)

CONCLUSIONS

The evidence establishes that in 1990, applicant was charged with Possession of a Controlled Substance, a drug-related felony. The evidence further establishes that applicant intentionally concealed this incident from the Government when she responded "no" to questions 21 and 24 on the SCA she executed in January 1999. Given the isolated nature of the drug-related incident, and the passage of time since it occurred, had applicant disclosed it on the SCA, it most likely would not have adversely affected her security clearance request. However, applicant's omission of this incident from the SCA in 1999 raises new security concerns, separate and apart from the underlying incident.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts on a security clearance application, it is extremely difficult to conclude that he or she nevertheless possesses the judgment, reliability and trustworthiness required of clearance holders. In this case, the recency of applicant's dishonesty, together with her continuing inability or unwillingness to acknowledge it, precludes a finding that it is now clearly consistent with the national interest to grant her access to classified information.

FORMAL FINDINGS

PARAGRAPH 1: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the applicant

Subparagraphs 1.b. and 1.c: For the applicant

PARAGRAPH 2: 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.

Joseph Testan

Administrative Judge

1. Applicant participated in a diversion program and the charge was eventually dismissed.
2. This conduct constitutes a felony under 18 U.S.C. 1001.
3. The evidence offered by the Government to support this allegation was applicant's August 15, 2000 statement (Exhibit 3). This statement certainly raises suspicions about applicant's involvement with marijuana; however, she never actually admits using marijuana in said statement.
4. In view of the dismissal of the 1990 charge, I find applicant's violation of 18 U.S.C. 1001 to be an isolated incident.