

DATE: December 9, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-10626

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY II

APPEARANCES

FOR GOVERNMENT

Jennifer Campbell, Department Counsel

Henry Lazzaro, Department Counsel

FOR APPLICANT

Tony O. Shaw, Esquire

SYNOPSIS

In 1981, the Applicant was found guilty of possessing stolen property. In 1992, she was arrested for credit card fraud, found guilty of wrongfully assessing a computer, and sentenced to two years in jail. In 1996, she was arrested for driving while intoxicated. Because she was sentenced to imprisonment for a term exceeding one year, 10 United States Code (U.S.C) section 986 applies. Clearance is denied. No waiver of 10 U.S.C. section 986 is recommended.

STATEMENT OF THE CASE

On January 25, 2002, 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 March 13, 2002, the Applicant answered the SOR and requested a hearing. The case was assigned to me on May 23, 2002. A Notice of Hearing was issued on August 15, 2002, scheduling the hearing which was held on September 6, 2002.

The Government's case consisted of eight exhibits (Gov Ex). The Applicant relied on her own testimony and one exhibit. (App Ex) Following the hearing, four additional documents were received, provisions having been made at the time of the hearing for their submission following the hearing. Department Counsel having no objection to their admission, the submissions were admitted as App Exs B, C and D. The transcript (tr.) of the hearing was received on September 16, 2002.

FINDINGS OF FACT

The SOR alleges criminal conduct (Guideline J). The Applicant admitted the stolen property allegation, but stated the property was left in her room by another person. She also admits being stopped at a sobriety checkpoint, but denies the

other allegation of credit card fraud.

The Applicant is 40 years old, has worked for a defense contractor since February 1992, and is seeking a security clearance. She does very good work, is a very valuable resource, is a very responsible employee, through, goal oriented, committed, willing to volunteer for different opportunities, actively works to develop her skills, and works well with others. She is a fast learner, reliable, team oriented, and a good communicator. (App Ex C) She is a very enthusiastic, dedicated, compassionate, reliable, and has a giving and generous nature. (App Ex D)

In October 1981, the Applicant was in the service stationed in Italy and was engaged to another service member, who later became her husband. In April or ay 1981, an individual came to her dormitory/barracks room, and stated the Applicant's fiancé told him to give her a camera, which he gave her. Also, in May 1981, the same individual brought her a stereo receiver. When she asked her fiancé about the camera, he was evasive and changed the subject. In June 1981, the individual brought her another camera and a radio cassette recorder and told her they were from her fiancé. When she asked her fiancé about these items, he was again evasive. In June 1981, the Applicant gave her fiancé \$150.00 to buy her a turntable and in July 1981, the same individual who had delivered the other items, brought her a turntable. In July 1981, the Applicant found another camera in her room and stereo headphones, which she believes had been delivered by the same individual. These items had been stolen from other military members. Additionally, another stolen camera was found in her room. (Gov Ex 2)

In July 1981, the Applicant was charged with possession of stolen property. In September 1982, the Applicant received non-judicial punishment under Article 15, Uniform Code of Military Justice (UCMJ), was sentenced to 20 days hard labor, 30 days restriction, and fined \$412.20. (Gov Ex 3)

Ten years later, in the early 1990's, The Applicant was dating a man who gave her a credit card, personal identification number (PIN), and asked her to get some cash from an ATM machine. She assumed the card belonged to the man but did not closely view the card for the name on the card was not the same as the name of her friend. The card had been stolen. She alleges she used the card only one time to get \$100.00 from an ATM. (Gov Ex 6) In June 1992, the Applicant was arrested and charged with credit card fraud, a felony, and theft of a credit card. The credit card theft charge was dismissed without leave by the district attorney. The Applicant pleaded guilty to, and was found guilty of, the lesser charge of attempted felonious accessing of computers. (Gov Ex 8) She was sentenced to two years confinement. The sentence was suspended and the Applicant was placed on one year supervised probation, four years unsupervised probation, ordered to pay restitution of \$3,700.00, \$200.00 in attorney fees, and court costs (Gov Ex 5), which included \$2,000.00 to be paid to the credit card company and to cover all the unauthorized charges on the card.

In July 1996, the Applicant was stopped at a sobriety check point after bowling with friends. She states she had had two or three glasses of wine during the evening and was not intoxicated, (Gov Ex 6) however she was arrested for Driving While Intoxicated (DWI). After pleading guilty to the charge, she was found guilty, sentenced to 30 days in jail (suspended), fined \$600.00, (\$400.00 suspended), ordered to attend Alcohol Safety Action Program (ASAP), give one year probation, and her driver's license was suspended for one year. (Gov Ex 7) Since the arrest, the Applicant is certain not to drive after consuming any amount of alcohol.

The Applicant has requested the felony charge be expunged from her records. (App Ex A)

Her university cumulative GPA is 3.25. (App Ex B)

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to an Applicant's lack of security worthiness.

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. 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.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to 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 admission 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.

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent.
- 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.

BURDEN OF PROOF

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish her security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue her security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the 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 she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of 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." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Guideline J, (Criminal Conduct). Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of criminal activity creating doubt about her judgment, reliability, and trustworthiness.

In 1982, the Applicant was punished for possessing stolen goods. In 1992, she pleaded guilty and was found guilty of attempted felonious accessing of computers and sentenced to two years confinement. Even though the Applicant's confinement was suspended, she was sentenced to two years confinement which makes Disqualifying Conditions (DC) c-(2) applicable. The sentence was suspended and the Applicant was placed on one year supervised probation, four years unsupervised probation, ordered to make restitution of \$3,700.00 plus attorney fees and court costs. In 1996, she was found guilty of DWI. Because of these events DC a-(3) and b-(4) apply.

The non-judicial punishment occurred 21 years ago when the Applicant was 19 years old. Mitigating Condition (MC) a (5) applies to this incident which is not recent. The Applicant was 30 years old when her felony conviction occurred in 1992. This conviction is not recent having occurred more than 10 years ago. C a. applies. I find for the Applicant as to SOR subparagraphs 1.a and 1.b. In July 1996, more than six years ago the Applicant was out bowling with friends when she had too much to drink and was convicted of DWI. This behavior is not recent. Additionally, this is the only alcohol related incident in which the Applicant has been involved and in that sense it is isolated. However, it is not isolated when considered as criminal behavior, because the Applicant was involved in other acts of criminal behavior which included possession of stolen goods and credit card theft. Because her DWI is not recent, MC a. applies and I find for the Applicant as to SOR subparagraph 1.c.

The provisions of 10 U.S.C. 986 (P.L. 106-398) apply to the Applicant because she was convicted in State court and sentenced to imprisonment for a term exceeding one year, even though

the imprisonment was suspended. I find against the Applicant as to SOR subparagraph 1.d.

The Applicant has established good work performance and did well in her university studies, however other evidence of positive charges in lifestyle and other evidence of rehabilitation have not been established by the record.

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

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability the circumstance or conduct will continue or recur in the future.

The awarding of a security clearance is not a once in a life time occurrence, but is based on current disqualifying and mitigating conditions. In fairness to the Applicant, this decision should not be construed as a determination the Applicant cannot or will not at some future date attain the state of true reform and rehabilitation necessary to justify the award of a DoD security clearance.

FORMAL FINDINGS

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

Paragraph 1Criminal Conduct (Guideline J): AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For 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 the Applicant.

Claude R. Heiny

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. MC 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.
3. DC a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.
4. DC b. A single serious crime or multiple lesser offenses.
5. MC a. The criminal behavior was not recent.