

DATE: March 11, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-17851

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Charged with conspiracy to import and distribute cocaine with her husband, Applicant's 1981 criminal conduct raised security concerns as she was convicted of Aiding and Abetting. She received a suspended eighteen months sentence and five years probation, but in 1986 she violated her probation by testing positive for marijuana. Found guilty of Violation of Probation in 1987, she was ordered to serve the original eighteen month sentence and three years Special Parole Term. Applicant served nine months confinement and 5 months in a halfway house. Clear evidence of successful rehabilitation and the absence of any subsequent criminal conduct over the past 15 years could mitigate security concerns, but the Smith Amendment (10 U.S.C. Section 986) disqualifies anyone convicted and sentenced to imprisonment for more than one year. Clearance is denied.

Applicant requested a waiver based on her rehabilitation and the length of time since her conviction. A waiver is recommended.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on September 13, 2001. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. ⁽¹⁾ The SOR alleges specific concerns over criminal conduct (Guideline J), including an allegation that her criminal conduct disqualifies Applicant from having a security clearance because of 10 U.S.C. Section 986, unless in a meritorious case the Secretary of Defense authorizes an exception. Applicant responded to these SOR allegations in an Answer notarized on October 6, 2001, where she admitted with explanations paragraph 1.a., but did not respond to 1.b. She requested a hearing and a waiver. (TR 36)

The case was assigned to Department Counsel who on November 28, 2001, attested it was ready to proceed; and the case was assigned to me. Subsequently, a mutually convenient date for hearing was agreed to and a Notice of Hearing

was issued on December 13, 2001, which set the matter for January 18, 2002, at a location near where Applicant works and lives. At the hearing the Government introduced six exhibits which were all admitted into evidence (Exhibits 1-6). The Applicant testified, and offered one ⁽²⁾ exhibit which was admitted into evidence. She was granted additional time to submit other evidence. (TR 39-40, 88, 94) Subsequently Applicant submitted two additional documents to which Department Counsel did not object. Exhibits B and C were admitted into evidence, and the record closed on February 6, 2002. The transcript (TR) was received on January 28, 2002.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, 46 years old, has been employed with a defense contractor in State #1 since May 1988. After she completed Security Clearance Applications (SF 86) in April 1996 and in November 1996, she was granted a Department of Defense Secret clearance in August 1997. (Exhibit 1, Exhibit B; TR 22-26, 42, 48)

Applicant married Husband #2 in June 1980 and divorced him in October 1992; he was incarcerated from 1985-90; she no longer has any contact with this husband. Previously she was married to Husband #1 in 1974 and divorced in 1980. She has three children born in 1976, 1978, and 1980. (Exhibit 1; TR 27-28, 37-38, 40-41, 44)

Criminal Conduct

Applicant was arrested in April 1981 after an indictment charged her with knowingly and intentionally conspiring to import into the United States substantial quantities of cocaine hydrochloride, a Schedule II narcotic drug controlled substance, in violation of Title 21 U.S.C. Sections 846 and 963 because of her role in accompanying Husband #2 while he engaged in criminal actions from April 1979 to January 1981 in trafficking in cocaine. (Answer, Exhibits 1, 2, 3, 4 & 5; TR 22, 28-29) While Applicant was convicted of Aiding and Abetting, her eighteen months of confinement was suspended with 5 years probation. Her husband testified for the government, and they were placed in a Federal Witness Protection Program from 1981 to 1986 and relocated to State #2. However, her husband continued to sell drugs and was subsequently incarcerated. Then Applicant was no longer in the witness program. In 1986, she violated the terms of her probation by using marijuana once a week. After an unannounced visit by her probation officer to her apartment in State #2 where he found drug equipment, she tested positive for marijuana use. In 1987 she was found guilty of Violation of Probation and ordered to serve her original sentence of 18 months and three years Special Parole Term. Applicant served nine months confinement in State #3 and 5 months in a halfway house in State #1. She successfully completed her parole in September 1988 and was considered a "good" risk. She attended a Narcotics Anonymous (NA) program which required her to obtain a job. Applicant obtained a job with a defense contracting company in May 1988 where she has continuously worked in increasingly responsible positions. Since 1986 she has not used any drugs and has no future intent to use drugs. (Exhibits 1, 2, 6; Exhibit C; TR 22-23, 30-35, 45-46)

Applicant was promoted to supervisor in 1996 and needed a security clearance for the job which was granted to her in August 1997. (Exhibit 1; Exhibit C; TR 23-24; 36-37) Her request for a waiver is based on exemplary post-conviction conduct and the extent to which she has rehabilitated her life. (TR 38-39) She has not requested a pardon. ⁽³⁾

Character References

Her supervisor from 1989 to 1994 is now retired. He assessed her work as very conscientious; she was well regarded by her superiors as well as by the government customer. "There was never a doubt as to her qualifications," and there was no evidence of any impropriety. (Exhibit A; TR 42-43)

Her current supervisor, a company manager, testified that he has known Applicant since 1988 when they were co-workers. Later in 1995 he became her supervisor; she applied for a security clearance at his insistence because of the high quality of her work. He believes she is an asset to the program. He is a scout master and believed Applicant meets the twelve elements that scouts are known for such as trustworthy, loyal, and helpful. He assesses Applicant as "a person" he "would trust with anything." (TR 46-52) He was surprised to learn of her past problems which she revealed

to him after he requested she apply for a security clearance. (TR 51-54) Since he has known her, he has not seen any evidence of drug use. (TR 54-55) Since she was granted a security clearance in 1997, she has handled classified matters in a conscientious fashion. She receives very good evaluations as she is very thorough. She has extensive training and is very knowledgeable in her field. The government customers always have the highest praise for her. (TR 55-65; 66-67)

A co-worker and personal friend also testified favorably for Applicant. She has known Applicant for 13 years and has never seen Applicant use drugs. She finds Applicant a "very good person." (TR 68-70; 70-75)

Applicant's friend of ten years also testified on her behalf as being a responsible and honest person. She has never seen Applicant use drugs. (TR 77-82)

Applicant's mother who lives near Applicant also testified on her behalf. She took care of Applicant's children while Applicant was incarcerated. She considers Applicant a very good daughter. (TR 82-88)

STATUTORY REQUIREMENTS

A provision of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, 10 U.S.C. Section 986 ("The Smith Amendment"), mandates restrictions on the granting or renewal of security clearances. This statutory limitation was implemented within the Department of Defense by a June 7, 2001, memorandum, and within DOHA by Operating Instruction (OI) 64, issued on July 10, 2001. Statutory provision (1) disqualifies a person who "has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." DoD implementing guidance interpreted this language to include "person with convictions in both State and Federal courts, including UCMJ offenses with sentences imposed of more than one year, regardless of the amount of time actually served." This case falls within this statutory provision. However, the Smith Amendment establishes authority for the Secretary of Defense (or the Secretary of the military department concerned) to grant a waiver where meritorious cases exist. This authority may not be delegated. Neither the statute, nor DoD, nor the DOHA Director in the OI has defined "meritorious circumstances."

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole, I weighed relevant Adjudication Guidelines as set forth below :

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
- b. A single serious crime or multiple lesser offenses.
- c. Conviction in a Federal or a State court. . .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
- d. . . .the factors leading to the violation are not likely to recur;
- f. There is clear evidence of successful rehabilitation

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. 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 after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Criminal Conduct

The Government's security concerns developed from Applicant's participation in her husband's criminal conspiracy to import and distribute cocaine from 1979 to 1981: she was convicted of Aiding and Abetting. Although her eighteen months sentence was suspended (and she received five years probation), Applicant violated her probation in 1986 by testing positive for marijuana. She was found guilty in 1987 of Violation of Probation and ordered to serve her original sentence of eighteen months and three years Special Parole Term. Applicant served nine months confinement and five months in a halfway house. Conditions which raise a security concern and may be disqualifying include allegations or admissions of criminal conduct and a single serious crime or multiple lesser offenses. Further, a provision of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, 10 U.S.C. Section 986 ("The Smith Amendment"), as implemented by DoD, mandates restrictions on the granting or renewal of security clearances: provision (1) disqualifies persons with convictions in both State and Federal courts with sentences imposed of more than one year, regardless of time actually served.

To her credit Applicant sought out Narcotics Anonymous in 1988, and she has avoided any subsequent drug use. Applicant obtained a job with the defense contracting company in May 1988 where she has continuously worked. Indeed she has flourished there for fourteen years in increasingly responsible positions. She is well regarded by her co-workers, superiors, and the government customers. Consequently, the twenty-year old actions where she aided and abetted her husband and her marijuana use in 1986 that ultimately led to her incarceration in 1987, might now be mitigated under condition (a) as the behavior was not recent. There is no evidence that she has subsequently been involved with any criminal or drug activity since 1986, fifteen years ago. Further under mitigation conditions (d), the factors leading to the violation are not likely to recur; and (f) there is clear evidence of successful rehabilitation. Indeed, she was granted a security clearance in 1997 and has handled the responsibility in a conscientious fashion according to her supervisor who has praised her expertise, work performance, and character.

As implemented by DoD, the statutory provision in 10 U.S.C. Section 986 makes no exception for the circumstances that led to the crime or for subsequent rehabilitation.⁽⁴⁾ Consequently, this statutory provision mandates doubt over Applicant's current trustworthiness and access to classified information: Applicant was convicted of a crime and sentenced for a term exceeding one year. Thus, her criminal conduct cannot be mitigated.⁽⁵⁾ After considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraph 1.a. and 1.b. incorporated under SOR Paragraph 1.

Request for Waiver

Applicant requested a waiver based on meritorious circumstances as she documented she has had no subsequent criminal conduct or drug involvement for fifteen years since her 1986 probation violation and subsequent incarceration for more than one year. Further, Applicant supported with evidence her steps towards rehabilitation and demonstrated her ability to lead a responsible and productive life for a significant period after her release from confinement. She has over a thirteen year history of employment stability and a reputation for excellence as a productive member of her company work force. Further, she was initially granted a security clearance in 1997 and subsequently performed the classified duties responsibly. I recommend⁽⁶⁾ further consideration of this case for a waiver under 10 U.S.C. 986.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against 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. I recommend further consideration of this case for a waiver under 10 U.S.C. Section 986.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.

2. Applicant was given an additional seven days until January 27, 2002, to submit additional exhibits, and the Government was given three days to review the document(s) and to submit any documents to me. (TR 94) On January 22, 2002, Applicant submitted Exhibit B to which government counsel did not object. On January 25, 2002, Applicant informally requested and on January 29, 2002, formally requested another extension until February 8, 2002, to submit her Parole Release Certificate. On February 4, 2002, Applicant submitted Exhibit C, to which the Government did not object.

3. Seeking a pardon is an exercise of executive clemency as authorized under Article II, Section 2, of the Constitution. Under the Constitution, the President's clemency power extends only to federal criminal offenses. In general, a pardon is granted on the basis of the petitioner's demonstrated good conduct for a substantial period of time after conviction and service of sentence. See <http://www.usdoj.gov/pardon/> The Department of Justice's regulations require a petitioner to wait a period of at least five years after conviction or release from confinement (whichever is later) before filing a pardon application (28 C.F.R. §1.2). In determining whether a particular petitioner should be recommended for a pardon, the principal factors taken into account are outlined in Section 1-2.112 **Standards for Considering Pardon Petitions:**

1. Post-conviction conduct, character, and reputation. An individual's demonstrated ability to lead a responsible and productive life for a significant period after conviction or release from confinement is strong evidence of rehabilitation and worthiness for pardon. The background investigation . . . focuses on the petitioner's financial and employment stability, responsibility toward family, reputation in the community, participation in community service, charitable or other meritorious activities and, if applicable, military record.

2. Seriousness and relative recentness of the offense. When an offense is very serious (e.g., a violent crime, major drug trafficking, breach of public trust, or white collar fraud involving substantial sums of money), a suitable length of time should have elapsed in order to avoid denigrating the seriousness of the offense or undermining the deterrent effect of the conviction. In the case of a prominent individual or notorious crime, the likely effect of a pardon on law enforcement interests or upon the general public should be taken into account. When an offense is very old and relatively minor, the equities may weigh more heavily in favor of forgiveness, provided the petitioner is otherwise a suitable candidate for pardon.

3. Acceptance of responsibility, remorse, and atonement. The extent to which a petitioner has accepted responsibility

for his or her criminal conduct and made restitution to its victims are important considerations. A petitioner should be genuinely desirous of forgiveness rather than vindication.

4. Need for relief. The purpose for which pardon is sought may influence disposition of the petition. A felony conviction may result in a wide variety of legal disabilities under state or federal law, some of which can provide persuasive grounds for recommending a pardon. For example, a specific employment-related need for pardon, such as removal of a bar to licensure or bonding, may make an otherwise marginal case sufficiently compelling to warrant a grant in aid of the individual's continuing rehabilitation. On the other hand, the absence of a specific need should not be held against an otherwise deserving applicant, who may understandably be motivated solely by a strong personal desire for a sign of forgiveness.

5. Official recommendations and reports. The comments and recommendations of concerned and knowledgeable officials, particularly the United States Attorney whose office prosecuted the case and the sentencing judge, are carefully considered. The likely impact of favorable action in the district or nationally, particularly on current law enforcement priorities, will always be relevant to the President's decision. Apart from their significance to the individuals who seek them, pardons can play an important part in defining and furthering the rehabilitative goals of the criminal justice system.

4. Under this *per se* statutory provision, successful rehabilitation, or other mitigating conditions previously considered under criminal conduct, are not factors under 10 U.S.C. Section 986 unless the Secretary of Defense or the Secretary of the military Department concerned, grants a waiver where meritorious circumstances exist.

5. Conditions that could mitigate security concerns include:

a. The criminal behavior was not recent; b. The crime was an isolated incident; c. The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life; d. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur; e. Acquittal; f. There is clear evidence of successful rehabilitation; g. Potentially disqualifying conditions. . . .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.

6. DOHA OI 64 explicitly prohibits an administrative judge from providing an explanation for a waiver recommendation.