

DATE: November 29, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-18081

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Arrested for drunk driving in August 1999 after drinking wine socially at a coworker's home, Applicant completed a diversion program. In May 2001, she was charged with larceny, 6th degree, after she shoplifted six items with a total value of \$59.73 from a local supermarket-conduct which she attributes to exceptional stress and steroid medication for pain. In counseling since 1997 for panic disorder and depression, Applicant continues to work on learning more effective ways of coping with personal stress and anger over difficult life circumstances, but it is too soon to safely conclude there is little risk of recurrence of the poor judgment which led her to commit these criminal acts. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4), issued a Statement of Reasons (SOR), dated June 20, 2002, to the Applicant. The SOR 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 the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on criminal conduct (guideline J) due to Applicant's driving under the influence (DUI) in August 1999 and her shoplifting of several items from a local supermarket in May 2001.

Applicant filed a response dated July 8, 2002, to the SOR in which she requested a hearing before a DOHA Administrative Judge. The case was assigned to me on August 29, 2002, and pursuant to formal notice of that date, a hearing was scheduled for September 10, 2002.

At the hearing held as scheduled, the Government submitted four exhibits, which were entered without any objection. Applicant testified on her behalf and offered a document from her counselor, which was admitted as Applicant exhibit

A. The record was ordered held open until September 26, 2002, for Applicant to furnish a current assessment from her counselor as well as character reference letters. Three documents were timely submitted on Applicant's behalf: a letter dated September 17, 2002, from her present counselor; a letter dated September 9, 2002, from the founder of a children's program where Applicant served as a volunteer; and a letter dated September 16, 2002, from Applicant's direct supervisor. Department Counsel filing no objections, these documents were marked and entered as Applicant exhibits B, C and D, respectively. With the receipt on September 20, 2002, of the transcript of the hearing held on September 10, 2002, the case is ripe for a decision.

FINDINGS OF FACT

After a thorough review of the evidence, and on due consideration of the same, I render the following findings of fact:

Applicant is a 55-year-old physician's assistant who has worked since June 1998 in the yard hospital at a defense contracting facility (company A). Applicant seeks a secret security clearance for her duties, as she may be required to access secure areas in her duties as a physician's assistant.

After working as a physician's assistant for several years, Applicant in 1993 relocated to her present locale (state X) to be near family, including her elderly mother. Needing further schooling before she could practice as a physician's assistant in state X, Applicant worked as a nurse's aide while pursuing her studies. Her income was insufficient to meet her expenses, and on the advice of an attorney she filed for Chapter 7 bankruptcy with liabilities of about \$50,000.00.

On Xanax medication since her early 30's for panic disorder, Applicant began counseling with a local therapist in 1997 to help her deal with depression surrounding her life circumstances, including responsibility for the care of her elderly mother and the bankruptcy. Helped by twice monthly counseling sessions, Applicant finished her schooling and earned her bachelor of science degree in September 1997. She passed her state examination for licensure as a physician's assistant, and in June 1998, secured stable employment at company A. ⁽¹⁾

Required to obtain a security clearance for her job with the defense contractor, Applicant on October 7, 1998, executed a security clearance application (SF 86), EPSQ version. Applicant responded affirmatively to inquiry into whether she had consulted in the last 7 years with a mental health professional or another health care provider about a mental health related condition. She also disclosed on the form her May 1994 bankruptcy.

A social drinker who frequents a local restaurant on Sunday afternoons where she consumes two glasses of wine per occasion, Applicant consumed three or four glasses of wine to intoxication during a dinner party at the home of another company A employee in August 1999. Advised by the coworker to take a cab home, Applicant elected to drive the five blocks to her residence as she felt she was not drunk. When she arrived at her home, she was arrested by the local police for driving under the influence (DUI). ⁽²⁾ At the station, she was administered a breathalyzer which registered over the legal limit. Applicant was placed in a diversion program where she was required to attend ten classes at a local alcohol rehabilitation facility. On her discharge from the program, no further treatment was recommended.

On September 13, 2000, Applicant was interviewed by a Defense Security Service (DSS) special agent about her financial status, arrest for DUI, and failure to list her long-term counseling on her SF 86. Applicant indicated she felt "like a lowlife" after her bankruptcy, so she went into counseling. Regarding her failure to disclose on the SF 86 either the name of her counselor or the duration of her counseling, Applicant denied any intentional concealment, citing her affirmative response to the question of any mental health consultation in the last 7 years. Concerning the August 1999 DUI, Applicant related she had elected to drive home after consuming three or four glasses of wine, as she felt tired but not drunk. She admitted taking a breathalyzer test, which indicated she was over the legal limit, and completing a diversion program. She denied any consumption of alcohol in the six months preceding her DSS interview because she was on a weight-loss program.

By 2001, Applicant was suffering from significant pain related to degenerative disk disease. In an effort to alleviate her symptoms, Applicant's neurologist prescribed 40 milligrams of steroids per day. In January 2001, Applicant lost her pet cat, to which she had felt an especially close attachment. Circa February 2001, Applicant failed her state examination for continued certification as a physician's assistant. Already under stress because of the demands of caring for her

elderly mother, Applicant stopped taking her steroid medication in April 2001 because the drug exacerbated her depression. Angry and depressed over her life's difficulties, Applicant late on a Saturday evening in May 2001 walked to a local supermarket, where she shoplifted six items (two meats, three music compact discs, and a box of cigars) valued at a total of \$59.73. (3)

After she cleared the checkout without paying for the items, she was detained by the store's loss prevention officer. He informed her she could avoid prosecution if she would remove the items from her bag then and there. Too embarrassed to admit her crime in front of store customers, Applicant declined, and she was escorted to the loss prevention office, where custody was taken of the concealed items. On the store's complaint, Applicant was arrested by the local police and charged with misdemeanor larceny in the 6th degree. She was placed in an accelerated rehabilitation program until June 2002.

On January 14, 2002, Applicant was interviewed by the DSS about her arrest for shoplifting. Applicant related she had walked the three miles to the supermarket, and on the spur of the moment, she decided to place the items in her bag. She indicated she consciously chose not to remove the items at checkout, and expressed her belief she had wanted to be caught. Unable to explain her actions, Applicant indicated her counselor had attributed the incident to "acting out" on her part. Citing the aberrant nature of the conduct, Applicant related her belief there would be no recurrence.

In discussing the shoplifting incident with her therapist, Applicant expressed shame, embarrassment, and remorse for the behavior. In the counselor's opinion, the shoplifting was committed during a period of "exceptionally high stress" and is not characteristic of Applicant's behavior. This counselor cannot predict Applicant's future behavior as to whether there is a likelihood of any future shoplifting or similar misconduct, but she reports Applicant is able to identify alternative methods for dealing with stress.

As of her hearing in September 2002, Applicant was having difficulty understanding the concern presented by the DUI as she does not have a drinking problem. While she was continuing to drink two glasses of wine on "quite a few Sundays" at the local restaurant, she had not driven after drinking since the DUI. She apologized for the shoplifting, which she attributed, at least in part, to the steroid medication, which had made her feel "a little wacky." (4) Intending to continue in therapy with her counselor, Applicant testified she had learned better strategies to cope with stressful situations. Recognizing her tendency to get very nervous and emotional, Applicant indicates it has taken her quite a few years to learn she should "walk away" at times and calm down. Applicant is still trying to get out of the negative frame of mind, which she has been in since her relocation in 1993. Having recently retaken her certification boards, Applicant was worried about the result, as she needs her state license to continue to work as a physician's assistant at company A. She was also concerned she might not be able to take a planned vacation with her mother planned for October 2002, as her mother had misplaced necessary documentation.

On Vicodin medication for pain, Applicant was planning on entering in October 2002 a pain management clinic, which she had previously avoided as she did not want to be placed on OxyContin. With the Vicodin ineffective in relieving her pain, Applicant sees no reasonable alternative to the clinic.

Applicant possesses an excellent work ethic. She is punctual in her attendance and has used minimal sick leave at company A, despite it taking her several hours to become functional in the morning due to her physical ailments. She is rated as an average performer by her supervisor, the clinic's medical director.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other

pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, 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. *See* Directive 5220.6, Enclosure 2, Section E2.2.4.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case:

GUIDELINE J

Criminal Conduct

E2.A10.1.1. The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

E2.A10.1.2.2. A single, serious crime or multiple lesser offenses

Conditions that could mitigate security concerns include:

None.

* * *

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's 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 can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

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 its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion 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." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. *See* Enclosure 2 to the Directive, Section E2.2.2.

CONCLUSIONS

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

Applicant's recent criminal conduct—an August 1999 DUI and a May 2001 petty larceny—creates doubts for her judgment, reliability and trustworthiness, which could indicate she may not properly safeguard classified information. Under the Directive's adjudicative guidelines, disqualifying conditions E2.A10.1.2.1. (allegations or admission of criminal conduct) and E2.A10.1.2.2. (multiple lesser offenses) must be considered in evaluating Applicant's suitability for access.

There is no evidence Applicant has engaged in any drunk driving apart from the August 1999 incident. Similarly, the record supports only one occasion of theft. Strictly from a recidivist standpoint, each offense is isolated in nature. The circumstances of her August 1999 DUI in particular were atypical of her drinking pattern. On the occasion of her DUI, Applicant drank three or four glasses of wine at a dinner party held at a coworkers home. Customarily, she consumes no more than two glasses of wine on Sundays at a neighborhood restaurant from which she walks home. Applicant submits her shoplifting was also an aberration, committed when she was experiencing high stress. However, the commission of diverse criminal acts raises security implications which cannot adequately be addressed by analyzing each offense on its own. There are acknowledged significant differences between drunk driving and shoplifting, including the deliberate intent involved in larceny ("I wanted to get food. I was hungry. I was angry. I was tired of struggling and not having anything. I, you know, I just wanted to get something to eat." Tr. p. 66). Yet, common to the DUI and the larceny, Applicant chose to do the wrong thing in the face of others urging her to do the right thing. With respect to the DUI, Applicant testified her coworker attempted to persuade her not to drive home ("She kept saying don't leave, don't leave, just you know, stay over night. I lived five blocks from where I was. She said well get a cab." Tr. p. 29). While Applicant's judgment was clouded by alcohol, she had sufficient control of her faculties to understand her friend thought she had consumed too much alcohol to drive safely. Likewise, according to Applicant, store security personnel gave her an opportunity to avoid prosecution for shoplifting if she would turn in the items concealed in her bag. ("They said if you take the stuff out here, we'll let you go. But I was too embarrassed to take it out, because there was people in there. I was humiliated." Tr. p. 31). The Government must be able to count on those entrusted with the Nation's secrets to admit to any errors, without due regard to personal embarrassment or humiliation.

Recent criminal conduct not isolated in nature may still be mitigated where the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life (E2.A10.1.3.3.), the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur (E2.A10.1.3.4.), or there is clear evidence of successful rehabilitation (E2.A10.1.3.6.). Certainly, while Applicant's judgment was impaired by alcohol, her decision to drive her automobile after drinking was voluntary, and in contravention of well-meaning advice given to her by a coworker whom she considered a friend. Placed in a diversion program, Applicant attended ten sessions at a local alcohol rehabilitation facility. Applicant testified credibly no treatment was recommended at discharge, and indeed, the Government did not allege any concerns related to excessive alcohol consumption. Applicant admits she was over the legal limit, and maintains she has not even operated a vehicle after drinking since August 1999. Yet, after ten sessions at the alcohol treatment center, she has demonstrated little insight into her behavior on that occasion ("See I mean I was over the drinking limit. But I just don't really understand. I don't have a drinking problem." Tr. p. 30; "the DWI, I don't, I mean I was over the limit, but that still confuses me." Tr. p. 65). Successful rehabilitation depends in part on recognizing what led to the criminal conduct so that it is not repeated, and Applicant exhibited little understanding of the judgment concerns raised by drunk driving.

Applicant has apologized for the shoplifting, which she attributes to anger, depression and severe stress caused by the pain of degenerative disk disease treated with Vicodin and high dose steroids, the loss of her cat, the burdens of caring for her elderly mother, and her failing her state certification examination which she requires to maintain her job as a physician's assistant. ⁽⁵⁾

Applicant experienced several setbacks which exacerbated her depression, but she also knew she was shoplifting when she placed the items in her bag. When she responded to the SOR, Applicant with respect to the shoplifting indicated she was extremely depressed (cried all night), had nothing to eat in the house, and no money on her. However, the loss prevention officer reported seeing Applicant make a purchase of some items in a cart and then exit the register without removing the shoplifted items from her black purse (*see* Ex. 3). Asked at the hearing whether she planned to steal from the store, Applicant testified, in part, "I was so tired of struggling and not having anything." (Tr. p. 66). She consciously

knew that she was taking items without paying for them, and there is no proof her misconduct was due to the lingering effects of steroid medication, which she had stopped taking three weeks before.

Although uncharacteristic of Applicant's behavior in that there have been no similar incidents, the shoplifting continues to engender concern as it occurred after more than four years of regular counseling. With sixteen months of counseling since the shoplifting, Applicant reports she has learned alternative methods of coping with stress and anger over difficult life circumstances. However, when asked what she will do if she failed the certification examination she had recently retaken, Applicant testified, "I don't know what I'll do, but I'm not going to freak out. I don't know, I'll have to, I don't know-I have to cross that bridge when I come to it." (Tr. p. 63). As of the hearing, Applicant was worried about the results of her boards and feeling stress because of an unexpected obstacle to her taking a planned vacation with her mother. With ongoing stressors in her life, including significant health issues, and Applicant's inability to articulate how she plans to cope with difficulties, it is too soon to safely conclude there will be no recurrence of the poor judgment which led her to commit the DUI and larceny offenses.

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

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.

Elizabeth M. Matchinski

Administrative Judge

1. According to Applicant's supervisor, Applicant has worked for the company as a full time employee for close to four years. For about a year prior to her direct employ by the company, Applicant was a contract vendor. (Ex. D).
2. Applicant assumes someone at the dinner party contacted the police, as the police were waiting for her. (Tr. p. 29).
3. In discussing her motivation for the shoplifting, Applicant testified, in part:

As far as what happened at [the supermarket], it was a horrible thing. I was under the care of a neurologist. I have severe degenerative disk disease, and I was on high dose of steroids. I was on Vicodin. I had lost my cat. I know it sounds stupid, but I got severely depressed. The cat was like my child. I was under severe stress trying to take care of my mother. You know, my mother's an 87-year-old woman. I'm trying to support her. I was in such pain and nobody could help me. So I don't know, I just, one night I was just so-I'm not making excuses, but I think the steroids made me a little wacky. I don't have any food in the house. I didn't have any money. I didn't want to ask anybody. I was angry. I was angry at God. I was angry at the world. I started walking, and I went in the [supermarket]. I mean, I knew I was going to get caught. (Tr. pp. 30-31).

4. *See* tr. p. 31.

5. Applicant's cat died in January 2001, months before her shoplifting. In her response to the SOR, she indicated she failed her board certification examination around February 2001. It is also noted Applicant had ceased taking the steroid medication about three weeks prior to her shoplifting.