

DATE: January 30, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-21337

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

William S. Fields, Department Counsel

Kathryn D. MacKinnon, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Between Christmas 1981 and mid 1983, the Applicant was AWOL from the Army. In 1985, the Applicant embezzled money from her employer and passed a number of worthless checks. Although the worthless checks charges were *nolle prosequi*, she was sentenced to two years imprisonment for the embezzlement. Because the misconduct is remote in time and because of clear evidence of rehabilitation, I find for the Applicant as to the criminal activity. However, because she was sentenced to imprisonment of more than one year, 10 U.S.C. section 986 applies, and because it applies, clearance is denied. A waiver of 10 U.S.C. 986 is recommended.

STATEMENT OF THE CASE

On May 22, 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 June 10, 2002, the Applicant answered the SOR and requested a hearing. The case was assigned to me on July 26, 2002. A Notice of Hearing was issued on August 14, 2002, scheduling the hearing which was held on September 11, 2002. For good cause, a second hearing was held on November 19, 2002.

The Government's case consisted of six exhibits (Gov Ex). The Applicant relied on her own testimony, the testimony of three witnesses, and three exhibits (App Ex). Following the first hearing, additional documents were received, provisions having been made for their submission following the hearing. Department Counsel (DC) having no objection to their admission, the submissions were admitted as applicant's exhibit (App Ex) D. The transcripts (tr.) of the hearings were received on September 16, 2002 and November 27, 2002.

FINDINGS OF FACT

The SOR alleges personal conduct criminal conduct (Guideline J). The Applicant admits some of the allegations and denies the rest.

The Applicant is 40 years old, has worked for a defense contractor since November 1999, and is seeking a security clearance. She has received outstanding work performance ratings because of her hard work, "can do" attitude, and timely, high-quality service. She is trustworthy, hardworking, dependable, highly ethical, honest, highly motivated, willing to go beyond the call of duty, professional, and has an excellent work ethic. (App Ex A and D) She has also been described as a highly valued self-starter with good organizational skills, eager to learn, and an invaluable worker. (App Ex B and C) Her tireless enthusiasm, dedication and hard work have been recognized. (App Ex D) The Applicant's manager and the company's vice president and marketing director testified the Applicant is industrious, diligent, hard working, that people like working with her, she does a wonderful job, she is willing to do everything to prove herself, and tries to do her best in everything.

In August 1981, the Applicant--then age 19-- married her husband when both of them were in the Army. In December 1981, after being married for four months, her husband cheated on her with a 16-year-old. She went to see him at Christmas 1981, did not return to the Army, and was absent without leave (AWOL) until February 1982, when she turned herself in. In March 1982--when she discovered she was pregnant⁽²⁾ with her first child--she again went AWOL and remained so until June 1983. In November 1983, she received a general discharge from the Army.

The Applicant's husband was physically, emotionally, and verbally abusive. He was also a substance abuser who used marijuana while he was in the Army and all through their marriage. In 1985, he went through a period of cocaine use. He was a womanizer--when the Applicant was in jail in 1985, he fathered an out-of-wedlock child with another woman. He was financially irresponsible and spent much of the family's money on alcohol and drugs. She has now divorced him.

During her marriage, the Applicant lived in anguish and anxiety, and her home life was miserable. She stayed in the marriage because she did not want to leave when the children were young. Her husband's alcohol and drug problems throughout the marriage grew worse as did his physical abuse. (tr. 34) In December 1998, she made the decision to end her marriage, but knew she could not leave until the school year ended in June 1999 and because her two sons needed surgery. In June 1999, the children were then teenagers,⁽³⁾ she had had enough and decided to move--four states away--where her mother and sister live and where she grew up. Her mother had been after her for some time to get away from her husband. Even though she had no job at the new location, she decided to put the \$500.00 cost of the rental truck on a credit card and make the move. She moved to start a new life. (tr. 34) From June through November 1999, she worked in various jobs before getting her current job. Her decision to leave her husband was the result of self reflection. Additionally, she knew if she stayed with him it would end with one of them in jail or dead. (tr. 45)

During a five-month period between March 1985 and July 1985, the Applicant--then age 23--wrote six bad checks at a grocery store and embezzled money from her employer--an insurance company. The Applicant worked for the insurance company from 1983 through early 1985. In early 1985, she was asked to cash out an insurance policy in the name of an individual who had the same name as her maiden name. She then issued other checks in the same name, picked up those checks, and cashed them. From March to June 1985, she cashed a number of checks for amounts between \$2,000.00 and \$5,000.00, which together totaled approximately \$24,000.00. The Applicant was pregnant with her second child and her husband was not working. She kept the money at home instead of in a bank account. Her husband got access to the money and spent most of it on cocaine, alcohol, and women. After resigning from the company, the Applicant voluntarily turned herself into the police and wrote a confession. (tr. 38)

In July 1985, she was charged with grand theft, forgery, and uttering a forgery (felonies). (Gov Ex 5) She initially agreed to a plea bargain for two years in jail without restitution. The Applicant's husband was living with another woman at the time. She was pregnant with her second son who was born in October 1985 with serious medical problems with required immediate surgery and constant medical care thereafter. With the birth of her son, the jail sentence was no longer feasible, so she agreed to probation and restitution. She was placed on probation for five years, and ordered to pay \$23,856.32 in restitution. From January 1986 until August 1986, she struggled to make the \$200.00 per month restitution payment plus \$50.00 per month probation and court costs.

The probation department, asked the Applicant to move closer to their office which would have entailed a 45-mile move plus the cost of renting at that location. The Applicant knew she could not afford the cost of the move, rent, restitution, and pay court costs, so she asked her case be reviewed looking at jail time instead of restitution. In September 1986, her case was reviewed and the court agreed to waive restitution in lieu of two years in jail. Her probation was revoked and she was sentenced to a two-year term of imprisonment. She was incarcerated from September 1986 through February 1987. She then spent two months on a work release program. In July 1987, her probation ended.

In June and July 1985, the Applicant wrote a number of checks at a local grocery store. She was out of work and needed to feed her children. When the checks were written there were sufficient funds in the accounts to cover the checks. (tr. 29) However, her husband took money from the account, after the checks had been written, causing them to be dishonored for insufficient funds. When they bounced, the Applicant was not working and did not have the funds to pay the checks. Her husband had signed her name to a couple of the checks, but the Applicant chose not to reveal this because

she was already going to jail and had two very young children--a two and a half year old son and a new born son. (tr. 68) She did not feel there was anything to be gained by having her husband also incarcerated. In October 1985, she was charged with six⁽⁴⁾ counts of passing worthless checks (a felony) (Gov Ex 6), which totaled less than \$900.00. The charges were withdrawn and then dropped.

In August 1987, her husband had been stopped for a traffic violation when it was discovered there was an outstanding warrant for his arrest for a prior driving under the influence offense. He was sentenced to 30 days in jail. Her husband asked her to bring him a pair of pants, which she did. In the pocket of the pant was marijuana, which resulted in the Applicant being charged with the introduction of contraband (marijuana) into a penal institution (a felony). The Applicant paid a \$153.00 fine and the matter was *nolle prosequi*. (tr. 27)

In 1980, the Applicant first used marijuana while in the Army. In July 1981, after meeting her husband, her usage, depending on pregnancies and other circumstances, increased to daily to weekly use, at times, until early 1988. The Applicant has not used marijuana since becoming pregnant with her daughter, who was born in October 1988. She has no intention of ever using marijuana or any illegal substance again.

Following her release from jail, the Applicant has been steadily employed.⁽⁵⁾ Although employed, she had some tough financial times which caused her to seek food stamps and receive medicaid. The Applicant worked at a steak house where she worked up to become a shift supervisor responsible for training a staff of 40 and opening a new store. She worked for the steak house for 10 years. In 1994, she decided she needed a different direction in her life, that she needed to make a better life for herself, and decided to go back to school, to go to college. She got student loans and worked two jobs to pay for college, attending classes during the day and worked 40 hours a week, at night. She worked full time, was a full time student, and a full time mother. (tr. 44)

The Applicant acknowledges her actions in cashing the checks was wrong and sincerely regrets her behavior. She believes a person is responsible for their own actions and she has only herself to blame for the misconduct during her young life. (tr. 33) Her time at the correction center gave her the desire to change her life and never again fail society, her friends or family. She learned financial security does not come easy, but can be reached with education and hard work. The Applicant has made positive steps to show true reform, has worked diligently to improve her life, to build a positive life for her family, and has come a long way from the young, impressionable, naive girl that she was at age 23. (tr. 35)

She is a single mother raising two⁽⁶⁾ children. She has bought a house and a car, been promoted at work, and spends her time taking care of her children. She has brought her bills current, no longer lives pay check to pay check, and now has a savings account. She belongs to a running group and runs four to five miles twice a week. She also spends time rock climbing, painting, gardening, doing yard work, and is on a ball team with her sisters. Since returning to live near her mother and sisters, the Applicant is more settled, more mature, more self confident, and more sure of herself. (tr. 57-58) She is no longer weighed down by her ex-husband and is no longer under his influence, and has turned her life around.

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.⁽⁷⁾

Conditions that could mitigate security concerns include:

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

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 an applicant is shown to have a history or pattern of criminal activity which creates doubt about her judgment, reliability, and trustworthiness. In 1985, the Applicant was charged with six counts of passing worthless checks and, in a different matter, was charged with grand theft, forgery, and uttering a forgery (felonies). In 1987, she was charged with introduction of contraband (marijuana) into a penal institution. Because of these arrests, DC a.⁽⁸⁾ and b.⁽⁹⁾ apply. The Applicant was sentenced to two years in jail and served five months which makes DC c.⁽¹⁰⁾ applicable.

In the early 1980's, more than 19 years ago, the Applicant was AWOL from the Army and in 1983, she received a general discharge from the Army. In 1985, the Applicant embezzled from her employer and was found guilty of grand theft, forgery, and uttering a forgery. Also in 1985, the Applicant's was charged with passing worthless checks, however the charge was *nolle prosequi*. The conduct occurred within a five-month period in the first half of 1985. The conduct occurred more than 17 years ago, and is, therefore, considered remote. In August 1987, she was charged with introduction of contraband into a penal institution when she took her husband a pair of pants which had marijuana in the pocket. This occurred more than 15 years ago and is also remote. Since all of the misconduct occurred between 15 and 19 years ago, Mitigating Condition (MC) a..⁽¹¹⁾ applies.

The Applicant has made marked changes for the better in her life since the mid 1980's. In 1994, she decided she needed a different direction in her life, that she needed to make a better life for herself and her family, and decided to go to college. She was a full time mother, a full time student attending classes during the day and working 40 hours a week, at night. She is a single mother raising two children. She has bought a house and a car, been promoted at work, and spends her time taking care of her children. She no longer lives pay check to pay check and now has a savings account.

The Applicant is no longer married to an abusive, womanizing, drug and alcohol abusing, dead beat husband. During her marriage, she lived in anguish and anxiety, her home life was miserable. In December 1998, she made the decision to end her marriage and move back to the location where she had grown up. Her decision to leave her husband was the result of self reflection and maturing. Additionally, she knew if she stayed with him either she or her husband would have ended up in jail or dead. Since leaving her husband and moving back to where she was raised, she is more settled, more mature, and more self confident. She is no longer weighed down by her ex-husband and is no longer under his influence. The factors leading to her earlier misconduct are not longer present.

The Applicant acknowledges her actions were wrong, sincerely regrets her behavior, and believes a person is responsible for their own actions and knows she has only herself to blame for the actions she took at age 23. Her time at the correction center gave her the desire to change her life and never again fail society, her friends or family. She learned financial security does not come easy, but can be reached with education and hard work. The Applicant has made positive steps to show true reform, has worked diligently to improve her life, to build a positive life for her family, and now, at age 40, has come a long way from the person she was at age 23. She has turned her life around. I find MC f. (12) applies. Because MC a. and f. apply, I find for the Applicant as to SOR subparagraphs 1. a., 1.b., 1.c., and 1.e.

As a result of the Applicant 1985 conviction she was sentenced to two years in jail. Because the Applicant was sentenced to more than one year in jail, Title 10 United States Code Section 986 applies. I find against the Applicant as to SOR subparagraph 1.d.

I recommend further consideration of this case for a waiver of Title 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 that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

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

Paragraph 1 Guideline J (Criminal Conduct): 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

Subparagraph 1.e.: For the Applicant

DECISION

In light of the provisions in 10 U.S.C. 986 and 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. A waiver of 10 U.S.C. 986 is recommended.

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. Her first son was born in November 1982.
3. As teenagers, they could make their own choice to stay with their father or leave with the Applicant. They chose to leave with the Applicant. (tr. 70)
4. Gov Ex 6 lists eight checks.
5. The Applicant has always been a hard worker. While in high school she worked 40 hours a week in a fabric store in addition to attending school.
6. Her oldest son does not live with her as he is in the service.
7. 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.
8. DC a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.
9. DC b. A single serious crime or multiple lesser offenses.
10. DC 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.
11. MC a. The criminal behavior was not recent.
12. MC f. There is clear evidence of successful rehabilitation.