

DATE: March 12, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-03463

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Fifty-six year old Applicant's 1972 arrest for assault with intent to commit murder (reduced to assault and battery), when she was 25 years old, and her subsequent conviction of the reduced charge, led to a sentence of imprisonment for five years (suspended). The clear evidence of successful rehabilitation, and the absence of any subsequent criminal conduct, would normally mitigate the government's security concerns. However, the application of 10 U.S.C. § 986 disqualifies her from such eligibility. Clearance is denied. Further consideration of this case for a waiver of 10 U.S.C. § 986 is recommended.

STATEMENT OF THE CASE

On November 25, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, 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 a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated December 17, 2002, Applicant responded to the allegations set forth in the SOR, and elected to have her case decided on the written record, in lieu of a hearing. Department Counsel submitted the government's written case on December 31, 2002. A complete copy of the file of relevant material (FORM) [\(1\)](#) was provided to Applicant, and she was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Any such submissions were due by February 14, 2003, and it appears she chose not to do so. The case was assigned to this Administrative Judge on March 6, 2003.

FINDINGS OF FACT

Applicant has admitted the factual allegations pertaining to criminal conduct under Guideline J. Those admissions are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 56-year old employee of a defense contractor, and is seeking to retain a security clearance, a clearance held since 1985. ⁽²⁾

Applicant has been involved in one criminal incident, and it occurred nearly 31 years ago. Other than the title of the crime originally charged, and the title of the reduced charge for which Applicant was convicted, there is no evidence whatsoever as to the underlying conduct that led to Applicant's arrest and conviction. ⁽³⁾ The following facts were developed from a review of the only court record in evidence; ⁽⁴⁾ an F.B.I. Identification Record, the accuracy of which is in doubt; ⁽⁵⁾ Applicant's response to an inquiry on her Security Clearance Application; ⁽⁶⁾ Applicant's Response to SOR; ⁽⁷⁾ and a letter submitted in her behalf by her attorney. ⁽⁸⁾ The developed facts are that on March 22, 1972, when she was 25 years old, Applicant was arrested and charged with assault with intent to commit murder. The charge was eventually reduced to assault and battery. On January 11, 1973, Applicant pled guilty to the reduced charge. On March 13, 1973, she was sentenced to five years confinement (suspended), probation for an indefinite period, and directed to seek psychiatric assistance. ⁽⁹⁾

Since her conviction, Applicant has obtained her GED (1975); graduated from military training as an honor graduate (1975); served honorably with the Air National Guard (1975-78), and discharged with an honorable discharge (1978); attended college (1987-93) and earned an undergraduate degree (1993); held a variety of jobs; raised a daughter as a single parent; and been gainfully employed by the same company for nearly 20 years. She is presently a senior photographer with that company. The record is replete with accolades, certificates, and letters of gratitude or appreciation, from a wide variety of sources. They characterize her as hard working, dependable, reliable, professional, enthusiastic, and dedicated.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

[Criminal Conduct - Guideline J]: 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:

- (1) allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
- (2) a single serious crime or multiple lesser offenses;
- (3) 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:

- (1) the criminal behavior was not recent;
- (2) the crime was an isolated incident;
- (4) the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;
- (6) there is clear evidence of successful rehabilitation.

On June 7, 2001, the Deputy Secretary of Defense issued a Memorandum, *Implementation of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001*. The memorandum provides policy guidance for the implementation of Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Title 10, United States Code, to add a new section (10 U.S.C. § 986) that precludes the initial granting or renewal of a security clearance by the Department of Defense under specific circumstances. The situation described above involves one of those specific circumstances.

The statutory mandate applies to any DoD officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or Marine Corps on active duty or in an active status, who is under consideration for the issuance or continuation of eligibility for access to classified information and who falls under one or more of the following provisions of the statute:

- (1) has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year;
- (2) is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802));
- (3) is mentally incompetent, as determined by a mental health professional approved by the Department of Defense; or
- (4) has been discharged or dismissed from the Armed Forces under dishonorable conditions.

The statute also "provides that the Secretary of Defense and the Secretary of the Military Departments concerned may authorize a waiver of the prohibitions concerning convictions, dismissals and dishonorable discharges from the armed forces in meritorious cases."

Implementing guidance attached to the memorandum indicates that provision 1, described above, "disqualifies persons 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."

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national

security," or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegation set forth in the SOR:

With respect to Guideline J, the government has established its case. By her own admission, Applicant was arrested and charged with criminal conduct in arch 1972. The original charge of assault with intent to commit murder was eventually reduced to assault and battery, and Applicant entered a plea of guilty to the reduced charge. She was sentenced, in part, to be imprisoned for a term of five years confinement (suspended). Applicant's criminal conduct in this regard clearly falls within Criminal Conduct Disqualifying Condition (DC) E2.A10.1.2.1., DC E2.A10.1.2.2., and DC E2.A10.1.2.3.

It has been nearly 31 years since the criminal conduct of early 1972. Since that time, Applicant has not been involved an any additional criminal conduct. Those facts would seem to activate Criminal Conduct Mitigating Condition (MC) E2.A10.1.3.1. as well as MC E2.A10.1.3.2. Moreover, by virtue of her spotless record since the incident, there is clear evidence of successful rehabilitation, thus activating MC E2.A10.1.3.6. In addition, the appearance that her subsequent maturity and involvement in educational, military, family, and professional activities, along with her 1972 divorce, seem to have eliminated the otherwise undeveloped factors leading to the violation and are not likely to recur, activating MC E2.A10.1.3.4. A person should not be held forever accountable for misconduct from the past when there is a clear indication of subsequent reform, remorse, or rehabilitation. Under other circumstances, I would conclude Applicant had, through evidence of extenuation and explanation, successfully mitigated and overcome the Government's case, and the allegation of the SOR would be concluded in favor of Applicant.

However, Applicant's criminal conduct in this regard also falls within 10 U.S.C. § 986. She was convicted in a state court of a crime and sentenced to imprisonment for a term of five years, a term which obviously exceeds the one year period envisioned in the law. Furthermore, as noted above, the implementing guidance attached to the memorandum indicates such a sentence would disqualify persons with "sentences imposed of more than one year, regardless of the amount of time actually served. In this instance, Applicant was fortunate enough to have her prison term suspended rather than actually ordered and served, but that fact does not help her in this issue. Consequently, by virtue of 10 U.S.C. § 986, I conclude Applicant is not eligible for a security clearance. Accordingly, allegations 1.a. and 1.b. of the SOR, are concluded against Applicant.

In this instance, I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

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. However, I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Robert Robinson Gales

Chief Administrative Judge

1. The government submitted six items in support of its contentions.
2. *See* Item 3, (Response to SOR, dated December 17, 2002), at 2
3. There are no police records or statements in evidence.
4. *See* Item 6 (County Circuit Court Docket Entries, dated March 13, 1973).
5. *See* Item 5 (F.B.I. Identification Record, dated January 10, 1984). The Record seems to indicate the disposition of Applicant's original charge with no mention that the charge had been reduced.
6. *See* Item 4 (Security Clearance Application (SF 86), dated September 14, 2001).
7. *See* Item 3, *supra* note 2.
8. *See* Attachment to Item 3 (Letter from Attorney, dated June 14, 1976).
9. *See* Item 6, *supra* note 4, at 2.
10. *See* Executive Order 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (*see* Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (*see* Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (*see* Enclosure 2, Sec. E2.2.2.)