

DATE: October 29, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-04308

AMENDED DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Catherine Engstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 42 years old. She works as an administrative assistant for a defense contractor, and seeks a security clearance. The Government alleges Guideline J (Criminal Conduct) concerns about her criminal arrests and convictions involving illegal drug use from 1985 until 1995. Applicant successfully mitigated those concerns. However, Applicant was convicted and sentenced in 1985 to three years in the penitentiary for one offense. The Smith Amendment (10 U.S.C. § 986) applies and disqualifies her for a security clearance without a waiver. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

STATEMENT OF THE CASE

On February 21, 2003, the Defense Office of Hearings and Appeals (DOHA), under 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. The SOR detailed reasons under the personnel security Guideline J (Criminal Conduct) 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. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed and sworn statement, dated April 11, 2003, Applicant responded to the SOR allegations. Applicant admitted all the allegations except the final allegation (subparagraph 1.f) which stated the Smith Amendment, 10 U.S.C. § 986, was applicable to her case. She requested a hearing.

This case was originally assigned to another Administrative Judge on May 17, 2003. It was reassigned to me on May 19, 2003 due to caseload considerations. On May 20, 2003, a Notice of Hearing was issued setting the hearing date for June 24, 2003. On June 19, 2003, Applicant submitted a written request for a continuance to allow her more time to prepare

for the hearing. The Department Counsel had no objection, and the motion was granted by a written Order on June 23, 2003. An amended Notice of Hearing was mailed to Applicant on June 23, 2003, setting the new hearing date as July 30, 2003.

On that date I convened the hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government presented five exhibits, all of which were admitted into evidence. Applicant appeared and testified, and offered one exhibit, which was admitted into evidence. I received the transcript (Tr.) of the hearing on August 7, 2003.

FINDINGS OF FACT

Applicant admitted all allegations in the subparagraphs of the SOR except subparagraph 1.f.. Those admissions are incorporated herein as findings of fact. However, the Government at the hearing withdrew subparagraph 1.e. to conform the proof to the allegations, having been alleged in error and was really part of the allegations in subparagraph 1.d. (Tr. 59-61) After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant was arrested in 1985, 1987, and 1995 for possession of PCP. The 1985 arrest also included a charge of conspiracy to distribute PCP. The 1985 arrest resulted in a conviction in 1986 with a sentence of three years imprisonment on the conspiracy charge and six months imprisonment on the possession charge, both prison terms to run concurrently. She actually served four to six months of jail time (she could not remember how much time), and the balance of the time was spent on probation. Her attorney obtained a reconsideration of her sentence. The official records show her sentence remained at three years incarceration. (Answer; Exhibit 3 at 2, 3; Exhibit 5 at 2; Tr. 31-41, 43, 45, 59, 60)

Applicant was also arrested and charged with theft in 1988. That charge resulted in no known disposition. (Answer; Exhibit 3 at 4; Tr. 29-31)

The 1995 arrest also involved a charge of possession of cocaine. The cocaine and PCP possession charges were nolle prossed by the local jurisdiction's prosecutor on July 11, 1996. (Answer; Exhibit 3 at 6; Exhibit 4; Tr. 13, 14, 23-29)

Applicant used cocaine in the early 1980s three or four times. She has not used it since then. (Exhibit 3 at 9)

Applicant used PCP from 1981 to 1995. She used it weekly from 1981 to 1985. After her arrest in 1985 and incarceration in 1986, her use of PCP dropped dramatically. She did not use PCP during the three years she was on probation. After that time she used it periodically until 1995 when her mother died at age 54, and Applicant reexamined her life. (Exhibit 3 at 9; Tr. 46-49, 52-54)

Applicant is 42 years old, unmarried, and works as an administrative assistant for a defense contractor. She has worked there for eight years, being hired after working for a while at that company as a temporary worker. Prior to that Applicant worked as a waitress and bartender. (Tr. 15-22; Exhibit 1 at 2; Exhibit 2 at 2)

Applicant has a GED and has taken college courses. She has 30 college credits towards an associate of arts degree. She does not have a college degree. (Tr. 51)

Applicant does not intend to use drugs in the future. She likes her job and the people with whom she associates. Her former friends who used drugs are no longer part of her circle of friends. She changed her life to a different direction after all the problems drugs had caused her from 1978 to 1995. (Tr. 56)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The president has restricted eligibility for access to classified information to

United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgement, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* Section 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

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. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation;
- (3) how recent and frequent the behavior was;
- (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 (See Directive, § E2.2.1., Enclosure 2).

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. See *Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive Para E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive Para. E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see Exec. Or. 12968 Section 3.1(b).

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 condition 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 other behavior specified in the Guidelines.

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:

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 the person was formally charged;

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

E2.A10.1.2.3. Conviction in a Federal or State Court, including a court-martial, of a crime and sentenced to imprisonment for a term exceeding one year.

E2.A10.1.3. Conditions which could mitigate security concerns include:

E2.A10.1.3.1. The criminal behavior was not recent;

E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

E2.A10.1.3.7. Potentially disqualifying condition E2.A10.1.2.3 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.

Smith Amendment

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 of Fiscal Year 2001*. The memorandum provides policy guidance for the implementation of Section 1071 of that Act. The amendment was added to Title 10, United States Code, adding 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 Directive was amended in Guideline J to incorporate the new Disqualifying Conditions and procedural guidance on the waiver process when the conviction and sentencing condition is applicable. The situation described in this case involves the conviction and sentencing Disqualifying Condition and the waiver procedural guidance.

The statutorily required Disqualifying Condition applies to any employee of a DoD contractor, who is under consideration for the issuance or continuation of eligibility for access to classified information and who has been convicted in any court of the United States or a crime and sentenced to imprisonment for a term exceeding one year, regardless of the time actually served.

CONCLUSIONS

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

Guideline J (Criminal Conduct) is quite clear in its statement that "A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness." The Disqualifying Conditions (DC) applicable here are 1 (Allegations or admission of criminal conduct, regardless of whether the person was formally charged) and 2 (A single serious crime or multiple lesser offenses). Applicant has four arrests between 1985 and 1995. Those arrests resulted in one conviction in 1985, with a three year sentence on a conspiracy charge. The Government proved its case on these allegations under this guideline.

The Mitigating Conditions (MC) applicable on these facts in this case are MC 1 (The criminal behavior was not recent)

and 6 (There is clear evidence of successful rehabilitation). Applicant's last use of any drugs and an arrest was in 1995, eight years ago. Her mother's death and her subsequent examination of her life led her down a different path from the wasteful one she was walking until then. She turned away from the drug culture, obtained a temporary position at a company which later hired her into a permanent position. She advanced within that company in the past eight years. She is attempting to obtain a college education and better her life. She expressed at the hearing, and her actions in the past eight years support her declaration, that she does not intend to use drugs in the future, and will remain out of trouble with the police. Applicant stated she was a different person than she was when she was using drugs and in trouble with the police. By staying away from illegal drugs and getting a good job where she feels valued, she has successfully rehabilitated herself over the past eight years. Based on her sincerity and demeanor, and the facts in evidence, I believe her testimony. The non-Smith Amendment MC here outweighs the non-Smith Amendment DC, and under those circumstances separately, I would find for the Applicant. However, the disqualifications contained in the Smith Amendment control here, as explained subsequently in this Amended Decision.

Regardless of the analysis under the Guideline J that would grant Applicant a security clearance, the Smith Amendment, 10 U.S.C. § 986, precludes the granting or renewal of a security clearance to those applicants for access who have been convicted in any Federal or State court and sentenced to more than one year, regardless of the time actually served. Applicant was convicted in 1985 of two offenses, and for one offense she received three years confinement in the state penitentiary. Regardless of whether the sentence was later reconsidered by the local court, the original sentence was three years of incarceration. Therefore, she falls within the purview of the Smith Amendment. DC 3 applies. MC 7 (which in some memorandum documents is lettered "g" under the mitigating conditions heading labeled "E2.A10.1.3, but I label here as "MC 7" for consistency in the Directive), the procedural guidance stated above, applies here. Applicant is ineligible for a clearance without a waiver. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline J: Against Applicant

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: Merged with Subparagraph 1.d

Subparagraph 1.f.: Against Applicant

DECISION

In light of all the circumstances and facts 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. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Philip S. Howe

Administrative Judge