

DATE: December 29, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-04781

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Robert J. Tuidor, Esq., Department Counsel

FOR APPLICANT

James H. Shoemaker, Jr., Esq..

SYNOPSIS

Applicant spent her childhood in foster care and was a troubled adolescent and young adult. In 1989, at age 25, Applicant was arrested and convicted of felonious drug conduct, for which she was sentenced to a term of two years in prison. The sentence was suspended, and Applicant entered and completed a drug rehabilitation program. She has not used drugs since completing rehabilitation in 1990. She has earned a college degree, is raising her three children, and has established herself as a respected and competent contract worker. By operation of law, the provisions of 10 U.S.C. § 986 preclude a grant of clearance to the Applicant, absent meritorious waiver by the Secretary of Defense. Applicant requests a waiver and provides persuasive evidence of mitigation. Clearance is denied. Waiver is recommended.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On January 8, 2003, under the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) of the Directive and additional Departmental guidance implementing the provisions of 10 U.S.C. §986. Applicant answered the SOR in writing on February 15, 2003 and elected to have a hearing before an administrative judge. The case was transferred to me on ay 19, 2003 from another judge due to caseload considerations. A hearing was scheduled for June 19, 2003, but by Order dated June 13, 2003, for good cause shown, I continued Applicant's hearing to July 11, 2003. An amended notice of hearing was issued June 24, 2003. On July 11, 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the transcript (Tr.) of the proceeding on July 21, 2003.

RULINGS ON PROCEDURE

At the request of Department Counsel, and with no objection from Applicant, I approved two amendments to the SOR to conform to the record evidence. (Tr. 31-32.) Because the amendments were concurred in by both parties, they will not

be discussed in detail here.

FINDINGS OF FACT

Applicant is 39 years old and has been employed by a defense contractor since April 2001. During the time of her employment, she has been promoted once and now works as a production planner. Applicant presents a history of hardship and a strong determination to overcome criminal behavior in her late adolescent and young adult years.

Applicant was abandoned at approximately eighteen months of age by her mother and subsequently spent her childhood and adolescence in foster care. (Tr. 14-15.) Against the wishes of her foster parents, she dropped out of high school at age 17, left home, and moved to another state. (Tr. 38-40.) Applicant became addicted to cocaine, bore three children, and married.

In 1989, at the age of 25, Applicant was arrested twice for criminal behavior. The arrests and charges are detailed in SOR allegations at subparagraphs 1.a. and 1.b. In September 1989 Applicant was arrested for simple possession of cocaine, possession of drug paraphernalia, and conspiracy to commit felony purchase of cocaine. The charge of conspiracy to commit felony purchase of cocaine and the charge of simple possession of cocaine were dismissed. Applicant pled guilty to the misdemeanor charge of possession of drug paraphernalia, which carried a jail term of one year. These facts are recited in SOR allegation 1.a.

In October 1989 Applicant was arrested for felony possession of cocaine and loitering for the purpose of drug activity, a misdemeanor. The misdemeanor charge was dismissed, and Applicant was found guilty of felony possession of cocaine and sentenced to a term of imprisonment of two years. The prison sentence was suspended. Applicant was placed on unsupervised probation for three years and fined \$100. (Ex. 2; Ex. A, Ex. B.) These facts are recited at SOR allegation 1.b. In 1990 Applicant entered a drug rehabilitation program, which she successfully completed. (3) Applicant has not used illegal drugs since completing the rehabilitation program in 1990. (Tr. 16.)

After completing the rehabilitation program, Applicant obtained high school equivalency certification and began college studies in 1991. She stated that she was living in the same area as her former companions in drug abuse and she undertook her college studies initially to keep busy and away from the drug culture. (Tr. 21.) Applicant supported herself and her three children and paid her college expenses by working as a waitress and bartender. (Ex. 1.) In August 2000, she was awarded a bachelor of science degree with an overall grade average of B.

Applicant plans to pursue advanced studies in environmental engineering. For the past five years, she has volunteered approximately 10 hours each month in a program at her church which feeds the homeless. (Tr. 44; Ex. F.) Applicant submitted several letters from associates and friends attesting to her character, sound judgment, and responsible parenting. (Ex. C, Ex. D., Ex. E., Ex. H.) Employers submitted letters stating that she was an outstanding employee, a hard worker, and possessed strong leadership ability. (Ex. G; Ex. M.) Applicant gives strong indication that she is rehabilitated and in positive charge of her life.

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 judgment, 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* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. In evaluating the security worthiness of an applicant, the administrative

judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Criminal Conduct and 10 U.S.C. § 986

In addition to the policy guidelines discussed above, adjudicators must follow additional guidance on the granting or renewal of security clearances mandated by more recent legislative action. By Memorandum dated June 7, 2001, the Deputy Secretary of Defense promulgated policy guidance for implementing Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Chapter 49 of Title 10 of the United States Code by adding a new section, enumerated 10 U.S.C. § 986. 10 U.S.C. § 986(1) provides, in pertinent part, that a person is disqualified from being granted a security clearance if "[t]he person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." The Deputy Secretary's memorandum specifies that the provisions of 10 U.S.C. § 986(1) apply "to any DoD [Department of Defense] 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 inactive status, who is under consideration for the issuance or continuation of eligibility for access to classified information."

Attachment 1 to the Deputy Secretary's Memorandum of June 7, 2001, provides general guidance for DoD adjudicators charged with making determinations of an individual's suitability for a security clearance under the provisions of 10 U.S.C. § 986. That guidance states that the disqualification from eligibility for security clearance under 10 U.S.C. § 986 applies to persons with convictions in State courts with "sentences imposed of more than one year, regardless of the amount of time actually served."

Also attached to the Deputy Secretary's Memorandum of June 7, 2001, are revised adjudication guidelines, originally promulgated by the Special Assistant to the President for National Security Affairs in March 1997, pursuant to Executive Order 12968, which pertain to criminal conduct. The Deputy Secretary's memorandum states that these adjudication guidelines have been revised to reflect the provisions of 10 U.S.C. § 986.⁽⁴⁾

The Government's concern under revised Guideline J is that a history or pattern of criminal activity creates doubt about a person's judgement, reliability and trustworthiness. Revised Guideline J conditions that could raise a security concern and may be disqualifying include:

- a. Allegations or admissions 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 a sentence of imprisonment for a term exceeding one year;

Conditions that could mitigate revised Guideline J security concerns include:

- a. The criminal behavior was not recent;
 - b. The crime was an isolated incident;
 - f. There is clear evidence of successful rehabilitation.
- g. Potentially disqualifying condition... c. ... 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.

CONCLUSIONS

Guideline J-Criminal Conduct; 10 U.S.C. § 986.

In the SOR, DOHA alleged Applicant had been arrested and convicted of criminal acts (¶¶ 1.a. and 1.b.) and had been sentenced by a state court to a prison term of more than one year for those criminal acts. (¶¶ 1.c and 1.d.). An applicant with a history or pattern of criminal behavior raises serious doubts about her judgment, reliability and trustworthiness. Directive ¶ E2.A10.1.1.

Footnote 1 in revised adjudication Guideline J reads: "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." An Administrative Judge may recommend that an applicant's case be considered or not considered for a grant of Secretarial waiver only if the Judge's decision to deny or revoke a clearance is based solely on the provisions of 10 U.S.C. § 986.

The Government established through Applicant's admissions that she had committed the multiple criminal acts alleged in subparagraphs 1.a. and 1.b. of the SOR. The allegation in SOR subparagraph 1.a. relates to Applicant's arrest in September 1989. The record evidence shows that the September 1989 felony conspiracy charge and simple possession of cocaine charge were dismissed, and Applicant was convicted of the misdemeanor charge of possession of drug paraphernalia, for which she received a sentence not exceeding one year. Thus the record evidence is insufficient to conclude that the provisions of 10 U.S.C. § 986 apply to the allegations in SOR subparagraph 1.a., as alleged in SOR subparagraph 1.c. Accordingly, I find for Applicant on the allegations in subparagraph 1.c. of the SOR.

Applicant's admissions as to the allegations in subparagraph 1.b. of the SOR disqualified her, under subparagraphs **a**, **b** and **c** of revised Guideline J, from receiving a security clearance pursuant to the provisions of 10 U.S.C. § 986, unless she could establish, through mitigation, a meritorious case for waiver of the statute's provisions, pursuant to subparagraph **g** of revised Guideline J.

Applicant established, under subparagraph **a** of the mitigating conditions in revised Guideline J, that her criminal behavior occurred in 1989, 14 years ago, and thus was not recent. Applicant admitted that at the time of her arrests, she was addicted to cocaine, and thus the behavior she was convicted of was likely a regular pattern in her life and not an isolated incident, making mitigating condition **b** under revised Guideline J inapplicable. However, the record shows that Applicant was able to overcome her addiction and break out of a pattern of criminal behavior. She demonstrates that she has reordered her life in positive ways and she provides ample evidence of successful rehabilitation, thus making mitigating condition **f** of revised Guideline J applicable. Accordingly, the allegations in subparagraph 1.a. of the SOR are concluded for the Applicant.

Pursuant to the policy guidelines implementing 10 U.S.C. § 986, I am unable to find for Applicant on the allegation in SOR subparagraph 1.b. I find the evidence presented by Applicant under Mitigating Conditions **a** and **f** of revised Guideline J sufficient to overcome her convictions for criminal drug conduct 14 years ago. However, notwithstanding strong persuasive evidence of mitigation under revised Guideline J, the provisions of 10 U.S.C. § 986 prohibit the Department of Defense from granting or renewing a security clearance for 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." Thus, the allegations in subparagraphs 1.b. and 1.d. of the SOR are concluded against the Applicant. Pursuant to the statute, only

the Secretary of Defense or the secretary of the military department concerned has the authority to authorize an exception to the prohibition against granting or renewing a security clearance under these circumstances. *See* 10 U.S.C. § 986(d). Absent the prohibition imposed by 10 U.S.C. § 986, I would find that Applicant has demonstrated that it is in the national interest to grant her a security clearance.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: Against Applicant

DECISION

In light of all of 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. Clearance is denied. However, I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. Also in 1989, before her convictions for drug abuse and her subsequent rehabilitation, Applicant was convicted of misdemeanor assault and battery and fined. (Tr. 22.) In 2001, Applicant was also assessed court costs for failure to appear in a civil matter relating to a medical bill. (Tr. 32-33.) She has since paid the judgment rendered against her. (Ex. 1; Tr. 32-33.)
4. The revised adjudication guideline for Guideline J (Criminal Conduct) incorporates DoD policy relating to 10 U.S.C. § 986. The modified Guideline identifies disqualifying and mitigating conduct by alphabetical letters and not by the Enclosure 2 code of alphabetical letters and numbers found in DoD Directive 5220.6. The policy promulgated in the revised adjudication guideline changes DoD 5200.2-R, and, according to the July 7, 2001, memorandum of the Deputy Secretary of Defense, will be codified in the next revision of the regulation.