

DATE: March 3, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11782

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1980 when she was nineteen, Applicant was arrested; and in 1981 she was found guilty of burglary and sentenced to one to ten years. The Smith Amendment (10 U.S.C. Section 986) disqualifies anyone convicted and sentenced to imprisonment for more than one year. Applicant requested a waiver based on clear evidence of her successful rehabilitation and the length of time since her conviction over 20 years ago as she has led a responsible and productive life for a significant period after her release from confinement. A waiver is recommended. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on July 31, 2003. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. ⁽¹⁾ The SOR alleges specific concerns over criminal conduct (Guideline J), including an allegation that her criminal conduct disqualifies Applicant from having a security clearance because of 10 U.S.C. Section 986, unless in a meritorious case the Secretary of Defense authorizes an exception. Applicant responded to the SOR in an Answer notarized on August 28, 2003, where she admitted to paragraph 1.a. with explanations. She requested a hearing and a waiver.

The case was assigned to Department Counsel who on October 30, 2003, attested it was ready to proceed; the case was assigned to me on October 31, 2003. Subsequently, a mutually convenient date for hearing was agreed to and a Notice of Hearing issued on November 18, 2003, set the matter for December 9, 2003, at a location near where Applicant works and lives. At the hearing the Government introduced six exhibits which were all admitted into evidence (Exhibits 1-6) and called the Applicant as an adverse witness. The Applicant testified, called five witnesses, and offered three exhibits which were admitted into evidence. (Exhibits A - C) The transcript (TR) was received on December 17, 2003.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, 43 years old, has been employed with a defense contractor in State #1 since October 2001. She completed Security Clearance Applications (SF 86) in December 2001. She was advised by her supervisor that she only had to document the past seven years in answering the questions. However, when she was interviewed by the Defense Security Service (DSS), she voluntarily disclosed her criminal record to the agent. (Exhibits 1, 2; TR 22-27, 43-44, 48)

Applicant has one child born in June 1987. She married Husband #2 in May 1993 and was widowed in August 1993. She remarried in June 2003. (Exhibit 1; TR 32, 38, 93)

Criminal Conduct

When Applicant was 19, she was arrested in State #2 in February 1980 for accessory to theft and burglary of a pharmacy; she was driving by a pharmacy while it was being burglarized, but this charge was dismissed. Five months later in July 1980 she was arrested for non-residence burglary, a class C felony in State #2, when she attempted to burglarize a pharmacy to steal pharmaceutical drugs. She hid in the store until closing and disconnected all of the alarms except one. After it went off, she sat and waited for the police. She was found guilty in April 1981 and sentenced to one to ten years. She was sent to a state penitentiary for women for two months and was transferred to a correctional vocational center. While at the later facility she agreed to be a state's witness in a capital murder trial where there was a conviction. Because of her cooperation in the case, she was allowed to enter a six month in-house/inpatient drug rehabilitation center which she completed. She was released on supervised probation for one year which she completed. (Exhibits 2, 3, 4, 6; TR 27-30) Since completing drug treatment in 1982, she has not used any drugs. (TR 37)

Her probation officer advised her to move away from State #2, so she moved to State #3 in 1983; she continued to report to her State #2 probation officer. (TR 31) She has had no arrests since 1991. (TR 35)

Her request for a waiver is based on exemplary post-conviction conduct and the extent to which she has rehabilitated her life. (TR 42-43)

Character References

Supervisor #1 who has known Applicant for five years and worked with her on a daily basis recommended her for a security clearance. Applicant disclosed her past criminal charges to her supervisors and asked for their support. Supervisor #1 strongly recommended her for a waiver. He concluded that "Her past behavior as a twenty year old is not indicative of the mature, family oriented and fiercely loyal employee that many of us have come to know." (Exhibit A; TR 53-60)

The chief of the division where Applicant works has known Applicant ten months and strongly recommended her as a "great worker, very dependable." He sees her as a "rock solid employee." (Exhibit A; TR 61-66)

Supervisor #2 who has known her five years testified on behalf of Applicant as someone he recommended be hired as she gives "110 percent." Initially, she worked in a part-time position, and now works full-time. He describes her as extremely dedicated and recommended her for a security clearance. He concluded that Applicant "is a mature and loyal employee dedicated to the training of the U.S. Military, and is far separated from a one time unfortunate, yet serious incident that occurred at a different phase of her life." (Exhibit A; TR 67-74)

A co-worker who has known Applicant for five years recommended her for a security clearance as someone who is a conscientious worker, on time, dependable. (TR 75-81)

Another co-worker who is also a friend has known Applicant for five years; she also recommended her for a security clearance. (TR 82-87)

Other co-workers wrote letters of recommendation on her behalf. (Exhibits A, B)

STATUTORY REQUIREMENTS

A provision of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, 10 U.S.C. Section 986 ("The Smith Amendment"), mandates restrictions on the granting or renewal of security clearances. This statutory limitation was implemented within the Department of Defense by a June 7, 2001, memorandum, and within DOHA by Operating Instruction (OI) 64, issued on July 10, 2001. Statutory provision (1) disqualifies 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." DoD implementing guidance interpreted this language to include "person 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." This case falls within this statutory provision. However, the Smith Amendment establishes authority for the Secretary of Defense (or the Secretary of the military department concerned) to grant a waiver where meritorious cases exist. This authority may not be delegated. Neither the statute, nor DoD, defined "meritorious circumstances."

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole, I applied relevant Adjudication Guidelines as set forth below :

Guideline J - Criminal Conduct

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 admissions of criminal conduct
- b. A single serious crime or multiple lesser offenses.
- c. Conviction in a Federal or a State court. . .of a crime and sentenced to imprisonment for a term exceeding one year.

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent
- d. . . .the factors leading to the violation are not likely to recur;
- f. There is clear evidence of successful rehabilitation

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Criminal Conduct

Security concerns exist over Applicant's criminal conduct from 1980 when she was arrested at age 19, and in 1981 found guilty of burglary and sentenced to one to ten years. The Smith Amendment restricts the granting or renewal of security

clearances as provision (1) disqualifies persons with convictions in both State and Federal courts with sentences imposed of more than one year, regardless of time actually served. As implemented by DoD, the statutory provision in 10 U.S.C. Section 986 makes no exception for the circumstances that led to the crime or for subsequent rehabilitation. (2)

But for the Smith Amendment, Applicant meets conditions that could mitigate security concerns including: a. The criminal behavior was not recent; c. the person was pressured or coerced into committing the act and those pressures are no longer present in that person's life as she no longer abuses drugs; d. the factors leading to the violation are not likely to recur; f. there is clear evidence of successful rehabilitation.

Applicant sought out drug treatment as her drug abuse was a factor that had led to her criminal conduct and has avoided any subsequent drug use. Applicant documented she successfully completed her probation and has had no subsequent criminal conduct. Thus, Applicant demonstrated her rehabilitation and her ability to lead a responsible and productive life for a significant period after her release from confinement. She has a history of employment stability and a reputation for excellence as a productive member of her company work force. Applicant obtained a job with the defense contracting company in October 2001 where she has continuously worked. Previously, she worked as a part-time employee. She is well regarded by her co-workers and her superiors. Indeed, she has handled her responsibilities in a conscientious fashion according to her supervisors and co-workers who praise her work performance, and character. All recommend her for a waiver. Applicant demonstrated her ability to lead a responsible and productive life for a significant period after conviction or release from confinement which is strong evidence of rehabilitation.

Nevertheless, this statutory provision mandates doubt over Applicant's current trustworthiness and access to classified information as Applicant was convicted of a crime and sentenced for a term exceeding one year. Thus, her criminal conduct cannot be mitigated. (3) After considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraph 1.a. incorporated under SOR Paragraph 1.

Request for Waiver

Applicant requested a waiver based on meritorious circumstances. I recommend further consideration of this case for a waiver under 10 U.S.C. 986.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against 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 the Applicant. I recommend further consideration of this case for a waiver under 10 U.S.C. Section 986.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.

2. Under this *per se* statutory provision, successful rehabilitation, or other mitigating conditions previously considered under criminal conduct, are not factors under 10 U.S.C. Section 986 unless the Secretary of Defense or the Secretary of the military Department concerned, grants a waiver where meritorious circumstances exist.

3. Conditions that could mitigate security concerns include:

a. The criminal behavior was not recent; b. The crime was an isolated incident; c. The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life; d. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur; e. Acquittal; f. There is clear evidence of successful rehabilitation; g. Potentially disqualifying conditions. . . .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.