

DATE: February 6, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-12112

## **DECISION OF ADMINISTRATIVE JUDGE**

**CHARLES D. ABLARD**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Marc Curry, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant, a civilian employee of a defense contractor, was convicted of a drug related offense that occurred in 1974 when she was 20-years-old. It resulted in a sentence of imprisonment for five years, suspended, one year probation and a \$200.00 fine. The provisions of 10 U.S.C. 986 require that any person so convicted cannot hold a security clearance absent a waiver from the Secretary of Defense. Applicant has lived an exemplary life for the past 30 years and has held a security clearance for part of that time. However, the law requires that the finding must be adverse. I recommend further consideration of this case for a waiver of 10 U.S.C. 986. Clearance is denied.

### **STATEMENT OF CASE**

On June 25, 2003, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, *Safeguarding Information Within Industry*, 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. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On July 25, 2003, Applicant, in a sworn written statement, responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to another administrative judge who could not hold the hearing because of his caseload and it was re-assigned to me on November 25, 2003. A notice of hearing was issued on November 28, 2003. A hearing was held on December 8, 2003. The Government introduced six exhibits and the Applicant introduced 18 exhibits. All of the exhibits were admitted into evidence. The Applicant was the only witness. A stipulation was entered into between Applicant and Department Counsel prior to the hearing in an effort to conform the SOR with the evidence. Subsequently a Motion to Amend the SOR was filed by Department Counsel on December 16, 2003, and agreed to by Applicant that corrected information about her conviction. The transcript was received on December 22,

2003.

## FINDINGS OF FACT

After a complete review of the evidence in the record and upon due consideration of the record the following findings of fact are made.

Applicant was convicted of a drug offense in 1974 when she was 20 years old involving sale of marijuana and possession of LSD that resulted in a sentence by a state court of imprisonment of five years, suspended, and one year of probation, and a \$200.00 fine (Exh.3). This occurred while Applicant was on probation for six months as a result of a prior misdemeanor for possession of drugs (Exh. 6).

Applicant has used no illegal drugs since that time having had an epiphany about her life with the experience of spending a day in jail when she was arrested (TR. 27 and 30).

Since the conviction, Applicant has led an exemplary life, raised two daughters, and has no criminal offenses of any kind. She has been married for 30 years and has had a responsible position with a defense contractor since 1985 through various ownerships of the division where she is employed. She was granted an associate degree in engineering in 1986 and is soon to be awarded a bachelors degree in the same field.

Applicant had a security clearance between 1986 and 1988 at which time she was assigned to work that did not require a clearance. She has now been assigned to work that requires a clearance and thus the security clearance application was filed (TR 33-34).

Applicant has received numerous awards and certificates from her employer and from the U.S. Government for her work (Exh. B-R). In addition to her professional work, Applicant is an enthusiastic volunteer for Habitat for Humanity donating her time and energy in building shelter for the needy (TR. 37).

Applicant and her husband had a tax lien filed against them by the Internal Revenue Service that arose due to inheritance of funds from an insurance policy from Applicant's mother-in-law and a resulting dispute occasioned by loss of some records when Applicant and her family were moving across the country. The matter has now been resolved and a release from IRS was introduced into evidence (Exh. A and TR. 34 and 37).

## 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.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the 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. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "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, ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b)

## 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 all allegations set forth in the SOR.

The applicable Disqualifying Condition Criminal Conduct (DC) 2 is applicable to Appellant in that she was convicted of a serious crime and sentenced to a five year term in prison. It is mitigated by application of the facts in the case to the Mitigating Conditions (MC) 1, the conduct was not recent; 2, the crime was an isolated incident; 4 the factors leading to the violations are not likely to recur; and 5, there is clear evidence of successful rehabilitation.

Both letters from her supervisors gave favorable accounts of the work performance and ethics of the Appellant.

Having observed Appellant at the personal appearance, I conclude she is a person of serious demeanor who is troubled at having this matter in her life resurrected after so many years. She has an established family which she has raised and educated. She is an active member of her community. She receives credit under the whole person concept for long and continuous service for the government, her family life, and contributions to her community.

Based on the evidence of record, including Applicant's admissions, the Government has established reasons to deny her a security clearance because of personal conduct. Having established such reasons, the Applicant has the burden to establish security suitability through evidence which refutes, mitigates, or extenuates the disqualification and demonstrates that it is clearly consistent with the national interest to grant a security clearance. ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

Applicant is completely rehabilitated and has not used drugs since her encounter with law enforcement 30 years ago. She is a mother of two daughters and has a stable marriage of 30 years. Her employment record is impressive having been recognized on numerous occasions for her service to her company and her country. She continues to improve her education at the college level. She volunteers her time for worthwhile community projects.

The provisions of 10 U.S.C. 986 and the implementing regulations are unequivocal that a person is disqualified from holding a security clearance if convicted of a crime and sentenced to more than one year of imprisonment.

In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security concerns of the nation. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information.

The "whole person" concept recognizes that we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I conclude that she is not eligible for access to classified information.

Thus, I find against the Applicant.

## FORMAL FINDINGS

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

Paragraph 2. Guideline F FOR APPLICANT

Subparagraph 2.a.: For 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 renew a security clearance for Applicant. The provisions of 10 U.S.C 986 and the implementing regulations preclude such a finding because of Appellant's conviction and sentence. Accordingly, I find that the SOR previously issued be sustained. However, I recommend further consideration of the case for a waiver under 10 U.S.C 986 Clearance is denied.

Charles D. Ablard

Administrative Judge