

DATE: April 30, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-12318

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Marc Curry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This case involves a defense contractor who has held a security clearance with her defense contractor for over twelve years. Between 1990 and 2000 while holding a clearance, she engaged in multiple acts of shoplifting, escaping detection in all but two relatively recent incidents in 2000 when she was arrested and charged with shoplifting. Attributing much of her behavior to depression and compulsive behavior problems for which she has long received treatment, she failed to disclose either her treatment or arrests in her security clearance application. Unable to demonstrate successful rehabilitation with her still ongoing treatment program or prompt, good faith correction of her omissions, it remains too soon to credit her with the degree of restored judgment, reliability, and trustworthiness sufficient to enable her to mitigate the Government's concerns. Clearance is denied.

STATEMENT OF THE CASE

On November 21, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, 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 clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on December 6, 2002, and requested a hearing. The case was assigned to this Administrative Judge on January 9, 2003. The hearing was noticed on January 14, 2003 for hearing on February 4, 2003. Hearing was convened on February 4, 2003 as scheduled. At hearing, the Government's case consisted of four exhibits; Applicant relied on one witness (herself) and no exhibits. The transcript (R.T.) of the proceedings was received on February 13, 2003.

STATEMENT OF FACTS

Applicant is a 64-year old administrative secretary for a defense contractor who seeks to retain her security clearance.

Summary of Allegations and Responses

Applicant is alleged to have been charged and convicted of two shoplifting: one in October 2000, for which she was convicted and sentenced to unsupervised probation (to end in April 2002) and another in December 2000, for which she paid \$50.00 in court costs in return for her case being dismissed. Applicant is alleged to have a history of shoplifting starting in 1990 and continuing to 2000.

Additionally, Applicant is alleged to have falsified her security clearance application (SF-86) of December 2000 by omitting (a) psychiatric treatment she underwent between 1993 and 2000 and (b) her arrests/charges. Applicant is also alleged to have demonstrated a pattern of dishonesty by virtue of her shoplifting arrests/charges.

For her response to the SOR, Applicant admitted the allegations with explanations. She claims her SF-86 omissions were due to embarrassment and fear of losing her job, claims remorse for her arrests and assures she no longer steals or does anything that might cause her to be arrested. She claims her medicine and counseling for life long depression is continuing with successful affects on discontinuing behavior and mistakes she has made in the past. And she claims she always performs to the best of her ability.

Relevant and Material Factual Findings

The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference adopted as relevant and material findings. Additional findings follow.

Applicant has a high school education and some credits earned at a business college. Between 1990 and 2000, Applicant shoplifted on numerous occasions (50 in all) without getting caught (*see ex. 2; R.T., at 17*). Most of her shoplifting she attributes to chronic depression over a chemical imbalance (*see R.T., at 22*). In October 2000, she got caught stealing between \$200.00 and \$300.00 of goods she intended to give to friends as Christmas presents. She was arrested and later charged with shoplifting. At her April 2001 hearing she pleaded guilty and was fined \$100.00 by the court, placed on unsupervised probation, and taxed court costs of \$100.00. Her probation is due to expire in April 2003. Besides paying the court costs, Applicant satisfied the merchant's restitution demands.

Besides her October 2000 shoplifting arrest, Applicant was arrested and charged with shoplifting in December 2000 after taking about \$25.00 worth of items from a local supermarket. Upon agreeing to pay court costs of \$50.00, her case was dismissed by the court. She was assured by the court at the time that her arrest and charges would not be made known to her employer: her biggest fear.

All of Applicant's shoplifting incidents occurred while she was holding a security clearance and was inferentially aware of the importance of trust and reliability in retaining access to the nation's secrets. Some of her actions were attributed to her depression and compulsive urges to shop lift. Still, Applicant knew her actions were morally and legally wrong, and has not been able to demonstrate with her proofs she could not control her urges while holding a clearance.

Asked to complete an SF-86 in December 2000, Applicant omitted her October 2000 arrest and charges. She attributed her omission to embarrassment and fear of losing her job (*see ex. 2*). In the same SF-86, Applicant also omitted the treatment she had been receiving for a number of years for depression/anxiety and compulsion disorder. Embarrassed and fearful of the affects such a disclosure might have on her employment, she couldn't bring herself to disclose her treatment. So concerned about her employer finding out about her treatment for an emotional disorder, she even expressed skepticism about starting a third medication for treatment of her depression problems. So far, she has continued to resist commencement of her planned third medication protocol; although she continues to take her other medications, which she assures are helping her avoid any more shoplifting behavior (*see R.T., at 23-24, 29*). In her past counseling for depression before the passing of her mother Applicant took several prescribed medications for her depression condition. She is resigned that she will require medication indefinitely to treat her depression/anxiety/compulsive disorder (*see ex. 2*).

Applicant's assigned explanations for omitting her October 2000 arrest and counseling, while sincere and somewhat

understandable, are insufficient to avoid falsification inferences. Government's security interests prime any personal interests Applicant might have for wanting to keep the information from her employer.

When interviewed by a DSS agent in August 2001 (some eight months after executing her SF-86), Applicant acknowledged both her October 2000 arrest and counseling/treatment. She could offer no recollection as to whether or not the DSS agent confronted her with the information before she provided it. With the evidentiary burden placed on Applicant to demonstrate she provided the corrections promptly and free of suggestion, she fails to do so.

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list "binding" policy considerations to be made by Judges in the decision making process covering DOHA cases. The term "binding," as interpreted by the DOHA Appeal Board, requires the Judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the Judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Personal Conduct

Basis: conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Disqualifying Conditions:

DC 2 The deliberate omission, concealment, falsification or misrepresentation of relevant and material facts from any personnel security questionnaire, personal history statement or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Mitigating conditions:

MC 3 The individual made prompt, good faith efforts to correct the falsification before being confronted with the facts.

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability or trustworthiness

Disqualifying Conditions:

DC 1 Allegations or admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

Mitigating Conditions:

MC 6 There is clear evidence of rehabilitation.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's request for security

clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a nexus to the applicant's eligibility to obtain or maintain a security clearance. The required showing of nexus, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

CONCLUSION

Applicant comes to these proceedings with raised security-significant omissions in the security clearance application she completed in December 2000, in addition to raised concerns about past shoplifting incidents, including two relatively recent ones in which she was arrested and charged (with only one resulting in a conviction).

In her December 2000 SF-86, Applicant omitted any references to her prior treatment for depression and shoplifting arrests when answering questions 19 (medical records) and 26 (police record). By her explanations, she was too embarrassed and concerned about losing her job to disclose either the treatment or arrests. None of these explanations, however, has been considered sufficient by our Appeal Board to avert inferences of falsification. *See* ISCR OSD Case No. 01-06870 (September 13, 2002); DISCR OSD Case No. 88-2245 (June 22, 1990). Our Appeal Board has been careful to underscore, too, that neither value to his or her employer nor demonstrated overall honesty and professional reputation are sufficient to surmount the adverse trust implications that stem from material misstatements in an SF-86 or DSS interview. *See* ISCR OSD Case No. 98-0435 (September 16, 1999); ISCR OSD Case No. 98-0370 (January 28, 1999); DISCR OSD Case No. 93-1390 (January 27, 1995). That Applicant has been diligent in her executing her job responsibilities do not insulate her from questions about her own departures from candor expectations when providing material information in an SF-86 questionnaire. Our Supreme Court teaches that even in close cases involving trust issues over security clearances, doubts should better be resolved against granting the clearance. *See Department of Navy v. Egan*, 458 U.S. 518, 531 (1988). So important is trust for those found to be eligible to access classified information that excused departures from strict candor expectations are necessarily narrow. Government may invoke DC 2 (deliberately falsifying material facts in a personnel security questionnaire) of the Adjudicative Guideline for personal conduct.

Not until interviewed by a DSS agent in August 2001 (over eight months later) did Applicant disclose her treatment and arrest history. While it is not entirely clear whether she was confronted or not, the evidentiary burden of demonstrating her disclosures were made voluntarily (free of confrontation) has always been on the applicant. Applicant is unable to meet this burden with her expressions of uncertainty over the circumstances of her disclosures. Moreover, her disclosures came over eight months after she falsified her SF-86, too late to satisfy the promptness prong of mitigating condition (MC) 3 (prompt, good faith disclosures) of the Adjudicative Guidelines for personal conduct. *See* DISCR OSD Case No. 93-1390 (January 27, 1995)

Mitigation is difficult to credit Applicant with, since she failed to take advantage of any early opportunity afforded her to notify DSS of her omission, either by telephone or correspondence, before her interview eight months later. By this time, DSS had already expended considerable effort in processing her clearance application and developing leads on both positive and adverse information. Moreover, all of the covered shoplifting incidents over the 1990 to 2000 time frame occurred while Applicant held a security clearance.

Taking into account all of the evidence produced in this record and the guidelines in the Directive (inclusive of the E.2.2 factors), unfavorable conclusions warrant with respect to sub-paras. 1.a through 1.c of Guideline E.

Of considerable security concern as well are Applicant's history of shoplifting incidents, with too that are particularly recent that resulted in either conviction and probation or payment of court costs in return for dismissal of the charges. That most of her shoplifting went undetected does not absolve her of security concerns about the behavior. Our Appeal Board has never limited criminal conduct concerns to conduct that results in convictions. Government may rightfully invoke several disqualifying conditions for criminal conduct: DC 1 (allegations or admission of criminal conduct) and DC 2 (a single serious charge or multiple lesser offenses).

Because of both the relative recency of Applicant's shoplifting conduct and multiple history of the conduct at issue, it is still too soon to consider the conduct mitigated. While much of her actions appear to be related to her depression condition, this potentially mitigating consideration is too thinly developed in the record to accord Applicant enough credit to mitigate the Government's security concerns. Moreover, her treatment efforts have been put on hold for the time being, making strong rehabilitation still too uncertain to fully credit Applicant with the mitigation benefits of MC 6 of the Adjudication Guidelines for criminal conduct. All together, Applicant needs more time to demonstrate she is fully able to keep her shoplifting impulses under control. Unfavorable conclusions warrant with respect to sub-paragraphs 1.a through 1.c as well.

In reaching my recommended decision, I have considered the evidence as a whole, including each of the factors set forth in the Procedures section (paragraph 6) of the Directive, as well as E.2.2 of the Adjudicative Process of Enclosure 2 of the same Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the FINDINGS OF FACT, CONCLUSIONS, CONDITIONS, and the factors listed above, this Administrative Judge makes the following FORMAL FINDINGS:

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Sub-para. 1.a: AGAINST APPLICANT

Sub-para. 1.b: AGAINST APPLICANT

Sub-para. 1.c: AGAINST APPLICANT

GUIDELINE J (CRIMINAL CONDUCT): AGAINST APPLICANT

Sub-para. 2.a: AGAINST APPLICANT

Sub-para. 2.b: AGAINST APPLICANT

Sub-para. 2.c: 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 Applicant's security clearance.

Roger C. Wesley

Administrative Judge