

DATE: September 3, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-15680

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Robert J. Tuidor, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a chronic shopping problem. She spent thousands of dollars shopping, and embezzled \$241,000 from her former employer to pay for the items she purchased. She made restitution and was fired. On the current federal charges, the Federal District Court convicted her of wire fraud and sentenced her to a year and a day in prison. Previously she was arrested for shoplifting a comparatively minor amount, and was convicted of a misdemeanor. Applicant has not mitigated the criminal conduct or financial considerations disqualifying conditions. Serious questions remain about her ability to conform to security clearance restrictions. Clearance denied.

STATEMENT OF THE CASE

On February 13, 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) and Guideline F (Financial Considerations) 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 March 7, 2003, Applicant responded to the SOR allegations. She requested a hearing. This case was reassigned to me from another administrative judge on April 2, 2003 due to caseload considerations. On April 15, 2003 a Notice of Hearing was issued setting the hearing date for May 9, 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 nine exhibits, all of which were admitted into evidence. Applicant appeared and testified, and offered 20 exhibits⁽¹⁾, all of which were admitted into evidence. Applicant testified and presented three

witnesses. Applicant was given two weeks until May 23, 2003 to submit a statement from a priest friend of hers. She did submit that document on time. I received the transcript (Tr.) of the hearing on May 20, 2003.

In the meantime, the Federal Court of Appeals, on an appeal of Applicant's sentence by the U.S. Attorney, reversed and remanded the District Court's sentence. Upon re-sentencing, Applicant received a year and a day in prison, thereby making her subject to the provisions of the Smith Act (10 U.S.C. 986). To allow her the opportunity to present evidence on that issue which was not addressed at the first hearing on May 9th, I reconvened the hearing on July 3, 2003. The Government presented another exhibit, which was numbered "10." Applicant appeared and presented additional evidence, however she did not have an official transcript of the District Court's new sentence. She was given two weeks additional time to obtain that official transcript, which was to be Exhibit Y. Applicant was not able to obtain the transcript by August 25, 2003, and the record is, therefore, closed. I note also that Applicant has appealed the new sentence of incarceration imposed by the U.S. District Court.

At this hearing the Government moved to amend Paragraph 1.c. to strike the last sentence of that paragraph and substitute therefor the following wording: "The 7th Circuit Court of Appeals reversed and remanded the May 23, 2001 sentence and at a re-sentencing before the U.S. District Court judge on June 6, 2003, Applicant was sentenced to a year and a day in the federal penitentiary. Applicant will appeal this sentence to the U.S. Court of Appeals." Applicant also moved to change the amount of the fine stated in this paragraph from \$30,000 to \$10,000 to reflect the modification ordered by the federal district judge. Without objection by the Government or Applicant these amendments were adopted. (Tr. 4 to 7)

FINDINGS OF FACT

Applicant admitted the allegations in subparagraphs 1.a., 1.b. (in part), 2.a., 2.b., and 2.c. of the SOR. She disagreed with the arrest allegation in subparagraph 2.c. and the restitution allegation in subparagraph 2.b. Those admissions are incorporated herein as findings of fact. 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 is a 49 year old and married for 17 years with no children. Applicant is a consultant, with a business title description as an "organizational change architect" working in a logistics modernization unit for a major defense contractor. She has a master's degree in human resources. (Tr. 89, 133-134, 146-153; Exhibits B and U)

Applicant's financial problems arose due to her extravagant spending habits, which were not motivated by any need for the acquired items, but as a pleasurable means to relieve her depression. She did not disclose the high credit card bills to her husband because she feared he would leave her. Applicant has suffered from depression since college and sought counseling after her graduation. From 1993 to 1996 she was treated by a medical professional in her former state and town of residence. That professional prescribed Zoloft at 150 mg. and later tapered that off and prescribed Prozac 80 mg. (Tr. 130, 137, 139; Exhibits 2 at 3, 9 at 1 to 13)

Applicant moved to her current city of residence in November, 1996. Her job produced stress and her depression worsened. Her husband persuaded her to return to therapy in September, 1998. She started to see a psychiatrist who specialized in compulsive shopping disorders, and consult with another physician who prescribed medications for her. She is currently taking Prozac at 60 mg., Wellbutron at 400 mg., and Lamictol. She feels better and is functioning better, and thinks she is doing better after hitting rock bottom several years ago. She is currently in therapy. (Tr. 96-99, 137, 141, Exhibits 8, C, D, and F)

Applicant had two incidents of shoplifting when she lived in her originating state. No criminal action was taken against her on those two incidents. She returned the merchandise from one incident, and the second store forgave her the small item she took because she shopped there all the time. (Tr. 29-30, 114; Exhibit 9 at 6)

Applicant shoplifted clothing from a department store in her current city of residence in February, 1999, and was arrested and prosecuted in state court. The charge was reduced to a misdemeanor. She was given two years probation, had to pay \$600 in fees, and was not ordered to pay any restitution or fine. She successfully completed her probation in 2001. (Exhibits 2 at 3, 3, 4; Exhibit G; Tr. 110, 112).

In 2001, Applicant was charged with wire fraud for obtaining travel money from her employer, a former prominent accounting firm which no longer exists. She was not arrested at any time, and certainly not at her work place, as was alleged. She would complete travel vouchers and obtain payment for trips she did not take, and similar items. She took the money to pay for credit card debt incurred from her shopping for jewelry and clothing. Her charges totaled over \$200,000 over several years. She extracted these sums from her employer unlawfully over a three year period. She pled guilty in Federal District Court and was sentenced to five years probation, a fine of \$30,000, to pay restitution of \$241,061.08 to her former employer, and prohibited from having any credit cards without court permission. Pursuant to the Court order, she repaid that money by taking out a second mortgage on their condo residence and from family savings and loans. The mortgage is \$430,000 on a condo with a fair market value of \$500,000. There is no practical equity against which Applicant could borrow further on that property. Applicant was fired from her job, and later rehired by a previous employer. (Response at 3 and 4; Tr. 82-83, 117, 126, 136, 154; Exhibits 2 at 1, 2, 4, 5 - 7; Exhibit Y at 4, 5, 11)

Applicant's sentence was appealed by the United States Attorney and reversed by the U.S. Court of Appeals. The downward departure sentence ordered by the U.S. District Court judge was not allowed. Applicant was re-sentenced on June 6, 2003, to a prison sentence of a year and a day in jail (which sentence was suggested by her counsel at the re-sentencing hearing), and a fine of \$10,000 instead of the \$30,000 originally ordered and paid by Applicant. Applicant was also sentenced to two years of supervised release, including needing court permission to obtain credit cards or enter into new credit relationships without court permission, and she is required to maintain mental health treatment. Applicant is appealing that sentence. The federal sentencing guidelines make the range of incarceration allowed to be 12 to 18 months. (Second Tr. 5-7, 20-22; Exhibit X, Y at 8 and 12, 24 to 26; Exhibit 12)

Applicant's household income is sufficient to leave a monthly surplus of income over expenses of \$4,500. Their annual income is about \$250,000. She and her husband are paying their credit card debts responsibly monthly. However, their household debt increased to pay the restitution and fines, and the credit card debt exceeds \$30,000. (Tr. 82 to 87, 119; Exhibit T)

Applicant is well-regarded for her professional work product and ethics. She has many friends and colleagues who provided good character references. (Exhibits A, B, J, K, M to S, U to W, Z; Tr. 40 - 45, 52 to 69)

POLICIES

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).

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

A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. E2.A10.1.1.

Conditions that could raise a security concern and may be disqualifying include:

(1) Allegations or admissions of criminal conduct, regardless of whether the person was formally charged; E2.A10.1.2.1.

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

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

None

Guideline F - Financial Considerations:

An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Directive, ¶ E2.A6.1.1.

Conditions that could raise a security concern and may be disqualifying include:

(1) A history of not meeting financial obligations. Directive, ¶ E2.A6.1. 2.1.

(2) Deceptive or illegal financial practices such as embezzlement, employee theft, . . . , expense account fraud, and other intentional financial breaches of trust.

E2.A6.1.2.2

(3) Inability or unwillingness to satisfy debts. Directive, ¶ E2.A6.1.2.3.

(5) Financial problems that are linked to ...other issues of security concern. E2.A6.1.2.5

Conditions that could mitigate security concerns include:

(6) The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts. Directive, ¶ E2.A6.1.3.6.

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 news 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 situation described in this case involves one of those specific circumstances.

The statutory mandate 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:

An overall point to be remembered in this case is that no one disputes the sequence of events which occurred in Applicant's life. She admitted her compulsive shopping problem and its root cause in her depression. She admitted her medical care and therapy attempting to address the problem. The only aspect of this case Applicant argues is the applicability of mitigating factors so she can obtain a security clearance. She seeks also to avoid the strictures of the Smith Amendment by demonstrating her good character, professional work, and responsible treatment and control of her depression and shopping behavior.

The Government proved Applicant engaged in criminal conduct. There are three incidents of shoplifting, the first two resulted in no criminal charges, and the last one resulted in a misdemeanor conviction in a state court with a sentence of probation and court fees. Applicant also was convicted in federal court of a felony on her plea to extract about \$241,000 from her employer by wire fraud. Disqualifying Conditions (DC) 1 and 2 apply.

The Mitigating Conditions (MC) that Applicant wants applied are all but one (acquittal). However, these crimes were recent and the punishment is as of yet unfulfilled because of the appeals, first by the government and now by Applicant. Each fraudulent travel voucher signed and submitted, each unlawful payment received and spent on Applicant's personal clothing and jewelry expenses, is a separate offense. These offenses continued over three years. The amount taken unlawfully is very large. Therefore, the crimes are not isolated. The wire fraud and the shoplifting are part of a pattern of misconduct by Applicant.

Next, Applicant would have us accede to her theory that her depression caused her to shop, and then steal and commit wire fraud. Therefore, she was coerced, but now her therapy has rehabilitated her. The evidence shows she has been in therapy since 1977 in at least three major blocks of time. She is also on medication to alleviate her depression. If she leaves therapy, which she has done in the past because she did not find a therapist compatible or she moved for job reasons, and/or she stops taking her medications, then she is at risk again. Her depression is a life-time struggle. The government has no control over her voluntary choices in treatment, and if she were to lapse, engage in shopping, accumulate large bills, and have classified information to sell, the government would be at risk then. Furthermore, I conclude she voluntarily committed her crimes. Excessive shopping is one condition, stealing and wire fraud are planned activities involving a person's cognitive functions.

Finally, Applicant strongly advocated her position that she has been successfully rehabilitated. However, she continues in therapy, which in view of her history and the history of family depression is appropriate, and Applicant takes at least two and possibly three prescribed medications to alleviate her depression, which causes in some part her excessive shopping. I cannot conclude based on the letter exhibits Applicant submitted from her physicians that she has been successfully rehabilitated. Her physicians did not testify at the hearing and submit themselves to cross-examination. Applicant may be on the road to recovery and control of her problems, but she does not seem to have arrived yet, certainly the evidence does not support that conclusion. In fact, her physician states in two exhibits (8 and F) that continued treatment is necessary to maintain a good prognosis. Yet her husband testified he thinks Applicant is better and could do without therapy if her physician retired. (Tr. 105) That view is not supported by the evidence.

Therefore, I conclude no mitigating factors are applicable. I am strengthened in this conclusion by the analysis presented by the U.S. Court of Appeals in its decision reversing the first sentence imposed by the U.S. District Court after Applicant's wire fraud conviction.

The Government proved Applicant had financial problems. She had very high credit card debt, and her husband's statements about their finances show he, who now controls those finances, constantly seeks lower interest rates on credit card debt to lessen those costs on the large balances resulting from Applicant's prior shopping excesses. Coupled with the large increase in the mortgage balance on their condo, incurred to pay the restitution ordered by the Federal Court, this debt load clearly places Applicant within this Guideline. Expense account fraud is a specific condition in the Guideline F. It is clear from the testimony that Applicant's high household income is not sufficient to allow these debts to be repaid to any reasonable level within the next several years. The debts are just too high. These financial conditions are linked to an issue of security concern, which is Applicant's chronic depression and shopping excesses. "Compulsive behavior that affects one's financial condition, work performance or relationships with others often prompts denial of security clearance because of the intractable nature of the underlying problem. Behavior that is out of control can compromise an employee's dependability."⁽²⁾ Disqualifying Conditions (DC) 1, 2, 3, and 5 apply.

The next issue is whether Applicant mitigated these conditions. I apply the same analysis to these mitigating conditions as I did for the Guideline J mitigating factors. The only one which might be applicable is MC 6. However, the debts were taken upon her husband and herself. They remain unpaid in that sense. Applicant and her husband are repaying their debts in an orderly fashion. But Applicant's mitigating evidence is insufficient to overcome the weight of the DC cited in the previous paragraph.

A person who seeks access to classified information enters into a fiduciary relationship with the Government, predicated upon trust and confidence. The Government must trust that the person will act accordingly with regard to Government classified information at all times, on and off duty. The Government must have a high degree of trust and confidence in persons to whom it gives access to classified information. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Any doubts will be resolved in favor of the national security, and access to classified information will be denied.

Such is the case here.

Applicant was advised of the possible applicability of 10 U.S.C. § 986 (Smith Amendment) at the first hearing on May 9, 2003, prior to her re-sentencing. After the re-sentencing, a continuation of the hearing was conducted on July 3, 2003, to afford Applicant the opportunity to present evidence on the applicability of the Smith Amendment. She did make such a presentation, and that evidence has been considered. I find the Smith Amendment is applicable because she was sentenced to a year and a day in prison, making condition one directly applicable.

Regardless of the analysis under the Guidelines J and F, which would not grant her 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 stands convicted of a Federal offense, and was sentenced to a year and a day in prison. Therefore, she falls within the purview of the Smith Amendment. She is ineligible for a clearance without a waiver. Applicant's criminal conduct and financial considerations provide sufficient bases for denial of her clearance, independent of this statutory disqualification.

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.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Paragraph 2 Guideline F: Against the Applicant

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b: Against the Applicant

Subparagraph 2.c: Against the 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.

Philip S. Howe

Administrative Judge

1.

2. *Financial Irresponsibility: Background Material for Security Personnel*, Richards J. Heuer, Jr., September, 1991, page 28.