

DATE: February 13, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-18483

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1996, the Applicant was arrested and charged with petit larceny, obstruction of justice, and cocaine possession. She was placed in first offenders status for the cocaine possession and after successfully completing the program, the charge was dismissed. She failed to disclose a 1990 petit larceny arrest. It was also alleged the Applicant failed to disclose her drug use. The record evidence is sufficient to mitigate or extenuate the negative security implications stemming from her 1996 arrest and failure to reveal the 1990 arrest. Clearance is granted.

STATEMENT OF THE CASE

On August 28, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On September 23, 2002, the Applicant answered the SOR requested a hearing. The case was assigned to me on November 4, 2002. A Notice of Hearing was issued on November 8, 2002, scheduling the hearing, which was held on December 3, 2002.

The Government's case consisted of four exhibits (Gov Ex). The Applicant relied on her own testimony and that of her husband. Following the hearing, four additional documents were received, provisions having been made for their submission following the hearing. Department Counsel (DC) having no objection to their admission, the submissions were admitted as applicant's exhibits A. through D. (App Ex) The transcript (tr.) of the hearing was received on December 11, 2002.

The Applicant admits she was arrested in 1996, admits she failed to disclose a 1990 petit larceny arrest, and admits she did not list drug use on a security clearance application (SF-86). She denies the remaining allegations.

FINDINGS OF FACT

The Applicant is 31 years old, has worked for a defense contractor since January 1999, and is seeking a security clearance. The Applicant has been described as: a reliable, trustworthy employee who has been given progressively greater levels of responsibility, making her a valuable employee (App Ex B); and a dependable, capable, reliable member of her church, with impeccable moral character. (App Ex C) She has received numerous certificates of merit and training. In June 1993, she received her associate of applied science college degree. (App Ex A)

In September 1990, the Applicant--then age 18--was charged with petit larceny (Gov Ex 2) when her cousin under rang the Applicant's purchase. The Applicant was young and had just graduated from high school.

In November 1996, the Applicant--then age 24 and nine months pregnant⁽²⁾--and a different cousin went shopping at a discount store. She was unaware that prior to entering the store, her cousin had put a plastic bag containing cocaine into her purse. When leaving the store, the Applicant's cousin was arrested for shoplifting. The Applicant accompanied her cousin and the store detective to an office in the back of the store. Her cousin asked to go to the bathroom and was allowed to do so. When he returned from the bathroom, he told the Applicant there was cocaine in her purse. The store detective requested her purse and the Applicant refused to give it to her. The store detective forcibly took the purse from her, but found nothing illegal in the purse. The Applicant had taken the plastic bag out of her purse and was trying to give it back to her cousin, but he refused to accept it. She was observed putting the bag into her cousin's back pant's pocket. She was arrested and charged with cocaine possession, petit larceny, and obstruction of justice for failing to immediately turn over her purse when requested to do so.

In July 1997, the Applicant was sentenced to 10 days in jail (suspended) on the obstruction of justice charge stemming from her failure to surrender her purse. She was sentenced to 90 days in jail, 60 days suspended, on the petit larceny charge. (Gov Ex 3) The Applicant appealed the finding. There is no indication in the police report she took anything from the store, but had accompanied her cousin who had shoplifted. In November 1997, even though she did not take anything, she followed her attorney's advice and pleaded guilty to petit larceny. (tr. 56) She was frightened and did what her attorney told her to do. She paid \$43.00 court costs and was sentenced to 30 days in jail with 30 days suspended on one year of supervised probation. (Gov Ex 3)

On the cocaine possession charge, the court gave the Applicant first offender status which required her to plead guilty to the possession charge. Having pleaded guilty to drug possession, the Applicant thought she would be in trouble if she did not say she also used cocaine. Family and friends were advising her what she needed to say in order to maintain her first offender status. The advice was to lie and say she used cocaine and she told this to her parole officer. (tr. 33) In keeping with her guilty plea, she admitted using cocaine three times, the last use being the day she was arrested in November 1996. (Gov Ex 3) This was a lie, the Applicant has never used illegal drugs and is aware the effects cocaine use could have on an unborn child and on someone pregnant.

In October 1998, she completed an eight-week drug education program, which consisted of classes twice a week. In April 1999, her adjustment to probation had been satisfactory and all of her drug urinalyses were negative. In June 1999, the Applicant having been found to be in compliance with the terms of first offender status, the possession charge was dismissed.

In September 2001, she completed an SF 86. (Gov Ex 1) In response to question 21, concerning her police record, she listed the October 1996 cocaine possession arrest. She answered "no" to question 27, which asked if she had ever used illegal drugs.

In January 2002, when interviewed by the Defense Security Service (DSS) the Applicant completed a sworn statement stating she had never used drugs and would never consider using them. She said her only possession occurred when she unknowingly possessed cocaine at the time of her arrest in November 1996. Her cousin had placed the cocaine in her purse without telling her. She told the investigator this was her only arrest, however she had been arrested for petit larceny 11 and one-half years earlier. She incorrectly assumed the DSS agent was only concerned about the previous seven years because SF 86 question 26, concerning her police record and other offenses limited the scope of inquiry to the previous seven years. The Applicant understands her response to the DSS agent was misleading. (tr. 43)

The Applicant did not know how important or detail-oriented the security process was until she attended a three-day

security seminar in January or February 2002. She then learned the importance of the SF 86. She never intended to mislead anyone or give falsified information. (tr. 26) As part of her duties she has become her company's security facility officer (SFO).

The Applicant spends her time with her family and attending church. She attends Sunday services, Tuesday night Bible studies, and Thursday night women's prayer group. The Applicant married her husband in 1993. They have a new baby. Her husband stated,

. . . the fact she has given herself to the Lord, everything has change and it made everything better between her and me. I couldn't ask for anything better than that . . . At first, . . . It was constantly bickering back and forth. (tr. 72)

Since the incident, she no longer associates or talks with her cousin. (tr. 40, 52) She does not associate with anyone who uses drugs. Her husband knows her version of the 1996 shoplifting incident is true because his wife was not and is not a drug user nor was she nor is she around people who use illegal drugs. (tr. 64) Her husband states the cousin was already wanted by the police. Her husband and the Applicant's cousin got into a big scuffle about the cousin's need to come forward and acknowledge the cocaine was his. (tr. 65) He told her cousin he needed to come forward and confess. Following that discussion and scuffle, her cousin disappeared, left the area, left the state. Her husband knows the symptoms of drug abuse because his brother used drugs. He never saw his wife with any symptoms or indicators of drug use. Because of her arrest, her husband was watching her to make sure she was not using drugs. (tr. 67)

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to an Applicant's lack of security worthiness.

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. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Personal Conduct (Guideline E) The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility: (E2.A5.1.1.)

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

3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination. (E2.A5.1.2.3.)

Conditions that could mitigate security concerns include:

2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily. (E2.A5.1.3.2.)

7. Association with persons involved in criminal activities has ceased. (E2.A5.1.3.7.)

Criminal Conduct (Guideline J) The Concern: 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 admission of criminal conduct, regardless of whether the person was formally charged.
- b. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent.
- b. The crime was an isolated incident.
- d. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.
- f. There is clear evidence of successful rehabilitation.

BURDEN OF PROOF

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish her security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue her security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. 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 she 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." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under guideline E, (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. In 1996, the Applicant was arrested for cocaine possession, petit larceny, and obstruction of justice. In January 2000, the Applicant gave a sworn statement stating her 1996 arrest was her only arrest. She failed to disclose a 1999, arrest for petit larceny. Disqualifying Condition 3 [\(3\)](#) applies.

In November 1996, the Applicant went shopping with her cousin. As they were leaving the store, they were stopped by the store detective for shoplifting. Prior to entering the store, her cousin had put a plastic bag containing cocaine in her purse. She was unaware he had done this until he whispered it to her when they were under apprehension. The store detective asked the Applicant for her purse, which the Applicant was reluctant to release. A search of the purse found nothing illegal but the Applicant was observed trying to give the bag back to her cousin. She was charged with cocaine possession, shoplifting, and obstruction of justice. Being scared and listening to both well meaning friends and her attorney, she agreed to plead guilty to the charges. Additionally, she admitted using cocaine three times, including the day of her arrest. This was a lie. She thought she needed to tell the lie about prior use in order to have a consistent story and receive first offender's status.

The decision comes down to an assessment of Applicant's and her husband's credibility, a task made more difficult by

the Applicant's 1996 lie to her parole office. The Applicant strongly states she has never used illegal drugs and never tried to mislead anyone. I had ample opportunity to evaluate her demeanor and that of her husband, observe their manners and deportment, appraise the way in which they responded to questions, assess their candor or evasiveness. I read the Applicant's statement, listened to their testimony, and watched the interplay between the Applicant and those around her as well as the interplay between her husband and those around him. It is my impression that Applicant's explanations regarding her 1996 arrest have the ring of truth. I find the Applicant and her husband to be credible.

The Applicant no longer associates with her cousin. Mitigating Condition (MC) 7⁽⁴⁾ applies. The Applicant testified credibly about her conduct resulting in her 1996 arrest. Her explanation, couple with the fact the arrest occurred more than six years ago, is sufficient for me to find for the Applicant concerning the negative aspects of her conduct as listed in SOR subparagraphs 1.a. and 1.c.

The Applicant told her parole officer she last used cocaine the day of her arrest, which was eight days before the birth of her son. It is difficult to believe a woman nine months pregnant would use cocaine. It is more probable she did not use illegal drugs as she now maintains, but lied to her parole officer in a mistaken belief she needed to confess to drug use to maintain her first offender status. Additionally, her husband closely observed her and credibly testified he never saw any symptoms of drug abuse. His brother was a drug user and he was knowledgeable of the symptoms of drug abuse. I find the Applicant has never used illegal drugs.

Having never used illegal drugs, the Applicant's answer to SF 86 question 27 was not false and her statement to the DSS, that she never used illegal drugs was true. I find for the Applicant as to SOR subparagraph 1.b. and 1.d.

In January 2000, the Applicant told the DSS her only arrest occurred in 1996 and did not reveal her 1990 shoplifting arrest. The Applicant failed to provide information about the 1990 arrest thinking it was outside the period of inquiry. The SF 86 question related to her police record and other offenses limits itself to the most recent seven years. The Applicant did not think the DSS was concerned with her 1990 shoplifting. Her failure to disclose this arrest does not, in itself, prove she did so in a deliberate effort to conceal the arrest from the government. The Applicant's statements about her intent or state of mind at the time she made her sworn statement are relevant and material, but not conclusive. An intent to deceive or mislead the government does not require direct evidence and can be inferred from circumstantial evidence, but this is not the case here. When her statements are weighed in light of the evidence as a whole, I find her response was not a deliberate omission, concealment, or falsification and, therefore, none of the disqualifying conditions under personal conduct apply. I find for the Applicant as to SOR subparagraph 1.e.

I conclude that Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the Government's *prima facie* case under Guideline E (Personal Conduct).

The Government has satisfied its initial burden of proof under Guideline J (Criminal Conduct). Under Guideline J, a person's security eligibility is questioned when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. In 1996, the Applicant was arrested for cocaine possession, obstruction of justice, and petit larceny. Because of this arrest, Disqualifying Conditions (DC) a.⁽⁵⁾ and b.⁽⁶⁾ apply.

I have previously found the Applicant did not falsify material facts on her SF 86 or during her interview with the DSS. I find for the Applicant as to SOR subparagraph 2.a.

Mitigating Condition (MC) a.⁽⁷⁾ applies to the Applicant's criminal conduct because the conduct is not recent having occurred six years ago, when the Applicant was 25. The Applicant's case in mitigation is persuasive because there has been no criminal conduct by the Applicant since November 1996. MC b.⁽⁸⁾ applies. C d.⁽⁹⁾ applies because the factors leading up her arrest, which included her cousin's shoplifting and putting cocaine in her purse without her knowledge, are not likely to recur. The Applicant has not seen her cousin since her husband got into a scuffle with him when her husband tried to get him to come forward and admit the cocaine was his. The Applicant's lifestyle has changed. She has "given herself to the Lord" and is very active in her church. MC f.⁽¹⁰⁾ applies because of her rehabilitation. I find for the Applicant as to SOR subparagraph 2.b. The Applicant has successfully mitigated and overcome the Government's *prima*

facie case under Guideline J (Criminal Conduct).

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

Formal Findings as required by Section 3., Paragraph 7., of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline E (Personal Conduct):FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the Applicant

Paragraph 2 Guideline J (Criminal Conduct):FOR THE APPLICANT

Subparagraph 2.a.: For Against the Applicant

Subparagraph 2.b.: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.
2. Her son was born eight days later. (tr. 67)
3. DC 3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination. (E2.A5.1.2.3.)
4. MC 7. Association with persons involved in criminal activities has ceased. (E2.A5.1.3.7.)
5. DC a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.
6. DC b. A single serious crime or multiple lesser offenses.

7. MC a. The criminal behavior was not recent.
8. MC b. The crime was an isolated incident.
9. MC d. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.
10. MC f. There is clear evidence of successful rehabilitation.