

DATE: November 5, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-18663

DECISION ON REMAND OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Faith A. Horowitz, Personal Representative

SYNOPSIS

Applicant, a 36-year-old security assistant, had a history of drug abuse that was mitigated by time and her renunciation of the use of drugs in the future. However, she failed to mitigate the personal conduct security concerns raised by her transferring customer incentives to friends who had not earned them. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 20 September 2003, DOHA issued a Statement of Reasons (SOR), under the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ detailing the basis for its decision-security concerns raised under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 21 October 2002 and elected to have a hearing before an administrative judge. The case was originally assigned to Administrative Judge Roger Willmeth on 6 January 2003, but was transferred to me on 7 January 2003 to consolidate cases in the same city. On 21 February 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the transcript of the proceeding (1Tr.) on 3 March 2003.

On 25 March 2003, I issued a decision denying Applicant a clearance. I concluded Applicant had sufficiently mitigated the security concerns resulting from her drug involvement, but not those resulting from her personal conduct. On 28 March 2003, Applicant filed a notice of appeal with the Appeal Board. In her appeal, Applicant claimed she had received insufficient notice of her hearing to properly prepare. Of course, Applicant never raised this issue to the administrative judge nor asked him for additional time to prepare. Nevertheless, the Chief Department Counsel declined to brief the issue or contest Applicant's appeal and, on 7 August 2003, the Appeal Board remanded the case for a new hearing.

A Notice of Hearing was issued on 27 August 2003 and the new hearing was held on 23 September 2003. The transcript

of the proceedings (2Tr.) was received by DOHA on 2 October 2003.

The parties stipulated that the transcript from the first hearing, as well as all exhibits admitted during that hearing, would be adopted by reference into the second hearing. (2Tr. 7).

FINDINGS OF FACT

Applicant, a 36-year-old security assistant for a defense contractor has a history of drug abuse. Ex. 1. After graduation from high school, Applicant worked as a server in various restaurants. In April 2000, she was terminated from employment at one restaurant for crediting frequent-diner points to three friends who did not earn them. Diners redeemed the points for gift certificates for use in the restaurant. Applicant did this approximately 24 times, issuing unearned points valued at between \$200-\$300. Ex. 2 at 2; 1Tr. 63-64. After her termination, Applicant moved to a different restaurant, where she continues to work part-time. Ex. 1.

During her employment in the restaurant industry, Applicant used cocaine with friends from 1986-87 and from 1997-99. Answer at 2. During those periods, she often contributed money to help offset the cost of the cocaine. Answer at 3. Applicant used marijuana from 1986-1989 and from 1996-2001. Answer at 4. She last used marijuana in early 2001 at a Super Bowl party when she took one puff of a marijuana cigarette. She contributed money to her friends to pay for her share of the marijuana. Answer at 5. Applicant also smoked "greens" once, a substance she later learned may have contained PCP (Phencyclidine). 1Tr. 67; Ex. 2 at 3.

In December 2000, Applicant was hired by a defense contractor as a part-time receptionist. In October 2001, Applicant started assisting in the processing of security clearance applications and, due to her excellent performance, became a full-time security assistant in March 2002. Ex. 1; 1Tr. 56. As a result of her promotion, Applicant was required to apply for a security clearance.

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. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

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." Exec. Or. 10865 § 2. *See* Exec. Or. 12968 § 3.1(b).

Initially, the Government must establish, by substantial 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. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his

security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "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* Exec. Or. 12968 § 3.1(b).

CONCLUSIONS

Guideline H-Drug Involvement

Under Guideline H, the improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. Directive ¶ E2.A8.1.1.1. The following applicable conditions in this case could raise a security concern:

- (1) Any drug abuse. Directive ¶ E2.A8.1.2.1.
- (2) Illegal drug possession, including purchasing drugs. Directive ¶ E2.A8.1.2.2.

Mitigating conditions that may apply in this case are as follows:

- (1) The drug involvement was not recent. Directive ¶ E2.A8.1.3.1.
- (2) A demonstrated intent not to abuse any drugs in the future. Directive ¶ E2.A8.1.3.3.

Through Applicant's own admissions, the Government established a prima facie case that Applicant used cocaine, marijuana, and PCP. The evidence that Applicant purchased drugs is more problematic. Although Applicant admits to contributing funds for the purchase of drugs, it is doubtful such participation is any more egregious than simply using drugs supplied without charge. Regardless, Applicant's drug involvement was not recent, the latest incident being two years before the initial hearing. Applicant has declared her intention not to use drugs in the future. Answer at 3-5; 1Tr. 72. After carefully listening to her statement and observing her demeanor, I find her renunciation of drugs to be credible. Finding is for Applicant.

Guideline E-Personal Conduct

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. Directive ¶ E2.A5.1.1. The following applicable condition in this case could raise a security concern: A pattern of dishonesty or rule violations. Directive ¶ E2.A5.1.2.5. By taking responsibility for her actions, Applicant took positive steps to reduce her vulnerability to exploitation. Directive ¶ E2.A5.1.3.5.

Through Applicant's own admissions, the Government has established a prima facie case that Applicant engaged in conduct involving questionable judgment and untrustworthiness by crediting frequent dining points to friends who had not earned them. This was not a one time error in judgment committed on the spur of the moment by a young and inexperienced woman. Applicant directed these unearned benefits to her friends approximately 24 times. She was 33 years old and knew the rules. She had opportunity between these incidents to reflect on her misconduct. Nevertheless, she repeatedly failed to conform her conduct to her employer's rules and regulations. During the remand hearing, Applicant and her witnesses tried to suggest that the company did not lose any money as a result of Applicant's actions because this type of promotional giveaways it helps bring in more guests who will spend more dollars. But, there is no evidence to suggest Applicant's friends spent more in the restaurant because of these promotional giveaways. Common sense suggests otherwise. Furthermore, the gravamen of Applicant's offense is that she refused to follow the companies policies. That is why her employment was terminated and why her actions are a security concern. Denial of a security clearance is appropriate when an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 99-0123, 2000 DOHA LEXIS 8 at *8 (App. Bd. 2000). Based on the record in this case, Applicant failed to demonstrate the required degree of judgment and trustworthiness. The finding is against Applicant.

FORMAL FINDINGS

Conclusions as to each of the allegations in the SOR as required by Executive Order No. 10865 § 3, ¶ 7 and the Directive ¶ E3.1.25, are as follows:

Paragraph 1. Guideline H: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against 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 continue a security clearance for Applicant. Clearance is denied.

James A. Young

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.