

DATE: October 10, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-32380

## **DECISION OF ADMINISTRATIVE JUDGE**

**WILFORD H. ROSS**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jennifer I. Campbell, Esquire, Department Counsel

#### **FOR APPLICANT**

John A. Crawford, Jr., Esquire

### **SYNOPSIS**

The Applicant was arrested and convicted for Petty Theft in 1994 and Theft from her employer in 1997. She was also detained after an alcohol-involved traffic accident in 1996. There has been no criminal activity in the six years since the last arrest. Compelling mitigating evidence has been submitted showing that the Applicant is now a mature and responsible person who is eligible for a security clearance. Adverse inference is overcome. Clearance is granted.

### **STATEMENT OF THE CASE**

On February 12, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on February 28, 2003, and requested a hearing. The case was transferred to the undersigned on June 25, 2003. Notices of Hearing were issued by the original Judge on June 2 and June 6, 2003.

A hearing was held on June 26, 2003, at which the Government presented seven documentary exhibits. Testimony was taken from the Applicant, who called two additional witnesses and also submitted seven hearing exhibits. The Applicant also submitted two post-hearing exhibits. Applicant's Exhibit H consists of an Order Dismissing Accusation Against Probationer regarding SOR allegation 1.c. Applicant's Exhibit I consists of an Order Dismissing Accusation Against Probationer regarding SOR allegation 1.a. The transcript was received on July 11, 2003.

### **RULINGS ON PROCEDURE**

Subparagraphs 1.b. and 1.c. of the SOR were amended at the hearing to conform to the evidence.

SOR subparagraph 1.b. was amended to read, "You were detained on May 14, 1996, in [City One], for driving with a blood alcohol content of .05% as a minor."

SOR subparagraph 1.c. was amended to read, "You were arrested on May 29, 1997, in [County Two], and charged with (1) Grand Theft by Employee, a felony violation of [the State] Penal Code Section 487(b)(3) and (2) Fraudulent Appropriation by Clerk, Agent or Employee, a felony violation of [the State] Penal Code Section 508. You pleaded guilty to a misdemeanor and were sentenced to one day confinement, fined a total of \$150.00 and placed on three years summary probation."

### **FINDINGS OF FACT**

The Applicant is 27, single and has an Associate in Science degree. She is employed by a defense contractor as a Computer Technician/Specialist and Assistant Help Desk Manager, and she seeks to obtain a Secret-level DoD security clearance in connection with her employment in the defense sector.

The Government opposes the Applicant's request for a security clearance, based upon the allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR. They are based on the Applicant's Answer to the SOR, the exhibits and the live testimony.

Paragraph 1 (Guideline J - Criminal conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because she has engaged in criminal acts.

The record shows that, between the ages of 18 and 21, the Applicant engaged in misdemeanor criminal activity.

In August 1994, the Applicant was 18. She and her then boyfriend went into a store, where the boyfriend decided to shoplift an article of clothing. He asked the Applicant for a shopping bag that she had obtained from another store. Knowing what her boyfriend was going to do, the Applicant gave him the bag. After shoplifting the article of clothing, the boyfriend was stopped by store security. While not detained herself, the Applicant did receive a citation for Petty Theft. She plead guilty, was placed on two years summary probation and fined. (Government Exhibit 3 at 3-5, Government Exhibit 4 at 2 and Applicant's Exhibit A.) The Applicant had her record cleared of this charge on July 22, 2003. (Applicant's Exhibits G and I.)

Two years later, the Applicant had been drinking at a party in May 1996. She fell asleep while driving home and was involved in an automobile accident. She was 20 at the time, which was underage. Her blood alcohol level was .05, which was below the legal limit. The Applicant was detained by the Highway Patrol. However, she was not arrested and no charges resulted from this incident. (Government Exhibit 6 at 4.)

The Applicant began working for a restaurant in early 1997. She learned from co-workers how to short change her employer and pocket the difference. The Applicant began doing this and stole an amount of several hundred dollars from her employer before being caught in May 1997. She revealed her part in the scheme and was prosecuted. In July 1997 she plead guilty to a misdemeanor charge of Theft and was sentenced to three years summary probation and fined. (Government Exhibit 3 at 1-2, Government Exhibit 4 at 1 and Applicant's Exhibit B.) She successfully completed her probation in 2000. The Applicant had her record cleared of this charge on July 18, 2003. (Applicant's Exhibits F and H.)

### **Mitigation.**

In the six years since her last criminal activity, the Applicant has turned her life around. She began school in 1999 and graduated with an Associate in Science degree in 2002 (Applicant's Exhibit E.) During this same period she began working with her defense contractor employer. Many of her supervisors and co-workers wrote glowing letters on her behalf. They are contained in Applicant's Exhibit C. One of her supervisors describes her as a "forthright, reliable and extremely [conscientious] employee." (Applicant's Exhibit C at 3.) Other co-workers describe her as having "integrity," being a "professional," and as someone who displays "exceptional learning ability as well as strong leadership instincts."

Members of the Applicant's family, and friends of the family, also submitted letters on behalf of the Applicant

(Applicant's Exhibit D). These letters speak to how the Applicant has matured and grown in the last several years. In addition, the Applicant's step-father testified. He is a civilian employee of the Navy and has a security clearance himself. He stated that the Applicant has underwent, "An incredible change. A young, impressionable young lady, young teenager, searching for herself, nor really sure where she was going or what she wanted to do. I saw her go through some periods of some very rough times. I saw her grow and just really continue to demonstrate, I guess on a daily basis, you know, how much her life and what she was doing means to her and means to her family, to her mother, her father, to me and all of her friends." (Transcript at 57-58.)

The Applicant's direct supervisor, a retired Marine counter-intelligence officer, testified at length about the Applicant. His testimony concerning the Applicant was extensive, and laudatory. (Transcript at 65-66.) He stated that the Applicant has always been forthcoming with her employers about her past and has never attempted to conceal it. (Transcript at 69.) The manager went on to testify, "I have never had an instance to question her truthfulness or her honesty." (*Ibid.*) This person goes on to state how the Applicant is a stickler for rules and regulations, making sure that everyone does everything they are supposed to do with regards to the job. According to the witness, the Applicant is trustworthy, reliable and has a reputation for honesty. This man supervises 80 people and the Applicant is in the top five percent. (Transcript at 75-76.)

The Applicant testified at length about her past. She was open, frank, honest and credible. In particular, the Applicant stated that the last incident in 1997 forced her to look at herself, at her morals, and change the path of her life. Her personal life today is under control. She owns her own home and has a good job which she enjoys and is good at. Her family, co-workers and supervisors respect her and are proud of her. The Applicant took complete responsibility for her past actions and did not attempt to minimize or excuse them. She states, "I do have a past and I have to admit it, so I do tell them [her employers] about it. I don't like it to be something that they judge me on though." (Transcript at 54-55.)

## POLICIES

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive, has set forth policy factors which must be given "binding" consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guideline. However, the factors are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on his own common sense, as well as his knowledge of the law, human nature and the ways of the world, in making a reasoned decision. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

### Guideline J (Criminal conduct)

#### Conditions that could raise a security concern:

- (1) Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
- (2) A single serious crime or multiple lesser offenses.

#### Conditions that could mitigate security concerns:

- (1) the criminal behavior was not recent;
- (6) there is clear evidence of successful rehabilitation.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, "In evaluating the relevance of an individual's conduct, the [Administrative Judge] should consider the following factors [General Factors]:

- a. The nature, extent and seriousness of the conduct
- b. The circumstances surrounding the conduct, to include knowledgeable participation

- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence."

The eligibility guidelines established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an Applicant for clearance may be involved in multiple criminal acts that demonstrates poor judgement, untrustworthiness or unreliability on the Applicant's part.

The DoD Directive states, "Each adjudication is to be an overall common sense determination based upon consideration and assessment of all available information, both favorable and unfavorable, with particular emphasis placed on the seriousness, recency, frequency, and motivation for the individual's conduct; the extent to which conduct was negligent, willful, voluntary, or undertaken with the knowledge of the circumstances or consequences involved; and, to the extent that it can be estimated, the probability that conduct will or will not continue in the future." The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order...shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

### **CONCLUSIONS**

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the granting of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has been involved in several criminal acts during the 1990s (Guideline J.)

The Applicant, on the other hand, has successfully mitigated the Government's case. The evidence shows that, since 1997, the Applicant has not been involved in any criminal activity. It is obvious that she went through several years where her judgment was not very good. She admits that fact. However, after her second arrest in 1997, she took a good hard look at her life and decided it was time to change. She could just as easily continued down the path of petty crime and be looking at a life without a future.

In addition to the six year time span since her last criminal act, there is overwhelming evidence of rehabilitation. She has moved forward with her education, obtained a good job, bought a home and become a successful member of society. Her family is proud of her, and that is good. Her employer trusts her, and that is better. Applicant's Exhibit C contains the letters of many co-workers stating what an asset to the company and country the Applicant is. The live

testimony of her supervisor, a retired Marine counter-intelligence officer, was compelling. This man went out of his way to testify about what an outstanding employee and person the Applicant is. The Applicant presented herself as an able, articulate and responsible young woman who has learned from her mistakes and is determined not to repeat them.

The General Factors also support a finding for the Applicant in this case. The conduct was not recent, occurring six years ago (Factor c); the Applicant was, by her own admission, young and immature at the time of the incidents (Factor d); there is considerable credible evidence of rehabilitation and other pertinent behavioral changes as described above (Factor f); there is no potential for pressure, coercion, exploitation or duress (Factor h); and, finally, there is virtually no likelihood of recurrence (Factor i).

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing her request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

### **FORMAL FINDINGS**

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive, are:

Paragraph 1: For the Applicant.

Subparagraphs 1.a. through 1.c.: 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.

Wilford H. Ross

Administrative Judge