

DATE: June 8, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-33547

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Marc Curry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Fifty-three-year old Applicant's May 1984 arrest--when she was 33-years-old--for possession of four grams of methamphetamine resulted in a conviction and eventual sentence to prison for a term of not less than two months and 15 days nor more than one year and 11 months. It was her second drug-related arrest in two months. She has a spotless record since May 1984, and is considered rehabilitated. However, 10 U.S.C. § 986 disqualifies her from eligibility for a security clearance. Clearance is denied. Further consideration of this case for a waiver of 10 U.S.C. § 986 is not recommended.

STATEMENT OF THE CASE

On September 16, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to 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 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 a clearance should be granted, continued, denied, or revoked.

In a sworn, written answer, dated October 10, 2003, Applicant responded to the SOR allegations, and requested a hearing. The case was assigned to me on May 11, 2004. A notice of hearing was issued on May 12, 2004, scheduling the hearing for May 27, 2004. It was held as scheduled. During the hearing, two government exhibits, six Applicant exhibits, and the testimony of one Applicant witness (the Applicant), were received. The transcript (Tr.) was received on June 7, 2004.

FINDINGS OF FACT

Applicant has admitted the factual allegations (subparagraph 1.a.) pertaining to criminal conduct under Guideline J.

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 same, I make the following additional findings of fact:

Applicant is a 53-year-old employee of a defense contractor, and is seeking to obtain a security clearance the level of which was not revealed. She previously had been granted an interim security clearance but it was rescinded about six months ago.

Applicant was a poly-substance abuser who started out using marijuana in the 1970s and methamphetamine thereafter. She became a regular methamphetamine abuser,⁽¹⁾ and, 20 years ago, was involved in two separate criminal incidents. In March 1984, when she was 33-years-old, Applicant was sitting in a parked car with a friend preparing a "line" of methamphetamine when she was observed by the police and arrested.⁽²⁾ A search incident to arrest revealed about one gram of the illegal substance in her purse.⁽³⁾ She was charged with possession of methamphetamine, and upon her plea, found guilty.⁽⁴⁾ She was sentenced to pay an unspecified fine and to attend substance abuse counseling.⁽⁵⁾ She attended the one counseling session ordered by the court, but kept abusing methamphetamine without any period of abstinence.⁽⁶⁾

Two months later, in May 1984, Applicant was at a friend's residence when it was raided by the police.⁽⁷⁾ A search revealed about four grams of methamphetamine in her purse⁽⁸⁾ as well as 19 bags of methamphetamine in the house.⁽⁹⁾ She was charged with three counts of violating the Controlled Substance, Drug, Device, and Cosmetic Act.⁽¹⁰⁾ Various legal maneuvering resulted in two of the charges being withdrawn, and the third charge being quashed and dismissed.⁽¹¹⁾ Two of the three charges were subsequently reinstated, and in August 1985, one charge was again dismissed.⁽¹²⁾ Applicant pled guilty to the remaining charge and was sentenced to imprisonment for a term of not less than two months and 15 days nor more than one year and 11 months, along with fines and costs.⁽¹³⁾ She actually served only two months and 15 days in jail, all in work release.⁽¹⁴⁾

Applicant was married for the first time in 1968.⁽¹⁵⁾ That marriage produced two children. She and her husband separated in 1981,⁽¹⁶⁾ and eventually were divorced in December 1985.⁽¹⁷⁾ She married her current husband in 1989.⁽¹⁸⁾

Applicant has been drug free since her May 1984 arrest--20 years ago.⁽¹⁹⁾ She continues to see most of her old friends--most of whom were substance abusers like her. However, they too have all matured and abstained for a similar period.⁽²⁰⁾

Applicant has been employed by the same government contractor since November 2001 where she now serves as a senior quality inspector.⁽²¹⁾ Previously, she held a similar position with another government contractor from March 1990 until October 2001. Supervisors and coworkers strongly support her application and have characterized her work performance in glowing terms. She is described as dependable, conscientious, and organized.⁽²²⁾ The quality of her performance has been rated as primarily excellent with some areas rated as fully successful.⁽²³⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set

forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Criminal Conduct - Guideline J: 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, as well as those which could mitigate security concerns, pertaining to this adjudicative guideline are set forth and discussed in the conclusions below.

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 for Fiscal Year 2001*. The memorandum provides policy guidance for the implementation of Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Title 10, United States Code, to add a new 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 above involves one of those specific circumstances.

The statutory mandate applies to any DoD officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or Marine Corps on active duty or in an active status, who is under consideration for the issuance or continuation of eligibility for access to classified information and who falls under one or more of the following provisions of the statute:

- (1) has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year;
- (2) is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802));
- (3) is mentally incompetent, as determined by a mental health professional approved by the Department of Defense; or
- (4) has been discharged or dismissed from the Armed Forces under dishonorable conditions.

The statute also "provides that the Secretary of Defense and the Secretary of the Military Departments concerned may authorize a waiver of the prohibitions concerning convictions, dismissals and dishonorable discharges from the armed forces in meritorious cases."

Implementing guidance attached to the memorandum indicates that provision 1, described above, "disqualifies persons with convictions in both State and Federal courts, including UCMJ offenses, with sentences imposed of *more than* one year, regardless of the amount of time actually served."

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national security," [\(24\)](#) or "clearly consistent with the national interest." For the purposes herein, despite the different language in

each, I have concluded both standards are one and the same. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegation set forth in the SOR:

The government has established its case under Guideline J. ⁽²⁵⁾ By her own admission, Applicant was involved in criminal behavior in May 1984 that resulted in her arrest and conviction. As a result, she was sentenced to no less than two months and 15 days to no more than one year and 11 months imprisonment. Two months earlier, in March 1984, she was also involved in other similar criminal behavior which resulted in a fine and court-ordered attendance at a counseling session. Applicant's criminal conduct clearly falls within Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*), CC DC E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*), and CC DC E2.A10.1.2.3. (*conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year*).

It has been 20 years since that major conviction and sentence. The May 1984 criminal conduct for which Applicant was convicted is not considered recent. Further, Applicant has not been involved in any additional more recent criminal conduct, has apparently turned her life around, and has avoided further criminal endeavors. These facts support the application of Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1. (*the criminal behavior was not recent*).

Moreover, by virtue of her spotless record since May 1984, there is substantial evidence of successful rehabilitation, thus activating CC MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). However, while there was only one significant conviction on one of the criminal counts, Applicant's earlier similar criminal conduct occurred just two months earlier, and I cannot find that it was isolated as set forth in CC MC E2.A10.1.3.2. (*the crime was an isolated incident*).

A person should not be held forever accountable for misconduct from the past when there is a substantial indication of subsequent reform, remorse, or rehabilitation. In this instance, as it pertains to her marijuana abuse in the 1970s or the March 1984 criminal conduct, neither of which was alleged in the SOR, no finding as to "uncharged conduct" is necessary. As it pertains to the May 1984 criminal conduct, under other circumstances, I might conclude Applicant had, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case, and the allegation of the SOR would be concluded in favor of Applicant.

However, Applicant's May 1984 criminal conduct also falls within 10 U.S.C. § 986. She was convicted in a state court of a crime and sentenced to imprisonment for a term of not less than two months and 15 days nor more than one year and 11 months—a term which obviously exceeds the one year period envisioned in the law. Furthermore, as noted above, the implementing guidance attached to the memorandum indicates such a sentence would disqualify persons with "sentences imposed of *more than* one year, regardless of the amount of time actually served." In this instance, Applicant was fortunate enough to have her prison term reduced to two months and 15 days, all in work release, rather

than actually served, but that fact does not help her in this issue. Consequently, by virtue of 10 U.S.C. § 986, I conclude Applicant is not eligible for a security clearance. Accordingly, allegations 1.a. and 1.b. of the SOR, are concluded against Applicant.

In this instance, I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the 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 a security clearance for Applicant. Moreover, I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986. Clearance is denied.

Robert Robinson Gales

Chief Administrative Judge

1. Tr., at 20-21.
2. Tr., at 33-34.
3. Tr., at 35.
4. Tr., at 36; Government Exhibit 1 (Security Clearance Application, dated May 23, 2002), at 6.
5. Tr., at 37.
6. Tr., at 37.
7. Tr., at 19.
8. Tr., at 20.
9. Tr., at 19.
10. Government Exhibit 2 (State Police Criminal History Record, dated October 17, 2002).
11. *Id.*
12. *Id.*
13. *Id.*
14. Tr., at 27.

15. Government Exhibit 2, *supra* note 10, at 3.
16. Tr., at 20.
17. Government Exhibit 2, *supra* note 10, at 3.
18. *Id.*, at 2.
19. Tr., at 28.
20. Tr., at 30-31.
21. Government Exhibit 1, *supra* note 4, at 1.
22. Applicant Exhibit D (Letter from a company quality manager, dated November 19, 2003); Applicant Exhibit E (Letter from a company quality supervisor, dated February 18, 2004); Applicant Exhibit F (Letter from co-worker, dated December 4, 2003).
23. Applicant Exhibit C (Performance Assessment Review, Review Period Calendar Year 2003, undated and unsigned).
24. Exec. Or. 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.)
25. Other than admissions made by Applicant in her Security Clearance Application and her Response to SOR, the government's entire case rests on limited information appearing in a somewhat cryptic state police criminal history record--a document which is unsigned and unverified. It lacks any indicia of reliability. Nevertheless, Applicant has not objected to the document.