

KEYWORD: Criminal Conduct

DIGEST: Applicant, a 40-year-old employee of a federal contractor, admitted to criminal activity occurring mostly in 1994. Mitigating factors included extreme emotional pressures because of the illness and death of her grandmother (and adoptive mother). There were continuing family illnesses and deaths. As the conduct was not recent and because Applicant has established an exemplary work record over the past three years, she has demonstrated rehabilitation and therefore, successfully mitigated the security concerns over her criminal conduct. Clearance is granted.

CASENO: 03-16801.h1

DATE: 03/31/2006

DATE: March 31, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-16801

**DECISION OF ADMINISTRATIVE JUDGE**

**CHRISTOPHER GRAHAM**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant, a 40-year-old employee of a federal contractor, admitted to criminal activity occurring mostly in 1994. Mitigating factors included extreme emotional pressures because of the illness and death of her grandmother (and adoptive mother). There were continuing family illnesses and deaths. As the conduct was not recent and because Applicant has established an exemplary work record over the past three years, she has demonstrated rehabilitation and therefore, successfully mitigated the security concerns over her criminal conduct. Clearance is granted.

**STATEMENT OF THE CASE**

On November 9, 2004, 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 alleged facts under Guideline J (criminal conduct) 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 Applicant's security clearance, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied or revoked.

In a sworn written statement, dated December 27, 2004, Applicant responded to the allegations in the SOR, and requested a decision without a hearing. Department Counsel submitted a file of relevant material (FORM) in support of the Government's preliminary decision, a copy of which was received by Applicant on March 7, 2005. Applicant was afforded the opportunity to file objections and submit material in refutation, extenuation, or mitigation by April 6, 2005. Applicant responded by submitting a two-page letter, dated April 13, 2005, with two letters of recommendation attached. The case was assigned to me on May 12, 2005.

## FINDINGS OF FACT

Applicant has admitted to all four of the SOR allegations pertaining to criminal conduct under Guideline J (subparagraphs 1.a. through 1.d.) Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact:

Applicant is a divorced 40-year-old employee of a federal contractor seeking to obtain a security clearance.<sup>(1)</sup> She was employed by this contractor in August 2002.<sup>(2)</sup> She has a history of criminal conduct as follows:

Date of offense	Charge(s)	Sentence
April 1, 1994	Shoplifting	60 days SES <sup>(3)</sup> , \$200.00 fine, attend theft prevention program, and 6 months probation <sup>(4)</sup>
August 24, 1994 <sup>(5)</sup>	Rx forgery (felony)	Deferred prosecution; dismissed 12/21/1995
December 16, 1994 <sup>(6)</sup>	Shoplifting	60 days SES, \$300.00 fine, 6 months probation, and theft prevention classes
September 7, 1999 <sup>(7)</sup>	Retail theft	30 days SES, \$140.00 fine, 12 months supervised probation, 24 hours community service, and theft prevention classes at New Horizon <sup>(8)</sup>

The 1994 shoplifting offenses occurred more than 7 years prior to the signing of her security clearance application and are not required to be reported on the SF 86. The 1999 theft conviction and the forged prescription charges in 1994 were disclosed on her SF 86.<sup>(9)</sup>

In her response to the SOR she gave the following history. Applicant's mother died when Applicant was 12 years old. Applicant lived with her grandmother from the age of 2, who adopted her when her mother died. She had no contact with her father who is deceased. Beginning in the early 1990s, Applicant's grandmother was diagnosed with cancer. Applicant moved her into her home to care for her. Her grandmother fought the disease for a number of five years with surgery, chemotherapy and radiation therapy, and finally died in 1997. During this time, Applicant was raising a young child, working full-time, and caring for her grandmother. She became stressed and suffered from migraine headaches. She sought medical assistance and became dependent on anti-depressants, Valium, and pain medication. Her doctor was over prescribing her medications and he was later disciplined by state authorities. During the late 1990s her partner's sister developed a brain tumor, and she helped care for her three children. The sister died in 2000, and one month later, one of the deceased sister's daughters died from a blood clot at age 15. In the past few years, Applicant has recovered from her periods of depression and grief, and for the past three years she has been an exemplary employee.<sup>(10)</sup>

One of Applicant's supervisors stated: "Applicant has overcome many obstacles through her ingenuity, determination, and excellent attitude."<sup>(11)</sup>

## **POLICIES**

"[No] one has a 'right' to a security clearance."<sup>(12)</sup> 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."<sup>(13)</sup> 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 coercion, and willingness and ability to abide by regulations governing use, handling, and protection of classified information."<sup>(14)</sup> Eligibility for a security clearance may be adjudicated using the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative factors listed in ¶ 6.3 of the Directive: nature and seriousness of the conduct and surrounding circumstances; frequency and recency of the conduct; age of the Applicant; motivation of the applicant, and the extent to which the conduct was negligent, wilful, voluntary, or undertaken with knowledge of the consequences involved; absence or presence of rehabilitation; and probability that the circumstances or conduct will continue or recur in the future.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information.<sup>(15)</sup> The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability.<sup>(16)</sup>

Once the Government establishes a disqualifying condition, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts.<sup>(17)</sup> An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."<sup>(18)</sup> A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. The Government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or his own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the

Government.<sup>(19)</sup> 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 degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security 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.

Having considered the SOR allegations and having reviewed the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are those conditions listed under Guideline J (criminal conduct), Directive, ¶ E2.A10.1.1. *A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.*

## 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 each allegation set forth in the SOR:

The Government has established its case under Guideline J. Applicant admitted the three convictions listed in the SOR, and the facts of the deferred prosecution case. Directive ¶ E2.A10.1.2.1. *Allegations or admissions of criminal conduct, regardless whether the person was formally charged* applies.

The criminal conduct mitigating conditions include Directive ¶ E2.A10.1.3.1. *(The criminal behavior was not recent.)* Three of the incidents are nearly 12 years old. The other is 6 years old. The criminal conduct is not recent. A derivative of Directive ¶ E2.A10.1.3.3. *(The pressures causing the acts are no longer present in that person's life)* also applies. It is an extremely emotional experience to care for and watch the only person that provided love and support die, while trying to care for one's own child and work full time. These factors coupled with drug dependency for depression provides a rational explanation for Applicant's conduct. The impact of the dependency issues is lessened by the fact her physician was over prescribing her medication. Those pressures are no longer in Applicant's life as they were confined to the period of approximately 1992 through 2000 to 2001. Another mitigating condition to consider is Directive ¶ E2.A10.1.3.6. *(There is clear evidence of rehabilitation.)* Applicant's supervisor has indicated that she has overcome her past problems and is a valued employee. Applicant has demonstrated great determination in moving ahead with her life.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guideline. I have also considered the whole person concept as contemplated by the Directive in ¶ 6.3. A fair and commonsense assessment of the positive information about Applicant's history, her truthfulness, her mitigating circumstances, and her determination to overcome her obstacles do not raise reasonable doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. I reach this conclusion because the mitigating conditions outweigh the disqualifying conditions as they are more recent in time and Applicant is demonstrating an ability to cope with her surroundings in an appropriate manner. I conclude the record evidence shows Applicant has successfully mitigated the information supporting the government's decision, and she should be granted access to classified information.

## **FORMAL FINDINGS**

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

Paragraph 1. Guideline J: 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

## **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 Applicant's security clearance. Clearance is granted.

**Christopher Graham**

**Administrative Judge**

1. Item 4 (*Applicant's Application for National Security Clearance SF86 November 21, 2002*) at 1-3.
2. *Id.* at 1.
3. SES = suspended execution of sentence.
4. Items 11, 14, and 15, Applicant's criminal history record.
5. Items 6 and 10, Applicant's criminal history record.
6. Items 7, 12, and 13, Applicant's criminal history record.
7. Items 8 and 9, Applicant's criminal history record.
8. New Horizons Certificate of Completion, dated November 13, 1999.
9. *Id.* at 5-6.
10. Item 3, Applicant's Response to the SOR, dated December 27, 2004, at 1-2.
11. Letter of Recommendation, dated April 10, 2005, attached to Applicant's Reply to the FORM.
12. See *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1998).
13. *Id.*, at 527.
14. Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995).
15. *Egan, supra*, at 531.
16. See *ISCR Case No. 95-0611* at 2 (App. Bd. May 2, 1996).
17. See *ISCR Case No. 01-20700* at 3 (App. Bd. Dec. 19, 2002).
18. *Id.*, at 3.
19. See *Egan*; Directive ¶ E2.2.2.