

DATE: June 10, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-26867

## **DECISION OF ADMINISTRATIVE JUDGE**

**CAROL G. RICCIARDELLO**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Rita O'Brien, Esq., Department Counsel

#### **FOR APPLICANT**

Joseph Johnson, Esq.

### **SYNOPSIS**

Applicant is a 52-year-old over-the-road truck driver. She has worked for a federal contractor since 2003. Applicant held a security clearance for 5 years while in the Air Force and later as a civilian. Applicant was arrested in March 2002, for failure to obey a peace officer, resisting arrest and disturbing the peace. Applicant pleaded guilty and her case was held in abeyance for 12 months, and was later dismissed. Applicant was advised by her attorney she did not have to report the incident, because it was not on her record. Applicant voluntarily provided the information during her interview with the Defense Security Service. Applicant's arrest was an isolated incident and she is successfully rehabilitated. Applicant has mitigated the security concerns regarding her criminal and personal conduct. Clearance is granted.

### **STATEMENT OF CASE**

On November 19, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct.

In a sworn statement, dated December 9, 2004, Applicant responded to the SOR allegations, and requested a hearing. In her SOR response, Applicant admitted the allegations in subparagraphs 1.a. and 2.a. contained in the SOR, and denied the allegations in subparagraphs 1.b. and 2.b.

The case was assigned to me on March 22, 2005. A notice of hearing was issued on April 1, 2005, scheduling the hearing for May 11, 2005. The hearing was conducted as scheduled. The government submitted seven exhibits that were marked as Government Exhibits (GE) 1-7, and were admitted into the record without objection. The Applicant testified on her own behalf, and had two witnesses testify for her. Applicant submitted two exhibits that were marked as Applicant's Exhibit (AE) A-B, and were admitted into the record without objection. The transcript was received on June 9, 2005

## **FINDINGS OF FACT**

Applicant's admissions to the allegations in the SOR, are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 52 years old, married and has two grown children. Applicant is an over-the-road truck driver and has worked for a federal contractor since 2003. Applicant has been a truck driver for 6 years. Applicant served five and a half years in the Air Force upon graduating from high school. While in the Air Force Applicant held a secret and later a top secret security clearance. She was honorably discharged at the rank of Sergeant (E-4). Applicant attended college and received three associate's degrees which at her school equated to a bachelor's degree. After college she worked at an Air Force base and held a secret security clearance for approximately five years.

Applicant was arrested on March 7, 2002, in State A and charged with (1) Failure to obey a Peace Officer, (2) Resisting Arrest, and (3) Disorderly Conduct. Applicant pleaded guilty to all charges in exchange for the pleas being held in abeyance for 12 months, was sentenced to pay \$925.00 in administrative fees, and was ordered to obtain a psychological evaluation.

Prior to Applicant's March 7, 2002 arrest, she had been hauling truck loads for Company A. The loads contained flour and were over the weight limit, thereby requiring special permits which Applicant had obtained. Applicant worked with her husband as a team, and they alternated driving the load. They hauled these loads three times a day, five days a week and went through the same weigh station on each load. They hauled these loads for an extended period of time.

Applicant was driving by herself on March 7, 2002, because her husband was transporting their personal vehicle to a new location, so he was driving the vehicle separately. During one 8 hour shift, at one specific weigh station Applicant and her husband would encounter one weigh officer who would harass the drivers. Sometimes he would wait until the drivers were leaving the weigh station before stopping them, thus requiring them to back their rigs up, which was quite difficult in the limited space and lining it up with the scales. Other times he would look to find minor discrepancies and generally had arrogant and abusive tendencies.

Applicant felt harassed by this officer and on the occasion of March 7, 2002, defied his order. Applicant was later stopped by a police officer for leaving the weigh station and not following the weigh officer's order. Because of previously reported incidents of female truck drivers being pulled over by lone male police officers and being told they would be ticketed if they did not have sex with the officer, Applicant was apprehensive about exiting her vehicle. Applicant's refusal resulted in an altercation with the police whereby she was arrested. Applicant was on medication at the time for depression and medical problems she was experiencing while going through menopause.

With the advice of counsel, Applicant pleaded guilty to the charges and the pleas were held in abeyance for 12 months. The terms of the guilty plea agreement were if Applicant did not get in any trouble for 12 months the charges would be dismissed and would not be listed on her record. Applicant's attorney specifically advised her that she would not have to disclose the arrest at anytime due to the agreement. Applicant did not serve any jail time, but did pay a fine. She was also order to obtain a psychological exam. It was concluded that at the time of the incident Applicant was being over-medicated for her depression and menopause issues. The problem was corrected by taking her off the medication. Applicant claims that the over-medication caused her to have excessive rage. Applicant's abeyance date started on May 30, 2002. Applicant's charges had not yet been dismissed when she filled out the SF 86 in August 2002. Applicant completed the 12 month abeyance without incident and the charges were dismissed.

Applicant was terminated by her employer for the March 7, 2002 incident. Applicant was hired by another truck company and completed her security clearance questionnaire (SF 86) on August 2, 2002. Applicant left that company before her security clearance was adjudicated and the SF 86 was transferred to her new and current company.

Question 23 on the SF 86 states: *Your police record, For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S. C. 3607.* Paragraph f of Question 23 states: *In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e above:(Leave out*

*traffic fines of less than \$150 unless the violation was alcohol or drug related.*)? Applicant listed a citation for Failure to license her dog, but failed to list the March 7, 2002 arrest and incident.

Applicant did not disclose this incident because her criminal defense attorney told her she did not have to. However, when interviewed by an agent with Defense Security Service, on November 27, 2002, Applicant admitted the incident prior to be questioned about it from the agent. Applicant listed on her SF 86 that she was terminated from her employment due to a "misunderstanding" with her employer. Applicant clarified that to mean that her employer terminated her five days after her arrest and prior to having the whole report. Her employment was terminated over the telephone and there was no follow-up written documentation.

In Applicant's answer to the SOR she verified that she failed to provide the information about her arrest due to an oversight. At the hearing, she claimed the reason was because her criminal defense attorney told her she did not have to disclose the offense at anytime, due to the case being in abeyance. Applicant had asked her criminal defense attorney if she would be permitted to drive a rig to Canada, while her case was in abeyance and was advised because the case was not part of her record she would be able to go to Canada. Applicant did drive to Canada, and when crossing the border, her record did not reflect her arrest. Prior to her hearing, Applicant attempted to contact her criminal defense attorney to corroborate her position, but he failed to return her telephone calls.

Applicant credibly testified that on the advice of her current attorney, in providing answers to the SOR, she merely signed a form that was prepared for her by her attorney that said the reason she failed to list her arrest on the SF 86 was due to an "oversight." This document and the language used in it was prepared by Applicant's attorney in contemplation of her hearing. Applicant was following her attorney's advice when she signed this form.

Applicant has worked with her current employer since 2003, and is considered in the top ten percent of quality drivers. She is considered a fantastic employee who always goes the extra mile in ensuring the job is completed. Her current employer has never had a problem with her conduct. Applicant has considerable experience in driving trucks and has an excellent rapport with other drivers and customers. Applicant has an excellent attitude and work ethic and is considered dependable and cooperative. She is recommended by a former employer and current employer for a clearance.

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, and Guideline E, pertaining to personal conduct, with their respective DC and MC, apply in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. <sup>(2)</sup> The government has the burden of proving controverted facts. <sup>(3)</sup> The burden of proof is something less than a preponderance of evidence. <sup>(4)</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him. <sup>(5)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. <sup>(6)</sup>

No one has a right to a security clearance <sup>(7)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." <sup>(8)</sup> Any reasonable doubt about whether an applicant

should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>(9)</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>(10)</sup> It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of all the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline J - Criminal Conduct-is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Guideline E-Personal Conduct-a security concern may exist when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions below.

### CONCLUSIONS

I have carefully considered all the fact in evidence and the legal standards. The government has established a prima facie case for disqualification under Guideline J and Guideline E.

Based on all the evidence, 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*, and CC DC E2.A10.1.2.2: *A single serious crime or multiple lesser offenses*, apply in this case. Applicant was arrested on March 7, 2002 for misdemeanor charges of failing to obey a peace officer, resisting arrest and disorderly conduct. Applicant's charges were dismissed after the case was held in abeyance for a year on the condition Applicant did not get in any further trouble.

I have considered all the mitigating conditions in the case and specifically considered Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1: *The criminal behavior was not recent*; E2.A10.1.3.2: *The crime was an isolated incident*; and E2.A10.1.3.6: *There is clear evidence of successful rehabilitation*, and conclude they all apply in this case.

Applicant's behavior happened in March 2002, over three years ago. Since that time she has not been in any trouble. She successfully remained out of trouble during the time her case was held in abeyance, and it was subsequently dismissed. Applicant's behavior was an isolated incident and there is no evidence she has been in trouble since that date, nor any evidence that she had any issues other than minor (i.e. failing to license her dog) with the law prior to the incident. Applicant obviously felt harassed by the weigh officer, however she clearly acted inappropriately by not following his orders. She also clearly did not respond appropriately when dealing with the police when her truck was pulled over. Applicant was being over-medicated at the time which had an effect on her emotional stability. I have also considered this as a mitigating factor. Applicant has continued to work diligently and has the respect of her employer, who values her work and attitude. There is clear evidence Applicant has been successfully rehabilitated.

Based on all the evidence, Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2: *The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*, applies. Applicant did not list her March 2002 arrest on her SF 86.

I have considered all the mitigating conditions in this case and specifically considered Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.2: *The falsification was an isolated incident, was not recent, and the individual has*

*subsequently provided correct information voluntarily; PC MC E2.A5.1.3.3: The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts; and PC MC E2.A5.1.3.4: Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided, and conclude they all apply.*

On the advice of Applicant's criminal defense attorney she was advised that she did not have to disclose her arrest and it would be stricken from her record. Of some concern is the fact that when Applicant completed her SF 86 in August 2002, her charges had not yet been dismissed, but were being held in abeyance until 12 months of good conduct had passed, so they had not yet been stricken from her record. However, when Applicant was interviewed by DSS, she provided the information on her arrest voluntarily and before being confronted with the facts. In addition, Applicant believed she did not have to disclose this information on the advice of her criminal defense attorney. Applicant attempted to contact her criminal defense attorney to corroborate her position, but he failed to return her calls. Although Question 23 is clear in stating that all information of arrests is to be provided regardless of whether the record was sealed or stricken from the court record, I find that Applicant's confusion related to the advice she received from her attorney is mitigating. I also find this is an isolated incident, that it is almost three years old, and the fact that Applicant voluntarily provided the information to the DSS agent prior to being asked, successfully mitigates the security concerns regarding her personal conduct.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I considered Applicant's credibility, appearance and demeanor while testifying. I considered all the evidence provided. I also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. Applicant has successfully mitigated the concerns arising from her criminal conduct and personal conduct. I am persuaded by the totality of the evidence in this case that it is clearly consistent with the national interest to grant Applicant a security clearance.

### **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: Criminal Conduct (Guideline J) FOR THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. For the Applicant

#### Paragraph 2: Personal Conduct (Guideline E) FOR THE APPLICANT

Subparagraph 2.a. For 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 Applicant. Clearance is granted.

Carol. G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.
4. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
5. ISCR Case No. 94-1075 (August 10, 1995) at pp.3-4; Directive, Enclosure 3, ¶ E3.1.15.
6. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15
7. *Egan*, 484 U.S. at 531.
8. *Id.*
9. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
10. Executive Order 10865 § 7.