

DATE: March 20, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-11162

ECISION OF ADMINISTRATIVE JUDGE

JUAN J. RIVERA

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 2001, at age 20, Applicant was convicted of assault and battery (misdemeanor). In 2003, she was convicted of shoplifting (misdemeanor). She no longer associates with her shoplifting friends and has dedicated herself to caring for her two children and being responsible at work. She disclosed her convictions on her SF 86, and candidly discussed her misconduct at the hearing. Applicant's behavioral changes, maturity, and demeanor are indicative of her successful rehabilitation. She has mitigated the criminal conduct security concerns. Clearance is granted.

STATEMENT OF THE CASE

On November 22, 2005, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns under Guideline J (Criminal Conduct). The SOR informed Applicant that, based on information available to the government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant her access to classified information. ⁽¹⁾

On December 9, 2005, Applicant answered the SOR (Answer). She admitted (with explanations) the allegations in subparagraphs 1.a and 1.b, and requested a hearing. The case was assigned to me on January 6, 2006. On January 25, 2006, I convened a hearing at which the government presented four exhibits, marked GE 1-4, to support the SOR. ⁽²⁾ Applicant testified and presented three exhibits that were admitted without objection and marked AE 1-3. ⁽³⁾ DOHA received the transcript (Tr.) on February 6, 2006.

FINDINGS OF FACT

Applicant's admissions are incorporated herein as findings of fact. After a thorough review of the pleadings, transcript, and exhibits, I make the following additional findings of fact:

Applicant is a 24-year-old, single mother of two children: a four-year-old boy and a two-year-old girl. After graduating

from high school in June 2000, she worked as a laborer and performed other menial jobs. In 2000, she was fired from one of these jobs for tardiness. In October 2001, she was hired by a defense contractor as an apprentice pipe fitter under a four-year training program. Applicant's pregnancies interrupted her training, and she still has approximately one year left to complete her apprenticeship. While working for the defense contractor, Applicant supplemented her income by working menial jobs intermittently.

In November 2001, Applicant was fired from her second job as a cashier-server in a fast food restaurant. Thereafter, she became involved in an altercation with the supervisor who fired her, and she was charged with assault and battery, a misdemeanor. She appeared in court, was convicted of the charge, and sentenced to pay a \$150 fine and court costs. (4) Applicant claimed she acted in self-defense. She was 20 years old at the time of this incident.

In October 2003, Applicant was arrested and charged with shoplifting (a misdemeanor) approximately \$92 worth of women's apparel from a department store. At the time of the incident, she was with her one-year-old child and friends who were also shoplifting. In December 2003, she was found guilty of the charge, sentenced to probation, (5) later placed in an offense diversion program. In January 2006, the court dismissed Applicant's shoplifting charge after she complied with all the court's requirements. (6) Applicant disclosed the above incidents in the SF 86 (7) she submitted in December 2003.

At the hearing, Applicant expressed sincere embarrassment and remorse for what she called "her stupidity." She was candid and forthcoming in her explanations, admitting she had no need to shoplift because she was working two jobs and making good money. She shoplifted because she thought she could get away with it. Applicant recognized that she placed herself and her child in jeopardy, and was very concerned about the possibility of losing custody of her child as a consequence of her criminal behavior. She testified she stopped shoplifting candy and toys after leaving high school, and claimed this incident was the first time she had shoplifted since. Applicant has learned her lesson and does not intend to shoplift ever again. There is no evidence she has been involved in any additional misconduct after October 2003.

Applicant presented two reference letters from friends that characterized her as a church-going and trusted friend. Applicant no longer associates with the friends with whom she used to shoplift. She works approximately 52 hours a week, and her social life centers around her children and participating in church related activities.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's suitability for access to classified information. The administrative judge must take into account both disqualifying and mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive, (8) and the whole person concept. (9) The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the granting or denial of access to classified information. Having considered the record evidence as a whole, I conclude Guideline J (Criminal Conduct) is the applicable relevant adjudicative guideline.

BURDEN OF PROOF

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest (10) for an applicant to either receive or continue to have access to classified information. The government has the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. To meet its burden, the government must establish a prima facie case that it is not clearly consistent with the national interest for the applicant to have access to classified information. The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries a heavy burden of persuasion. (11) 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 to ensure each

applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security. ⁽¹²⁾

CONCLUSIONS

Guideline J (Criminal Conduct). A history or pattern of criminal conduct is a security concern because it may indicate an unwillingness to abide by rules and regulations and may show the applicant to be lacking in judgment, reliability and trustworthiness. ⁽¹³⁾ The government established its case under Guideline J by showing that Applicant was convicted of two misdemeanor offenses in November 2001 and October 2003. I conclude Guideline J Disqualifying Condition (DC) 1: *Allegations or admission of criminal conduct ...*; ⁽¹⁴⁾ and DC 2: ⁽¹⁵⁾ *A single serious crime or multiple lesser offenses*, apply.

Although Applicant was not a teenager at the time of her offenses, I believe her actions could be attributed, to a certain extent, to youthful exuberance and stupidity. She deserves credit for being truthful on her SF 86 and disclosing her misconduct. Additionally, at the hearing, she candidly discussed her criminal behavior, accepted responsibility for her actions, and acknowledged her wrongdoing. Applicant's primary concerns for the welfare of her children and improving her family's quality of life demonstrates she has changed and is now a responsible, mature person.

Having observed her demeanor at the hearing, I am convinced the Applicant has learned her lesson as a result of her criminal convictions and the ordeal associated with defending herself in these proceedings. I find she is now fully attuned to what the government expects of persons it trusts with access to sensitive information. Although Applicant's last episode of misconduct took place only two and one-half years ago, her changes in behavior and attitude, as well as her candidness, lead me to conclude she has rehabilitated herself. I find she is not likely to engage again in similar misconduct. I conclude Mitigating Condition (MC) 1: *The criminal behavior was not recent*; ⁽¹⁶⁾ and MC 6: *There is clear evidence of successful rehabilitation*, ⁽¹⁷⁾ apply.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. A fair and commonsense assessment ⁽¹⁸⁾ of the record before me reflects a young woman who stumbled while making the transition from an immature, irresponsible teenager to a responsible, hard working mother. Considering all relevant and material facts and circumstances present in this case, including Applicant's testimony, the circumstances that caused her misconduct, her personality changes and maturity, the whole person concept, and the adjudicative factors listed in the Directive, I find Applicant has mitigated this security concern. Guideline J is decided for the Applicant.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Criminal Conduct (Guideline J) FOR THE APPLICANT

Subparagraphs 1.a - 1.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 the Applicant. Clearance is granted.

Juan J. Rivera

Administrative Judge

1. Required by Executive Order 10865, Safeguarding Classified Information Within Industry (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, Defense Industrial Personnel Security Clearance Review

Program (Jan. 2, 1992) (Directive), as amended.

2. I marked the government's exhibit list as GE 5 for Identification.

3. AE 1-3 were submitted after the hearing. The government's response to Applicant's post-hearing submission was marked Appellate Exhibit 1.

4. GE 4.

5. GE 3.

6. AE 3.

7. Office of Personnel Management Security Clearance Application, Standard Form (SF) 86.

8. Directive, Section 6.3. Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate: the nature and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the age of the applicant; the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation; and the probability that the circumstances or conduct will continue or recur in the future.

9. Directive, E2.2.1.

10. See Department of the Navy v. Egan, 484 U.S. 518 (1988).

11. *Id.*, at 528, 531.

12. See Egan; Directive E2.2.2.

13. Directive, E2.A10.1.1.

14. Directive, E2.A10.1.2.1.

15. Directive, E2.A10.1.2.2.

16. Directive, E2.A10.1.3.1.

17. Directive, E2.A10.1.3.6.

18. Directive, E2.2.3.