

DATE: October 24, 2006

---

In re:

-----

SSN: -----

Applicant for Security Clearance

---

P Case No. 06-08061

## **DECISION OF ADMINISTRATIVE JUDGE**

**SHARI DAM**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Julie R. Edmunds, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is 23 years old and works part-time for a company that administers government health care benefits. In 2002 she was cited six times for driving on a suspended license. In 2004 she was again cited and charged with retail theft on two occasions. During that same year she used illegal drugs. The Government alleged she failed to disclose some of her previous misconduct when she was interviewed by an investigator. She has not used illegal drugs since 2004 and presented sufficient evidence of rehabilitation. She mitigated the trustworthiness concerns raised by her criminal and personal conduct, as well as those raised by her drug involvement. Her eligibility for assignment to a sensitive position is granted.

### **STATEMENT OF THE CASE**

On October 18, 2004, Applicant submitted a public trust position application (SF-85P). The Defense Office of Hearings and Appeals (DOHA) declined to grant the application under Department of Defense Regulation 5200.2-R, *Personnel Security Program*, (Jan. 1987), as amended (Regulation), and Department of Defense Directive 5220.6, *Defense Industrial Security Personnel Review Program* (Jan. 2, 1992), as amended, (Directive). On May 16, 2006, DOHA issued a Statement of Reasons (SOR), alleging trustworthiness concerns under Guidelines J (criminal conduct), E (personal conduct) and H (drug involvement) of the Directive.

In a sworn statement, dated July 5, 2006, Applicant responded to the SOR allegations and requested a hearing. On August 2, 2006, this case was assigned to me. A Notice of Hearing was issued on August 3, 2006, setting the case for hearing on August 22, 2006. At the hearing Department Counsel introduced exhibits (GX) 1 - 3 into evidence without objections. Applicant testified in her case-in-chief and introduced exhibits (AX) A - C into evidence without objections. DOHA received the hearing transcript (Tr.) on August 31, 2006.

### **PROCEDURAL ISSUES**

On July 24, 2006, Department Counsel filed a Motion to Amend the SOR and add the following allegation as ¶ 1.c

under Guideline J: "That information as set forth in subparagraphs 3.a. and 3.b. below." Applicant did not object to the amendment. (Tr. 6) The motion was granted.

### **FINDINGS OF FACT**

Based on the entire record, including Applicant's admissions in her Answer to the SOR and at the hearing, I make the following additional findings of fact:

Applicant is 23 years old and the mother of an eleven-month-old child. For the past year she has lived with her fiancée. Since 2003, she has worked full time for a bank, where she is a mortgage closer. Her fiancée also works at the bank. The bank's performance appraisal for the period of March 2004 to March 2005 rates her as meeting all requirements. It notes that she "continues to mature and has become more professional with her peers." (AX C at 5) Her co-worker states "I have watched [her] grow in these 4 years." (AX A)

In October 2004 Applicant began a part-time position with a company that administers a government health insurance plan, at which time she completed a SF-85P. In March 2005 she was promoted to a claims processor, and in December 2005 she was authorized to work at home. (Tr. 12-13) A comment by her supervisor in her Performance Review from 9/2005 to 3/2006, notes Applicant "has succeeded in meeting all performance goals." (AX B at 2).

In February 2002 Applicant was charged with (1) Imprudent Speed or Failure to Have Control and (2) Operating While Suspended and paid a \$220 fine. Her driver's license was suspended a year or more prior to this incident. (Tr. 21) During August and September 2002 she was cited five more times for driving on a suspended license while going to school, work or socializing with friends. Applicant was nineteen at the time and admits her behavior was irresponsible. She paid all of the fines imposed for those offenses. (Tr. 32) In November 2004 she was in an accident and charged with Operating While Suspended, which was amended to License to Be Carried. She paid the \$100 fine. (Tr. 33) Presently, she does not have a driver's license because she cannot afford insurance. (Tr. 32) She no longer drives illegally and goes to work with her boyfriend. (Tr. 19)

In March 2004 Applicant was arrested and charged with Theft after she and a co-worker purchased merchandise (a pair of tennis shoes and a \$10 ring) at an unauthorized discount from a department store where they worked. She paid a \$243 fine after going to court. In September 2004 she was charged and found guilty of Retail Theft. She was arrested after she walked out of a store with a dress to show her girlfriend who was standing outside. She did not go to court but paid a \$164 fine by mail. (Tr. 20; Answer)

Applicant disclosed in her SF-85P that she used marijuana at least 30 times from January 2004 to September 2004, and cocaine four times from January 2004 to July 2004. She was 20 years old at the time and used the substances while with friends. (Tr. 25-26) She stopped using drugs when she became pregnant and did not want to hurt her child. (Tr. 27) She stated, "I don't enjoy drinking, I don't enjoy anything like that any more . . . I grew out of the stage, I guess. I mean, I'm only twenty-three years old, but I just grew up, I guess." (Tr. 39) She no longer associates with the friends who use cocaine and is not around some friends when they smoke marijuana. (Tr. 27; 42) She has a new set of friends, many of whom are married and starting families. She loves her jobs and appreciates being able to work at home in the evening and take care of her child. She realizes future drug usage would have a negative effect on her employment. (Tr. 43)

In April 2005 Applicant was interviewed by a Government investigator over the phone. Later he mailed her a summary of the interview that she signed and returned to him without carefully reading it. (Tr. 35-36) She remembers discussing the March 2004 theft with him, but is uncertain about discussing the second charge. In her Answer she admitted she failed to disclose it, but attributes the omission to an oversight at the time of her telephone interview. She did not realize she was required to disclose the traffic violations and did not mention them to him. <sup>(1)</sup> (Tr. 37) I find her explanations credible, given her candid disclosure about drug usage and the inclusion of both thefts on the SF-85P. (GX 1 at 7)

### **POLICIES**

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." *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). In Executive Order 12968, *Access to Classified Information*, § 3.1(b) (Aug. 4, 1995), the President provided that eligibility for access to classified information shall be granted only 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 for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information."

To be eligible for assignment to sensitive duties, an applicant must meet the security guideline contained in DoD 5200.2-R. "The standard that must be met for . . . assignment to sensitive duties is that, based on all available information, the person's loyalty, reliability, and trustworthiness are such that . . . assigning the person to sensitive duties is clearly consistent with the interests of national security." DoD 5200.2-R, ¶ C6.1.1.1. Appendix 8 of the Regulation sets forth personnel security guidelines as well as the disqualifying conditions and mitigating conditions under each guideline.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Section E.2. of Enclosure of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the disqualifying and mitigating conduct of the applicant, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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.

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not just the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. Directive, Enclosure 2, ¶ E2.2.2. The decision to deny an individual a security clearance request to an individual is not necessarily a judgment of the applicant's loyalty. Executive Order 10865, § 7. Instead, it is a determination that the applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

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. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). The Directive presumes a rational connection between past proven conduct under any disqualifying condition and an applicant's present security suitability. ISCR Case No. 95-0611 at 3 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the position of the government. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." *Id.*

## CONCLUSIONS

I considered all of the facts in evidence and the application of the appropriate legal standards, including the "whole person" concept, and concluded the following with respect to the allegations set forth in the SOR:

### Guideline J: Criminal Conduct

Under this guideline a trustworthiness concern may exist when a pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. The Government's evidence and Applicant's admissions establish a potential disqualification under disqualifying condition (DC) 1: (*Any conduct, regardless of whether the person was*

*formally charged*). In 2004 Applicant was convicted of two retail theft charges and illegally used cocaine and marijuana.

The Government having raised a trustworthiness concern, the burden shifted to Applicant to mitigate or rebut the allegations. Applicant has not used illegal drugs or been involved in any form of criminal conduct since September 2004, about two years ago. She subsequently became a mother, formed a committed relationship, and obtained satisfactory work performance ratings at both jobs. She acknowledged her immature misconduct and indicated she no longer participates in illegal drug behavior. Based on that evidence, mitigating condition (MC) 5: (*There is clear evidence of successful rehabilitation*) applies to this case.

#### Guideline H: Drug Involvement

Under this guideline improper or illegal involvement with drugs raises trustworthiness concerns. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. Applicant's admission that she used marijuana and cocaine in 2004 established a potential case for disqualification under DC 1: (*Any drug abuse, which by definition includes marijuana and cocaine*) of this guideline. In mitigation she repeatedly stated she has not used any illegal drugs since September 2004. She has no intention of using them in the future because she matured, is responsible for her child, and wants to retain her jobs. I find those assurances credible and sufficient to apply MC 3: (*A demonstrated intent not to abuse any drugs in the future*) in this case.

#### Guideline E: Personal Conduct

A trustworthiness concern may arise 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.

The Government alleged Applicant falsified an April 2005 statement to an authorized investigator by failing to disclose the September 2004 theft charge and numerous traffic related incidents, which constituted a disqualification under DC 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 determines security clearance eligibility or trustworthiness, or award fiduciary responsibilities*) of this guideline. Applicant admitted in her Answer that she did not disclose the second theft during the telephone interview, but claimed it was an oversight. She did not disclose the traffic violations because she did not think she was required to do so. However, in reviewing her SF-85P, both thefts were disclosed.

When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Based on the inclusion in the SF-85P of both thefts and Applicant's credible explanation that she mistakenly failed to disclose the information about the traffic incidents, I conclude she did not intentionally falsify her SF-85P. I give no weight to the investigator's summary of her statement that was taken over the telephone, transcribed by two separate people and mailed to her for a signature. Accordingly, the allegations contained in ¶¶ 2.h and 2.i are concluded in her favor.

The Government did establish a potential disqualification under DC 5: *A pattern of dishonesty or rule violations*. During 2002, Applicant was cited five times for driving on a suspended license and once in 2004. Mitigation of this disqualification is discussed below.

#### The "Whole Person" Concept

In addition to evaluating the disqualifying and mitigating conditions under each guideline, I considered the totality of the evidence in view of the "whole person" concept, including Applicant's sincere demeanor while testifying, her young

age at the time of the various allegations, and her candid disclosure about illegal drug use, theft charges, and the series of traffic violations. I took into account her new role as a mother and her dedication to two jobs for the past two years. I carefully considered her testimony that she maintains a friendship with some of her friends who continue to smoke marijuana, but not while she is present. While her decision to retain those friendships may not be prudent, I am not concerned that those people will exert pressure over her to resume illegal drug usage, in view of her maturity and awareness of the potential problems additional drug usage could create for her. I believe the behaviors underlying the issues raised in the SOR will not recur in the future. Applicant mitigated the security concerns raised by her criminal and personal conduct, as well as drug involvement. Accordingly, Guidelines J, E and H are concluded for her.

### **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 as follows:

Paragraph 1: Guideline J (Criminal Conduct) FOR APPLICANT

Subparagraphs 1.a - 1.c: For Applicant

Paragraph 2: Guideline E (Personal Conduct) FOR APPLICANT

Subparagraphs 2.a - 2.i: For Applicant

Paragraph 3: Guideline H (Drug Involvement) FOR APPLICANT

Subparagraphs 3.a - 3.b: For Applicant

### **DECISION**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for assignment to sensitive duties. Her application for eligibility is granted.

Shari Dam

Administrative Judge

1. The 11 page summary of the April 2005 interview is found in GX 2. The document is not clearly written, is repetitious, and contains two different handwritings, neither of which is the Applicant's. The agent was not present when Applicant signed it, despite his affidavit to the contrary.