

DATE: December 3, 1996

In Re:

SSN: -----

Applicant for security clearance

ISCR OSD CASE No. 96-0112

DETERMINATION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

Carla Conover Esq.

Department Counsel

FOR THE APPLICANT

Robert V. Semon, Esq.

STATEMENT OF CASE

On February 26, 1996, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which 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 clearance should be denied or revoked.

The SOR is attached.

Applicant filed her Answer to the SOR on May 13, 1996.

The case was received by the undersigned on July 10, 1996. A notice of hearing was issued on July 15, 1996, and the case was heard on August 6, 1996. The Government and Applicant submitted documentary evidence. Testimony was taken from Applicant. The transcript was received on August 14, 1996.

RULINGS ON PROCEDURE

Applicant's post-hearing submission, received on September 3, 1996, shall be marked and admitted in evidence (over the Government's objection) as Applicant's Exhibit A.

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony.

Applicant is 50 years old and employed as a ----- for a defense contractor. She received her clearance July 1985.

On November 23, 1979, Applicant stole about \$300 from a department store and was charged with petty theft.⁽¹⁾ She pled guilty, paid the court fine, and, after completing the community service at a community hospital, she was hired full time in the hospital's ----- department. (Tr. 20-21).

On March 3, 1991, Applicant was charged with petty theft after trying to steal a clock from a department store. She was given a 30 day jail sentence which was suspended. She paid a \$74 fine and court costs and was barred from the department store for a year. A boyfriend was indirectly culpable for her conduct because he removed everything from her apartment after she told him to leave. (Tr. 22-23).

On June 2, 1995, Applicant was apprehended for stealing some medication and reading glasses.⁽²⁾ She pled guilty and received a suspended sentence on condition she complete 40 hours of community service. Her community service consisted of cleaning the latrines at the local park 8 hours every Sunday for 5 weeks. Besides the embarrassment of being seen cleaning latrines, she was also ashamed to tell her child they were banned permanently from the local drug store. (Tr. 31).

Applicant did not really learn anything from the first two thefts because the sentences were not severe enough. (Tr. 35). However, after the second theft in 1991, Applicant discussed the circumstances with her social worker. The social worker concluded the second theft may have occurred as a result of the emotional stress/anger Applicant was experiencing after the separation from her second boyfriend. (Tr. 34).

Applicant was awarded a lifetime membership in the state parent and teacher association because she served as the local president or treasurer of the association from 1982 to 1985. Applicant received 5 letters of appreciation or commendation for her participation in community activities. She has also received 6 certificates of completion of courses to improve her job-related skills.

Applicant's manager since 1985 has found her to be a diligent and trustworthy employee. Applicant's supervisor since 1989 has found Applicant to be trustworthy employee who takes pride in her work.⁽³⁾ Applicant is manager of the condominium association's clubhouse.⁽⁴⁾

Having weighed Applicant's demeanor and manner of testifying I find credible Applicant's explanation for her criminal conduct. In addition, I find she regrets she committed the thefts. Until the last year, Applicant did not understand the relationship between her pattern of criminal activity and holding a security clearance. However, consultations with the social worker and minister have helped her focus on the actual and potential adverse consequences of her past conduct so she will not repeat the conduct in the future. (Tr. 33-34, 48-52).

POLICIES

Enclosure 2 of the Directive set forth policy factors which must be given binding consideration in making security clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in this case are:

Criminal Conduct

Factors Against Clearance:

1. Any criminal conduct, regardless of whether the person was formally charged.

Factors for Clearance:

4. Factors leading to the violation are unlikely to recur.
5. There is successful evidence of rehabilitation.

General Policy Factors

In evaluating the relevance of an individual's conduct, the administrative judge should consider:

1. The nature, extent, and seriousness of the conduct
2. The circumstances of 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 the participation
6. The presence or absence of rehabilitation and other behavioral changes
7. The motivation of the conduct
8. The potential, for pressure, coercion, exploitation, or duress
9. The likelihood of continuation or recurrence.

The nine general factors above shall be considered in conjunction with the whole person concept.

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information in the future. The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must establish all the factual allegations under Criterion j (criminal conduct) which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to the sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation which demonstrates that the past adverse conduct is unlikely to repeat itself and applicant presently qualifies for a security clearance.

CONCLUSIONS

Criterion j is defined as a history or pattern of criminal activity creating doubt about a person's judgment, reliability and trustworthiness. Applicant intentionally committed petty thefts in 1979, 1991 and June 1995. The thefts show a pattern of criminal conduct of illegally taking items without purchasing them.⁽⁵⁾ Clear and present security concerns emerge from such conduct because a person who is willing to commit a crime to satisfy his or her desires may also be willing to commit security violations to accomplish selfish objectives. Therefore, there is no requirement that a security clearance holder be caught in the act of violating security regulations before action is taken to remove his or her security

clearance. The thefts in 1991 and June 1995 raise particular concern because Applicant violated the law while holding a security clearance.

On the other hand, mitigating factor number 4 recommends evidence which shows the precipitating factors leading to the violations are unlikely to recur. In Applicant's situation, I conclude the most important factor that will keep her from violating the law is not a contributing factor causing the conduct but her knowledge or awareness of the potential consequences of her conduct. In 1979 and 1991, she received only a fine and was not seriously threatened by imprisonment or community service or the potential loss of her clearance. However, the embarrassment caused by cleaning latrines in the summer of 1995 for 8 hours for five Sundays, and having acquaintances recognize her performing this work, represents the type of potential consequence she does not want to experience in the future. In short, her knowledge of the penal as well as the security clearance consequences of the 1995 theft will be more than enough to prevent her from committing larcenous behavior in the future.

Mitigating factor number 5 calls for successful evidence of rehabilitation. Beginning in 1991, Applicant demonstrated good judgment by consulting with the social worker to find out why she demonstrated so much anger to her family and boyfriends. In addition, the social worker, and to some extent Applicant's minister, have played a pivotal role in Applicant's current understanding of her past thievish conduct and the reason why she will not repeat this conduct in the future.

The general policy factors have been thoroughly considered with the specific factors under Criterion j. Considering (1) Applicant's positive credibility at the hearing, (2) the impressive awards for her valuable contribution to the parent and teachers' association, (3) the documented efforts to improve her skills on the job, (4) the strong statements of support from Applicant's supervisors regarding her dedication and reliability, and, (5) her understanding of the adverse conduct that can place her security clearance at risk, Applicant has successfully met her ultimate burden of persuasion under criminal conduct.

FORMAL FINDINGS

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: FOR THE APPLICANT.

- a. For the Applicant.
- b. For the Applicant.
- c. For the Applicant.

Factual support and reasons for the foregoing findings are set forth in FINDINGS OF FACT and CONCLUSIONS above.

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.

Paul J. Mason

Administrative Judge

1. After thinking about the surrounding circumstances for the theft, and discussing the theft with her minister and her psychologist (actually a licensed clinical social worker), Applicant believed her husband was to blame for taking her to another state to live without talking about the new job in advance with her. (Tr. 17). Also, Applicant had a new baby and a small child and her husband told her she could not return home for the December holidays. (Tr. 17).

2. She knew she was being watched by a store detective because he followed her throughout the store to the check out counter. (Tr. 29-30).
3. Applicant advised both supervisors of her criminal conduct before they wrote character statements for her.
4. She also served as president and vice president in the past.
5. Whether the items were too large to conceal, or the theft was committed under emotional circumstances caused by a romance gone awry, or Applicant did not have the money to pay because she was not feeling well, her eyes ached, and she was tormented by severe financial problems, does not excuse the illegality of her underlying conduct.