

DATE: _September 19, 1997

In Re:

Applicant for security clearance

ISCR Case No. 97-0111

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

Appearances

FOR THE GOVERNMENT

Melvin A. Howry, Esq.

Department Counsel

FOR THE APPLICANT

Pro se

STATEMENT OF CASE

On January 28, 1997, 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, amended by Change 3, February 13, 1996, 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 February 26, 1997.

The case was received by the undersigned on May 23, 1997. A notice of hearing was issued on May 30, 1997, and the case was heard on June 23, 1997. The Government and Applicant submitted documentary evidence. Testimony was taken from Applicant. The transcript was received on July 8, 1997.

FINDINGS OF FACT

The Following Findings of Fact are based on the documentation and testimony. The SOR alleges criminal conduct (Criterion J) and personal conduct (Criterion E). Applicant admitted all the allegations of the SOR except for subparagraph 1b. [\(1\)](#)

Applicant is 49 years old and employed as a secretary for a defense contractor. She seeks a secret level clearance.

On April 4, 1975, Applicant was arrested for petty theft. She pled guilty and was fined \$65.00. On May 12, 1987, Applicant was charged with stealing and petty theft. She pled no contest; imposition of sentence was suspended, she was given 45 days probation and ordered to pay a fine of \$225.00. On May 23, 1993, Applicant was arrested for petty theft with a prior conviction. She pled guilty and her sentence was suspended for two years on condition she pay the court fine of \$270.00 and complete six days of weekend work. On October 13, 1995, Applicant was arrested for petty theft with prior convictions for the same offense. She pled guilty; she was ordered to pay court fines and restitution of

\$505.00, to serve 60 days in work furlough, and to perform 60 hours of community service. She was placed on probation for two years. According to her sworn statement dated October 28, 1996, Applicant attributed her petty thefts (of clothing) to immaturity, not thinking, not having the money to pay for the property, and being totally stressed. At the hearing, Applicant could not recall what she stole.

Applicant did not file her federal tax returns for 1994 and 1995. She did not file because she owed money. Also, she was provided some confusing information that she could wait five years before she had to file returns. (TR. 38-39) She filed the 1994 and 1995 returns in 1996, and was placed on a payment plan by the Internal Revenue Service (IRS). (TR. 42; Applicant's Exhibit G)

On September 15, 1995, Applicant applied for a corporate credit card and knowingly used the card for personal purposes, in violation of company policy. By April 22, 1996, Applicant improperly charged approximately \$4,374.92 to the card. She received a disciplinary notice of misconduct on May 14, 1996. ⁽²⁾

The coordinator of the employee assistance program verified that Applicant came to the program in early 1996 for help with her legal and other problems. She also received outpatient treatment from the state treatment facility and completed the treatment on March 18, 1996. Then, she successfully completed a woman's residency treatment program on June 3, 1996. (TR. 55; Applicant's Exhibit A) One of the residency program classes addressed her motivation for committing the theft offenses. (TR. 62) The counseling also helped her to understand she should talk with other people about her problems. She has returned to the church and plans to go back to school in the fall.

Six coworkers who have known Applicant for eleven years, consider Applicant a conscientious employee with good work habits. Her supervisor for fourteen months, until she was promoted in June 1997, believes Applicant is a valuable employee who is security conscious.

POLICIES

Enclosure 2 of the Directive sets 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 (Criterion J)

Factors Against Clearance:

2. a single crime or multiple lesser offenses.

Factors for Clearance:

None.

Personal Conduct (Criterion E)

Factors Against Clearance:

5. A pattern of dishonesty or rule violations.

Factors for Clearance:

None.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at page 2-1 of Enclosure 2 of the Directive) include: (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; and, (8) the likelihood of continuation or recurrence.

Burden of Proof

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 the 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) and Criterion E (personal 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, 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

The Government has established a case of criminal conduct with the scope of Criterion J. In

1975, 1987, 1993, and 1995, Applicant unlawfully pilfered property. The four petty thefts definitely show a pattern of conduct, linked together by the unlawfully taking of property. No one forced Applicant to commit these crimes. Immaturity, mentioned by Applicant, as a reason she committed the crimes, does not carry much weight in extenuation because she was 45 years old in 1993 when she committed her third theft offense. In addition, she had been discharged from probation for only five months before she committed the fourth theft offense in October 1995.

Although Applicant referred to "not thinking" and being "totally stressed" as additional reasons for stealing the property, the primary reason was that she did not have the money at the particular time. However, not having the money is no excuse for Applicant's exercise of poor judgment for unlawfully taking property that did not belong to her.

Even though Applicant did not intend to misuse the corporate credit card between September 1995 and April 1996 for personal use, the fact remains that she used the card improperly. Furthermore, she knew she used the card improperly. Her violation of corporate policy is not mitigated by the criminal problems she encountered at the time because she created those legal problems. She clearly exercised poor judgment in using the corporate credit card rather than some other means of paying her bills.

Applicant has taken some remarkable steps in rehabilitation to turn her life in the right direction. The respect and support she has earned on the job, along with her promotion in June 1997, has been given serious consideration. However, even with her progress on her job, and the positive strides she has taken to regain control of her life, it is too soon for me to confidently say her past conduct will not recur in the future.

FORMAL FINDINGS

Having weighed and balanced the specific policy factors with the general policy factors (whole person concept), Formal Findings required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1 (criminal conduct): AGAINST THE APPLICANT.

- a. Against the Applicant.
- b. For the Applicant.
- c. Against the Applicant.
- d. Against the Applicant.
- e. Against the Applicant.
- f. For the Applicant.
- g. For the Applicant.

Paragraph 2 (personal conduct): AGAINST THE APPLICANT.

- a. Against the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Paul J. Mason

Administrative Judge

1. GE #3 reflects Applicant was arraigned for fraud in obtaining aid for a child. On March 5, 1980, she changed her plea from not guilty to guilty to an unidentified amended charge. On May 15, 1980, an unidentified sentence was suspended; she was placed on summary probation for three months and was ordered to pay court fines and establish a restitution schedule to pay back approximately \$2100 to the social service agency. Applicant claims the fraud charge was ultimately dismissed although she produced no independent evidence to support her claim. (GE #8; TR. 28) The fact she repeated her claim in Applicant's Exhibit G, does not make her claim any more credible, particularly because of the pattern of admitted theft offenses since 1975. However, due to the lack of any evidence to the contrary, subparagraph 1b is found in Applicant's favor.

2. According to her sworn statement (GE #9), Applicant did not intend to use the card for personal purposes but pressing legal problems arose and car problems, caused her to use the card improperly. (TR. 36)