

DATE: February 20, 1998

In Re:

-----

SSN: -----

Applicant for Security Clearance

ISCR Case No. 97-0474

**DECISION OF ADMINISTRATIVE JUDGE**

**PAUL J. MASON**

**APPEARANCES**

**FOR GOVERNMENT**

Melvin A. Howry, Esq., Department Counsel

**FOR APPLICANT**

G. Dan Rambo, Esq.

**STATEMENT OF THE CASE**

On July 9, 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, 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 his Answer to the SOR on July 25, 1997.

The case was received by the undersigned on September 4, 1997. A notice of hearing was issued on September 16, 1997, and the case was heard on October 21, 1997. The Government and Applicant submitted documentary evidence. Testimony was taken from Applicant. The transcript was received on October 29, 1997.

**RULINGS ON PROCEDURE**

Applicant's Exhibit A is actually a cover letter from DOHA explaining the rights and procedures applicants have once they receive an SOR. Applicant's Exhibit A was not admitted in evidence.

**FINDINGS OF FACT**

The Following Findings of Fact are based on the documentation and testimony. The SOR alleges criminal conduct (Criterion J). I have reviewed the transcript, evaluated witness credibility and examined the exhibits.

Applicant is 48 years old and employed as a truck driver by a defense contractor. She seeks a secret clearance.

Applicant was indicted in approximately January 1992 for embezzlement, a felony. In approximately September 1994, Applicant was found guilty of embezzlement and required to pay \$7,000.00, which included restitution, fees and court

[\(1\)](#)

costs, an complete religious therapy. Applicant was imprisoned from September 1994, then she received a five year deferred sentence and she was placed on five years probation. On July 25, 1997, Applicant was transferred from supervised probation to unsupervised probation. (AE-H)

In mitigation of her conviction in a non-jury trial for embezzlement, Applicant attended the female offender treatment program between September 1994 and January 1995. Applicant also began the court-ordered religious therapy in October 1994.<sup>(2)</sup> After her satisfactory completion of the first offender program in January 1995, Applicant was released from prison and received a five-year deferred sentence. Applicant was required to begin making restitution payments in August 1995 and she completed payments with a compromise settlement in June 1996.

After her release from prison in January 1995, Applicant enrolled and successfully completed a six-month truck driving school. Applicant drove for her first employer for about six months. Both her first and second employer notified her of where to pick up and deliver a load.<sup>(3)</sup> With her current employer, she generates her own assignments where she independently obtains the load and makes the delivery. Her schedule (after driving for more than three years) at the present time is driving for three months and returning home for a month. While she is at home, she tries to catch up on her reading about the trucking industry to learn about new regulations or safety devices. Recently, she has moved her parents into her house because her father needed to retire and determined that his pension was not enough to live independently.

Applicant has no criminal record except for the conviction in September 1994. The attorney fees, along with court-ordered restitution required Applicant to file for bankruptcy in October 1995. After her discharge from bankruptcy in January 1996, Applicant worked hard to keep her finances under control and is presently current on all her debts.

Considering the entire record, including Applicant's credible demeanor at the hearing, I find Applicant's testimony generally worthy of belief. I find her continued assertion of innocence in the face of her conviction for embezzlement, does not automatically remove her from security clearance consideration. By her actions since January 1995, Applicant has satisfactorily demonstrated she will not commit any criminal conduct in the future.

## **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:

1. a serious crime or multiple lesser offenses.

#### Factors for Clearance:

1. the criminal conduct was not recent;
2. the criminal conduct was an isolated event;
5. there is clear evidence of successful rehabilitation.

### **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 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 criminal conduct (Criterion J) 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**

The record establishes a case of embezzlement by Applicant some time in 1991. Though the record is silent on whether the embezzlement was one act or several acts by Applicant, she was found guilty some time in September 1994. The court ordered her to repay \$7,000.00. She paid the restitution by January 1996. The court required participation in the first offender program that Applicant completed in January 1995. The court also required completion of a year-long religious therapy course designed as a cathartic experience to reestablish the participant's understanding of their surroundings. Applicant completed the course in October 1995.

Immediately, on her discharge in January 1995, Applicant enrolled in truck driving school and has a good job with transport company. She explained how security conscious she has been over the last three years on her trucking jobs while complying with the rules of her probation. Her completion of all requirements of her sentence, specifically the rehabilitative requirement's, persuades me she will engage in absolutely no criminal conduct in the future.

The whole-person concept calls for consideration of the seriousness of the offense. Embezzlement is a very serious offense because it involves a violation of a fiduciary relationship between the employee and the employer. The employee is entrusted with items of value that he instead misappropriates for his own use. Applicant stands guilty of embezzling \$7,000.00 from her employer by misusing the money for her own purposes. There is no indication of the frequency of the conduct or degree of participation by Applicant. Applicant's compliance with all conditions of her sentence, including timely restitution, plus the favorable judgment and initiative demonstrated in completing training and in landing a good trucking job, establishes complete justification for my conclusion that there will be no recurrence of criminal conduct in the future by Applicant.

### **FORMAL FINDINGS**

Having weighed and balanced all the specific and general policy factors, Formal Findings required by Paragraph 3 of the Directive are:

Paragraph 1 (**criminal conduct**): FOR THE APPLICANT.

a. For the Applicant.

## **CONCLUSIONS**

In light of all the evidence 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. Applicant stated in her sworn statement (GE-2) that she did not steal anything from her former employer. Her statements that she did not commit embezzlement carry very little probative value given the fact she was found guilty of felonious embezzlement in a non-jury trial in September 1994. Embezzlement is a serious crime involving dishonesty with the perpetrator violating a business or fiduciary relationship with her employer by misappropriating items of value entrusted to her care. However, evidence in mitigation or extenuation of the offense must still be closely evaluated, particularly where there is no documentary evidence of the crime or the methodology Applicant used to carry out the embezzlement plan. Also, any evidence that explains what Applicant has done with her life since her conviction more than three years ago, is essential to Applicant's case in reform.
2. The religious therapy consisted of weekly counseling sessions that Applicant completed in October 1995. (AE-F) The purpose of the counseling is to have the participants reflect upon decisions they have made since childhood and how these decisions have affected their lives as well as the persons around them. (Tr. 11) The course taught her how much her family means to her. She also has a renewed respect for the value of life.
3. Applicant resigned from her first employer because the employer's dispatcher wanted her to violate safety rules by having to exceed the maximum number of driving hours in one day and in one week. The dispatcher also wanted her to drive a load outside the continental United States, which would have been a direct violation of her probation.