



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:	)	
	)	
-----	)	ISCR Case No. 07-02457
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Nichole Noel, Esq.  
For Applicant: Pro Se

January 17, 2008

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**Decision**

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ABLARD, Charles, Administrative Judge:

Applicant submitted her Security Clearance Application (SF 86), on January 12, 2006. On August 6, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline J for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on August 13, 2007. She answered the SOR in writing on September 21, 2007, and requested a hearing before an Administrative Judge. DOHA received the request the same day. Department Counsel was prepared to proceed on October 12, 2007. I received the case assignment on October 17, 2007, after it was transferred from another judge who had received it two days earlier. DOHA issued a notice of hearing on November 7, 2007, and I convened

the hearing as scheduled on November 28, 2007. The government offered Exhibits (Exh.) 1 through 4, which were received without objection. Applicant testified on her own behalf and submitted one exhibit (Exh. A) which was admitted without objection. Applicant requested that the record be left open until December 28, 2007, for submission of additional evidence. A submission with five documents was timely received (Exh. B) and admitted without objection. DOHA received the transcript of the hearing (Tr.) on December 6, 2007. Based upon a review of the case file, pleadings, exhibits, testimony, and the applicable statutory provision relating to an applicant who has served over one year in confinement (18 U.S.C. § 986) eligibility for access to classified information is denied.

### **Findings of Fact**

In her Answer to the SOR, Applicant admitted the factual allegations in the SOR, with explanations.

Applicant is a 56-year-old employee of a defense contractor who works in a temporary position as a data processor without a security clearance. She worked as a civilian employee of the Army for 25 years and retired in 1998. During the latter part of her employment she was introduced to marijuana and occasionally used it. Once it was laced with crack cocaine and after once disliking it intensely, used it again with a frequency of approximately once a month (Tr. 22-25). After her retirement she became involved with friends who introduced her to drug sales. One stored marijuana in her house and another asked her to purchase drugs for him and she did so. This person was a DEA undercover informant and this led to the charges at issue in this case.

Applicant was arrested by agents of the Drug Enforcement Agency on or about September 27, 1999, when she was 48-years-old and charged with six cocaine related counts including conspiracy with intent to distribute, conspiracy to distribute, and distribution. Her trial was delayed for two years during which time she became ill, was hospitalized, and diagnosed with congestive heart failure. She received a heart pacemaker. For more than one year before trial, she was allowed to live on her own and participated in alcohol and drug rehabilitation programs until she appeared in court (Tr. 24).

Applicant pleaded guilty to one count of distribution of cocaine base on July 25, 2002 and was sentenced in October 2002 to 30 months imprisonment. She was fined \$100, ordered to take 500 hours of a residential drug addiction program (RDAP), which she completed. She was given three years of supervised release. The remaining charges were dismissed. She spent one month in a U.S. Marshal's confinement facility and another year in a federal corrections facility. She was then moved to a halfway house for six months, and on May 21, 2004, was placed on supervised release for three years. Her probation officer requested early release (Exh. B 4 and 5) and she was discharged early on August 4, 2005, by order of the U.S. District Court (Exh. B 6). After she was released from supervised probation in 2005, her doctor would not immediately

approve her return to work because of her heart condition, but she obtained approval to work and did so in January 2006.

Applicant's drug rehabilitation efforts have been successful and she has been drug free since 2002. She receives \$800 per month from her federal retirement. When she is fully employed she receives \$700 every two weeks from her employer. Her immediate family is a son who is 37 years old. He is successfully employed, supportive of his mother, and visits her often. She was very devoted to her mother who died while she was in prison. This loss caused her to regret her conduct even more. She has several brothers and sisters who are supportive of her rehabilitation. She deeply regrets the conduct that led to her conviction and knows that it was wrong and that she deserved the punishment imposed. She no longer has any contact with the people with whom she consorted when her legal difficulties occurred or others who might lead her into further misconduct.

Applicant is well regarded by her supervisor at work who finds her dedicated and professional in her work (Exh. B 2). She is also supported by a friend of 20 years who has gone through her difficult times with her and concludes that she is on the right track (Exh. B 3). The attorney for Applicant in her criminal case has known her since 1999 and vouches for her truthfulness and moral values (Exh. A).

### **Policies**

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline J Criminal Conduct**

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.

The guideline notes several conditions that could raise security concerns for an applicant. One of them that may be a disqualifying condition (DC) is a single serious crime or multiple lesser offenses (AG ¶ 31 a). However, the most pertinent DC is a conviction in a federal or state court of a crime that results in a sentence of imprisonment for a term exceeding one year and incarceration as a result of that sentence for not less than a year (AG ¶ 31 f). The evidence in this case is sufficient to raise these disqualifying conditions.

Possible mitigating factors under the guideline that could be applicable are that so much time has elapsed since the criminal behavior happened that it does not cast doubt on the individual’s reliability, trustworthiness, or good judgment (AG ¶ 32 a), or there is evidence of successful rehabilitation including but not limited to passage of time without recurrence of criminal activity, remorse, and a good employment record (AG ¶ 32 d). However, neither can be applied because of the confinement for more than one year.

The history of the section of the guideline concerning sentences originated in a law enacted by Congress in 2000 (18 U.S.C. § 986 c 1) and amended in 2004. It prohibited the Department of Defense from granting or renewing a security clearance for certain persons falling into four categories. The statute is applicable to a person who has been convicted in any U.S. court of a crime, and was incarcerated as a result of that sentence for not less than one year. Applicant spent over one year in confinement as a result of her conviction. Thus she is disqualified from holding a security clearance. An exception is provided and a security clearance may be granted if an applicant receives a waiver from the Secretary of Defense or his designee (AG ¶ 31 f).

The law authorizes a waiver in a meritorious case if there are mitigating factors. Waivers may be granted by the Director of DOHA pursuant to a delegation of authority in accordance with Operating Instruction (OI 64). The instruction limits the administrative judge's responsibility to determining if the law applies to facts of the case and provides that the judge may not make a recommendation of any kind.

### **Whole Person Concept**

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): "(1) the nature, extent, and seriousness of the conduct; (2) the circumstances 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) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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." Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

While Applicant has shown evidence of successful rehabilitation as a result of her conviction, she has been out of prison for only two and a half years and has been employed for only a little over one year. She was a mature woman with 25 years of federal service in a military department when the offense occurred. She knows that the punishment was justified. She greatly regrets the conduct that caused her to lose several years of her life including the last years of being with her mother. She no longer consorts with the people whom she knew during the time of the trouble nor with others like them. She is not in the best of health yet now works in the defense industry in an effort to make a contribution to society.

After considering all the evidence in its totality, I conclude that Applicant has not mitigated the security concerns arising from her criminal conduct since she served over one year in confinement as a result of her conduct and the sentence imposed for it.

## **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:

Paragraph 1, Guideline J:AGAINST APPLICANT

Subparagraph 1.a:Against Applicant

Subparagraph 1.b:Against Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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CHARLES D. ABLARD  
Administrative Judge