DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------------------------	)	ISCR Case No. 07-04194
SSN: --------------------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

March 18, 2008

Decision

LOKEY-ANDERSON, Darlene D., Administrative Judge:

Applicant submitted her Electronic Questionnaire for Investigations Processing (e-QIP) on August 28, 2007. On October 18, 2007, 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 the 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 the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR in writing on November 8, 2007, and requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on January 15, 2008. A notice of hearing was issued on January 23, 2008, scheduling the hearing for February 13, 2008. At the hearing the Government requested that allegation 1(b) of the SOR be withdrawn. The Applicant had no objection to said request, and allegation 1(b) of the SOR was withdrawn. The Government presented six exhibits, referred to as Government Exhibits 1 through 6. The Applicant presented two exhibits, referred to as Applicant's Exhibits A and B. She also called two witnesses to testify and she testified on her own behalf. The official transcript (Tr.) was received on February 27, 2008.

FINDINGS OF FACT

The Applicant is 56 years old and has a high school diploma and some junior college. She is employed by a defense contractor as an Access I.D. and Parking Lead, and is applying for a security clearance in connection with her employment.

Paragraph 1 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because she engaged in criminal conduct.

The Applicant has worked in the defense industry for 32 years and has held a DoD security clearance since 1984, and has never received a security violation.

In October 2004, the she was arrested and charged with (1) Possession Narcotic Controlled Substance, felony, (2) Under the Influence Alcohol/Drug in Vehicle, and (3) .08% More Weight Alcohol Driving Vehicle. The Applicant explained that she and a couple of girlfriends went out after work to a bar for cocktails. They started at one establishment and over the course of the night moved to two others. At the time the Applicant was arrested, the officer told her that she had almost hit him as he was getting into his car. The Applicant explained that at the police station her purse was dumped out in front of her and examined. She was then taken to a cell. Sometime later, a police officer approached her with a packet of cocaine and told her that he had found it in her purse. The Applicant told the officer that the packet was not hers. The Applicant's only explanation for the packet of cocaine that was allegedly found in her purse is that given her seating location at the bar earlier that night, the cocaine may have been accidentally dropped into her purse by someone else. She pled guilty to Count (1) with a disposition of Deferred Entry of Judgment for 18 months, and was ordered to enroll in a drug program. She pled No Contest to Count (3) and was sentenced to 180 days in jail, suspended, placed on three years probation, required to pay a fine, and was ordered to complete a First Offender Alcohol/Drug Program. Count 2 was dismissed.

Two days following the incident, upon returning to work, the Applicant immediately reported the arrest and charges to her Manager. A copy of the adverse information report indicates that the Applicant reported all of her charges including her charge for Possession of a Narcotic. (*See* Applicant's Exhibit A).

The Applicant has never been arrested, charged or convicted of any other offense. She expressed that the experience of her arrest was embarrassing, humiliating and horrifying. (Tr. p. 41). She has never used any illegal drugs in her life. (Tr. p. 45).

Paragraph 2 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because she intentionally falsified material aspects of her personal background during the clearance screening process.

The Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) dated August 28, 2008. Question 23(d) of the application asked the Applicant, have you ever been charged with or convicted of any offenses related to alcohol or drugs. The Applicant answered, “YES” and listed a DUI in October 2004. She failed to list the charge of Possession of Narcotic. (*See* Government Exhibit 1). The Applicant explained that she did not disclose her charge for Possession of Narcotic because she was told by her attorney and the Judge that after completing her diversion class she would never have to answer “yes” to a question concerning whether she was ever charged with a drug related offense. The Applicant explained that she answered “yes” in response to question 23(d) in regards to her alcohol charge. (Tr. pp. 38-39).

The Government alleges that during an interview with an investigator from the Defense department on November 21, 2006, the Applicant omitted material facts when she stated that he had been arrested and charged with an alcohol related offense in October 2004, and failed to mention the fact that she was charged with Possession of Narcotic. For the same reason set forth above, the Applicant did not reveal this charge to the investigator.

Two witnesses, a co-worker and a long time friend, testified on behalf of the Applicant. They both find the Applicant to be highly trustworthy and reliable.

Three letters of recommendation from the Applicant’s manager, a coworker, and a friend, indicate that the Applicant is a person of high integrity who is honest and responsible. She is considered intelligent, diligent, and a conscientious employee. She is an extremely hard worker who can be relied upon to perform a multitude of assignments.

POLICIES

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline J (Criminal Conduct)

30. *The Concern*. Criminal activity creates a 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.

Conditions that could raise a security concern:

31.(a) a single serious crime or multiple offenses;

31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;

Condition that could mitigate security concerns:

32.(a) So much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

32.(d) There is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

Guideline E (Personal Conduct)

15. *The Concern*. Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Conditions that could raise a security concern:

16.(a) Deliberate omission, concealment or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Conditions that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

a. The nature and seriousness of the conduct and surrounding circumstances

b. The circumstances surrounding the conduct, to include knowledgeable participation

c. The frequency and recency of the conduct

d. The individual's age and maturity at the time of the conduct

e. The voluntariness of participation

f. The presence or absence of rehabilitation and other pertinent behavior changes

g. The motivation for the conduct

h. The potential for pressure, coercion, exploitation or duress

i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have 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. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in criminal conduct and dishonesty that demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant her a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in criminal conduct (Guideline J) and dishonesty (Guideline E). The totality of this evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with her security clearance eligibility.

Considering all of the evidence, the Applicant has introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case under Guideline J and E of the SOR.

The evidence shows that the Applicant was arrested on one occasion in 2004, over four years ago, and that she has never been arrested for any violation at any other time. On that occasion, she was convicted of drunk driving. Although she was arrested and charged with Possession of a Narcotic, she adamantly contends that she has never used any illegal drugs in her life and that the narcotics that were found in her purse were not hers. There is no evidence in the record to the contrary. Under Guideline J, Criminal Conduct, disqualifying conditions, *31.(a) a single serious crime or multiple offenses* and *31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted* apply. However, Mitigating Conditions *32.(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment* and *32.(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement* also apply.

Under Guideline E, Personal Conduct, disqualifying condition *16(a), deliberate omission, concealment or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities* applies. Applicant's conduct under Guideline E has merit. She believed at the time she answered the questions on her security application and during her interview with the DoD investigator that she was being honest with the Government concerning her arrest history. She was advised that after completing the diversion program she did not have to admit to any illegal drug involvement of any sort. Thus, she did not deliberately try to conceal anything from the Government. Consequently, this allegation is found for the Applicant.

Based upon the evidence presented, I find that the Applicant did not deliberately falsify her security clearance application, nor did she omit material facts during her interview with the defense department. What is crucial in this case is the fact that the Applicant did reveal this adverse information to her company security officer immediately after it occurred. She was under the reasonable assumption, be it erroneous or misinterpreted advice, that she did not have to list her drug charge on her security clearance application or in response to questions during a security background investigation.

I have also considered the "whole person concept" in evaluating the Applicant's eligibility for access to classified information. The Applicant has worked for the same defense contractor for 32 years. She has never received a security violation. She is respected and admired by her friends and colleagues. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, support a whole person assessment of good judgement, trustworthiness, reliability, candor, a willingness to comply with rules and regulations, or other characteristics indicating that the person may properly safeguard classified information.

This Applicant has demonstrated that she is trustworthy, and does meet the eligibility requirements for access to classified information. Accordingly, I find for the Applicant under Guidelines J (Criminal Conduct) and E (Personal Conduct).

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing her request for a security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the SOR.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: For the Applicant.
Subpara. 1.a.: For the Applicant.

Paragraph 2: Against the Applicant.
Subpara. 2.a.: For the Applicant.
Subpara. 2.b.: For the Applicant.

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 the Applicant.

Darlene Lokey Anderson
Administrative Judge