



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 07-12002

Appearances

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

December 7, 2009

Decision

WHITE, David M., Administrative Judge:

Applicant was arrested for numerous offenses, most of which were drug or alcohol-related, between 1970 and 1993. She also had a minor traffic infraction in 2002. She completed probation in December 1993, and she provided strong evidence of successful rehabilitation. Security concerns were mitigated. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Applicant submitted her security clearance application on May 8, 2006. On March 18, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J (Criminal Conduct), and E (Personal Conduct). 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 June 17, 2009. She answered the SOR in writing that same day (AR), and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on July 14, 2009, and the case was assigned to me on July 17, 2009. DOHA issued a Notice of Hearing on September 8, 2009, and I convened the hearing as scheduled on September 29, 2009. The Government offered exhibits (GE) 1 through 4, which were admitted without objection. Applicant offered exhibits (AE) A through J, which were also admitted without objection, and testified on her own behalf. Two other witnesses also testified for her. I granted Applicant's request to leave the record open until October 12, 2009, to permit submission of additional evidence. DOHA received the transcript of the hearing (Tr.) on October 7, 2009. On October 13, 2009, Department Counsel forwarded the additional evidence that was timely submitted by Applicant, without objection to its consideration. The evidence was marked AE K and admitted.

Findings of Fact

In her answer to the SOR, Applicant admitted all of the criminal conduct allegations and denied two personal conduct allegations. (AR at 1-2.) Her admissions are incorporated into the following findings. Applicant is a 60-year-old technician employed by a defense contractor. She has worked for her present employer since June 2004, and has held an interim security clearance without incident since shortly after being hired. She is divorced, with three adult children. She has no prior military service. (GE 1 at 6, 13-14, 18-20, 23-24, 27; Tr. at 7-9.)

In 1970, Applicant was arrested for possession of drugs after an undercover police informant mistakenly identified her as her cousin. Applicant had used marijuana with her cousin and the informant, but was not involved in possession or distribution of the drug. When the mistake was discovered, charges against Applicant were dismissed. (GE 2 at 4; Tr. at 70-71, 74-75.)

In July 1977, Applicant was arrested and charged with Sale of Cocaine and Possession of a Controlled Substance (marijuana) with Intent to Distribute. In November 1977, she was convicted of the second charge, and sentenced to one year in jail (suspended), and one year of probation. (GE 1 at 31-32; GE 2 at 4-5; GE 4 at 3; Tr. at 75-79.)

Applicant formerly owned and operated a seafood wholesale business. In November 1979, she traveled to another state with a large amount of cash to purchase some fish for the business. She took a handgun with her for protection. The gun was registered in her home state, but not in the other one as required by that state's law. She left the gun under a pillow in her hotel room, where a maid found it and turned it in to police. The gun was confiscated, and she is not sure whether she had to pay a fine. However, she was not formally prosecuted or otherwise sentenced. (GE 2 at 5; Tr. at 80-82.)

During August 1982, Applicant became intoxicated and got into a loud domestic argument with the man with whom she was then living. The police were called by a neighbor, and Applicant resisted their intervention and assaulted one of the responding officers. She was arrested on a Drunk and Disorderly charge, and spent the night in jail to sleep off her inebriation. She was then released without further legal action taken against her. (AR at 2; GE 2 at 5-6; Tr. at 82.)

On May 27, 1986, Applicant was arrested for nine counts of Unsworn Falsification and Welfare Fraud. She had been receiving welfare assistance from about 1980 to 1982 before her seafood business grew to become profitable. She wrote to the welfare agency to inform them she no longer needed assistance, but nine additional checks were mailed to her. During this time, she had employed a nanny to care for her children and given her access to her checking account. The nanny cashed the nine checks, without Applicant's knowledge, and kept the money. Applicant was found guilty of fraud, and sentenced to 30 days in jail, with 28 days suspended, and had to repay about \$7,000 in unearned benefits. (GE 2 at 6; GE 4 at 3; Tr. at 68-70, 86-88.)

In 1986, Applicant and a friend went to a Caribbean island where she purchased a kilogram of cocaine for \$4,000. She hid the cocaine on her person where it remained undetected as she reentered the U.S. through Customs. She sold the kilogram of cocaine to a drug dealer in her hometown for \$18,000. She used the profits to support her children. She admitted to these events during her September 20, 2006, interview with an investigator from the Office of Personnel Management (OPM). They were never detected by law enforcement, and she was not arrested or charged in connection with them. (GE 2 at 6-7; Tr. at 88-92.)

In August 1987, Applicant went back to the Caribbean island, with a different associate, to buy another kilogram of cocaine. Customs agents searched her as she reentered the U.S. and found the cocaine. She was arrested and charged with Importation of Cocaine and Possession of Cocaine with Intent to Distribute. She reached an agreement with the U.S. Attorney and Drug Enforcement Administration to work undercover and identify other drug dealers for them. In return, the second charge was dismissed and she was sentenced to two years of confinement, followed by four years of supervised probation that began in December 1989. While in prison, she saved the life of another inmate who was threatened by prison gang members, and she was released early for good behavior after serving 16 months. Since her 1987 arrest and subsequent imprisonment, Applicant has not illegally used or possessed any drugs. (GE 2 at 7; GE 3; GE 4 at 4; Tr. at 88-95, 112.)

In late March 1993, while still serving probation, Applicant went on vacation to another state. She spent the evening with some acquaintances, one of whom purchased some marijuana and was subsequently arrested. The police interviewed all group members, and discovered that Applicant was on Federal probation for a drug offense. The state authorities charged her with Promoting Detrimental Drugs, and notified her probation officer. This charge was dismissed in April 1993, and Applicant

successfully completed her probation in December 1993. (GE 2 at 8-9; GE 4 at 4; Tr. at 92-93.)

In June 2002, Applicant was working on a construction project in another city and staying in a hotel. She went to a restaurant for dinner and had two drinks with her meal. As she drove back to her hotel in the early morning hours, she realized her hotel was on the other side of the street from where she was driving in the right lane. After confirming that there were no other cars in the area, she drove across the road into the left turn lane. A policeman then pulled her over and accused her of being intoxicated. Even though she passed the field sobriety test, he still arrested her. In the process, he re-injured her shoulder that she hurt earlier that week. She became angry and combative as a result. At the police station, she consented to and passed a blood alcohol test. She was initially charged with Driving While Intoxicated (DWI) and Resisting/Interfering with Arrest, but the former charge was reduced to a Negligent/Reckless Driving violation for which she paid a fine, and the latter charge was dismissed. (GE 2 at 7-8; GE 4 at 5; AE K at 2, 3; Tr. at 82-84.)

Applicant admits and recognizes the wrongfulness of her criminal behavior from 1970 to 1987. She resolved after leaving prison that she would turn her life around and become a good citizen. She has performed significant charitable work, is very highly regarded by numerous friends and coworkers, and has received regular recognition by her military customers for her outstanding efforts in support of their missions. She takes great pride in having overcome her difficult past and in her present contributions to the community and her employer. Her expressions of regret for past wrongdoing and intention never to repeat such conduct were very credible and sincere. (AE A through K; Tr. at 32-68, 94-99, 112-113.)

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 to be used 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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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. 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, “[t]he applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7 of Executive Order 10865 provides that “[a]ny determination under this order adverse to an applicant 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.”

A person applying for access to classified information seeks to enter into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. 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.

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct: “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.”

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying (DCs). The two DCs supported by the SOR allegations, Applicant’s admissions, and undisputed evidence of record are:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.

Applicant admittedly committed multiple drug offenses from 1970 to 1987, including felonious importation of cocaine in 1986 and 1987. She unknowingly violated a gun registration law in 1979, and was convicted on Welfare Fraud charges in 1986 for wrongdoing that was primarily committed by her nanny. There is no evidence she

committed the 1993 Promoting Detrimental Drugs offense for which she was arrested, and that charge was dismissed before trial. Most recently, she paid a fine for a minor traffic violation in June 2002. The evidence fully supports security concerns under the DCs set forth in AG ¶¶ 31(a) and (c).

AG ¶ 32 provides conditions that could mitigate criminal conduct security concerns. These are:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; and
- (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.

For mitigation analysis, Applicant's SOR-listed criminal conduct and her criminal history must be evaluated as a whole, not piece by piece. Other than one minor traffic violation, Applicant's most recent criminal conduct occurred in August 1987, and was motivated by her desire to earn money to support her children who have long since grown up. For the past 22 years, she has remained law-abiding and worked hard to overcome her difficult past. All evidence from those who have known her recently attests to her present reliability, trustworthiness, and good judgment. She also testified credibly concerning her determination that such criminal conduct will not recur. This evidence establishes substantial mitigation under AG ¶ 32(a).

Applicant made no showing that she was pressured or coerced into any of her criminal acts to support application of AG ¶ 32(b). Applicant's 1993 Promoting Detrimental Drugs charge and 2002 DWI charge were both dismissed, and the record evidence shows that she did not commit those offenses despite having been arrested for them. AG ¶ 32(c) thus provides some mitigation in relation to those two matters.

Applicant also established substantial mitigation under AG ¶ 32(d). Other than a minor traffic violation for a reckless lane change, it has been more than 22 years since her most recent criminal activity. She demonstrated sincere remorse for her past wrongdoing, and has fully complied with all court sentences resulting therefrom. After her 1987 arrest, she worked with law enforcement to identify and apprehend others involved in illegal drug distribution. Her lengthy and excellent employment record and

extensive volunteer charitable community work further demonstrate her successful rehabilitation.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation;

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. Department Counsel expressed the Government's position that the Personal Conduct allegations in the SOR duplicate and are multiplicitous with the allegations under the Criminal Conduct Guideline. (Tr. at 21, 100.) To the extent that the Personal Conduct guideline allegations pertain to general judgment, reliability, and trustworthiness issues already addressed under Guideline J, and further analyzed under the whole-person discussion below, Department Counsel is correct. To the extent her SOR-alleged drug involvement and criminal history may support security concerns under AG ¶ 16(e) ("personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing. . ."), separate Guideline E concerns may arise. Applicant's full acknowledgment and disclosure of her past acts, and the passage of more than 20 years since her last conviction, fully mitigate any such concerns under AG ¶¶ 17(c) (" . . . so much time has passed. . . that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment") and 17(e) ("the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress").

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 relevant circumstances established by the record evidence. 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) the 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.

I considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. Applicant's conduct of security concern primarily involved several significant drug-related offenses, but the most recent of these occurred more than 22 years ago. Since her arrest for that offense, she has cooperated in Federal investigations as an undercover drug informant, resolved to change her former criminal ways, and lived as a law-abiding and contributing member of her community. She was old enough to be accountable for her crimes, and fully acknowledges their wrongfulness. Over the past 20 years, however, she has demonstrated her resolve to live a responsible life while making positive contributions to help others in need of assistance.

The testimonials to her present good character, trustworthiness, and responsibility by numerous friends and coworkers are unanimous and impressive. Taken together with her sincere and credible expression of remorse for former misconduct and pride in her new lifestyle, Applicant fully demonstrated rehabilitation and permanent behavioral change. Her full disclosure of past actions and recent good behavior have alleviated any potential for pressure, coercion, exploitation, or duress. The likelihood of recurrence is minimal.

Overall, the record evidence generates substantial confidence concerning Applicant's present eligibility and suitability for a security clearance. She fully met her burden to mitigate the security concerns arising from her criminal conduct and personal conduct.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	For Applicant
Subparagraph 1.i:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

DAVID M. WHITE
Administrative Judge