



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 07-05437
)	
Applicant for Security Clearance)	

Appearances

For Government: Paul Delaney, Esquire, Department Counsel
For Applicant: *Pro Se*

June 30, 2008

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant completed a Questionnaire for Sensitive Positions, SF-86 Form, on December 13, 2006. On October 24, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, and 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.

In an undated response, Applicant acknowledged receipt of the SOR and answered the SOR allegations in writing. On January 8, 2008, she was sent a letter stating that her response was incomplete, requesting her to state whether she wished to have a hearing on the matter. A January 22, 2008, response to the SOR was submitted admitting the allegations with explanations and indicating Applicant's selection of a hearing before an Administrative Judge. DOHA received that request on

March 3, 2008, and the matter was assigned to me on March 5, 2008. Department Counsel and Applicant agreed to an April 1, 2008, hearing date and a Notice of Hearing was issued on March 17, 2008. Due to an administrative conflict, an Amended Notice of Hearing was issued on March 27, 2008, moving the hearing to April 3, 2008.

The hearing took place as scheduled. Department Counsel submitted five exhibits (Ex.) which were accepted into the record as Exs. 1-5 without objection. Applicant submitted two exhibits, accepted as Exs. A-B without objection. No witnesses were called. The transcript (Tr.) was received on April 10, 2008. Based upon a review of the case file, exhibits, and testimony, security clearance is granted.

Findings of Fact

Applicant is a 28-year-old mail room worker who works for a defense contractor. She has a high school diploma and briefly attended college. She has one child, an eight-year-old daughter.

In the third grade, Applicant had been held back a year. Consequently, she turned 18 while in high school, where most of her peers were minors. 1998 was a difficult year for her. Her parents had separated and her father had passed away. On March 21, 1998, Applicant and five or six of her girl friends from school went to a local mall. One of her peers said "Hey. Let's, you know, get a pair of jeans out of the store, you know. I don't think you can get in trouble . . . if you just get a pair -- a shirt or something . . ." ¹ With that childish challenge waged, the girls entered a department store to execute the plan. Applicant chose to take a shirt, which she put on to wear. Before they left the store, the students were escorted to security by a female security guard. There, a male security guard joined the party to inventory the clothing the students had attempted to steal. All the clothing involved totaled approximately \$752 in merchandise. The young ladies were cuffed and taken by van to a local police station. At the station, charges were waged and Applicant was released to her mother.

About a month later, Applicant appeared in court. Each of the students was accompanied by a parent, although Applicant was also accompanied by a court appointed attorney. ² Both the judge and the attorney explained the situation to all the defendants at the same time, but Applicant was very nervous and recalls very little of the event. ³ She remembers discussion about expungement. ⁴ She does not remember anyone ever using the term "felony" to describe the charge to which the students would

¹ Tr. 30.

² Applicant remains unclear as to whether she was the only defendant afforded a court appointed attorney.

³ Tr. 39.

⁴ See., e.g., Tr. 50.

plea guilty.⁵ She remembers entering a guilty plea.⁶ She did not think the charge or the conviction was a felony, only a charge that would be ultimately removed from her adult record.⁷ A formal two year sentence in jail was suspended, so she was relieved of serving jail time. She expressed her contrition and restitution was made. She resolved it would be her only brush with the law and determined to move on with her life as a “positive, productive person.”⁸ She did not dwell on the event.⁹

Indeed, later, in successfully applying for positions of trust both as a bank teller and as an employee of a federal agency, Applicant made no reference to the criminal charge. The incident did not prove to be an issue or an obstacle in either job. Consequently, her belief that the expungement made the entire incident a nullity not worthy of reporting seemed confirmed and she kept the incident out of her mind.¹⁰

When Applicant first applied for her present position, she was orally asked about criminal activity in the past seven years. Although she thought the issue was otherwise inapplicable because of the expungement, she denied such criminal activity. She did so because seven years had passed and because she believed the incident, having been expunged, was a non-issue.¹¹ When she subsequently completed her SF-86, she did so unaided.¹² She also noticed an emphasis on inquiries as to incidents in the past seven years, the same time frame mentioned when she first applied for the job.¹³ Based on her understanding of the incident, her situation, and past experience in what was needed for preemployment screening, she answered “no” to Question 23(a)'s inquiry as to whether she had previously been charged or convicted of a felony. In so doing, she was not deliberately withholding information, only answering the question as she thought appropriate given the nature of the incident and the expungement.¹⁴ In a subsequent oral interview, she described the incident. Eventually, she rephrased her answer to the question to disclose the arrest, the conviction, and the circumstances.

⁵ Tr. 39-40.

⁶ Applicant's police record shows that she was found guilty of grand larceny (stealing clothing valued at \$200 or more), sentenced to two years in jail (suspended), and ordered to pay costs of approximately \$750. See Ex. 4.

⁷ Tr. 40-41, 46.

⁸ Tr. 42.

⁹ Tr. 41-42.

¹⁰ Tr. 40-41.

¹¹ Tr. 47.

¹² Tr. 48.

¹³ Tr. 47-48.

¹⁴ Tr. 45-46.

In the intervening years between the arrest and her current security clearance application, Applicant became committed to her resolve to move beyond the arrest. She describes herself as “a changed person.”¹⁵ She stresses her personal growth and maturity since her arrest. She completed high school. She had a baby. She is active with her church. She found a college schedule and collegiate life incompatible with her adult responsibilities as a mother and wage-earner. Instead, she chose to balance her adult obligations maturely and successfully. One co-worker describes her as “honest, caring of what’s right, and works hard, showing a high degree of professionalism in every endeavor she embarks upon.” The co-worker continues by stating: “She is a quick study and very loyal. [She] is an asset to any organization. . . .”¹⁶ Another co-worker describes Applicant as “dependable and a joy to work with.”¹⁷ Her manager describes her as “loyal, honest, and a very hard worker. I highly recommend her for a position of trust.”¹⁸

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. Under AG ¶ 2(c), this 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.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by

¹⁵ Tr. 54.

¹⁶ Ex. A (Co-Worker letter I).

¹⁷ Ex. B (Co-Worker letter II).

¹⁸ Ex. C (Manager letter).

Department Counsel. . . .¹⁹ The burden of proof is something less than a preponderance of evidence.²⁰ The ultimate burden of persuasion to obtain a favorable clearance decision is on the applicant.²¹

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. 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.

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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²² Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.²³ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.²⁴ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Analysis

Based upon consideration of the evidence, I find the following adjudicative guidelines to be the most pertinent to the evaluation of the facts in this case: **Guideline J – Criminal Conduct** and **Guideline E – Personal Conduct**. Conditions pertaining to these adjudicative guidelines that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the appropriate sections below.

¹⁹ See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

²⁰ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

²¹ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

²² *Id.*

²³ *Id.*

²⁴ Executive Order 10865 § 7.

Guideline J – Criminal Conduct

The concern regarding criminal conduct is that 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. Applicant was arrested, charged with a felony, and convicted in 1998 for the theft of clothing along with some high school peers. Consequently, as urged by the Government, Criminal Conduct Disqualifying Condition (CC DC) AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) applies. With a disqualifying condition thus raised, it is Applicant's burden to raise conditions in mitigation.

In 1998, Applicant had a difficult home life. Her parents' marriage failed, they separated, then her father passed away. Having been held back a grade in elementary school, she was slightly older than her academic peers. When some of her high school girlfriends dared each other to steal a piece of clothing, Applicant succumbed to the peer pressure and joined in. Their senior year prank, however, was not a joke to the store or the police. Together, they were caught, tried, and convicted.

Over a decade later, Applicant is no longer an easily influenced school girl. She is a grown, mature, woman who, at an early age, made the difficult choice to become an independent, single, working mother. She purposefully pursued a course of employment that permitted her to balance her financial needs with her maternal obligations. As a result, she has earned the respect and trust of her manager and co-workers while balancing her family life with church and social activities. There is no evidence to suggest even the remotest possibility she would ever again succumb to immature pressures or resort to childish antics. There is no reason to gauge the woman she is today in 2008 on a youthful transgression from over a decade ago. Consequently, Criminal Conduct Mitigating Conditions (CC MC) AG ¶ 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(b) (*the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life*) apply.

Additionally, aside from the passage of a decade and a great deal of maturation, Applicant expressed her contrition and made restitution on the clothing article. She has never again had a brush with the law. Indeed, she immediately began her own personal rehabilitation when she purposefully resolved to never again find herself in such trouble. As a result, she has led a life of successful achievement, devoid of criminal conduct. She has been a responsible mother and employee, and been active within her community church. Such factors additionally give rise to CC MC AG ¶ 32(d) (*there is evidence of successful rehabilitation, including but not limited to the passage of time without recurrence of criminal conduct, remorse or restitution, job training or high education, good employment record, or constructive community involvement*).

Guideline E – Personal Conduct

Security concerns related to personal conduct arise because personal 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. Here, Applicant answered "no" to an SF-86 question inquiring to whether she had ever been charged or convicted of a felony. As urged by the Government, such facts could potentially give rise to Personal Conduct Disqualifying Condition (PC DC) AG ¶ 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*) and ¶ 16(b) (*deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security officer, competent medical authority, or other official government representative*).

Applicant was a high school student when she was charged with the theft of clothing along with her peers. It was a traumatic experience for her, as she appeared in court with her mother. As a result, she remembers little of the incident. What she does remember, however, is that all the female students appeared as a group before the judge, that she did not have to serve time in jail, and that an explanation was given as to how expungement worked. In short, only the payment of costs necessitated action, everything else seemed waived. After becoming a mother and entering the workplace, she sought and obtained employment as a bank teller and with a federal agency. Knowing she was subject to some sort of screening for such positions, but also knowing – or thinking – her arrest and conviction had been expunged, she did not mention the incidents when she applied for those jobs. No further inquiries were ever made. As a result, her interpretation of what transpired in 1998 was confirmed: her record had been expunged and the incident was a non-issue. Similarly, when she denied a past charge or conviction for a felony on her SF-86, Applicant did not actively attempt to conceal or falsify. Rather, thinking the matter had been erased by the courts and was now a nullity.

The Government also points to Applicant's inconsistency in explaining why she did not note the 1998 incident on her SF-86: Was it because she forgot about the incident? Was it because she thought it was expunged? Was it because she thought it was not necessary to report the matter? It argues her inconsistency highlights itself as recent misconduct involving active concealment and demands scrutiny of her credibility. This apparent inconsistency, however, is not irreconcilable. Applicant explained that she had purposefully put the incident out of her mind in her attempt to move on with her life. She did so after concluding that her record would be expunged and the incident reduced to a nullity. Her decision to do this seemed solid after gaining banking and government jobs, both of which included some form of pre-employment screening. On the stand, Applicant's testimony was exceptionally credible. Given that credibility, in conjunction with her level of education, her youth at the time, and her experience in

subsequent years, her conclusion is highly plausible and gives no indication that her past inconsistencies were the result of misconduct, rather than basic misunderstanding.

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 public trust position must be an overall common sense 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 the facts and circumstances surrounding this case, as well as the "whole person" factors noted above. Applicant is an articulate and credible young woman. Her youthful brush with the law inspired her to refocus her life and her belief that the incident was expunged from her record gave her the feeling she could start anew. She is no longer the high schooler who takes up risky challenges for the sake of a thrill or to join the crowd. She is a respected employee and responsible single mother who demonstrates no qualities that might suggest she would ever again find herself on the wrong side of the law.

When Applicant was adjudicated along with her younger peers, expungement was duly explained to the group. Therefore, she was left with the impression her record would be wiped clean and that the incident would be deemed a nullity. Consequently, it was a learning experience best put behind her and safely forgotten. When she eventually obtained employment with the federal government and as a bank teller, the incident she believed to be expunged was not disclosed, the issue did not arise, and her belief her record had been wiped clean validated. Consequently, she confirmed her understanding that her record had been expunged. Not illogically, she subsequently answered "no" on the SF-86 question regarding the same issue. Nothing in her highly credible testimony shows that this was anything more than a lack of understanding of how the law was applied to her during the group trial and discussion, reenforced by subsequent job screenings where the issue was never raised. Applicant's answer may have been in error, and, as expungement is meant to do, it may have worked to her advantage. There is no evidence, however, that her answer was devised to mislead.

Over a decade has past since she was arrested and convicted of theft. She is contrite and embarrassed over the incident, There is substantial evidence of rehabilitation during the interceding period of time. There is scant risk she would ever

put herself in a similar position again. As a high school student, she was ill-advised of the repercussions of her actions and how the consequences differed for her, as opposed to her juvenile peers. Nothing in her life experience intimated that her interpretation of how her record read was incorrect; indeed, her experience was that the incident must have been erased or it would have been raised previously. Her testimony on this matter was credible. While some of her statements indicated some degree of inconsistency over the years, none of those statements were markedly irreconcilable with her testimony as a whole. Applicant has met her burden in mitigating both criminal conduct and personal conduct security concerns. I conclude it is clearly consistent with national security to grant Applicant a security clearance. Clearance is granted.

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
Paragraph 2, Guideline E:	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 national security to grant Applicant eligibility for a security clearance. Clearance is granted.

ARTHUR E. MARSHALL, JR.
Administrative Judge