

DATE: December 14, 2007

In re:)	
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-----)	ISCR Case No. 05-04319
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
ROBERT J. TUIDER**

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1993, Applicant was convicted of theft while employed by an international package and delivery company. In 1994, she was arrested for fraudulent illegal use of credit cards. In 1995, she was subsequently convicted of this offense and sentenced to 15 months incarceration in a federal women’s prison. After her release from prison, she left one of her jobs under “unfavorable conditions.” Considering the evidence as a whole, she was unable to mitigate criminal conduct concerns. Additionally, under 10 U.S.C. § 986(c)(1), she cannot be granted access to classified information. Clearance is denied.

STATEMENT OF THE CASE

On July 21, 2004, Applicant applied for a security clearance and submitted a Security Clearance Application (SF 86).¹ On May 10, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to her, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified, and revised.²

The SOR alleges security concerns under Guideline J (Criminal Conduct). In addition, the SOR includes an allegation that Applicant is disqualified, as a matter of law, from having a security clearance granted or renewed by the Defense Department under 10 U.S.C. § 986. The SOR 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 her, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In an answer notarized on June 6, 2007, Applicant responded to the SOR allegations, and asked for a hearing. Applicant's Response to SOR was received at DOHA on June 7, 2007. The case was assigned to me on July 6, 2007. On July 20, 2007, DOHA issued a notice of hearing, scheduling the hearing on August 9, 2007. The hearing was conducted as scheduled.

The government submitted five documentary exhibits that were admitted without objections as Government Exhibits (GE) 1 through 5. The Applicant testified and submitted 17 documents that were admitted as Appellant Exhibits (AE) A through Q without objection, except for AE L through O. As to AE L through O, Department Counsel objected to those documents, which were unsigned performance evaluations, on authenticity grounds.

I allowed the record to be held open to afford Applicant the opportunity to submit signed performance evaluations and other material. Applicant timely submitted additional documents post-hearing, which included signed copies of her performance evaluations, which addressed Department Counsel's objection. The post-hearing documents were marked and admitted without objections as AE R and S as well as AE A through Q. DOHA received the transcript on August 22, 2007.

FINDINGS OF FACT

¹GE 1 (Electronic Standard Form (SF) 86, Security Clearance Application is dated July 21, 2004. For convenience, the security application in this decision will be called SF 86. The Government also submitted a second SF 86, GE 2) dated July 22, 2004, which augmented the information contained in GE 1.

²On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of the revised Adjudicative Guidelines to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2007. The revised Adjudicative Guidelines are applicable to Applicant's case.

In her response to the SOR, Applicant admitted the allegations in the SOR. Her admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is a 36-year-old senior graphics artist. She has been employed by a defense contractor since April 2004, and is a first-time applicant for a security clearance. She graduated from high school in June 1989. She was awarded an associate's degree in computer animation in June 2003. At the time of graduation, she was given a certificate for "outstanding achievement." Tr. 32, 43, AE A, AE B. After being awarded her associate's degree, Applicant earned certificates in advanced AutoCAD and Architectural Development Programs to become an Autodesk professional. Tr. 33, AE C, AE D. Applicant is currently attending college part-time working toward a bachelor of arts degree. She estimates she has 111 credit hours and expects to graduate in 2009. Tr. 23, 43-44. Applicant has been married since December 2001 and has no children.

In February 1993, Applicant was arrested and charged with theft. She was sentenced to 90 days in jail, 12 months probation. She stated the theft occurred while she was an employee of an international package and delivery company. The item she stole was a "gold ring with a stone on it" from a package being shipped. She stated she never went to jail, but did serve her probation. Tr. 50-52, GE 4.³

Applicant was arrested in November 1994 and charged with fraud - illegal use of credit cards, a felony. She was subsequently indicted on that charge in February 1995, and pled guilty in federal district court March 1995. Pursuant to her plea, she was found guilty and sentenced in January 1996 to 15 months in prison to be followed by three years probation. She reported to a federal woman's prison in February 1996 and was released in April 1997, a period of 15 months. Tr. 10-11, GE 3 through 5. She completed her probation in April 2000. AE S. Applicant provided an explanation regarding this offense, which is quoted in part:

Criminal docket for Case No. [Number] lists that I was convicted of one count of credit card fraud. Upon reading this document, it is my opinion that any normal person would assume that I was involved in some type of fraudulent Visa, Master Card or other financial card transactions. This is not the case at all. Absolutely no financial bank cards or theft of money from a financial institution was involved whatsoever. What the criminal docket does not say is that there were no fraudulent financial transactions of any kind nor were any bank cards involved. No financial cards were stolen, no IDs were stolen, nor were there any bank accounts of any kind involved. Please let me explain what happened, but just as a side note, everything that happened took place before there was an Internet or a world-wide web. This point is important to know because this case involved what was called BBSs or bulletin board systems on computers. From what I found out after the court case was over, a person whom I never met or had spoken to named [Suspect 1] worked for a large telephone company. He somehow generated false telephone calling card numbers and these numbers were used to make telephone calls anywhere around the world. [Suspect 1] was friends with a person named [Suspect 2] in [State A]. I met [Suspect 2] over a

³Although this arrest and conviction was not alleged as part of the SOR, it is indicative of Applicant's conduct and therefore relevant in assessing Applicant's suitability for a security clearance.

telephone call through a gentleman named [Suspect 3] in [State B]. I met [Suspect 3] on a computer BBS, but never met him personally. My part in the crime that was committed was because that I was the middle man between [Suspect 2] in [State A] and [Suspect 3] in [State B]. My job as the middle man was to transfer computer text files which contained lists of telephone calling card numbers from [Suspect 2] in [State A] to various people in [Country A] and [Country B]. The recipients in [Country A] would then use these telephone numbers to make calls from [Country A] to [Suspect 3]'s computer where they download hundreds of various computer games and software programs. The people in [Country A] would pay [Suspect 3] for downloading the computer software. [Suspect 3] would also pay [Suspect 2] for the calling numbers. In return for my participation I was also given free access to [Suspect 3]'s BBS. The Secret Service investigated my crime and chose not to convict me under any computer crimes. They decided instead that my crime should be credit card fraud. Tr. 28-30, AE P.

Applicant stated as a result of her participation in this crime, she earned "a couple hundred dollars." Tr. 49. In response to Department Counsel's question, "So it was at least alleged that at least the numbers that you passed on ultimately cost approximately seven million dollars in - -", she responded, "Yeah, what happened was that my lawyer requested - - because my public defender tried to defend me before everything was completed to finalize all the paperwork and they came up with an amount of money based on like the number of calls that what were made that were called from [Country A] and different places and then they used that formula to estimate how much [Telephone Company 1] or [Telephone Company 2] lost in whatever revenue that they felt they would get from those calls." Tr. 54.

After Applicant was released from prison, she held several jobs to include working for a publishing company from October 1997 to February 2002. She left the company under "unfavorable circumstances" for selling books that were given to her company by vendors. She stated she made "about \$1,000" in these unauthorized sales. Referring to her employer at the time, she said, "They were really mad. They were extremely mad at me and they said that I didn't represent the company in a favorable manner and they fired me." GE 2, Tr. 56-58.

Later on, she also was a seasonal worker at a toy company from October 2002 to January 2003 and stated she was told by her employer, "don't bother coming back" if she went home for being sick. Applicant stated she left this job "under unfavorable circumstances." GE 2, Tr. 59-60.

Applicant's three years of performance evaluation document above average performance. AE L through O, AE R. Her current employer named her "Employee of the Year" two times. Applicant also submitted several commendatory certificates and a training certificate. AE E through H. It is clear that her employer considers her to be a valued employee, which is evidenced by several pay raises. AE I through K. Applicant also submitted a reference letter from a colleague who described her as "a good honest, and trustworthy person." AE P, AE Q. Applicant's right to vote was restored in September 2004. AE R.

POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider Enclosure 2 of the Directive, which sets forth adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into disqualifying conditions (DC) and mitigating conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These adjudicative guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed in the adjudicative process provision in Section E2.2, Enclosure 2, of the Directive. An administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Directive ¶ E2.2.1: (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to the relevant adjudicative guidelines are set forth and discussed in the Conclusions section below. Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests 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.

In the decision-making process, facts must be established by "substantial evidence."⁴ The government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive. Directive ¶ E3.1.15 provides, "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, and [applicant] has the ultimate burden of persuasion

⁴"Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

as to obtaining a favorable clearance decision.” The burden of disproving a mitigating condition never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).⁵

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an 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.

The scope of an administrative judge’s decision is limited. Applicant’s allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance 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.” Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

Guideline J (Criminal Conduct)

Guideline ¶ 30 explains the Government’s concern about criminal conduct stating, “[c]riminal 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.”

Guideline ¶ 31 indicates three Criminal Conduct Disqualifying Conditions that could raise a security concern in this case, including:

- (a) a single serious crime or multiple lesser offenses;

⁵“The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, [evaluates] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and [decides] whether Applicant [has] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

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

(f) conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year.⁶

The Government produced substantial evidence of these three disqualifying conditions as it pertains to Applicant's past criminal conduct and applicability of 10 U.S.C. 986.

Guideline ¶ indicates three potential Criminal Conduct Mitigating Conditions:

(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;

(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; and

(e) potentially disqualifying conditions (b) and (f) above, may not be mitigated unless, where meritorious circumstances exist, the Secretaries of the Military Departments or designee; or the Directors of Washington Headquarters Services (WHS), Defense Intelligence Agency (DIA), National Security Agency (NSA), Defense Office of Hearings and Appeals (DOHA) or designee, has granted a waiver.

Notwithstanding Applicant's successful completion of probation, furthering her education, recent employment success, and strides in rehabilitation, an administrative judge must look at the record as a whole before reaching a final decision. Troubling in this case is the nature of the crimes involved. At age 23, Applicant, while in a position of trust and responsibility as an employee of an international package and delivery company, violated the trust placed in her by stealing a ring contained in a package. She was convicted and sentenced for this crime.

Approximately four years later, at age 26, she was arrested for credit card fraud and pursuant to her guilty plea, was sentenced and served 15 months at a federal woman's prison. It's unclear the exact amount of money the victims in this case lost, but it is safe to say the amount was substantial. As evidenced by her statement at her hearing, Applicant appears to downplay her role in this offense, but a federal district court judge determined her crime serious enough to warrant a 15 month prison

⁶Under the provisions of 10 U.S.C. 986, a person who has been convicted in a Federal or State court, including courts martial, sentenced to imprisonment for a term exceeding one year and incarcerated for not less than one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretaries of the Military Departments or designee, or the Directors of WHS, DIA, NSA, DOHA or designee may authorize a waiver of this prohibition. Within DOHA, waivers are governed by Operating Instruction (OI) 64. In summary, OI 64 implements the waiver authority granted to the Director of DOHA by the Under Secretary of Defense (Intelligence). Also, OI 64 addresses an administrative judge's responsibilities in handling a case. First, a judge's authority is limited to determining if the law applies to the facts of the case. Second, if it does apply, no waiver recommendation of any kind will be made.

sentence followed by three years of probation. Further troubling is this offense involved conduct over a period of time as opposed to a single isolated event.

After she was released from prison and while employed by a publishing company from 1997 to 2002, she was fired for selling books that were provided to her company by vendors. This conduct is not isolated to one event and, like her 1994 offense, involved conduct over a period of time. This behavior leaves me with doubt as to the Applicant's future resolve. Accordingly, I find none of the mitigating conditions applicable under this concern. In reaching this conclusion, the whole-person concept was given due consideration and that analysis does not support a favorable decision.

“Because of the extreme sensitivity of security matters, there is a strong presumption against granting a security clearance. Whenever any doubt is raised . . . it is deemed best to err on the side of the government's compelling interest in security by denying or revoking [a] clearance.” *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990). After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, I conclude Applicant has not mitigated the security concerns pertaining to criminal conduct. Applicant's overall criminal conduct and conduct since her release from prison when weighed against her positive accomplishments leaves me with doubts as to her security eligibility and suitability.

Viewing the record evidence as a whole, Applicant did not present sufficient evidence to explain, extenuate, or mitigate the criminal conduct security concerns alleged in SOR ¶ 1.a. Furthermore, based on her conviction and serving 15 months of confinement, she is disqualified from having a security clearance granted (or renewed) by the Defense Department under 10 U.S.C. § 986(c)(1). Accordingly, this case is decided against Applicant based primarily on her criminal conduct as well as the applicability of 10 U.S.C. 986.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors”⁷ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude she is not eligible for access to classified information.

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 - 1.b.:	Against Applicant

DECISION

⁷See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Robert J. Tuidor
Administrative Judge