



## SYNOPSIS

In 2001, Applicant was arrested for forgery of a government instrument related to a fake twenty dollar bill. He had unprotected sensitive documents on his company computer, he talked about automatic weapons, gave a friend a Viagra tablet, and never reduced to writing that his apartment was searched by the police in 2001. The record evidence is sufficient to mitigate or extenuate the negative security implications stemming from the criminal conduct and personal conduct security concerns. Clearance is granted.

## **STATEMENT OF THE CASE**

On February 9, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding<sup>1</sup> it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR set forth reasons security concerns due to criminal conduct and personal conduct.

On March 3, 2006, Applicant answered the SOR and requested a hearing. On August 28, 2006, I was assigned the case. On September 18, 2006, a Notice of Hearing was issued for the hearing held on October 20, 2006. On October 31, 2006, DOHA received a copy of the transcript (Tr.).

## FINDINGS OF FACT

The SOR alleges security concerns for Criminal Conduct and Personal Conduct. Applicant admits to the following: in February 2001, he was arrested for forgery. In attempting to transfer documents to another he used the default setting, which inadvertently allowed other in his Windows Workgroup access to the material. He was contacted by company security and corrected the problem. He had an email exchange about automatic weapons. Applicant obtained a Viagra pill from a colleague and gave it to a friend who was curious about the pills effects. The admissions are incorporated herein as findings of fact. After a thorough review of the entire record, I make the following additional findings of fact:

Applicant is a 32-year-old materials engineer who has worked for a defense contractor since August 1998 and is seeking to obtain a security clearance. Applicant is regarded by those who know him as a very trustworthy, loyal, honest, organized, efficient, and competent employee who has excellent rapport with people. (App Ex A) His most recent performance evaluation rates him as a high contributor willing to go the extra mile. His previous evaluation rated him as a successful contributor, a competent performer, and valued team player. His next most recent evaluation listed

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<sup>1</sup>Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended.

him as a high contributor. (App Ex B) In September 2006, his duty performance earned him a spot cash award. (App Ex C)

In 1997, Applicant graduated with two bachelor's of science degrees, one in chemistry and the other in environmental science. He is currently working on his Master's degree. Since August 1998, he has been employed with his current employer.

In February 2001, Applicant accompanied a group of friends to a bar. Applicant paid for his beer with a twenty-dollar bill. An acquaintance was also at the bar paying for his drink. His acquaintance continued at the bar talking to the bartender whom he knew from high school or from some other activity. The acquaintance returned to the table and said the bartender had pointed out the bill the acquaintance used to pay for his drink was a forged twenty dollar bill. The acquaintance said he tore up the bill and threw it in the trash near the bar. The acquaintance did not reference the bill Applicant had used. After the bill was reported as fake, Applicant never saw the bill. Applicant and friends remained in the bar. Two or three hours later, the police arrived at the bar and said there were reports of forged twenty dollar bills being passed.

Applicant was arrested on the charge of forging a government instrument and released on a \$1,500 bond. Shortly after being released, he was questioned by the U.S. Secret Service. In December 2001, approximately eight months later, the charges were dropped. He never appeared in court or had any action taken against him related to this matter. Applicant never knowingly passed a forged or fraudulent bill. (Tr. 30)

In August 2002, Applicant needed to share unclassified files with a coworker. He was not familiar with setting up share permissions on his computer. He chose the default share permissions which unknown to him allowed everyone in his workgroup to see the sensitive information. Applicant received an email stating the problem and saying the files had been deleted. He was informed to reset his share permissions. This was a one time event. Applicant no longer uses Windows Shares for that reason. The company removed the majority of employees' ability to control this type of activity. The company's current procedure is the systems administrator opens and shares out folders. (Tr. 33) Other than the email, Applicant received no punishment or loss of pay over the incident. It did not impact on his work performance evaluation.

In July 2003, the police were investigating an acquaintance of Applicant. They were looking for items this individual may have given Applicant. The police asked to search Applicant's apartment and he granted permission for the search. A search of the acquaintance's apartment disclosed a Viagra pill inside a bottle on which was written Applicant's name. Applicant's friend had heard the claims being made about Viagra and was curious. Applicant had a coworker who had a prescription for Viagra and obtained a pill from the coworker for his friend. Applicant realizes it was wrong and an error in judgment to pass along the Viagra tablet. (Tr. 34) Applicant occasionally sees the person he gave the pill to because the person works out at the same gym as Applicant. They no longer socialize and are no longer close friends.

In an email, Applicant and this same friend also discuss how cool it would be to have an automatic weapon. Applicant admits it was very poor judgment on his part to talk about obtaining automatic weapons. (Tr. 34) Applicant has not emailed this individual in years. (Tr. 50)

In September 2003, Applicant made a signed, sworn statement (Gov Ex 2) about the forged bill incident. The statement did not mention the July 2003 search of his apartment. Applicant told the Defense Security Service (DSS) special agent about the search and was told that since the party being investigated was not the Applicant but his friend further discussions about the search were not necessary. The discussion about the search then ended and was not made part of the September 2003-written statement. In December 2003, Applicant made another signed, sworn statement (Gov Ex 3) addressing the forged bill and other incidents which included the July 2003 search. Applicant did not withhold information about the search during the September 2003 interview.

## **POLICIES**

The Directive sets forth adjudicative guidelines to be considered when evaluating a person's eligibility to hold a security clearance. Disqualifying Conditions (DC) and Mitigating Conditions (MC) are set forth for each applicable guideline. Additionally, each decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in Section 6.3 of the Directive. The adjudicative guidelines are to be applied by administrative judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. The presence or absence of a particular condition or factor for or against clearance is not determinative of a conclusion for or against an applicant. However, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, I conclude the relevant guidelines to be applied here are Guideline J, Criminal Conduct, and Guideline E, Personal Conduct.

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## **BURDEN OF PROOF**

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, an applicant from being eligible for access to classified information. The burden of proof in a security clearance case is something less than a preponderance of evidence, although the government is required to present substantial evidence to meet its burden of proof. Substantial evidence is more than a scintilla, but less than a preponderance of the evidence. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Additionally, the government must prove controverted facts alleged in the SOR. Once the government has met its burden, the burden shifts to an applicant to present evidence to refute, extenuate or mitigate government's case. Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>2</sup>

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence.

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<sup>2</sup> ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15

The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access to classified information in favor of protecting national security. Security clearance determinations should err, if they must, on the side of denials.

## CONCLUSIONS

Under Guideline J, criminal conduct is of security concern because a history or pattern of criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

In February 2001, Applicant was arrested and charged with forgery of a government instrument, a felony. The charge was later dropped. Because of this arrest DC 1 (E2.A10.1.2.1. *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*) and 2 (E2.A10.1.2.2. *A single serious crime or multiple lesser offenses*) apply.

Applicant supposedly passed a fake twenty dollar bill. After paying for his beer and being informed by an acquaintance about a fake bill, Applicant and his acquaintances stayed at the bar for another two to three hours before the police arrived. It is most unlikely had Applicant knowingly passed a fake bill that he would have remained in the bar for another two or more hours. A person passing fake currency is more apt to leave immediately after getting his change and finishing his beer. He is not likely to stick around for hours. Applicant talked to the Secret Service and months later the charge was dropped. Applicant did not appear in court.

I find no criminal conduct on the part of Applicant. MC 4 (E2.A10.1.3.4. *The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*) applies. Even if I did, the arrest occurred more than five and one half years before the hearing making this behavior not recent. MC 1 (E2.A10.1.3.1. *The criminal behavior was not recent*) applies. I find for Applicant as to SOR 1.a.

Applicant told the investigator his apartment had been searched looking for items that might have been stored there for an acquaintance who was under investigation. Applicant was not being investigated and was not charged with any crime. When Applicant told this to the DSS special agent, he was told he did not have to talk about it because the investigation was unrelated to him. Applicant completed a sworn statement (Gov Ex 2) in which he stated he had no other adverse contact with any law enforcement agency. The statement followed the special agent’s advice. It does not constitute a false statement. I find for Applicant as to SOR 1.b. and find for him as to criminal conduct.

The Government has satisfied its initial burden of proof under guideline E, (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness. In August 2002, Applicant had unprotected

sensitive documents on his computer, he talked about automatic weapons with a friend, and passed along a Viagra tablet to a friend.

Personal conduct is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. In August 2002, Applicant needed to share sensitive documents with a coworker. Not being familiar with the share permissions, he used the default setting which was too broad and allowed access to other employees who he did not intend to have access. It would be nice to know how to do everything on a computer, but the average person's knowledge is not all encompassing. He attempted to perform something he was unfamiliar with and made a mistake. Applicant received an email stating there was a problem, informing him the information had been deleted, and directing him to reset his share permissions, which he did. This was a one time event. Not knowing how to set the permission status on one's work computer does not create doubt about a person's judgment, reliability or trustworthiness. I find for Applicant as to SOR 2.a.

Applicant and a friend emailed each other about how great it would be to have an automatic weapon. Applicant admits it was very poor judgment on his part to talk about obtaining automatic weapons. But that is all the emails amounted to was talk. No actions were ever taken in order to secure such a weapon. Talking about guns, even about obtaining automatic weapons, is not so egregious as to create doubt about a person's judgment, reliability or trustworthiness. I find for Applicant as to SOR 2.b.

Back in July 2003, the claims of Viagra were new. Applicant's friend wanted to check out the claims and Applicant said he had a friend with a prescription and would get a tablet. Applicant gave his friend a tablet, which was an inappropriate action. Passing along prescription medicine to someone without a prescription is wrong. Applicant realizes it was wrong and an error in judgment. This occurred more than three years ago. This was a bad thing to do but not so egregious as to create doubt about a person's judgment, reliability or trustworthiness. I find for Applicant as to SOR 2.c.

As previously described, there was no deliberate failure to disclose the search, in fact Applicant did disclose the search to the DSS but it was not made part of the first statement. Applicant informed the DSS about the search, he was told he did not have to talk about it. In a second interview, he was asked more questions about the search and he answered the questions. Applicant's explanation as to why the search was not made part of the first sworn statement is credible. No disqualifying conditions apply. Considering his appearance and demeanor while testifying and the totality of information, his explanation is credible. I find for Applicant as to SOR 2.d.

Each of the allegations concerning Applicant's misconduct has been addressed separately. Least any reviewer attempt to say that they were addressed piecemeal, I have considered the application of various mitigating factors in addition to the totality of Applicant's circumstances and the record as a whole. The "whole person" factors have been considered, which include: the nature, extent, and seriousness of the conduct; Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

Applicant was charged with passing a forged bill. However, after paying for his drinks and being informed of the concern over a forged bill, Applicant and his associates continued to remain at the location where the money was passed for more than two hours. Passing forged bills is certainly serious conduct, but considering the facts and circumstances surrounding the passing of the bill, Applicant did not know the bill was fraudulent. He did not voluntarily pass a bogus bill. The frequency and recency of this event was one time more than five and one half years ago.

Making a mistake as to the permissions on a Window folder does not involve questionable judgment, unwillingness to comply with rules, unreliability, dishonesty, or lack of candor. The nature, extent, and seriousness of the conduct of having unprotected sensitive documents on one's computer, the circumstances surrounding the conduct, Applicant's voluntary and knowledgeable participation, the motivation for the conduct, the frequency and recency of the conduct, and the probability that the circumstance or conduct will continue or recur in the future must be considered. Applicant voluntarily set the permissions but his knowledge as to how to do it was faulty. He did not intend the material to be accessible to anyone but the one person he thought he had given access. His motivation was to provide that one person access. It was simply a mistake which occurred once four years ago and has not been repeated. It is unlikely the conduct would recur since the company changed its policy and now requires a systems manager to set the permissions

In reviewing the "whole person" factors, the seriousness of passing along a Viagra pill has been considered. The facts and circumstances surround the event were a friend was curious about the effects, Applicant knew someone who had a prescription, and got a pill for his then friend. Viagra, although a prescription drug, is not a schedule II or III controlled drug. Applicant acted voluntarily and was motivated by a desire to allow his friend to experience the claims being made by the drug manufacture. This was a one time occurrence occurring more than three years ago. There is no probability that the circumstance or conduct will continue or recur in the future.

The "whole person" factors have been considered, related to Applicant's talking about guns and wouldn't it be great to have an automatic weapon. In considering the nature, extent, and seriousness of the conduct, this was all just talk. His talk does not show unreliability, untrustworthiness, lack of candor, dishonesty, or unwillingness to comply with rules,

The Applicant revealed the search of his apartment and relied on the DSS special agent's statement that it did not need to be part of the sworn statement. This is neither a false statement nor a deliberate failure to disclose. His actions constituted neither criminal conduct nor adverse personal conduct.

My analysis of the numerous acts of misconduct in this record are a reasonable interpretation of the record evidence as a whole. I have considered the significance of Applicant's pattern of conduct. Taken together, the separate events alleged do not have a significance that is missing when each event is viewed in isolation. In this case, there is no evidence of serious, repeated poor judgment, or rule violations. I have considered the totality of Applicant's conduct when deciding whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant and have not made a piecemeal analysis of Applicant's overall conduct. I find for Applicant as to criminal conduct and personal conduct.

## **FORMAL FINDINGS**

Formal Findings as required by Section 3., Paragraph 7., of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 Criminal Conduct: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Paragraph 2 Personal Conduct: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Subparagraph 2.b.: For Applicant

Subparagraph 2.c.: For Applicant

Subparagraph 2.d.: For 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 Applicant. Clearance is granted.

**Claude R. Heiny**  
Administrative Judge