

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant failed to mitigate criminal conduct and personal conduct security concerns relating to allegations of corporate fraud and false claims against a former employer (1999-2004) for which he and three others were charged with a felony and paid restitution and a fine. The conduct occurred in 2003 and 2004 when he was investigated and discharged by his employer. The final judgment in the criminal matter occurred only two years ago. While he is highly regarded by his present employer and has taken positive steps to rehabilitate, it is premature at this time to grant a clearance. Clearance is denied.

CASENO: 05-18055.h1

DATE: 06/26/2007

DATE: June 26, 2007

In Re:)	
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)	
-----)	ISCR Case No. 05-18055
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
CHARLES D. ABLARD**

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

James E. Corl, Jr., Esq.

SYNOPSIS

Applicant failed to mitigate criminal conduct and personal conduct security concerns relating to allegations of corporate fraud and false claims against a former employer (1999-2004) for which he and three others were charged with a felony and paid restitution and a fine. The conduct occurred in 2003 and 2004 when he was investigated and discharged by his employer. The final judgment in the criminal matter occurred only two years ago. While he is highly regarded by his present employer and has taken positive steps to rehabilitate, it is premature at this time to grant a clearance. Clearance is denied.

STATEMENT OF CASE

_____ On March 9, 2006, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, 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 and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On March 27, 2006, Applicant, in a sworn written statement, responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to me on February 12, 2007. A notice of hearing was issued on March 22, 2007, for a hearing that was held on April 10, 2007. The Government and Applicant each introduced five exhibits at the hearing and all were admitted into evidence. One witness testified for the government. Applicant and four witnesses testified on his behalf. The transcript was received April 26, 2007.

PROCEDURAL MATTERS

_____ The hearing in this matter concluded late in the day on April 10, 2007, and the parties agreed that, in lieu of oral arguments, written arguments would be submitted at scheduled times. The government submitted its argument on May 4, 2007, and therein moved to amend the SOR to add allegations relating to three new factual issues brought out in the hearing involving the personal conduct allegations concerning falsifications relating to his prior employment. Applicant objected to the amendments on the grounds that it was too late to make such an amendment, and, if it were granted, requested that the hearing be re-opened for additional testimony.

The government cited several Appeal Board decisions affirming the right to amend during a hearing as stated in Section E3.17 of Additional Procedural Guideline of the Directive. I find nothing in the cited cases to indicate whether an amendment can be made during closing arguments even when they are presented in oral form. In this case, because they were submitted several weeks after the record was closed in written argument, I sustain Applicant's objection. To grant it would require opening the hearing for additional testimony. Judicial economy indicates a contrary result.

_____The SOR was amended on motion of the government during the hearing to strike language in Par. 1.a. alleging that Applicant pled guilty to the larceny charge.

FINDINGS OF FACT

Applicant denied both allegations in the SOR. After a complete review of the allegations in the SOR, the documentary evidence, and testimony in the record, I make the following additional findings of fact:

Applicant is a 32-year-old employee of a major defense contractor, working as an engineer since October 25, 2004. He has a bachelor's degree and is working on an MBA which he expects to receive in 2008. Before his present employment he worked for another defense contractor from May 1999 until August 10, 2004 when he and others were terminated after an internal corporate investigation of financial improprieties in the company (Exh. 4). The investigation involved falsification of company expense claims and using company funds for personal gain during a seven-month period at the end of his employment. Applicant asked to be permitted to resign but was advised that he was already terminated. The allegations involved Applicant, his supervisor, and two other staff members who all worked together as a marketing team for a service. He was unemployed for two months until he was hired by his present employer in his home state. He also had worked for another defense contractor between 1996 and 1999 when he held a security clearance. He held an interim clearance with his present employer at the time of his arrest but it was revoked when this proceeding began. He now works on an unclassified project.

As a result of the investigation and a referral to the district attorney, Applicant was arrested in November 2004 only a few weeks after he was hired by his present employer. Criminal charges of felony larceny were filed on April 13, 2005. He wanted to litigate the charges but the expense to do so was prohibitive so he negotiated an admission of facts and agreed to pay \$4,900 in restitution and a \$1,000 fine. The case was continued with no findings and he was released on \$500 bail. He advised his present employer when he was arrested and the charges were filed. The company security office advised the Defense Security Service on November 15, 2004 (Exh. 3). On June 13, 2005, the case was dismissed on recommendation of the probation office since he had no further difficulties during the past sixty days (Exh. 5).

The improprieties and illegal actions about which Applicant, his supervisor, and the other two employees were investigated and charged arose as a result of actions that were instigated by their supervisor to make financial claims against their employer using false information to cover certain expenditures. Applicant's supervisor was authorized to approve the claims made by the three members of his staff. The claims were usually made by the staff members and approved by the supervisor. In some instances the supervisor had access to the credit cards of his staff and made charges on them directly. He then told the staff members to pay the cards and make claims for company reimbursement which he would and did approve. Threats were sometimes used by the supervisor to obtain the cooperation of his staff on financial claims (Tr. 92). This process was followed because, if the supervisor submitted the claims himself, then his own supervisor would be the approval authority for the charges whereas he had the authority to give final approval for claims submitted by his own subordinates.

These charges included such things as expensive tickets for major sports events, restaurant dinners, and corporate gift cards. Some of these expenses incurred on the credit cards were for the supervisor's travel expenses when he used Applicant's travel card. Often customers names were listed on the expense vouchers when only the marketing team and their families were the guests. Applicant and his team members were sometimes told by their supervisor that these were expressions of appreciation for their good work and were authorized by the company since the supervisor controlled the budget for his marketing group.

One instance involved a trip to Europe when Applicant intended to take his wife along at company expense which his supervisor authorized. The business part of the trip in Paris was cancelled but the supervisor authorized him to take the trip as a vacation at company expense. He did so but did some company business during the four days in Paris at the company office and continued on to Sweden where other company business was conducted. Applicant was aware that the practices he engaged in probably were in violation of company policy but acceded to his supervisor's requests. At one point he did raise a question about the practices to another supervisor, without results.

The supervisor was often late in approving company reimbursements for the claims and the company was often late in paying the claims so penalties and interest accumulated on the credit cards of Applicant and the other staff members. Applicant and the other staff members then submitted false vouchers for non-existent expenditures to the company to obtain reimbursement for those charges which were occasionally as much as \$1,000. Those claims were the only ones directly attributable to Applicant by the company investigators and accounted for approximately half of his restitution charges. The other half of his restitution was for the costs of the company investigators who performed the internal investigation. Other false claims that he made on behalf of the supervisor were attributed the supervisor for restitution. In addition to the restitution paid by Applicant, the supervisor paid over \$20,000 in restitution and the other two members of the staff each paid amounts similar to Applicant's in restitution based on the amounts of the corporate fraud attributed to each (Exh. A).

Although Applicant holds his former supervisor responsible for the false claims since it was he who encouraged and authorized the conduct, he recognizes his own culpability in the matter and now realizes that he should have taken steps to report and end the practices. He has had no contact with his former supervisor or his former colleagues on the marketing team since his employment terminated.

When Applicant applied for work with his present employer, he did not reveal the reasons for departing his former employment but only advised them that he wanted to relocate in his home city which was his choice as a place of employment. He did advise them fully a few weeks later when he was arrested and charged, and they continued his employment. He is well regarded by his employer in his evaluations during the three years of his employment (Exh. C). He has had extensive training in a great variety of subjects including ethics and personal conduct (Exh. B). These subjects were not covered by training of his former employer and he has benefitted from the past three years of instruction (Tr. 184).

POLICIES

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has “the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position that will give that person access to such information.” *Id.* at 527.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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. Directive, ¶ E2.2.1. Security clearances are granted only when “it is clearly consistent with the national interest to do so.” Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

_____ Initially, the Government must establish, by something less than a preponderance of the evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information *See Egan*, 484 U.S. at 531. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant’s clearance. “Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.” Directive, ¶ E2.2.2. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b).

CONCLUSIONS

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

_____ Under Guideline J, Criminal Conduct, a security concern arises when there is a history of pattern of criminal activity that creates doubt about a person’s judgment, reliability, and trustworthiness (E2.A10.1.1.). Conditions that could raise a security concern and may be disqualifying include allegations or admission of criminal conduct, regardless of whether the person was formally charged (E2.A10.1.2.1.), or a single serious offense or multiple lesser offenses (E2.A10.1.2.2.). The evidence raises those concerns. The allegations could be mitigated if the criminal behavior was not recent (E2.A10.1.3.1.), or there is clear evidence of successful rehabilitation (E2.A10.1.3.6.). While the conduct ended with his termination in 2004, the criminal proceedings that developed as a result of that conduct ended only two years ago. There is evidence of rehabilitation but more time is needed to satisfactorily establish that there is clear evidence of rehabilitation as the guidelines require.

_____ Under Guideline E Personal Conduct, actions involving questionable judgment,

untrustworthiness, unreliability, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information (E2.A5.1.1.). The deliberate falsification of expense accounts of his former employer was established by corporate investigators and resulted in state criminal felony charges which are conditions raising security concern (E2.A5.1.2.1). The burden shifts to the Applicant to show that Mitigating Conditions (MC) are applicable to him. While it is unlikely that these events could lead to coercion, I find that there are no mitigating conditions that are fully applicable to facts and circumstances of this case.

_____The objective of the security clearance process is the fair-minded, commonsense assessment of a person’s trustworthiness and fitness for access to classified information. The “whole person” concept recognizes that we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Applicant is an impressive young man who has a bright future with his present employer. His employer is aware of his past conduct having become fully aware of it only a few weeks after he joined the company, and did not give the reasons for leaving the former employer when he was hired. This is a tribute to him and is illustrative of the opinion of him held by his employer. While he has learned a valuable lesson in corporate ethical conduct, he was old enough at the time of the actions for which he has been punished to know better than to join in the effort of his supervisor to take advantage of his employer. The conduct occurred over time and involved multiple false claims. The activity was induced by the supervisor but Applicant was motivated by a desire to get along with the supervisor and enhance his career. While there is little likelihood of a recurrence of such conduct, I conclude that, because the actions taken against him only ended less than two years ago, a decision in his favor at this time is not warranted.

After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, it is premature at this time to grant him access to classified information. Thus, I find against Applicant.

FORMAL FINDINGS

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline J:	AGAINST APPLICANT
Subparagraph 1.a.:	Against Applicant
Paragraph 2. Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant

DECISION

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

is denied.

Charles D. Ablard
Administrative Judge