

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant is 23 years old, married, and works for a defense contractor. He and a friend created at least four counterfeit county fair tickets in 2004. He pled guilty to attempted forgery in 2006, after he completed his security clearance application. Applicant mitigated the criminal conduct and personal conduct security concerns. Clearance is granted.

CASENO: 06-18830.h1

DATE: 08/09/2007

DATE: August 9, 2007

In re:)	
)	
-----)	
SSN: -----)	ISCR Case No. 06-18830
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
PHILIP S. HOWE**

APPEARANCES

FOR GOVERNMENT

D. Michael Lyles, Esq., Department Counsel

FOR APPLICANT

James T. Ambrose, Esq.

SYNOPSIS

Applicant is 23 years old, married, and works for a defense contractor. He and a friend created at least four counterfeit county fair tickets in 2004. He pled guilty to attempted forgery in

2006, after he completed his security clearance application. Applicant mitigated the criminal conduct and personal conduct security concerns. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on October 4, 2006, detailing the basis for its decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued. Applicant answered the SOR in writing on October 20, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on March 20, 2007. With the consent of the parties, I convened a hearing on June 7, 2007, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on June 20, 2007.

FINDINGS OF FACT

Applicant is 23 years old, married, and works for a defense contractor. He started working for the defense contractor on September 12, 2005, after graduating from junior college. He completed a security clearance application (SCA) on that date. Question 23 (Your Police Record) in subsection Question 23.f. inquires if Applicant had been arrested for, charged with, or convicted of any offenses not listed in the other subsections of Question 23. Applicant answered “no.” (Tr. 51, 52; Exhibit 1)

Applicant and a friend with whom he no longer associates prepared several counterfeit county fair tickets in August 2004. The county fair board raised prices, and Applicant did not have much money then, so he and his friend used Applicant’s computer to prepare the tickets. Applicant attempted to sell one ticket for \$5.00, but it was to a sheriff’s office undercover operative. Applicant thought if he were caught making any sale, he would be warned and told to stop doing it. He thought of himself then as being young and stupid. (Tr. 18, 19, 39, 49)

Applicant voluntarily went to the sheriff’s office in his county on August 14, 2004, to answer questions. He was not arrested. The sheriff’s investigator told him he was not under arrest. The sheriff’s jail division records show Applicant has not been arrested in that county nor was he ever incarcerated there. Applicant thought when he heard nothing from the sheriff or local prosecutor after August 2004, that he was “home free.” The court clerk’s office found no felony record in the court records pertaining to Applicant. (Tr. 20, 21, 33, 37, 44; Exhibit A)

After speaking to that investigator, Applicant returned home and never heard from the sheriff or local prosecutor until December 2005. His attorney originally told Applicant to continue with his life and he would contact Applicant if there were any developments in the case. In December 2005, the local prosecutor contacted Applicant's attorney to resolve the case before the end of 2005. The attorney did not agree with that request. The prosecutor issued a misdemeanor complaint for attempted forgery, a misdemeanor of the first degree under state law. On July 11, 2006, Applicant pled guilty to the attempted forgery. The state court judge fined him \$500 plus court costs of \$83.74. Applicant paid that amount. Applicant also received a suspended jail sentence of 180 days, 100 hours of community service, forfeiture of his 2004 computer equipment the sheriff seized in August 2004, ordered to remain out of trouble for one year, and was further ordered to cooperate with the sheriff and prosecutor on any investigation and prosecution involving the counterfeit fair tickets. On July 16, 2006, the state court reduced the community service time to 60 hours to be equal to what his friend received in his sentence. Applicant completed the community service successfully. He worked at the county fairgrounds picking up trash. The "traffic docket" for July 11, 2006, shows a conviction for forgery, but the actual court findings shows the offense was "attempted forgery," a misdemeanor. (Tr. 22-28; Exhibits 2, A-C, F)

Applicant spoke with a Government investigator about his SCA before June 2006. The investigator spoke with him once, and then returned after she had talked to his neighbors and was told about the counterfeit county fair tickets. He disclosed everything to her that had happened up to that time, which was before he had been charged in the misdemeanor complaint. Page 2 of the SCA, under "Your Personal Interview," states the interview allows the Applicant the opportunity to "update, clarify, and explain information on your form more completely . . ." Applicant updated and clarified his situation regarding this incident for which he had not been charged until June 13, 2006. (Tr. 42, 50; Exhibit 1)

Applicant received acceptable ratings on his first employee evaluation from December 2004 to December 2005. In the January to December 2006 evaluation he increased his ratings in five of eight categories to the "exceeds expectations" rating. His supervisor considers Applicant competent, trustworthy, a fast learner, not a disciplinary problem, and a good team player. (Tr. 54-63; Exhibits D, E)

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. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information with Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. The revised Adjudicative Guidelines set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. Those assessments include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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 (See Directive, Section E2.2.1. of Enclosure 2). Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. 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.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). All that is required is proof of facts and circumstances that 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. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance. ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "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* Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline J: Criminal Conduct: The Concern: 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. ¶30

Guideline E: Personal Conduct: The Concern: 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. ¶15

CONCLUSIONS

Guideline J—Criminal Conduct Applicant and his friend counterfeited county fair tickets in 2004. Applicant had four tickets, and tried to sell only one of them. The county sheriff caught him immediately. Applicant's actions were a single serious crime (¶ 31.a), and involve allegations or admissions of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted (¶ 31.c). Applicant had a one year probation expiring July 11, 2007, which he was currently serving at the time of the hearing in June 2007. (¶ 31.d). These are the Disqualifying Conditions that apply to these facts.

However, the SOR alleges Applicant was arrested on August 2, 2004, but the evidence shows he was never arrested then or ever for this violation of state law. The SOR also alleges Applicant "faced Fourth Degree Felony-Forgery charges", but the evidence shows he only faced a misdemeanor charge in June 2006.

The Mitigating Conditions (MC) applicable are that "so much time has elapsed since the criminal behavior happened that it is unlikely to recur and it does not cast doubt on the individual's reliability, trustworthiness, or good judgment" (¶ 32.a), and "there is evidence of successful rehabilitation, including but not limited to, the passage of time without recurrence of criminal activity, remorse or restitution, higher education, or a good employment record"(¶ 32.d). Applicant was 19 years old when he made the tickets with a friend. He is now three years older, married, and has responsible employment. His performance evaluations from his supervisor are very good, and the supervisor finds him to be a valuable employee. This incident was a one time occurrence that was stopped by the local sheriff that will not recur because Applicant is now gainfully employed, as is his wife, so they can afford tickets to the county fair. He does not associate with the friend involved with him in the incident.

Applicant's state of mind at the time was that this counterfeit ticket production was harmless and he would be told to stop by the authorities if caught. The minimal cost of each ticket, and his lack of success in selling the four he had, made him think it was a truly minor offense, if any at all. Applicant admitted he was young, poor, and foolish at the time. He also thought that nothing would happen from it because after his August 2004, discussion with the sheriff's office, he heard nothing again from any law enforcement official. Neither he nor his attorney heard anything until December

2005. He thought it had gone away and he was “home free.” He later discovered he was wrong, and his actions resulted in a misdemeanor conviction.

This incident was not disclosed on his SCA, but Applicant had not been arrested nor charged for the offense until nine months after he completed his SCA. In addition, he fully disclosed the incident to the Government investigator before June 2006. There was not a knowing and willful making of a false statement to a government agency. No felony under 18 U.S.C. 1001 was committed.

Guideline E—Personal Conduct Applicant did not disclose in SCA Question 23.f. that he had been arrested, charged, or convicted of the counterfeit county fair offense. That non-disclosure was accurate because the county records show he was never arrested for that offense, was not charged with any offense until June 13, 2006, nine months after the September 12, 2005, completion of the SCA, and was not convicted of a misdemeanor attempted forgery until July 11, 2006. Therefore, his answer was accurate and not a deliberate omission, concealment, or falsification on the SCA under Disqualifying Condition (DC) ¶ 16.a. The adverse information on this incident does not meet the criteria of DC ¶ 16.c. because there is only one adjudicative issue area, criminal conduct, involved. Nor does DC ¶ 16.d. or the following DCs apply on the facts or their criteria.

Applicant disclosed to the Government investigator the facts involved in this incident, thereby making an update of his original SCA. Mitigating Condition (MC) ¶ 17.c. would apply because the one-time offense was minor, it happened three years ago, it is unlikely to recur, and the unique circumstances were Applicant’s lack of maturity, minimal finances, increased fair ticket cost occurring at that time, and Applicant succumbing to his friends suggestion. That friend is no longer in Applicant’s circle.

Whole Person Analysis

“The adjudicative process is an examination of a sufficient period of a person’s life to make an affirmative determination that the person is eligible for a security clearance.” AG ¶ 2(a). “Each security clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy.” Directive ¶ 6.3. “Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.” AG ¶ 2(a). In evaluating Applicant’s case, I have considered the adjudicative process factors listed in the AG ¶ 2(a).

Under this concept, I considered the one-time and minor nature of this offense. The local prosecutor thought it only warranted a misdemeanor charge nearly two years later. Applicant is gainfully employed and married now, no longer without income to buy fair tickets and not subject to the importuning of his friend. Applicant was three years younger then. There is no likelihood of recurrence of this incident. He served his probation conditions successfully. The month remaining on his probation term is not significant. Considering all the evidence, this incident was obviously a stupid and youthful action that Applicant now regrets.

Therefore, I conclude the criminal conduct security concern for Applicant. I conclude the personal conduct security concern for Applicant. I conclude the “whole person concept” for Applicant.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Philip S. Howe
Administrative Judge