

KEYWORD: Criminal Conduct; personal Conduct

DIGEST: Applicant is a 27-year-old employee of a defense contractor who has a history of juvenile arrests and traffic offenses from 1994 until 2003. She was convicted in 2003 for harassment due to a domestic incident. She successfully completed her court ordered classes in anger management and probation. She has mitigated the trustworthiness concerns under criminal conduct, and personal conduct. Applicant's eligibility for an assignment to a sensitive position is granted.

CASENO: 06-18949.h1

DATE: 03/28/2007

DATE: March 28, 2007

In re:)	
)	
-----)	ADP Case No. 06-18949
SSN: -----)	
)	
Applicant for Public Trust Position)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
NOREEN A. LYNCH**

APPEARANCES

FOR GOVERNMENT
Nichole Noel, Esq., Department Counsel

FOR APPLICANT
Pro Se

SYNOPSIS

Applicant is a 27-year-old employee of a defense contractor who has a history of juvenile arrests and traffic offenses from 1994 until 2003. She was convicted in 2003 for harassment due to a domestic incident. She successfully completed her court ordered classes in anger management and probation. She has mitigated the trustworthiness concerns under criminal conduct, and personal conduct. Applicant's eligibility for an assignment to a sensitive position is granted.

STATEMENT OF THE CASE

On November 21, 2005, Applicant submitted an application for a position of public trust, an ADP I/II/III position. The Defense Office of Hearings and Appeals (DOHA) declined to grant the application under Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Jan. 2, 1992), as amended (the “Directive”).¹ On November 29, 2006, DOHA issued Applicant a Statement of Reasons (SOR) detailing the basis for its decision. The SOR, which is in essence the administrative complaint, alleged security concerns under, Guideline E, Personal Conduct, and Guideline J, Criminal 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.

In a sworn statement dated December 7, 2006, Applicant responded to the SOR allegations and requested a hearing. The case was assigned to me on January 26, 2007. A notice of hearing was issued on February 21, 2007, scheduling the hearing for March 6, 2007. The hearing was conducted on that date with Applicant waiving the 15 day notice. The Government submitted Government Exhibits (GE) 1-2, which were admitted into the record without objection. Applicant testified on her own behalf, and presented the testimony of her mother-in-law. She offered one exhibit AE A, which was read into the record. At Applicant’s request, the record was held open until March 13, 2007 for submission of the document that was read into the record at the hearing. Applicant did not submit the copy. DOHA received the hearing transcript (Tr.) on March 19, 2007.

FINDINGS OF FACT

Applicant admitted all SOR allegations under Guideline J, and all allegations under Guideline E.² Those admissions are incorporated as findings of fact. After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a married, 27-year-old employee of a defense contractor, serving as a customer service representative. She has three children, ages eight, five and two years.³ She completed her high school general equivalency degree (GED) in 2001. She submitted an application for a position of trust in connection with her employment on November 21, 2005.⁴

Applicant’s grandparents raised her because her mother did not choose to do so. Applicant believed her mother was her older sister. Until the age of 13, Applicant believed that her grandparents were her real parents.⁵ When she learned the truth, she was quite upset. During her high

¹This action was taken under Executive Order 10865, dated February 20, 1960, as amended.

² (Applicant’s Answer to SOR, dated December 7, 2006) at 1-3.

³Tr. 28.

⁴ GE 1 (Application for Public Trust Position, dated November 21, 2005) at 1-11.

⁵Tr. 32.

school years, Applicant rebelled against authority. She and her friends engaged in behaviors at school (theft, fighting, disorderly conduct) that led to several juvenile arrests.⁶

In 1994, when she was 14 years old, Applicant was charged with shoplifting and false information. She was found guilty and fined \$25. She does not remember any details.⁷ Although, she recalled that she just forgot that the ring was on her finger. In the same month of that year, Applicant and her friends saw an open locker in school and one of her friends took things from the locker. Applicant did not want to “rat out” her friend. Thus, she was charged. She does not remember what happened in that case.⁸ She asked her aunt and grandmother about the incident after receiving the SOR, because she could not recall many details.⁹

In 1995, Applicant was late for school one day. According to the class policy, if you were late for class, you had to empty your purse of all contents. The school was concerned that the student was late because they were outside smoking. When Applicant emptied her purse, a small pocket knife fell out. She explained she carried the knife with her because she had no home telephone and if she needed to go out and make a phone call at night, she wanted the knife for protection. She forgot that it was still in her purse. On November 27, 1995, she was arrested for a concealed weapon, and taken to a juvenile detention center for a week.¹⁰

On October 28, 1996, she was charged with fighting at school. A friend of hers was bullied by someone at school, and Applicant “stood up for her friend” and became involved in an altercation. She spoke to the guidance counselor at school prior to the October incident, but the school did not intervene. In the school yard, the bully attacked Applicant and they fought. Applicant does not remember the disorderly conduct incident in November 1996. Applicant believes that all these incidents were not relevant to a public trust determination because they were part of her juvenile record. She admits they were silly kid stuff.¹¹

Applicant received her driver’s license at the age of 18. She did not drink and drive, but was stopped numerous times for traffic violations: speeding or vehicle safety violations. From 1998 until 2005, she was stopped eleven times. Several charges from 1999, 2001 and 2003 were dismissed, including expiration of a license plate, compulsory insurance violation, and seat belt violation. Applicant went to court and paid the speeding tickets.

A June 5, 2003-speeding ticket was amended to a defective headlamp, but carried a fine of \$190. Also, on June 20, 2003, Applicant was charged with operating a vehicle without a child

⁶Tr. 18.

⁷Tr. 36.

⁸Tr. 30.

⁹Tr. 37.

¹⁰Tr. 19-20.

¹¹Tr. 21.

restraint/safety violation. She was found guilty and fined \$56, and related court costs. She explained that the car seat for her four-year-old son was in her husband's car.¹²

Applicant and her husband (common law since 1997) separated in 2003. She was stressed and trying to raise her children. Her husband was seeing another woman and lied to Applicant about this situation. Applicant saw her husband in a car with another woman. She left her vehicle and confronted the other woman. This resulted in an altercation in the middle of the street. Her children were with her in the vehicle. She is not proud of this incident but learned from it.¹³

Thus, on August 3, 2003, Applicant was arrested and charged with (1) harassment, (2) assault -3rd degree and (3) child abuse. Charges (2) and (3) were dismissed. Charge (1) was dismissed after successful completion of a two year deferred sentence, including 90 days jail (suspended), \$159 fine and 36 sessions of domestic violence counseling. There is no other information concerning this incident in her FBI record.

On August 8, 2003, Applicant was charged with (1) reckless driving, (2) compulsory insurance, (3) expired plates and (4) failure to display proof of insurance. Charges (2), (3) and (4) were dismissed. However, Applicant was found guilty of careless driving and fined \$128, placed on six months probation and sentenced to 24 hours useful public service. She successfully completed probation and public service.

On August 20, 2004, Applicant was charged with speeding, compulsory insurance and driving under restraint. She received a deferred sentence for driving under restraint, was fined \$78 and given 100 hours of community service, and five days in jail (suspended). On September 30, 2004, Applicant was charged with failure to stop. She was found guilty of the amended charge of unsafe vehicle and was fined \$120. Applicant acknowledged having a "heavy foot."¹⁴

On December 21, 2004, Applicant was charged with harassment, but the charge was dismissed. This incident was ultimately settled in a mediation. Applicant was employed by a rental car agency. At that time she was still attending the court ordered anger management/domestic violence classes. Her replacement did not come to work on time. Applicant waited until the person arrived, but then explained that she needed to leave immediately to get to her class. Her supervisor wanted to speak to her immediately, and an argument ensued. Her supervisor filed a complaint against Applicant for harassment. The parties agreed to participate in a mediation in the neighborhood justice center. The charge was dismissed after the parties agreed to a settlement. There is no court record of this incident.¹⁵

Applicant interviewed for her current position in 2005. She completed an employment application at home. After she was hired, she completed his public trust application on November 21, 2005. Applicant answered "yes" to question 16- Your Police Record (In the last 7 years, have

¹²Tr. 44.

¹³Tr. 23.

¹⁴Tr. 43.

¹⁵Tr. 25-26-27; Record of Settlement Agreement read into the record.

you been arrested for, charged with, or convicted of any offense(s)? Leave out traffic fines of less than \$150.¹⁶ She listed her August 8, 2003 conviction for harassment. She did not list the December 21, 2004 harassment complaint. She did not list it because it never reached court, she had not pled guilty, nor did she receive any fines and it was dismissed by a mediated settlement out of court. As to the traffic ticket of \$190, Applicant did not remember the amounts of the various traffic fines. Her explanations are credible. At the hearing, Applicant acknowledged she completed many employment applications and always put down her 2003 charge.¹⁷ She recalled she called the court at one point in time to inquire about dismissed charges that were not on her record. She believed they did not need to be listed on any employment form.

Applicant's mother-in-law praised Applicant for her genuine caring for her family and her three children. She has known Applicant for ten years, and shares many family events with Applicant, her husband and the three children. Applicant's mother-in-law had a security clearance herself and understood the implications of Applicant's behavior. She described Applicant as patient, stable and low keyed. She is in the car when Applicant drives her children to various places. She acknowledged that her son and Applicant had a difficult relationship when they were younger. She reports they are together and working as a family unit now.¹⁸

Applicant loves her work, and has achieved awards and certificates. Her supervisor volunteered to testify on her behalf and recommend Applicant, but company policy will not allow this.¹⁹ She has received training in all areas and handles various types of customer requests. She is motivated to continue in this position.²⁰

Applicant survived a difficult time in her relationship while raising her children. She has maintained steady employment. She and her husband have been reunited for four years and together for a total of ten years. They now own a home. Applicant works hard and hopes to advance her career. Despite her juvenile record and many traffic offenses, she acknowledged responsibility for her immature actions. She completed her probations and her court ordered classes. She is responsible in her finances and manages her family.

POLICIES

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 . . .

¹⁶ GE 1 *supra*, note 4 at 6.

¹⁷Tr. 58.

¹⁸Tr. 69-71.

¹⁹ Tr. 64.

that will give that person access to such information.”²¹ In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance or access to sensitive information, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guidelines at issue in this case are:

Criminal Conduct - Guideline J: 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.

Personal Conduct - Guideline E: 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.

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to this adjudicative guideline, are set forth and discussed in the conclusions below.

“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.”²² An administrative judge must apply the “whole person concept,” and consider and carefully weigh the available, reliable information about the person.²³ An administrative judge should consider the following factors: (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.²⁴

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information.²⁵ Thereafter, the applicant is responsible for presenting evidence to rebut, explain,

²¹ *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

²² Directive, ¶ E2.2.1.

²³ *Id.*

²⁴ *Id.*

²⁵ Directive, ¶ E3.1.14.

extenuate, or mitigate the facts.²⁶ An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.”²⁷ Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.²⁸ The same rules apply to trustworthiness determinations for access to sensitive positions.

CONCLUSIONS

Upon consideration of all facts in evidence, and after application of the appropriate adjudicative factors, I concluded the following with respect to the allegations set forth in the SOR:

Criminal Conduct

The government has established its case under Guideline J. based on Applicant’s admissions, and several documented arrests and conviction for harassment in 2003. Criminal Conduct Disqualifying Condition (CC DC) AG ¶ 31 (a) (*a single serious crime or multiple lesser offenses*) and CC DC AG ¶ 31 (c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*) applies.

With the government’s case established, the burden shifts to Applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. Applicant’s last conviction was in 2003. Applicant provided evidence to establish some mitigation under Criminal Conduct Mitigating Condition (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*).

The majority of the charges are more than ten years old. They were the result of juvenile behavior. The conviction in 2003 was the result of Applicant seeing her husband with another woman in public. Applicant successfully completed all court ordered terms and has not been involved in any subsequent incidents for four years. The 2004 incident was an unfortunate mis-communication and was mediated. Even counsel conceded that this incident was an unfortunate one. In addition to these facts and those stated above, she has satisfactorily performed her job over the past years, which constitutes evidence of mitigation under CC MC AG ¶ 32 (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*).

Based on the conclusion, stated below, that Applicant did not deliberately falsify her public trust application, as required under 18. U.S.C. § 1001, the allegations contained in SOR ¶ 1.h are concluded in her favor.

²⁶ Directive, ¶ E3.1.15.

²⁷ ISCR Case No. 01-20700 at 3 (App. Bd. December 19, 2002).

²⁸ Directive, ¶ E2.2.2.

Personal Conduct

The Government alleged in Paragraph 2 that Applicant intentionally falsified her public trust application by failing to disclose her 2004 harassment charge that was dismissed and her traffic ticket with a fine more than \$150, which operates as a disqualification under 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*). Although Applicant admitted that she did not disclose the information, she denied that she did it with an intent to deceive.

When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004).

Applicant credibly explained that she did not disclose the above referenced incidents because she did not think that she was required to list the 2004 dismissed charge and that she did not recall the amount of the 2003 traffic ticket. She now realizes that she made an error. The Government conceded that her explanation was plausible and I conclude similarly.

PC DC AG ¶ 16 (d) (*credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information*) is raised due to Applicant's history of traffic violations from 1998 until 2005.

PC MC AG ¶ 17 (d) (*the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur*) applies in this case. As discussed above and for the reasons articulated under the whole-person analysis, I find in favor of Applicant under the Personal Conduct trustworthiness concern.

Whole Person

In all adjudications, the protection of national security is the paramount concern. The objective of the trustworthiness determination process is the fair-minded, commonsense assessment of a person's life to make an affirmative decision that the person is eligible for assignment to sensitive duties. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of his acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into

consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I considered Applicant’s troubled family history, her ability to reunite with her husband and raise three children, her steady employment and good work record. I took into account her testimony about the traffic violations and the fact that she accepted responsibility for them. Although, she has a history of violations, she has not had any for two years. Her mother-in-law’s testimony regarding Applicant’s maturity and ability to be patient with her family is persuasive. I do not believe similar criminal problems will recur in the future, given her awareness of the trustworthiness process and the impact additional incidents would have on her employment. Applicant was under unusual stress during her separation. Applicant was forthright and clear in her resolve at the hearing. Applicant has mitigated those security concerns raised by her criminal conduct and personal conduct. Those concerns raised under those guidelines are found in her favor. Accordingly, Guidelines J and E are concluded for her. Based on the evidence in the record, it is clearly consistent with the national interest to grant Applicant eligibility for assignment to sensitive duties. Eligibility is granted.

FORMAL FINDINGS

Formal findings for or against Applicant on the allegations set forth in the SOR are:

Paragraph 1. Guideline J: **FOR APPLICANT**

Subparagraph 1.a.	For Applicant
Subparagraph 1.b.	For Applicant
Subparagraph 1.c.	For Applicant
Subparagraph 1.d.	For Applicant
Subparagraph 1.e.	For Applicant
Subparagraph 1.f.	For Applicant
Subparagraph 1.g.	For Applicant
Subparagraph 1.h.	For Applicant

Paragraph 2. Guideline E: **FOR APPLICANT**

Subparagraph 2 a.	For Applicant
Subparagraph 2.b.	For Applicant
Subparagraph 2.c.	For Applicant
Subparagraph 2.d.	For Applicant
Subparagraph 2.e.	For Applicant
Subparagraph 2.f.	For Applicant
Subparagraph 2.g.	For Applicant
Subparagraph 2.h	For Applicant
Subparagraph 2.i	For Applicant
Subparagraph 2.j.	For Applicant
Subparagraph 2.k.	For Applicant
Subparagraph 2.l.	For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national interest to grant Applicant's request for a determination of trustworthiness and eligibility for assignment to sensitive duties. Eligibility is granted.

Noreen A. Lynch
Administrative Judge