

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant is a 33-year-old administrative project assistant employed by a defense contractor. Between 1997 and 2003, she was involved in six offenses, which included grand theft, check forgery, and larceny under false pretenses. In 2005, she deliberately failed to disclose in her security clearance application her four felony charges and her conviction for larceny under false pretenses. Applicant failed to present sufficient evidence to mitigate security concerns raised by her criminal conduct, and personal conduct. Clearance is denied.

CASENO: 06-22628.h1

DATE: 05/29/2007

DATE: May 29, 2007

In re:)	
)	
)	
-----)	ISCR Case No. 06-22628
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
JUAN J. RIVERA**

APPEARANCES

FOR GOVERNMENT
Francisco (Paco) Mendez, Esquire

FOR APPLICANT
Pro Se

SYNOPSIS

Applicant is a 33-year-old administrative project assistant employed by a defense contractor. Between 1997 and 2003, she was involved in six offenses, which included grand theft, check forgery, and larceny under false pretenses. In 2005, she deliberately failed to disclose in her security clearance application her four felony charges and her conviction for larceny under false pretenses. Applicant failed to present sufficient evidence to mitigate security concerns raised by her criminal conduct, and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On December 13, 2006, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). The SOR informed Applicant that, based on information available to the government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant her access to classified information.¹ Applicant answered the SOR on January 3 and January 24, 2007, and requested a hearing.

The case was assigned to me on March 7, 2007. On April 5, 2007, with the parties' agreement, I issued a notice of hearing convening a hearing for April 24, 2007. Applicant failed to appear at her scheduled hearing. On that day, she submitted a request for postponement explaining that she was not able to appear at her hearing because her company's CEO convened an all-hands meeting for April 24, 2007.² Based on Applicant's request, I reconvened the hearing on April 25, 2007. At the hearing, the government presented seven exhibits, marked GE 1-7. Applicant testified on her own behalf, and presented no exhibits. DOHA received the transcripts (Tr.) on May 2 and 4, 2007.

PROCEDURAL ISSUES

On February 26, 2007, the government moved to amend the SOR and provided Applicant with notice and an opportunity to object to the government's motion and to answer the SOR. The amended SOR corrected the allegation under SOR ¶ 2.a (Guideline E), by adding the full text of question 23 of Applicant's security clearance application. It provided notice that the government also was alleging Applicant had falsified question 23.f, in her security clearance application.³ Applicant did not object to the amendment, and I granted the government's motion. (Tr. 26)

¹ See Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended. On August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised adjudicative guidelines (Guidelines) to all adjudications and other determinations made under the Directive in which the SOR was issued on or after September 1, 2006.

² GE 6.

³ GE 1 (Electronic Questionnaires for Investigations Processing (e-QIP), dated October 27, 2005).

On April 25, 2007, the government moved to amend SOR ¶ 2 (Guideline E), by adding ¶ 2.b (alleging that Applicant lied in her April 24, 2007, request for continuance), and ¶ 2.c (alleging that Applicant lied to her supervisor when she requested leave from work on April 24, 2007, “to attend a security clearance hearing”).⁴ I denied the government’s motion to amend the SOR, pursuant to Directive, ¶ E3.1.10.

FINDINGS OF FACT

Applicant admitted SOR ¶¶ 1a - c, with explanations. She denied ¶ 1.d, and ¶ 2.a. In her January 24, 2007, answer to the SOR, she had admitted ¶ 2.a. At her hearing, she denied providing false information with the deliberate intent to mislead the government, and denied ¶ 2.a. Her admissions are incorporated herein as findings of fact.

After a thorough review of the pleadings, the evidence as a whole, and considering Applicant’s demeanor and testimony, I make the following additional findings of fact:

Applicant is a 33-year-old administrative project assistant. She has worked for a defense contractor for approximately two years. Applicant is not married, but has four children, ages 16, 14, 12, and 10. In 1994, she completed an associate’s degree in computer science.

In June 1997, Applicant was arrested and charged with two counts of uttering forged checks (felony offenses) and two counts of check forgery (felony offenses). In August 1997, Applicant was arrested and charged with two counts of uttering forged checks (felony offenses), two counts of check forgery (felony offenses), and two counts of larceny under false pretenses (misdemeanors).⁵ Applicant explained that the August 1997 charges were based on the same incidents that led to the June 1997 charges. The court found her guilty of two counts of larceny under false pretenses, and sentenced her to serve 30 days in jail (suspended), to pay court costs, and to pay a \$100 fine.⁶

In December 2003, Applicant was arrested and charged with grand theft (a felony) and theft over \$500. She was working as a cashier at a large retail store and allowed several family members to go through her cash register check out line without making payment for their merchandise. She believed she was being a good family member by allowing her family members to go through her

⁴ The motion was marked as Appellate Exhibit 1. The text of the new allegations is as follow: “SOR ¶ 2.b You deliberately provided false or misleading information regarding material facts in a continuance request you submitted to the DOHA on April 24, 2007, when you stated that “Due to a mandatory ALL HANDS meeting that was hosted by the CEO of X Corporation this morning, April 24, 2007, I was unable to attend my clearance, no such meeting took place yesterday.”; and “SOR ¶ 2.c You deliberately provided false or misleading information regarding material facts to your employer on April 24, 2007, when you told your supervisor words to the effect that you were unable to go to work on April 24, 2007, because you had to attend a security clearance hearing. Whereas, in truth and fact, you failed to appear at your security clearance hearing that had been scheduled for April 24, 2007, and provided DOHA false or misleading information for your failure to attend said hearing, as set forth in subparagraph 2.b, above.”

⁵ GE 8.

⁶ GE 3 (FBI Identification Record, dated Nov. 22, 2005).

cash register check out line without paying for their merchandise. (Tr. 60-61) The charges were *nolle prosequi* when the retail store witnesses failed to appear in court.⁷

In her October 2005 security clearance application,⁸ Applicant answered “No” to question 23.a, which asked whether she had ever been charged with or convicted of any felony offense. Applicant failed to disclose that in June and August 1997 she was charged with at least four counts of felony offenses (two counts of uttering forged checks and two counts of check forgery), and that in December 2003 she was charged with another felony, i.e., grand theft.

Applicant claimed her failure to disclose the information was not deliberate and that she made an honest mistake. She submitted several explanations for her failure to disclose the 1997 felony charges: 1) the 1997 felony charges were downgraded, and she pled to a misdemeanor; 2) she believed she only had to disclose felony convictions; 3) she was in a hurry to complete her SF 86, and misread the question; 4) she believed she did not have to disclose the misdemeanor conviction because it was more than seven years old and, as such, outside of the scope of question 23.f; and 5) in 1997, she was young and did not realize she was convicted of a misdemeanor until 2005-2006 when her pay was garnished by the state to collect the unpaid fine.⁹ Concerning the December 2003 felony grand theft charge, and the charge for theft over \$500, Applicant claimed she believed she did not have to disclose them because the charges were dismissed. (Tr. 64).

On April 5, 2007, with the agreement of the parties, I issued a notice of hearing scheduling Applicant’s hearing for April 24, 2007. On April 23, 2007, department counsel called Applicant to remind her of the scheduled hearing. She indicated she would attend her hearing. (Tr. 72) I convened the hearing as scheduled, and noted on the record that Applicant failed to appear at her hearing. I issued an order requiring Applicant to show why her security clearance, if any, should not be revoked and the processing of her case terminated for failure to appear at her hearing as scheduled. That day, she submitted a request for continuance explaining that she was not able to appear at her hearing because the CEO of her company convened an all-hands meeting for April 24, 2007.¹⁰ I granted the delay, and reconvened the hearing on April 25, 2007.

At her hearing, Applicant admitted, and the evidence established, she lied in her request for continuance. There was no company all hands meeting scheduled, and she did not have to attend any company meetings on April 24, 2007. She also lied to her employer when she requested leave from work on April 24, 2007, “to prepare security clearance paperwork for an important clearance issue.”¹¹ During her hearing, Applicant explained that on April 24, 2007, she had to attend a meeting with her daughter’s school principal. She lied in her request for postponement because she was afraid

⁷ GE 2 (Applicant’s interview, dated April 5, 2006), and GE4 (State criminal history record, furnished December 20, 2005).

⁸ GE 1 (Electronic Questionnaires for Investigations Processing (e-QIP), dated October 27, 2005).

⁹ This is contrary to her statement to a defense investigator in April 2006 (GE 2), in which she admitted the 1997 conviction and paying a fine.

¹⁰ GE 6.

¹¹ GE 7, and Tr. 42-52.

I would not grant her a continuance to attend the meeting with her daughter's school principal.¹² (Tr. 73) When asked why she did not inform the government in April 23, 2007, of her meeting with her daughter's principal, Applicant stated she wanted to tell the administrative judge herself. (Tr. 73-74).

Applicant expressed remorse for her past criminal behavior and stated she was sorry for providing the wrong information in her security clearance application. She explained she was young and immature at the time of her 1997 offense. She claimed she has not been in trouble during the last three years, and asked that her past mistakes not be considered against her. She averred she is dependable, truthful, and a hard-worker. Applicant highlighted that this was her first time applying for a security clearance, and she did not know how to complete her security clearance application.

POLICIES

The Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's eligibility for access to classified information. Foremost are the disqualifying and mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. However, the guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive,¹³ and the whole person concept.¹⁴ Having considered the record evidence as a whole, I conclude Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) are the applicable relevant adjudicative guidelines.

BURDEN OF PROOF

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified

¹² This conduct may be considered: "(a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3." ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted).

¹³ Directive, Section 6.3. "Each 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 in enclosure 2 . . ."

¹⁴ Directive, ¶ 2(a). ". . . The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . ." The whole person concept includes the consideration of the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the extent to which participation was voluntary; the presence or absence of rehabilitation and other permanent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; and the likelihood of continuation or recurrence. . . ."

information.¹⁵ The government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish a prima facie case by substantial evidence.¹⁶ The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries the ultimate burden of persuasion.¹⁷

A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest to ensure each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. 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.¹⁸

CONCLUSIONS

Under Guideline J (Criminal Conduct), 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.¹⁹ The government established its case under Guideline J by showing that Applicant was involved in six offenses between 1997 and 2003. I also find, as discussed below under Guideline E, that Applicant deliberately falsified her 2005 security clearance application. Her falsification of the SF 86 is a violation of 18 U.S.C. §1001, a felony.²⁰ Disqualifying Condition (DC) 31(a): *a single serious crime or multiple lesser offenses* and DC 31(c): *allegation or admission of criminal conduct regardless of whether the person was formally charged, formally prosecuted or convicted*, apply.

Applicant's past behavior, from 1997 to 2005, forms a pattern of criminal activity. Her falsification brings to the forefront the criminal conduct concerns raised by her past behavior. I am required to consider Applicant's overall questionable behavior when evaluating the seriousness of the conduct alleged in the SOR to determine factors such as the extent to which his behavior is

¹⁵ See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

¹⁶ ISCR Case No. 98-0761 at 2 (App. Bd. Dec. 27, 1999) (Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.); ISCR Case No. 02-12199 at 3 (App. Bd. Apr. 3, 2006) (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.); Directive, ¶ E3.1.32.1.

¹⁷ *Egan*, *supra* n.15, at 528, 531.

¹⁸ See *Id*; Directive Enclosure 2, ¶ 2(b).

¹⁹ Guidelines ¶ 30. Hereinafter, the particular paragraph of the Guidelines will be cited as part of the relevant disqualifying and mitigating condition. See n.1 *supra*.

²⁰ It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation, or knowingly make or use a false writing in any matter within the jurisdiction of the executive branch of the Government of the United States. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *Egan*, 484 U.S. at 527 (discussing 18 U.S.C. § 1001).

recent; the likelihood of recurrence; Applicant's explanations concerning the circumstances of the incidents alleged; and her rehabilitation.²¹

Under the totality of the circumstances, I find Applicant's criminal behavior is recent and not isolated. Considering her criminal behavior, the nature and seriousness of her misconduct, her falsification of the SF 86, her disregard for the law, and her lies in her request for continuance, I find her favorable information is not sufficient to mitigate the Guideline J security concerns. Her behavior raises questions about her ability and willingness to follow the law, and ultimately, to protect classified information. Her falsification and lies weigh against a finding of rehabilitation and positive behavioral changes. I find that none of the mitigating conditions apply.²² Guideline J is decided against Applicant.

Under Guideline E (Personal Conduct), 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.²³

Applicant admitted she failed to disclose relevant information in her answers to SF 86 questions 23.a and 23.f. She further admitted she lied in her request for continuance. In light of Applicant's admissions, age, maturity, length of employment, the number of incidents that she failed to disclose, the seriousness of those incidents, and the circumstances surrounding those incidents, I find Applicant's omissions were deliberate and made with the intent to mislead the government. Disqualifying Conditions (DC) 16(a): *deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . .*, and DC 16(e): *personal conduct or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress . . .*, apply.

I specifically considered all Guideline E Mitigating Conditions (MC) and conclude that none apply. Applicant's falsification is recent. Considering the totality of the circumstances in her case, not enough time has passed to mitigate the security concerns raised by her behavior. Furthermore, she presented no evidence that she has reduced her vulnerability to exploitation, manipulation, or duress. Additionally, for the same reasons outlined above under the discussions of Guidelines J, incorporated herein, I conclude none of the MCs apply. Guideline E is decided against Applicant.

I have carefully weighed all evidence, and I applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. I specifically considered Applicant's age, education, maturity, her two years working for a defense contractor, and that this

²¹ ISCR Case No. 04-09959 at 3 (App. Bd. May 19, 2006).

²² I specifically considered Criminal Conduct Mitigating Condition (MC) 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*; and MC 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*.

²³ Guidelines ¶ 15.

is her first time applying for a security clearance. As previously discussed, Applicant's overall past behavior forms a pattern of criminal activity with significant adverse security implications. Her falsifications bring to the forefront the criminal conduct concerns raised by her past behavior. Her failure to provide truthful answers in her security clearance application shows she cannot be trusted, and show a serious lack of judgment. Applicant failed to present sufficient evidence to mitigate the overall judgment and trustworthiness security concerns raised by her behavior.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Criminal Conduct (Guideline J) Subparagraphs 1.a - 1.d	AGAINST APPLICANT Against Applicant
Paragraph 2, Personal Conduct (Guideline E) Subparagraph 2.a	AGAINST APPLICANT Against Applicant

DECISION

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.

Juan J. Rivera
Administrative Judge