

DATE: February 26, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-26057

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Jonathan A. Beyer, Department Counsel

FOR APPLICANT

Bryan H. Schempf, Esquire

SYNOPSIS

In December 1974, the Applicant was found guilty of four counts of forgery and sentenced to 48 months incarceration. In February 1975, the balance of his sentence was suspended. He has not been in trouble with the law since then. He has held security clearances for a number of years. Because the misconduct is remote in time and because of clear evidence of rehabilitation, I find for the Applicant as to the criminal activity. However, 10 U.S.C. section 986 prohibits the granting the Applicant a security clearance absent a waiver by the Secretary of Defense. The Applicant's security clearance is denied. I recommend further consideration of this case for a waiver of 10 U.S.C. section 986.

STATEMENT OF THE CASE

On August 20, 2002, 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⁽¹⁾ it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On August 28, 2002, the Applicant answered the SOR and requested a hearing. The case was assigned to me on November 4, 2002. A Notice of Hearing was issued on November 7, 2002, scheduling the hearing, which was held on December 12, 2002.

The Government's case consisted of four exhibits (Gov Ex). The Applicant relied on his own testimony, the testimony of his wife, his mother, four others, and on eight exhibits (App Ex). The transcript (tr.) of the hearing was received on December 20, 2002.

In the SOR, the Government alleged Applicant is disqualified from obtaining a security clearance because of criminal conduct (Guideline J), based on his conviction of forgery for which he was sentenced to 48 months incarceration. In his answer, Applicant admitted the criminal conduct and sentence, which occurred 28 years ago.

FINDINGS OF FACT

The Applicant is 50-years-old, has worked for a defense contractor since April 2000, and is seeking to maintain a security clearance.

In 1970, the Applicant started college. During the same year, he met a woman who he later found out was involved in automobile thefts. In early 1972, he moved into an apartment by himself, which was more than he could afford even though he had a part-time job as a bus driver. While in college, the Applicant experienced financial troubles, which increased when a grant ended.

During a five-day period in March 1973⁽²⁾, the woman convinced him he should sign four checks, which she had stolen, issued in the amounts of: \$30.00, \$48.00, \$239.00, and \$540.75. The money was used to buy stereo equipment, which they planned to sell and divide the money between them. The Applicant admits he forged the checks, but did so at a time when he was "young and dumb." (tr. 45) In June 1973, the Applicant entered the U.S. Air Force. (App Ex C) The Applicant states his enlistment occurred three months after the checks had been forged. However, the court records (Gov Ex 4) indicated the checks were forged in March 1974. In August 1974, the Applicant was arrested and released on bond after seven days. (Gov Ex 4) At the time of his arrest, the Applicant never told the authorities about the woman for he considered her a friend who would bail him out of jail. (Gov Ex 3) She did not, and the Applicant has not seen her since shortly after the checks were forged. In December 1974, the Applicant was found guilty of feloniously forging and utter four checks with the intent to defraud a bank. He was sentenced to one year in jail for each of the four checks, for a total of 48 months incarceration. The Applicant went to jail. In February 1975, the balance of his jail time was suspended.

Upon his released from jail, he returned to the Air Force, and successfully completed the remainder of his enlistment. In February 1977, the Applicant received an honorable discharge from the Air Force, having made up the 90 days of bad time incurred when he was incarcerated in August 1974 and from December 1974 until February 1975. (App Ex C) In March 1977, using the electronic skills acquired in the Air Force, the Applicant got a job with an electronics company. During his employment, he disclosed the forgeries and was granted a clearance. He worked for the company until a downturn in the economy caused him to be unemployed for 18 months. From August 1990 through March 1992, he worked for a shipyard. From March 1992 until September 1993, he was unemployed, again due to a downturn in the economy. (tr. 33) In 1993, he went to work for a chemical company, a job and company he did not like. He worked as a laborer for 14 months before moving to the laboratory, which was a promotion. In 1998 and 1999, he then went back to school to study computer science. From September 1999 until April 2000, he was unemployed. In April 2000, he secured his current job as a software systems engineer and fully disclosed his past criminal conduct. (App Ex H)

The Applicant's current job performance has been commendable, he does a very, very good job, has recently been promoted, and has received a pay raise. (App Ex A, tr. 80-81) In previous jobs his work has been outstanding, resulting in letters of commendation. (App Ex B) The director of operations at his current job believes the Applicant has a fine character, and the Applicant's work performance is reliable and competent, and would like to see him continue in his current job. (tr. 95, 97, 101) The Applicant has been described as a role model, an upstanding citizen, trustworthy, dependable, honest, loyal, with which there is no question of integrity or truthfulness. (tr. 120)

Married in August 1977, and has two children, a son, age 23, who is in technical support for a telecommunications company and a daughter, age 22, who is a college senior. He is very family conscious, very close with his wife in a loving relationship, openly communicative, and a wonderful husband. (tr. 119, 145) He has told his wife and children of his criminal conduct. The Applicant spends his time being home with the family, going to movies, working on old cars and doing things with his family. He is active and involved with his church and volunteers serving dinners to senior citizens and the homeless. He has volunteered his time, tutoring math to 6th, 7th, and 8th grade students. (App Ex H) Since the initial incident, he has not been arrested or been in any type of trouble. (tr. 45)

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they 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. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to an Applicant's lack of security worthiness.

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. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Criminal Conduct (Guideline J) The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and

trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

- b. A single serious crime or multiple lesser offenses.
- c. Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year.⁽³⁾

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent.
- b. The crime was an isolated incident.
- d. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.
- f. There is clear evidence of successful rehabilitation.
- g. Potentially disqualifying conditions c. and d., above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver.

BURDEN OF PROOF

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Guideline J, (Criminal Conduct). Under Guideline J, the security eligibility of an applicant is placed into question when a history or pattern of criminal activity, which creates doubt about the applicant's judgment, reliability, and trustworthiness, is shown. In 1974, the Applicant was arrested for forging four checks totaling less than \$900.00. He was found guilty and sentenced to one year for each of the four checks for a total of 48 months incarceration. In 1975, the balance of the Applicant's sentence was suspended after he had served 90 days in jail. Because of his convictions, DC b.⁽⁴⁾ applies and because he was sentenced to more than one year in jail, DC c.⁽⁵⁾ applies.

Mitigating Condition (MC) a.⁽⁶⁾ applies to the Applicant's criminal conduct because the conduct is not recent having occurred 28 years ago, when the Applicant was 22. The Applicant's case in mitigation is persuasive because there has been no criminal conduct by the Applicant since December 1974. MC b.⁽⁷⁾ applies. The criminal conduct was committed when the Applicant was an immature, 22-year-old single, student. The Applicant is no longer that same person. He is 50-years-old, a husband, father, and is active in his community and church. Clearly he is a more mature, responsible, reliable individual than he was when 22. The financial factors which contributed to the criminal conduct back in 1973 no longer exist. MC d.⁽⁸⁾ applies. There is clear evidence of successful rehabilitation making MC f.⁽⁹⁾

applicable. The Applicant has always revealed his criminal misconduct when applying for jobs. He has held a number of clearances since his arrest and conviction. I find for the Applicant as to SOR subparagraph 1.a.

After reviewing the evidence of record and observing Applicant as he testified, and the witnesses who testified on his behalf, I am convinced the Applicant's criminal conduct was isolated to a five-day period in 1973. The Applicant has demonstrated he has been rehabilitated over the past 28 years. He performs well at his job, and has demonstrated his good judgment and reliability. However, because the Applicant was sentenced to more than one year in jail, Title 10 United States Code Section 986 applies. I find against the Applicant as to SOR subparagraph 1.b. Absent 10 U.S.C. § 986, I would find Applicant has demonstrated that it is in the national interest to grant him a security clearance. The Applicant is ineligible to be granted a clearance unless granted a meritorious waiver from the Secretary of Defense. I recommend further consideration of this case for a waiver of Title 10 U.S.C. 986.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the 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.

FORMAL FINDINGS

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

Paragraph 1 Guideline J (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: Against the Applicant

DECISION

In light of all of the circumstances presented by the record in this case, the clearance is denied because the Department of Defense is prohibited from granting or renewing his clearance absent a waiver from the Secretary of Defense under 10 U.S.C. § 986. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.
2. There is a one year discrepancy concerning the dates of when the checks were forged. The court records (Gov Ex 3) indicate the forgeries occurred in March 1974. However, the Applicant states the forgeries were committed in March 1973, while he was a university student and could not have occurred in March 1974 because at that time he was in the Air Force and was not in the jurisdiction where the checks were forged. (tr. 70) Although the discrepancy exists as to when the forgeries occurred, there is no discrepancy as to the crimes being committed by the Applicant. (Gov Ex 3)
3. Under the provisions of 10 U.S.C. 986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waiver of this prohibition.
4. DC b. A single serious crime or multiple lesser offenses.
5. DC c. Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year.

6. MC a. The criminal behavior was not recent.

7. MC b. The crime was an isolated incident.

8. MC d. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.

9. f. There is clear evidence of successful rehabilitation.