

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant is a 34-year-old manufacturing specialist who has worked for a federal contractor since 2000. Applicant has a history of criminal conduct from 1986 to 1998. Applicant lied on his security clearance by failing to list a bank he had been employed at that was investigating a cash shortage in his cash drawer. Applicant failed to meet with investigators about the matter, never returned to the bank, and failed to divulge this information until confronted with it. Applicant failed to mitigate the security concerns regarding his criminal conduct and personal conduct. Clearance is denied.

CASENO: 02-28446.h1

DATE: 01/30/2006

DATE: January 30, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28446

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Jeff A. Nagel, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 34-year-old manufacturing specialist who has worked for a federal contractor since 2000. Applicant has a history of criminal conduct from 1986 to 1998. Applicant lied on his security clearance by failing to list a bank he had been employed at that was investigating a cash shortage in his cash drawer. Applicant failed to meet with investigators about the matter, never returned to the bank, and failed to divulge this information until confronted with it. Applicant failed to mitigate the security concerns regarding his criminal conduct and personal conduct. Clearance is denied.

STATEMENT OF CASE

On May 26, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct.

In a sworn statement dated July 19, 2004, Applicant responded to the SOR allegations. He admitted all the allegations except SOR allegation 1.h. Applicant elected to have his case decided on the written record. Department Counsel submitted the government's file of relevant material (FORM) on September 16, 2005. The FORM was mailed to Applicant on October 31, 2005, and received on November 10, 2005. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant responded on December 6, 2005 and provided additional material. Department Counsel had no objections. The case was assigned to me on December 19, 2005.

FINDINGS OF FACT

Applicant is a 34-year-old manufacturing specialist who has worked for a defense contractor since 2000. Applicant was married in 2001 and has four children.

Applicant was arrested on about January 26, 1986, and charged with possession of marijuana. He pled guilty to the offense and paid a fine. [\(2\)](#)

He was a minor at the time.

Applicant was arrested on July 3, 1989, and charged with Minor in Possession of Alcohol. He was found guilty and was fined approximately \$102.75.

On May 23, 1990, Applicant was arrested and charged with grand theft auto, a felony, and two counts of failure to appear. The grand theft auto charge was eventually dropped. No information was provided regarding the disposition of the failure to appear charges.

On December 6, 1990, Applicant was charged with driving while intoxicated and driving with blood alcohol over .10%. He pled guilty to the driving while intoxicated charge and was sentenced to one day in jail, 12 months of unsupervised probation, fined approximately \$438.00, and was ordered to complete 20 hours of community service. The other charge was dismissed.

Applicant was arrested on about November 8, 1992, and charged with two counts of drug possession/narcotics, both felonies, violation/promise to appear, and drugs/possession-synthetic narcotics, a felony. He pled guilty to the amended charge of solicitation to possess or use a narcotic drug. Applicant received a suspended sentence and was fined approximately \$1,400.00 plus costs, placed on three years probation, and was ordered to participate in treatment or training programs and outpatient treatment as directed by his probation officer. Applicant completed the required drug counseling. No other information was provided regarding the specifics of Applicant's sentence.

Applicant was arrested on about June 29, 1994, and charged with failure to signal before turning, driving on a suspended license, failure to produce identification, and no proof of insurance. He was found guilty and fined \$895.00. Applicant has not paid this fine.

On December 10, 1994, Applicant was charged with obstruction of justice. This charge was later dismissed.

On July 24, 1997, he was investigated by the police department for domestic violence and disorderly conduct. Applicant was attempting to contact his ex-girlfriend by yelling for her outside her home. The police responded twice to the incident, but both times Applicant eluded them.⁽³⁾

Applicant was arrested on about December 13, 1997 and charged with domestic violence, criminal damage, and trespass. He had wanted to talk to his girlfriend, and when she refused and went into her house, he broke a window to gain entry. He was found guilty of criminal damage and was placed on one year of unsupervised probation and was fined approximately \$1,030.00. The remaining counts were dismissed.

On January 16, 1998, Applicant was charged with issuing a bad check. He entered into a bad check program, but failed to appear and a warrant was issued. Applicant claims he paid the bad check, but provided no other evidence to support his claim.

Applicant was employed by a bank from March 1998 to May 1998. The bank did a surprise cash count on his cash drawer and it revealed that the drawer was short by \$150.00 and his total cash shortages reached \$600.00. Applicant was told to return to the bank to speak with an investigator. Applicant never returned to resolve the matter. When answering questions on his security clearance application (SCA) regarding his history of employment,⁽⁴⁾ Applicant deliberately failed to list that he had been employed by this bank. Applicant answered "No" to question 20⁽⁵⁾ and deliberately failed to list that his employment was terminated by the bank on May 29, 1998 for cash shortages totaling \$600.00. Applicant stated, "I purposely omitted my employment at [the bank] from my EPSQ because it only lasted for three months. I thought that listing [the bank] would not give a good impression to any prospective employer because I was employed for such a short period of time. I did not omit this information because I was terminated or because I was suspected of stealing money from [the bank]."⁽⁶⁾ Applicant lists three other periods of employment that are for less than a year.⁽⁷⁾ Applicant's explanation is not credible. Applicant made a sworn statement to an investigator on November 15, 2001 and failed to divulge his termination.⁽⁸⁾ It was not until a second sworn statement was made on April 5, 2002, that he finally provided information that he had been terminated from employment from the bank.⁽⁹⁾ The criminal investigation was never pursued by the Federal Bureau of Investigation because of the relatively small amount of money involved. No charges were filed against Applicant.

Applicant deliberately falsified his answer to question 37⁽¹⁰⁾ on his SCA that asked whether he had any judgments against him. He answered "No," when in fact he did have an unpaid judgment for approximately \$437.00 that has been due to his state's justice department since April 1996. As of April 5, 2002, this debt had not been satisfied. Applicant claims he is 90% out of debt, but failed to verify whether this debt has been satisfied.⁽¹¹⁾ No explanation was provided as to why he failed to provide correct information.

Applicant provided character statements that state he is an excellent performer, a valuable member of the team who is dedicated to the success of the business. He is trusted and performs his duties honorably and faithfully.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, and Guideline E, personal conduct, with their respective DC and MC, apply in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽¹²⁾ The government has the burden of proving controverted facts.⁽¹³⁾ The burden of proof is something less than a preponderance of evidence.⁽¹⁴⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him.⁽¹⁵⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁶⁾

No one has a right to a security clearance⁽¹⁷⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁸⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽¹⁹⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽²⁰⁾ 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.

Based upon consideration of all the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline J-Criminal Conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Guideline E-Personal Conduct is a security concern when an individual's conduct involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that could indicate that the person may not properly safeguard classified information.

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

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a prima facie case for disqualification under Guideline J and Guideline E.

Based on all the evidence Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*), and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser charges*) apply. Applicant was arrested numerous times for felonies and misdemeanors as both a juvenile and adult. He was convicted and sentenced as detailed above.

I have considered all the mitigating conditions and especially considered Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.2.1 (*The conduct was not recent*), CC MC E2.A10.1.2.2 (*The crime was an isolated incident*), CC MC E2.A10.1.2.4 (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*), and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*). Applicant's last criminal offense that is alleged occurred in 1998, a period of approximately six years ago. The number of offenses committed over a period of 12 years are too numerous to find his crimes were isolated and therefore CC MC E2.A10.1.2.2 does not apply. There is no evidence that Applicant was not voluntarily involved in criminal activity and therefore CC MC E2.A10.1.2.4 does not apply.

In any matter within the jurisdiction of the executive of the United States Government, it is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or writing or conceal any material fact. (21) Security clearances are within the jurisdiction of the executive branch of the Government of the United States. (22) Applicant knowingly and willfully falsified his SCA by failing to admit he had been terminated from his employment at a bank under unfavorable circumstances and had a judgment against him. An applicant's employment history and financial situation are relevant and material to a determination of his security worthiness.

The Government established each of the allegations under Guideline J alleged in the SOR. Applicant has the burden of mitigating the security concerns raised by his criminal conduct. An applicant may mitigate criminal conduct security concerns by demonstrating his criminal behavior was not recent. As Applicant's falsifications were not alleged as criminal conduct, they may not be used to establish a disqualifying condition under Guideline J. Nevertheless, the falsifications are relevant in deciding if Applicant established any of the mitigating conditions. Under the circumstances, I conclude Applicant's criminal conduct was recent and CC MC E2.A10.1.2.1 does not apply. I also find because of Applicant's falsifications there is not clear evidence of successful rehabilitation and conclude CC MC E2.A10.1.2.6 does not apply.

Based on all the evidence, Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.2 (*The deliberate omission, concealment, or falsification of relevant and material 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*), PC DC E2.A5.1.2.4 (*Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*), and PC DC E2.A5.1.2.5 (*A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*), all apply in this case.

Applicant deliberately failed to divulge on his SCA that he had been employed and later terminated from his employment at a bank. He failed to divulge the apparent reasons for his termination, a matter that was important for his background investigation. Applicant filled out his SCA on March 29, 2000, and later made a sworn statement on November 15, 2001. He failed to provide this information to the investigator at that time. He later made another sworn statement on April 5, 2002, where he was confronted with the facts and finally admitted his termination. Applicant admitted he did not divulge he had an unpaid judgment and has not provided proof that it has been satisfied. PC DC E2.A5.1.2.2 applies. Applicant's conduct when he was advised by the bank to return to speak to the investigator raises serious questions. He states he did not fail to return because he did anything wrong, yet he did not participate in the investigation to resolve the conflict. Applicant's lack of judgment in this regard is a serious security concern. I find PC DC E2.A5.1.2.4 applies.

Applicant's deliberate falsification of his SCA and his personal conduct in failing to participate in the bank's investigation into missing funds demonstrates a willingness to hide his past, a lack of truthfulness and questionable judgment. This conduct demonstrates a pattern of dishonesty that makes him vulnerable as a security risk. I find PC DC

E2.A5.1.2.5 applies.

I have considered all the mitigating conditions and especially considered Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.2 (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*), PC MC E2.A5.1.3.3 (*The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*), and PC MC E2.A5.1.3.5 (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*). I conclude none of the mitigating conditions apply. Applicant deliberately kept important information off his SCA and had ample opportunity to correct the deficiency, but failed to do so before being confronted. PC MC E2.A5.1.3.2, PC MC E2.A5.1.3.3 do not apply. Applicant was confronted with a cash shortage at the bank where he worked and instead of resolving it and assisting in the investigation, he failed to return and rectify the situation, if he truly had no involvement with the missing funds. I find Applicant has not provided any evidence to show he has somehow eliminated his vulnerability to coercion. I find PC MC E2A5.1.3.5 does not apply. Applicant has failed to mitigate the security concerns with regard to his personal conduct.

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. 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 their 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 all the evidence provided and also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I find Applicant has failed to mitigate the security concerns raised by his criminal conduct and his personal conduct. Therefore, I am persuaded by the totality of the evidence in this case, that it is not clearly consistent with the national interest to grant Applicant a security clearance. Accordingly, Guideline J and Guideline E are decided against Applicant.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1 Criminal Conduct (Guideline J) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. Against the Applicant

Subparagraph 1.g. Against the Applicant

Subparagraph 1.h. Against the Applicant

Subparagraph 1.i. Against the Applicant

Subparagraph 1.j. Against the Applicant

Paragraph 2 Personal Conduct (Guideline E) AGAINST THE APPLICANT

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. Against the Applicant

Subparagraph 2.c. Against the Applicant

Subparagraph 2.d. Against the 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.

Carol. G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. GE 17 at 11.
3. GE 13.
4. GE 4, Question 6 states: *Your Employment Activities-List your employment activities, beginning with the present and working back 10 years. You should list full-time work, part-time work, military service, temporary military duty locations over 90 days, self-employment, other paid work, and all periods of unemployment.*
5. *Id.*, Question 20 states: *Your Employment Record-Has any of the following happened to you in the last 10 years?- Fired from job-Quit a job after being told you'd be fired-Left a job by mutual agreement following allegations of unsatisfactory performance-Left a job for other reason under unfavorable circumstances?*
6. GE 18 at 2.
7. GE 4.
8. GE 17.
9. GE 18.
10. GE 4, Question 37 states: *Your Financial Record Unpaid Judgments In the last 7 years have you had any judgments against you that haven not been paid?*
11. Statement of Applicant dated December 1, 2005.
12. ISCR Case No. 96-0277 at 2 (App. Bd. Jul. 11, 1997).
13. ISCR Case No. 97-0016 at 3 (App. Bd. Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
14. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
15. ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
16. ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
17. *Egan*, 484 U.S. at 531.
18. *Id.*
19. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
20. Executive Order 10865 § 7.
21. 18 U.S.C. § 1001.

