

KEYWORD: Criminal Conduct

DIGEST: Applicant pleaded guilty to a single count of insurance fraud in December 2002 following his arrest and charge of insurance fraud and grand theft. His continued denial of responsibility for his offense, when coupled with his probationary status and relative recency of the misbehavior, precludes crediting Applicant with successful reform and mitigation. While Applicant is to be commended for the positive steps he has taken in meeting his probationary conditions, more time needed for Applicant to demonstrate his full restoration to levels of judgment and trust required to hold a security clearance. Applicant fails to mitigate the security concerns associated with his September 2002 insurance fraud incident. Clearance is denied.

CASENO: 03-12903.h1

DATE: 08/23/2004

DATE: August 23, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-12903

DECISION OF ADMINISTRATIVE JUDGE

ROGER C. WESLEY

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Department Counsel

FOR APPLICANT

Kimberly Clark Menchion

SYNOPSIS

Applicant pleaded guilty to a single count of insurance fraud in December 2002 following his arrest and charge of insurance fraud and grand theft. His continued denial of responsibility for his offense, when coupled with his probationary status and relative recency of the misbehavior, precludes crediting Applicant with successful reform and mitigation. While Applicant is to be commended for the positive steps he has taken in meeting his probationary conditions, more time needed for Applicant to demonstrate his full restoration to levels of judgment and trust required to hold a security clearance. Applicant fails to mitigate the security concerns associated with his September 2002 insurance fraud incident. Clearance is denied.

STATEMENT OF THE CASE

On February 23, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on February 16, 2004, and requested a hearing. The case was assigned to me on April 21, 2004, and was initially scheduled for hearing on May 12, 2004, before being rescheduled for June 24, 2004. A hearing was convened on June 24, 2004, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At hearing, the Government's case consisted of eight exhibits. Applicant relied on three witnesses (including himself) and two exhibits. The transcript (R.T.) was received on July 7, 2004.

SUMMARY OF PLEADINGS

Under Guideline J, Applicant is alleged to have been arrested in September 2002 and charged with (1) insurance fraud and (2) grand theft, to which he pled guilty to Count I (Count II was dismissed) and was sentenced to three years probation, 75 hours of community service and assessed costs and restitution totaling \$1,636.14.

For his response to the SOR, Applicant admitted the allegations with explanations that undercut his guilty plea with claims of innocence. Essentially, he claimed to have informed the insurance agent of his accident before being told by his insurance agent that his policy was being renewed. He provided a detailed summary of his version of his conversations with both his insurance agent and a state insurance investigator who subsequently interviewed him about his insurance claims and the decision by his carrier not to renew his insurance. Applicant claimed he later pleaded guilty to insurance fraud on the advice of counsel and was awarded deferred adjudication, 18 months of probation, 75 hours of community service and assessed restitution. He claimed to have completed 15 months of probation and 80 hours of community service, and was still paying on his restitution.

FINDINGS OF FACT

Applicant is a 37-year-old system administrator for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein by reference and adopted as relevant and material findings. Additional findings follow.

While on his way home on December 16, 2001 (at around 5:30 P.M.), Applicant struck a deer, disabling his vehicle. Both police and a tow truck operator arrived shortly thereafter. Unbeknownst to Applicant, the police filed a traffic crash report of the incident. The tow truck that arrived at the scene, in turn, towed Applicant and his vehicle to a nearby repair shop. At approximately 7:37 P.M. on December 16, 2001, Applicant called his insurance agent to check on his coverage and was told his insurance had lapsed. Without advising his insurance agent (for Company A) of the accident he was involved in two hours previous, he applied for a new policy. Based in part on Applicant's assurances to the agent, his application for a new policy was accepted.

Applicant filed a claim the following morning (*i.e.*, on December 17, 2001, at around 9:39 A.M.) with his insurance company on his new insurance policy re: his December 16 accident. The carrier assigned a claim number for the reported loss, which Applicant claimed occurred between 11:00 P.M. and 1:00 A.M. on December 16, 2001. The insurance agent who took Applicant's report (Agent A) then checked the dates and times of Applicant's reported accident with the information contained in the filed police report he had obtained from the towing company's tow slip and found discrepancies in Applicant's claimed incident time. Agent A then referred his findings to the insurance

company's special investigative unit, who later (in March 2002) referred the matter to the State's insurance fraud division for consideration of criminal prosecution against Applicant.

After finding discrepancies in Applicant's reported time of the accident, Agent A called Applicant back (sometime in mid-morning of December 17, 2001) to reconcile his divergent account. Confronted with conflicting accounts, Applicant (a) acknowledged police coming to the scene, (b) couldn't explain his providing a 11:00 P.M. to 1:00 A.M. time frame for the accident in the face of the reported 5:30 P.M. time in the police report, and (c) refused to relent on his obtaining a new policy the day before the accident (*i.e.*, on December 15, 2001).

Agent A took an additional recorded statement from Applicant on December 17, 2001. In this statement, Applicant insisted he had obtained his insurance policy before the December 16 accident had occurred (*i.e.*, on December 15, 2001), but did not actually buy a policy from the carrier until after the accident had happened on December 16, 2001 (*see ex. 3*).

In July 2002, Applicant was interviewed by a law enforcement investigator for the State's insurance fraud division, who had left her card at his home earlier in the day (*see ex. 2*). In her recorded interview of Applicant upon returning to his residence (after first reading him his perjury and oath and Miranda warnings), the investigator elicited an admission from Applicant that his insurance policy had lapsed for non-payment of two due insurance premiums. Applicant advised her that he had tried to make payment on his policy the preceding Sunday (December 15, 2001) but was told he would have to obtain a new policy due to a lapse of the old one. He then acknowledged obtaining his new policy on the evening of December 16, 2001, after the accident had occurred (*ex. 3*). These statements he provided the State insurance investigator contradict the explanations he provides in both his DSS statement (*ex. 2*) and SOR answer. Applicant's statements to the insurance investigator also provided the basis for the ensuing felony charges filed against him for insurance fraud and grand theft.⁽¹⁾ Because the insurance policy remained in effect for the balance of December 16, 2001 and some of the following day (based on the account of the insurance investigator), Applicant must be held responsible for actually receiving and potentially benefitting from a policy that was based on inaccurate information supplied by Applicant re: the timing of his accident.

Based on the affidavit provided by the State insurance investigator, the State filed charges against Applicant for insurance fraud (Count I) and grand theft (Count II), both felonies, in December 2001 (*ex. 4*). The criminal complaint cites Agent A of Applicant's insurance company as the complaining person. Applicant, in turn, was arrested on September 21, 2002, on an outstanding warrant and transported to a local jail facility pending transfer to the neighboring jurisdiction where the charges were pending. Applicant reported the incident to his employer's security representative who wrote up an adverse information report on the incident (*see ex. 7*).

When Applicant appeared in court in December 2002, he pled guilty to insurance fraud. The remaining charge of grand theft was dismissed. Upon accepting Applicant's plea, the court hearing Applicant's case withheld adjudication of guilt as a part of his sentence that entailed three years probation, 75 hours of community service, and assessment of costs and restitution for the cost of supervision (*compare exs 8 and B*). Exhibit B contains a correction to the original order (*ex. 8*) that did not confirm withholding of adjudication of guilt. Applicant has since completed his ordered 75 hours of

community service and has been fully compliant with his probation conditions: drug testing (consistently negative) and regular payments towards his court-ordered monetary obligations. Applicant is also credited with maintaining stable employment and a residence, in addition to remaining arrest free (*see ex. A; R.T., at 57-60*).

Once his restitution is satisfied, Applicant would be positioned to seek an early termination of his probation, which courts typically entertain according to his probation officer (R.T., at 74-75). It is still too speculative at this time, however, to estimate Applicant's likelihood of success on such a request, should it be made. At the moment, Applicant still has 17 months remaining on his probation (*see ex. A; R.T., at 76*).

Applicant is highly regarded by the course director for the systems administrator course that Applicant is assigned to: Applicant is one of her systems instructors. The course director was not familiar with the incident for which he was criminally charged (R.T., at 51-52).

POLICIES

The Adjudicative Guidelines of the Directive (Change 4) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Disqualifying Conditions:

DC 1 Allegations or admission of criminal conduct.

DC 2 A single serious crime or multiple lesser offenses.

Mitigating Conditions:

MC 1 The criminal behavior was not recent.

MC 2 The crime was an isolated incident.

MC 6 There is clear evidence of successful rehabilitation.

Burden of Proof

By virtue of the precepts framed by the Directive, a decision to grant or continue an Applicant's for security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of

material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a

security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his

case.

CONCLUSIONS

Applicant had no prior history of criminal arrests before his September 2002 arrest for insurance fraud and grand theft. The insurance fraud charges he pled guilty to in December 2002 were serious, though, and covered conduct of a felonious nature. Even without an adjudication of guilt, Applicant's admissions of the underlying insurance fraud charges are security significant and raise security concerns under Guideline J.

Fully advised of the charges against him, Applicant pleaded guilty to one count of insurance fraud (associated with the September 2001 incident) and was placed on three years of supervised probation. The incident, though isolated, is a serious one and warrants the application of two of the disqualifying conditions (DC) of the Adjudicative Guidelines for criminal conduct: DC 1 (allegations or admission of criminal conduct) and DC 2 (a single serious or multiple lesser offenses). Government must be able to repose a high degree of trust in those it bestows access to classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980).

Applicant's 2002 insurance fraud offense is not only serious but is aggravated by his failure to acknowledge guilt or responsibility. To the contrary, he takes issue with the insurance investigator's version of Applicant's applying for and obtaining a new insurance policy without disclosing the accident he was involved in just hours before. That his guilty plea is not subject to collateral estoppel absent a conviction does not change the clear impression that Applicant is still unwilling to accept responsibility for his misconduct unless ordered to do so by a court of law as a condition of his awarded probation. This undercuts the diligence he has displayed in meeting his probation conditions.

Applicant's completion of most of his probation conditions, while commendable, is not enough to demonstrate clear evidence of rehabilitation. Applicants historically can be expected to exhibit good behavior while on probation. *Cf. Domingues v. Dept. Air Force*, 803 F.2d 680, 683-84 (Fed. Cir. 1986) (in evaluating good behavior since misconduct it

may be noted that employees can be expected to exhibit their best behavior when faced with the strong possibility the agency will be acting soon to remove them); ISCR Case No. 90-1115 (October 1992). Time elapse without further incidents are important factors in gauging the quality of Applicant's rehabilitation. And, certainly, acknowledgments of guilt and responsibility are highly material considerations to take into account in progress assessments.

Neither sufficient time elapse without further incident nor demonstrated acceptance of responsibility aid Applicant in his making the case for rehabilitation from the trust loss he experienced as a consequence of his insurance fraud incident. Not only has Applicant failed to take responsibility for his behavior leading to his guilty plea, but he still has almost 17 months remaining on his probation. That Applicant will remain on probation until 2005 cannot be disregarded. His continuing probation status serves to further undercut his claims of successful reform and rehabilitation. While nothing in the Directive indicates that an applicant's probationary status is a *per se* bar to a favorable security clearance, it is a consideration to take into account when weighing an applicant's reform and rehabilitation claims (as here). *Cf.* ISCR Case No. 96-0710 (June 1997). Here, several factors militate against crediting Applicant with mitigation of the misconduct covered by his September 2002 arrest: his absence of acceptance of responsibility for his actions, his continued probation status, the seriousness of the offense covered by the SOR and the relative recency of his actions.

So, based on the evidence presented, Applicant may invoke several of the mitigating conditions covered by the Adjudicative Guidelines for criminal conduct, but not to their fullest extent: MC 1 (behavior not recent), MC 2 (isolated incident) and MC 6 (there is clear evidence of rehabilitation). MC 6, in particular, has very limited applicability in view of lack of accountability for his actions and unfinished probation requirements.

Taking into account all of the circumstances surrounding Applicant's 2002 insurance fraud incident, his continued insistence on innocence, his still active probation status, and the relative recency of the conduct when weighed against the seriousness of the trust breach, it is too soon to conclude Applicant is no longer at risk to recurrent behavior in the foreseeable future. Unfavorable conclusions warrant with respect to the allegations covered by Guidelines J.

In reaching my decision, I have considered the evidence as a whole, including each of the factors and conditions enumerated in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive.

FORMAL FINDINGS

In reviewing the allegations of the SOR in the context of the FINDINGS OF FACT, CONCLUSIONS and the FACTORS and CONDITIONS listed above, this Administrative Judge makes the following separate FORMAL FINDINGS with respect to Appellant's eligibility for a security clearance.

GUIDELINE J (CRIMINAL CONDUCT): AGAINST APPLICANT

Sub-para. 1.a: 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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley

Administrative Judge

1. While Applicant continues to dispute the insurance investigator's account and his own guilt, his admission of guilt seriously undercuts his claims of innocence of the claims made by the insurance company and the State's fraud division. In the face of the detailed affidavit provided by the State insurance investigator, Applicant's guilty plea and all of the circumstances surrounding the events of December 16 and 17, 2001, Applicant's version of the material facts cannot be accepted.