

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: From 1991 until 1998, Applicant was convicted of various criminal offenses at least nine times. She is precluded by federal law from holding a clearance because she served more than one year in jail for one of those convictions. Applicant also deliberately omitted relevant information about her arrest record from her application for clearance (SF 86). Applicant failed to mitigate the security concerns about her criminal conduct and about her personal conduct. Clearance is denied.

CASE NO: 03-16179.h1

DATE: 12/31/2005

DATE: December 31, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-16179

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

From 1991 until 1998, Applicant was convicted of various criminal offenses at least nine times. She is precluded by federal law from holding a clearance because she served more than one year in jail for one of those convictions. Applicant also deliberately omitted relevant information about her arrest record from her application for clearance (SF 86). Applicant failed to mitigate the security concerns about her criminal conduct and about her personal conduct. Clearance is denied.

STATEMENT OF THE CASE

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to give Applicant a security clearance. On November 19, 2004, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline E (personal conduct) and Guideline J (criminal conduct). Applicant timely answered the SOR (Answer), and admitted all but one of the allegations⁽²⁾ under Guideline J. Applicant also denied the SOR ¶¶ 2.a and 2.b allegations that she intentionally falsified responses to two questions in her SF 86.

Applicant also requested a hearing, and the case was assigned to me on August 10, 2005. I convened a hearing on September 22, 2005, and the parties appeared as scheduled. The government presented 32 exhibits, which were admitted without objection as GE 1 - 32. Applicant testified in her own behalf. DOHA received the transcript (Tr) on October 6, 2005.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is 37 years old and seeks a security clearance so that she can work as a secretary for the defense contractor who hired her in August 2001. She currently works as a data entry clerk after being hired by the contractor based on her good performance as an interim hire from a temp agency. Applicant enlisted in the U.S. Navy in 1986 and was a Mess Management Specialist Third Class (MS3; paygrade E-4) at the time of her involuntary separation from the Navy on October 10, 1991. She received an Other Than Honorable Discharge due to misconduct.

While stationed overseas, Applicant had a child out of wedlock. When she was transferred back to the United States, her family ostracized her because they would not tolerate the fact she had an illegitimate, biracial child. Lacking any family support, she was desperate to find a father-figure for her child. In 1991, Applicant hastily entered into a marriage that soon ruined her life. Applicant's husband was a drug user, who abused and manipulated Applicant into engaging in various criminal acts throughout their marriage. Most of the crimes were intended to get money for her husband's drug habit, or merchandise for Applicant's mother-in-law.

The couple officially divorced in 2001. In 1997, Applicant relinquished parental rights regarding the three children she had with her ex-husband and she has not seen the children or her ex-husband since 1994, when, as discussed below, Applicant was sent to prison for over two years.

Applicant was arrested, charged, or convicted with criminal offenses at least 15 times between May 1991 and October 1998. On April 26, 1991, Applicant hit his husband's ex-girlfriend in the face with a frying pan after the two had been arguing about the girlfriend's continued presence in the husband's life. The next month, Applicant was charged with causing bodily injury with intent to maim, a felony, but was convicted of a reduced charge of assault and battery, a misdemeanor. For this offense, she was sentenced to 12 months in jail, suspended on condition of two years of good conduct. Applicant was also ordered to pay restitution to the victim and was assessed court costs, but was jailed in 1993 after six show cause orders were issued for her failure to pay as ordered (SOR ¶ 1.a).

When interviewed by a Defense Security Service (DSS) agent on August 2, 2002, Applicant did not dispute that, on June 19, 1991, she was convicted of shoplifting and given a suspended jail sentence of 90 days. (SOR ¶1.b) Nor did she dispute was also charged the same day with making threats over the phone and assault by threat (SOR ¶1.c). However, Applicant has been unable to recall any details about either arrest, and, aside from the sworn statement provided as GE 2, there is no documentation of either charge.

On July 25, 1991, Applicant was charged with failure to appear. The charge was dismissed. (SOR ¶1.d). On October 1, 1991, she was charged with writing checks with insufficient funds, but that charge was dismissed (SOR ¶1.e). On December 7, 1991, she was charged with writing checks with insufficient funds and failure to appear. These charges were dismissed (SOR ¶ 1.h).

On November 27, 1991, Applicant was charged with writing a check with insufficient funds, a felony. She was convicted and sentenced to 12 months in jail, suspended, and assessed court costs. She was later jailed when she failed to pay the court costs (SOR ¶1.f).

On February 5, 1992, Applicant was charged with two counts of failure to appear. This time, one count was dismissed, but she was convicted of the other count and fined \$75 (SOR ¶1.i).

In December 1991, Applicant was arrested and charged with five counts of unlawfully and feloniously uttering a certain check with intent to defraud. She was subsequently found guilty on all five counts and sentenced to five, two-year jail sentences, and assessed court costs. The jail sentences, which totaled 10 years, were suspended for five years on condition of good behavior. However, as alleged in SOR ¶ 1.g, Applicant was sent to state prison for four years as of February 1994, because she violated the terms of her suspended sentence when she committed the following offenses:

(1) November 28, 1992: shoplifting (SOR ¶1.j);

(2) February 11, 1993: concealing merchandise (SOR ¶1.k);

(3) February 24, 1993: two counts of writing bad checks (SOR ¶1.l);

(4) November 17, 1993: wrongfully possessing goods or merchandise valued at less than \$200, 2d offense. (SOR ¶1.m)

Applicant was paroled from state prison on July 10, 1996. One term of her parole was that she attend group substance abuse counseling. In September 1996, Applicant's parole officer reported that Applicant was not attending the counseling and had violated the terms of her parole. A hearing was held on September 16, 1996, regarding whether to continue Applicant's parole. She was not sent back to jail and was released from parole in December 1998 (SOR ¶ 1.o).

On or about October 1, 1998, Applicant was arrested at work and charged with threatening to bomb, burn, destroy, or damage a mobile home, a felony. Applicant pleaded not guilty to a reduced charge of harassment over the phone, and was ordered to have no contact with the complaining party. Judgment was withheld by the court. (SOR ¶ 1.p)

Applicant also testified that sometime since her last arrest in 1998, a counselor at her daughter's high school swore a criminal complaint against Applicant for harassing the counselor over the phone. When Applicant appeared in court, no judgment was entered, but Applicant was told to have no further contact with the complainant.⁽³⁾

Applicant submitted a security clearance application (SF 86) on March 4, 2002. In response to question 21, which asks if the Applicant has "ever been charged with or convicted of any felony offense," Applicant answered "yes," but listed only a January 1991 worthless check charge (SOR ¶ 2.a). She did not list the 1998 charge involving threats to burn, etc., or the November 1991 bad check charge, or the original felony charge of causing bodily injury with intent to maim in May 1991. Nor did Applicant list the 1998 charge when she answered question 26, which seeks information about offenses or charges occurring in the preceding seven years not specifically addressed by any other question about criminal conduct (SOR ¶ 2.b).

POLICIES

The Directive sets forth adjudicative guidelines⁽⁴⁾ to be considered in evaluating an Applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline E (personal conduct) and Guideline J (criminal conduct). Also applicable here is the statutory prohibition, expressed in 10 U.S.C. § 986, against granting Applicant a clearance because of her incarceration from 1994 until 1996.

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽⁵⁾ for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for the Applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden 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 bears a heavy burden of persuasion.⁽⁶⁾ 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 in ensuring 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 in favor of the government.⁽⁷⁾

CONCLUSIONS

The security concern expressed through Guideline J is that a person who is willing to disregard the law and risk fines or incarceration may also be willing to disregard rules and regulations governing the protection of classified information.

(8) The criminal activity at issue may consist of a single serious crime or multiple lesser offenses. Of the 17 SOR allegations relating to criminal conduct, Applicant denied only one - the ¶ 1.n allegation that she was charged and convicted of shoplifting and bad checks in September 1994. She based her denial on the fact she was in jail at the time. Insofar as the record shows Applicant was in jail from February 1994 until July 1996, I find for Applicant as to SOR ¶1.n. Further, with respect to SOR ¶¶ 1.c, 1.d, 1.e, and 1.h, all that has been established is that Applicant was charged with crimes that were eventually dismissed. Accordingly, I find for Applicant as to these allegations.

However, the government has presented sufficient information to support the remaining allegations of criminal conduct as reasons for its decision to deny Applicant's request for clearance. On the facts established by this record, Guideline J disqualifying condition (DC) 1-(9) and DC 2-(10) apply. Applicant has a history of criminal conduct that occurred between 1991 and 1998, including a felony charge of making threats while Applicant was still on parole. Based on her testimony at hearing, it also appears Applicant was the defendant in a criminal complaint alleging similar threatening conduct sometime after 1998.

I have also considered the Guideline J mitigating conditions (MC); specifically, (MC) 1, (11) MC 3, (12) and MC 6. (13) As to MC 1, it is possible to view Applicant's criminal conduct as remote in time; however, this view is limited by the length of her criminal history, and by the fact that, since the last alleged arrest in 1998, Applicant has engaged in similar conduct. MC 3 also has limited value for Applicant because, while it is clear her ex-husband pressured or manipulated Applicant into committing many of the crimes alleged here, Applicant admits she knew at the time what she was doing was wrong and that she willingly did the acts for which she was convicted. Further, her criminal conduct since being released from parole weakens any weight I might give MC 3 and MC 6. Based on the entire record, including, as discussed below, her willingness to withhold information from the government about her criminal record, reasonable doubts remain about whether Applicant's criminal conduct is likely to recur.

Further, because Applicant served more than one year in jail for violating the terms of her suspended sentences for felony check fraud, 10 U.S.C. § 986 (also known as the Smith Amendment) applies to bar Applicant from receiving a clearance. The Defense Department and the military departments may not grant or renew a clearance for any DoD officer or employee, any employee, officer, or director of a DoD contractor, or a member of the armed forces, both active and inactive, whose circumstances fall within one of four statutory categories. (14) The specific category at issue here is 10 U.S.C. § 986(c)(1), which, when first enacted, barred grant or renewal of a clearance where a person has been convicted of a crime and sentenced to "imprisonment for a term exceeding one year." In October 2004, Congress amended the statute in relevant part to impose this prohibition in cases where the person was sentenced "to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year." Therefore, under either the original or amended versions of the Smith Amendment, Applicant's criminal record bars her from holding a security clearance.

The Smith Amendment also provides that the appropriate authority may authorize a waiver, in meritorious cases, of the statutory prohibitions in 10 U.S.C. § 986(c)(1) and (4). DOHA Operating Instruction (OI) 64, dated July 10, 2001, further requires administrative judges to state whether or not they recommend further consideration of Smith Amendment cases for possible waiver of the statutory bar, but only in cases where the Smith Amendment is the sole basis for denial or revocation. Based on the foregoing discussion of Applicant's criminal conduct between 1991 and 1998, even without application of the Smith Amendment, I would conclude Guideline J against the Applicant.

Under Guideline E, conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. ⁽¹⁵⁾ Here, the government has established Applicant withheld information about her past felony charges and her more recent criminal activity from her SF 86, but Applicant has denied intentionally falsifying the SF 86. She did, in fact, list one felony offense in response to question 21, but failed to list the 1998 arrest in response to question 26. It is possible from the facts presented here that Applicant did not understand the technical difference between a felony and a misdemeanor. It might also be possible, given Applicant's lengthy record of arrests and court appearances that she may have had trouble providing details about specific events. However, she has not claimed either excuse. Rather, she testified that she had put these events in the back of her mind and was trying to move on from her past. As to the 1998 arrest, she claimed it had slipped her mind; however, the fact she was arrested at work is not something one easily forgets. ⁽¹⁶⁾

I conclude, based on the totality of the information available on this issue, that Applicant intended to minimize the extent of her criminal record when she omitted the information about her felonies and her 1998 arrest. Accordingly, Guideline E DC 2 ⁽¹⁷⁾ applies. I further conclude there is no support for any of the listed mitigating conditions. The falsification was recent, in that it involves the basis for the current evaluation of Applicant's suitability for clearance, and Applicant did not come forward to volunteer the omitted information. Rather, a DSS agent confronted her with facts from her background during a subject interview several months after Applicant submitted the SF 86. Based on all of the foregoing, I conclude Guideline E against the Applicant.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guideline. A fair and commonsense assessment ⁽¹⁸⁾ of Applicant's conduct in the context of all of the information before me shows that reasonable doubts persist about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Absent substantial information to mitigate these doubts, which Applicant failed to provide, and in light of the statutory requirements applicable here, I make no recommendation as to waiver and cannot conclude she has otherwise overcome the government's case.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

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

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c: For the Applicant

Subparagraph 1.d: For the Applicant

Subparagraph 1.e: For the Applicant

Subparagraph 1.f: Against the Applicant

Subparagraph 1.g: Against the Applicant

Subparagraph 1.h: For the Applicant

Subparagraph 1.i: Against the Applicant

Subparagraph 1.j: Against the Applicant

Subparagraph 1.k: Against the Applicant

Subparagraph 1.l: Against the Applicant

Subparagraph 1.m: Against the Applicant

Subparagraph 1.n: For the Applicant

Subparagraph 1.o: Against the Applicant

Subparagraph 1.p: Against the Applicant

Subparagraph 1.q: Against the Applicant

Paragraph 2, Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 2.a: Against the Applicant

Subparagraph 2.b: 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 the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. Applicant denied the allegation in SOR ¶ 1.n that she was arrested and charged in September 1994 with shoplifting and three counts of passing bad checks.
3. Tr., 39 - 41.
4. Directive, Enclosure 2.
5. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
6. *See Egan*, 484 U.S. at 528, 531.
7. *See Egan*; Directive E2.2.2.
8. Directive, E2.A10.1.1.
9. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
10. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
11. Directive, E2.A10.1.3.1. The criminal behavior was not recent;
12. Directive, E2.A10.1.3.3. The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life;
13. Directive, E2.A10.1.3.6. There is clear evidence of successful rehabilitation.
14. 10 U.S.C. §986(c)(1) through (c)(4).
15. Directive, E2.A5.1.1.
16. Tr., 23, 31 - 32.

17. Directive, 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;

18. Directive, E2.2.3.