

DATE: November 2, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-18257

ECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Nichole L. Noel, Esq., Department Counsel

Erin C. Hogan, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is unable to successfully mitigate her history of not meeting financial obligations. She is also unable to successfully mitigate the security concern stemming from her 1997 felony conviction for credit card theft resulting in a sentence to confinement for two years, because she is yet to make full restitution as required by the state court's order. Clearance is denied.

STATEMENT OF THE CASE

On November 7, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J for criminal conduct and Guideline F for financial considerations. The criminal conduct allegation is based on Applicant's 1997 felony conviction for credit card theft and resulting two-year sentence to confinement. The financial considerations allegations is based on Applicant having nine unpaid accounts, totaling more than \$3,000, in a collection or past due status as of August 26, 2003. Applicant responded to the SOR in writing, dated February 4, 2004, and she admitted the SOR allegations with explanation; she also requested a hearing.

Department Counsel indicated they were ready to proceed on June 1, 2004, and the case was assigned to me June 3, 2004. A notice of hearing was issued on June 16, 2004, scheduling the hearing for July 30, 2004. Applicant appeared without counsel and the hearing took place as scheduled. I received the transcript August 16, 2004.

FINDINGS OF FACT

Applicant's admissions are incorporated into my findings, and after a thorough review of the record, I make the

following essential findings of fact:

Applicant, a 31-year-old high-school graduate, is employed in an administrative support position/program analyst for a federal contractor. She has never married and has no children. She has worked for her current employer since January 1999. In conjunction with her employment, she completed a security-clearance application in February 1999 (Exhibit 1). Her employment history includes working in several entry-level jobs such as server, hostess, sales associate, and cashier.

Applicant is a convicted felon. While working as a sales associate for a major department store, Applicant became involved in a credit-card scheme resulting in her 1997 conviction for credit card theft. She went along with a group of other store employees to use a customer's credit card number to make purchases for herself. When detected by the store, Applicant admitted her wrongdoing to security personnel. In her statement of January 1997, she admitted her conduct started the previous December, and that she made several purchases using three different credit card numbers that were not her own (Exhibit 4). In a statement provided during her background investigation, she admitted participating in the scheme once or twice a week for four weeks (Exhibit 3). Subsequently, the matter was turned over to the local police for investigation, which led to an arrest warrant being issued for Applicant.

In June 1997, Applicant, with the assistance of a public defender, offered to plead guilty to the felony offense of credit card theft. The state court accepted her guilty plea and sentenced her as follows: (1) to be confined in the state penitentiary for two years, with all but 30 days suspended for two years conditioned upon her good behavior; (2) to make restitution in the amount of \$4,665 to the department store by making monthly payments of \$50 beginning August 30, 1997, until paid in full; and (3) to serve the 30 days confinement in the sheriff's modified work release program.

In April 1999, the probation office notified the prosecutor's office that Applicant's restitution payments had been sporadic, amounting to about 12 \$50 payments during 22 months. In September 1999, on the motion of Applicant's public defender, the state court extended Applicant's probation for one year to monitor her payment of restitution. Applicant is yet to make full restitution. In her testimony, Applicant indicated she went about four years without making a restitution payment. She started making payments again in February 2004 after receiving the SOR. As of July 21, 2004, the balance due was about \$370 (Exhibit B).

Applicant admits to the nine delinquent accounts alleged in the SOR. In her answer, she pointed out that six of the accounts were medical bills. In February 2004, Applicant paid or settled all nine delinquent accounts (Exhibit C). She was able to pay the delinquent accounts using money received from an insurance settlement from an automobile accident. In a sworn statement during her background investigation (Exhibit 3), Applicant described her financial situation, in part, as follows:

- She first experienced financial problems in summer 1992.
- From 1992 to 1999, she had problems paying creditors on a timely basis.
- Over the years she has not managed her money well due to immaturity and wasting money on unnecessary spending on clothes and travel.

Her current annual salary is about \$35,000, and she owns no financial assets (e.g., real estate, stock, mutual funds, etc.). She pays no rent because she lives with her boyfriend, but she anticipates starting to pay rent in September 2004. As of the day of the hearing, Applicant had about \$66 in checking and savings accounts. Her current financial situation can be described as living paycheck-to-paycheck.

Applicant presented evidence that she is performing well in her current employment (Exhibits A and D). Her supervisor testified and he described Applicant as an employee who has grown and developed into a mature, responsible, customer-service oriented individual. He relies on her to take care of the customer's requirements, and she represents the company well.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline.

In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. 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.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽²⁾ There is no presumption in favor of granting or continuing access to classified information.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁵⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.⁽⁸⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Under Guideline F,⁽¹¹⁾ a security concern typically exists for two different types of situations--significant unpaid debts and unexplained affluence; this case involves the former. An individual who is financially overextended is at risk of having to engage in illegal or unethical acts to generate funds to meet financial obligations. Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information.

Here, based on the record evidence as a whole, the government has established its case under Guideline F. The nine delinquent accounts demonstrate a history of not meeting financial obligations as well as inability or unwillingness to pay one's just debts.⁽¹²⁾ The same facts and circumstances also demonstrate financial irresponsibility. And Applicant's unwillingness or inability to pay her court-ordered restitution in full is further evidence of her financial irresponsibility.

In mitigation, her financial behavior cannot be viewed as not recent⁽¹³⁾ because her delinquencies were ongoing until she finally resolved them in February 2004. Her situation was not an isolated incident⁽¹⁴⁾ because it involved multiple accounts over a period of time. Although Applicant has paid or settled the nine delinquent accounts, she did so after receiving money from an insurance settlement. But for this windfall, I have little doubt the majority of the nine delinquent accounts would still be unpaid or unresolved. Given these circumstances, Applicant receives reduced credit in mitigation for her effort⁽¹⁵⁾ in taking care of the nine delinquent accounts. This is especially true considering Applicant went four years without making court-ordered restitution payments, resumed doing so after receiving the SOR, and she still has an outstanding balance.

I have reviewed the remaining mitigating conditions under Guideline F and conclude they do not apply given the facts and circumstances here. Although Applicant has addressed the symptoms of her financial irresponsibility by paying or settling the nine delinquent accounts, she has failed to prove she has changed her financial habits that caused the problems in the first place. Until she changes her habits and establishes a track record of good debt management, it is most likely she will return to her financial irresponsible ways. Indeed, her current situation with \$66 in the bank and living paycheck-to-paycheck are not indicators of financial responsibility. Accordingly,

Guideline F is decided against Applicant.

Under 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. 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.

Here, based on the record evidence as a whole, the government has established its case under Guideline J. During a period of about four weeks in December 1996 and January 1997, Applicant participated in a credit-card scheme at her place of employment. She abused her position as a sales associate to obtain more than \$1,000 worth of goods she charged to other persons' credit card accounts. In 1997, she pleaded guilty to the felony offense of credit card theft and was sentenced to two years confinement, with all but 30 days suspended, and she was placed on two years probation. She was allowed to serve her confinement on a work release program. Although ordered to pay restitution, her probation was extended for one year to monitor her payment of restitution. Her payment history has been sporadic, and the court-ordered obligation remains unpaid as of when the record closed. These facts and circumstances are evidence of a history or pattern of illegal behavior that creates doubt about her judgment, reliability, and trustworthiness. Given these circumstances, both DC 1-(16) and DC 2-(17) apply.

I have reviewed the mitigating conditions under Guideline J and conclude one of the six apply in Applicant's favor. Her criminal conduct took place about seven years ago and she pleaded guilty in June 1997. Given these circumstances, her criminal conduct is viewed as not recent. (18) The remaining MC do not apply given the facts and circumstances here. In particular, MC 6-(19) does not apply because Applicant has yet to make full restitution, a requirement of her sentence. Given this circumstance, Applicant has not presented clear evidence of successful rehabilitation.

To sum up under Guideline J, the record evidence shows Applicant engaged in felony-level criminal conduct when she was 24 years old by abusing her position as a sales associate for a department store by using customers' credit card numbers to enrich herself. More than seven years have passed without recurrence, and I assess the likelihood of additional criminal conduct as relatively low. Considering the passage of time without additional criminal conduct, I would normally be inclined to decide this matter in Applicant's favor. But given she is yet to make full restitution, Applicant has failed to successfully mitigate the security concern. Accordingly, Guideline J is decided against Applicant.

SOR subparagraph 1.c alleges Applicant is disqualified from having a security clearance under 10 U.S.C. § 986 due to her conviction and sentence to more than a year of confinement. When this case was heard, absent a waiver from the Secretary of Defense, Applicant was disqualified from obtaining or holding a security clearance. On October 28, 2004, the President signed the Defense Authorization Act of Fiscal Year 2005, which amended 10 U.S.C. § 986. Now, the disqualification applies only to those who actually were "incarcerated as a result of that sentence for not less than one year." According, the prohibitions of 10 U.S.C. § 986 do not apply to Applicant.

In reaching my decision, I have considered the record evidence as a whole, the whole-person concept, and other appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

As required by ¶ E3.1.25 of Enclosure 3 to the Directive, below are my conclusions as to the allegations in the SOR:

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: For the Applicant

SOR ¶ 2-Guideline F: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: Against the Applicant

Subparagraph e: Against the Applicant

Subparagraph f: Against the Applicant

Subparagraph g: Against the Applicant

Subparagraph h: Against the Applicant

DECISION

In light of all the circumstances presented by the record, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Michael H. Leonard

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. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
10. *Egan*, 484 U.S. at 528, 531.
11. Directive, Enclosure 2, Attachment 6, at pp. 29-30.
12. E2.A6.1.2.1. A history of not meeting financial obligations;" and E2.A6.1.2. 3. Inability or unwillingness to satisfy debts.
13. E2.A6.1.3.1. The behavior was not recent.

14. E2.A6.1.3.2. It was an isolated incident.
15. E2.A6.1.3.6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.
16. E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.
17. E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
18. E2.A10.1.3.1. The criminal behavior was not recent.
19. E2.A10.1.3.6. There is clear evidence of successful rehabilitation.