

DATE: October 19, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-18279

ECISION OF ADMINISTRATIVE JUDGE

THOMAS M. CREAN

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a data analyst for a defense contractor. She was convicted in 2002 of embezzling funds by sending benefit checks to accounts controlled by her while working for a civilian health management organization. She was sentenced to probation and a fine. Applicant has not established any mitigating conditions. Clearance is denied.

STATEMENT OF THE CASE

On January 21, 2004, the Defense Office of Hearing and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb 20, 1990), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan 2, 1992), as amended and modified (Directive). Applicant acknowledged receipt of the SOR on February 3, 2004. At the time, Applicant was employed by a defense contractor different than her present defense contractor employer. She left the employment of the first defense contractor on April 27, 2004 and subsequently was employed by and still works for her present defense contractor employer. The SOR alleges security concerns under Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline F (Financial Considerations) of the Directive.

Applicant answered the SOR in writing on February 25, 2004. She admitted to each of the allegations in the SOR. She elected to have the matter decided on the written record in lieu of a hearing.

Department Counsel submitted the Government's written case on August 19, 2004. Applicant received a complete file of relevant material (FORM) on August 25, 2004. She was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Her response was due September 26, 2004. As of October 5, 2004, she had not responded. The case was assigned to me on October 12, 2004.

FINDINGS OF FACT

Applicant is 44-years-old and employed as a data analyst by a defense contractor. Prior to this employment, she was employed from 1990 to 2000 as an enrollment specialist for a health care organization. The employer learned in February 2000, through its internal checks and balances of accounts that Applicant was embezzling funds by sending at least eight benefit checks over a period of time to accounts controlled by her. Applicant was terminated in April 2000, by the employer for the embezzlement. Applicant was arrested in November 2000, for second degree theft as a result of the embezzlement. Applicant pled guilty in February 2002, to second degree theft and was sentenced to pay a fine, serve probation for five years, write a letter of apology to the employer, and pay court and probation costs. Applicant is meeting the requirements of her probation.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander-in-Chief, the President has "the authority to ... control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position ... that will give that person access to such information." *Id.* At 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgement, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1 (b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through ¶¶ 6.3.6

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." Directive ¶ E2.2.1. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation of recurrence. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. 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.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determination should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

I carefully considered all of the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR:

Applicant's conviction of the felony of second degree theft brings her conduct under Guidelines J, E, and F. Under Guideline J (Criminal Conduct (CC)), criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's reliability and trustworthiness. E2.A10.1.1. Under Guideline E (Personal Conduct (PC)), a security concern exists for conduct involving questionable judgment, untrustworthiness, *lack of candor*, *dishonesty*, or unwillingness to comply with rules and regulations. Any of these characteristics in a person could indicate that the person may not properly safeguard classified information. E2.A5.1.1. Under Guideline F (Financial Considerations(FC)), a security concern exists for an individual who is financially irresponsible. An individual who is financially irresponsible may also be irresponsible, unconcerned, or careless in their obligations to protect classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life. E2.A6.1.1.

Applicant's conviction of second degree theft raises a security concern under Criminal Conduct Disqualifying Conditions (CC DC) E2.A10.1.2.1. (*allegation or admission of criminal conduct, regardless of whether the person was formally charged*); and E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*). Applicant admitted to the serious felony crime of second degree theft from an employer. I conclude that the criminal conduct disqualifying conditions have been established.

The Criminal Conduct Mitigating Conditions (CC MC) that are relevant to Applicant's case are: E2.A10.1.3. (*the criminal conduct was not recent*); E2.A10.1.3.2. (*the crime was an isolated incident*); and E2.10.3.6 (*there is clear evidence of successful rehabilitation*). The embezzlement was a continuous course of conduct that ended only 4 years ago when the employer discovered the theft. While the Applicant is complying with the terms of her sentence and probation, this does not provide a clear indication of successful rehabilitation. I conclude that there are no mitigating conditions established by Applicant under Guideline J.

Applicant's conviction of second degree theft raises a security concern under Personal Conduct disqualifying Condition (PC DC) E2.A5.1.2.5. (*a pattern of dishonesty or rule violation*). Applicant admitted to sending at least eight benefit checks to accounts under her control. This pattern of dishonest conduct establishes the disqualifying condition under Guideline E. Applicant has not established any mitigating conditions under Guideline E.

Applicant's conviction of second degree theft raises a security concern under Financial Considerations Disqualifying Condition (FC DC) E2.A6.1.2.2. (*deceptive or illegal financial practices such as embezzlement, employee theft, or check fraud*). Applicant's conviction establishes she embezzled funds from her employer. Her conviction established the disqualifying condition and she has not established any mitigation conditions under Guideline F

I carefully considered all of the circumstances in light of the "whole person" concept. I conclude Applicant is not eligible for access to classified information.

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. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Paragraph 3. Guideline F.: AGAINST APPLICANT

Subparagraph 3.a.: Against Applicant

DECISION

In light of all of 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.

Thomas M. Crean

Administrative Judge