

KEYWORD: Criminal Conduct

DIGEST: Applicant is 26 years old and works as a network engineer for a defense contractor. He was convicted of Reckless Driving in 2002 and Shoplifting in 2003. Since then he has matured and not been involved in any other criminal proceedings. Applicant mitigated the security concerns regarding his criminal conduct. Clearance is granted.

CASENO: 03-26360.h1

DATE: 01/23/2006

DATE: January 23, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-26360

**DECISION OF ADMINISTRATIVE JUDGE**

**SHARI DAM**

**APPEARANCES**

**FOR GOVERNMENT**

Jason Perry, Esq.

**FOR APPLICANT**

Kathleen Voelker, Esq.

## **SYNOPSIS**

Applicant is 26 years old and works as a network engineer for a defense contractor. He was convicted of Reckless Driving in 2002 and Shoplifting in 2003. Since then he has matured and not been involved in any other criminal proceedings. Applicant mitigated the security concerns regarding his criminal conduct. Clearance is granted.

## **STATEMENT OF THE CASE**

On April 25, 2005, the Defense Office of Hearings and Appeals (DOHA) under Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR, which is essentially an administrative complaint, detailed reasons under Guideline J (Criminal Conduct) why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to the Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted.

On June 15, 2005, Applicant answered the SOR in writing and requested a hearing. The case was assigned to me on August 26, 2005. A Notice of Hearing was issued on September 8, 2005. On September 15, 2005, Counsel for Applicant filed a Motion for a Continuance to which the Government did not object. An Amended Notice of Hearing was filed on September 27, 2005, re-scheduling the case to November 3, 2005. At the hearing the Government introduced Exhibits 1 and 2 into evidence without objection. Applicant introduced Exhibits A-E into evidence without objection. The Government did not call any witnesses. Applicant testified and called one witness in his case-in-chief. DOHA received the Transcript (Tr.) of the proceeding on November 17, 2005.

## **FINDINGS OF FACT**

In his Answer Applicant admitted the allegations contained in subparagraph 1.a. of the SOR and admitted in part and denied in part the allegations contained in subparagraph 1.b. These admissions are incorporated herein. After a complete review of the evidence in the record, I make the following additional findings of fact:

Applicant is 26 years old. In May 2001, Applicant was diagnosed with acute myeloid leukemia. He immediately started chemotherapy treatments, which concluded in December 2001, <sup>(1)</sup> the same month he graduated from a university with a degree in systems engineering. <sup>(2)</sup> After his leukemia went into remission in January 2002, <sup>(3)</sup> he began working as a computer engineer for a federal contractor. <sup>(4)</sup> He filed his security clearance application (SCA) in August 2002.

On May 14, 2002, Applicant was arrested and charged with Reckless Driving, a misdemeanor, after he and another driver were stopped for racing late at night. He was found guilty, fined \$200.00, ordered to serve five days in jail, with three days suspended, and his driver's license was suspended for six months. He was 23 years old and "wanted to feel alive" to celebrate his good health and the remission of his cancer. He later realized that he made a bad choice and could have endangered other people. <sup>(5)</sup>

On March 13, 2003, Applicant, age 24, was arrested and charged with misdemeanor Shoplifting. He was shopping at a department store when he decided to steal a couple DVD's to see if he could get away with it. <sup>(6)</sup> He was caught, arrested, and spent the night in jail. The next day he was released after paying a \$300.00 bond. When he left court he believed the matter was resolved and that he did not need to return. He was unaware of the court date listed on the ticket. <sup>(7)</sup> After he failed to appear on the assigned date, he forfeited his bond and the court entered a judgment order against him. Although the Government alleged in subparagraph 1.b. that the failure to appear and forfeiture of his bond constituted disqualifying conduct, the information noted on the back of the ticket listed forfeiture as one of the optional methods under the state statutes for resolving the matter. <sup>(8)</sup> He feels ashamed and embarrassed by his impulsive conduct and recognizes that the incident is now part of his record. <sup>(9)</sup>

In July 2004, Applicant was married and now has a young son. <sup>(10)</sup> He is committed to his family and remains in good health. He feels he has matured and that these incidents are not indicative of his overall character. <sup>(11)</sup> He has received very good evaluations from his employer for the years 2003 and 2004. <sup>(12)</sup> He has not been involved in any legal proceeding since March 2003.

One of Applicant's long time friends and colleagues recently found out about the two criminal incidents. Although he was surprised to learn of the problems, he believes Applicant has matured over the last two years and is focused on his family. He finds Applicant to be a reliable and honest person. <sup>(13)</sup>

## POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, sets forth the criteria that must be evaluated when determining security clearance eligibility. Within those guidelines are factors to consider in denying or revoking an individual's request for access to classified information (Disqualifying Conditions), and factors to consider in granting an individual's request for access to classified information (Mitigating Conditions). By recognizing that individual circumstances of each case are different, the guidelines provide substantive standards to assist an administrative judge in weighing the evidence in or to reach a fair, impartial and common sense decision.

The adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. Section E.2. of Enclosure of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the disqualifying and mitigating conduct of the applicant, an administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence

Granting an applicant's clearance for access to classified information is based on a high degree of trust and confidence in the individual. Accordingly decisions under the Directive must include consideration of not just the *actual* risk of disclosure of classified information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information.<sup>(14)</sup> The decision to deny an individual a security clearance request to an individual is not necessarily a judgment of the applicant's loyalty.<sup>(15)</sup> Instead, it is a determination that the applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information.<sup>(16)</sup> The Directive presumes a rational connection between past proven conduct under any disqualifying condition and an applicant's present security suitability.<sup>(17)</sup>

Once the Government establishes a disqualifying condition by substantial evidence, the corresponding burden of rebuttal shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the position of

the government. <sup>(18)</sup> An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his clearance."<sup>(19)</sup>

Based upon a consideration of the evidence, the following adjudicative guideline is most pertinent to an evaluation of the facts of this case:

Guideline J - Criminal Conduct: A security concern may exist when a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

### CONCLUSIONS

Upon consideration of all the facts in evidence, an assessment of credibility, and the application of the appropriate adjudicative factors and legal standards, including the "whole person" concept, I conclude the following with respect to the allegations set forth in the SOR:

The government established a case under Guideline J. Based on the evidence and Applicant's admissions that he was arrested and charged with two misdemeanor crimes, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*), applies to this case. As both occurred within ten months of one another, the case also falls within the CC DC E.2. A10.1.2.2. (*A single serious crime or multiple lesser offenses*).

In mitigation of the allegations, Applicant offered proof that these incidents occurred more than two and one-half years ago and spanned a limited period of his early 20's. Since March 2003, Applicant has remained in good health, started a family, earned good recommendations from his employer, and not encountered any other legal problems. This evidence of rehabilitation, coupled with his overall sense of maturity and remorsefulness for his bad conduct, sufficiently mitigates the allegations under Criminal Mitigating Conditions (CC MC) E2.A10.1.3.1. (*The criminal behavior was not recent*), and CC MC E2.A10.1.3.6. (*There is clear evidence of successful rehabilitation*). Accordingly, Applicant has successfully mitigated the security concerns under Guideline J.

For the reasons stated, I conclude Applicant is 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 as follows:

Paragraph 1: Guideline J (Criminal Conduct) FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

## **DECISION**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant a security clearance for Applicant. Clearance is granted.

Shari Dam

Administrative Judge

2. *Id.*; Tr. 25.
3. Tr. 35.
4. Government Exhibit 1 (Security Clearance Application, dated August 8, 2002) at 2.
5. Tr. 40.
6. Tr. 41-42.
7. Tr. 43.
8. Applicant Exhibit D (Copy of Uniform Traffic Ticket, dated March 3, 2003); Applicant Exhibit E (Copy of applicable state statute regarding Proceedings in case of forfeiture of recognizances.)
9. Tr. 47.
10. Tr. 53 and 24.
11. Tr. 47.
12. Applicant Exhibits A & B ( 2003 & 2004 Work Evaluation Forms).
13. Tr. 18-19,
14. Directive, Enclosure 2, ¶ E2.2.2.
15. Executive Order 10865, § 7.
16. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
17. ISCR Case No. 95-0611 at 3 (App. Bd., May2, 1996).
18. ISCR Case No. 01-20700 at 3 (App. Bd., Dec. 19, 2002); *See* Directive ¶ E3.1.15.
19. *Id.*