

KEYWORD: Criminal Conduct

DIGEST: Applicant was convicted of conversion of government property in 1998, sentenced to five years supervised probation, and ordered to pay restitution to the United States in the amount of \$11,927.27. Clearance is denied.

CASENO: 04-03811.h1

DATE: 11/29/2005

DATE: November 29, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-03811

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was convicted of conversion of government property in 1998, sentenced to five years supervised probation, and ordered to pay restitution to the United States in the amount of \$11,927.27. Clearance is denied.

STATEMENT OF THE CASE

On March 31, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline J (criminal conduct). Applicant submitted a sworn answer to the SOR that was received by DOHA on ay 9, 2005, admitted all SOR allegations, and requested a hearing.

The case was assigned to me on August 26, 2005. A notice of hearing was issued on September 9, 2005, scheduling the hearing for September 29, 2005. The hearing was conducted as scheduled. The government submitted ten documentary exhibits that were marked as Government Exhibits (GE) 1-10, and admitted into the record without objection. Applicant testified but did not provide any other evidence. The transcript was received on October 17, 2005.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 44 years old, has never been married, and has no children. He earned a bachelor of arts degree in 1984, and a master of arts degree in 1996. He possessed a secret security clearance from about 1986 to 1989, and a top secret security clearance with access to sensitive compartmentalized information (SCI) from 1993 to 1998. Applicant has been employed as a systems engineer by a defense contractor since March 2003. He was unemployed from July 2002 to March 2003, and was employed as a senior structural designer from October 2000 to July 2002.

Applicant was charged with Reckless Driving in May 1990, pled nolo contendere to the charge, adjudication was withheld, and he was fined \$244.00. He was charged with Driving Under the Influence (DUI) and Reckless Driving in November 1998. He pled guilty to a reduced charge of Driving While Ability Impaired, the DUI and Reckless Driving Charges were dismissed, and he was placed on probation for 12 months, and ordered to attend an alcohol evaluation program, perform 24 hours community service, and pay a fine and court costs totaling \$349.00.

Applicant was employed by the government as a Visual Information Specialist and then as the Visual Information Manager from 1992 to 1998. Between August 1995 and January 1996, Applicant signed for about \$70,000.00 worth of computer and computer related equipment that had been purchased by and for the use of the U.S. Air Force. Applicant was directed to conduct an inventory sometime between February and April 1997, and he reported the equipment was in a storage facility at another location. Several months later, Applicant was questioned about the equipment when others could not locate it where he stated it had been, and he maintained his claim that it had been at the site where he had indicated it was when he conducted the inventory. [\(2\)](#)

Applicant was informed he would have to account for the missing equipment, and approximately a week later much of the missing equipment was returned. However, about eight to ten items remained missing. Special Agents from the Federal Bureau of Investigation who were assigned to investigate the missing equipment received information that Applicant had been using government equipment in a private business he was operating, and that equipment similar to the missing equipment had been observed in Applicant's apartment. The agents obtained an inventory of the equipment that had not been returned, which was valued at about \$28,000.00, and executed a search warrant for Applicant's apartment on February 10, 1998.

The agents recovered two Sony Computer monitors, two Apple Power CPUs, and a Sledge Hammer hard drive during the search that were part of the missing government property. Two Apple keyboards that were identified as U.S. Air Force property but not included in the list of missing property were also recovered during the search. Applicant was questioned about the recovered property, and acknowledged his possession of the property constituted "misuse of government property." However, Applicant claimed he neither intended to sell nor profit from the misuse of the property, and that he intended to return it at some indefinite time, "probably when he ended his employment with the U.S. Government."

Applicant resigned his employment in about April 1998, his security clearance was thereafter terminated, and he pled guilty to a felony of converting government property having a value of more than \$10,000.00 but less than \$20,000.00

on May 4, 1998. On July 20, 1998, he was sentenced to five years probation, placed on home detention for four months, and, as community service, he was required to speak to his former co-workers about conversion of government property. He was also ordered to make restitution to the United States in the amount of \$11,927.27. Applicant, having complied with all terms of probation, was discharged from probation on September 18, 2002, and the proceedings in his case were terminated.

Applicant provided a statement to a Special Agent (SA) from the Defense Security Service (DSS) on January 22, 2004, in which he greatly minimized his culpability for the criminal activity that led to his 1998 conviction. Essentially, Applicant's statement is to the effect that he decided to store the equipment at his private business and in his home without filling out the proper paperwork because it seemed to him at the time there was not a more suitable government facility to use for storage. He only admits to having used the equipment to train government employees at his private company's facilities at no cost to the government.

Applicant's hearing testimony was similar to the statement he provided the DSS SA in January 2004. However, at the hearing he did admit to using the equipment to some limited extent for his personal use. He attributes his use of the equipment for personal use to poor judgment.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon 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. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, with its respective DC and MC, is most relevant in this case.

BURDEN OF PROOF

The sole 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.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁵⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

No one has a right to a security clearance⁽¹⁰⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹²⁾

CONCLUSIONS

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. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. 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.

The government has established its case against Applicant under Guideline J. Applicant was convicted of a relatively minor traffic offense in 1990, a much more serious alcohol related traffic offense in 1998, and a felony offense against the U.S. government in 1998. His offense against the U.S. government occurred while he possessed a top secret security clearance and was entrusted with SCI access. DC 2: *A single serious crime or multiple lesser offenses* apply.

Applicant's statement to the DSS SA and his hearing testimony, in which he greatly minimizes any wrongdoing on his part, are not credible. The only evidence of rehabilitation that he presented were his successful completion of probation, the passage of time, and his self-serving statements about working hard, attaining financial stability, regaining his personal integrity, and become a responsible citizen. While those things certainly must be considered and given some weight, they are insufficient to establish that Applicant has now become a trustworthy individual when they are compared with the tremendous breach of trust he committed less than eight years ago.

Weighing Applicant's criminal transgressions against what record evidence there is demonstrating for and against rehabilitation, I find Mitigating Conditions (MC) 4: *The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*; and MC 6: *There is clear evidence of successful rehabilitation* do not apply. Further, although Applicant's last criminal offense occurred seven years ago, his false testimony and statement to a DSS SA seriously minimizes any credit he might otherwise receive from MC 1: *The criminal behavior was not recent*. The remaining mitigating conditions clearly have no applicability to the facts of this case.

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Once again, it must be noted that no one has a right to a security clearance⁽¹³⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁴⁾ After considering the evidence of record in this case, I find Applicant has failed to mitigate the security concern caused by his criminal conduct. Guideline J is decided against Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: 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 a security clearance for Applicant. Clearance is denied.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. The details of the investigation are taken from the affidavit of the FBI Special Agent assigned to the investigation and other pleadings that are included in the court documents admitted in evidence as GE 7.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the 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. *Id.* at 531.
12. *Egan*, Executive Order 10865, and the Directive.
13. *Egan*, 484 U.S. at 528, 531.
14. *Id.* at 531.