

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Even though Applicant should have disclosed the 1996 theft offense on her two security forms in 1997, her failure to do so is extenuated by her age and unfamiliarity with security forms at the time. However, Applicant should have disclosed the 1996 theft on her security form in September 2002 because she knew: (1) that she had been booked; (2) that she had pled guilty; and (3) that she had paid a fine. Given her continuing refusal to acknowledge she deliberately withheld material information in September 2002, and her serious criminal behavior in November 2002, insufficient time has passed to conclude Applicant warrants access to classified information. Clearance is denied.

CASENO: 04-08934.h1

DATE: 02/24/2006

DATE: February 24, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-08934

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Jason R. Perry, Esq., Department Counsel

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Even though Applicant should have disclosed the 1996 theft offense on her two security forms in 1997, her failure to do so is extenuated by her age and unfamiliarity with security forms at the time. However, Applicant should have disclosed the 1996 theft on her security form in September 2002 because she knew: (1) that she had been booked; (2) that she had pled guilty; and (3) that she had paid a fine. Given her continuing refusal to acknowledge she deliberately withheld material information in September 2002, and her serious criminal behavior in November 2002, insufficient time has passed to conclude Applicant warrants access to classified information. Clearance is denied.

STATEMENT OF CASE

On June 14, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6, dated January 2, 1992, as reissued through Change 4 thereto, dated April 20, 1999, issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked. On July 1, 2005, Applicant responded to the SOR and requested a hearing before an Administrative Judge.

The case was assigned to me on October 6, 2005. On October 21, 2005, this case was set for hearing on November 6, 2005. The Government submitted seven exhibits (GE 1-7), and Applicant submitted five character statements (AE A) at the hearing. Testimony was taken from Applicant. Following the hearing, I received one additional character statement that shall be admitted in evidence as AE B. The transcript (Tr.) was received on November 28, 2005.

FINDINGS OF FACT

Criminal conduct. Applicant admitted two of the three allegations under the criminal conduct guideline. Her uncertainty on how to respond to the third allegation shall be construed as a denial. Applicant denied all three falsification allegations under the personal conduct guideline. Applicant is 26 years old and has been employed as a facility security representative by a defense contractor for over three years.

Applicant testified she had trouble remembering the May 1996 theft (1.a.) because she had been abandoned by her mother at age 15, and was living with her grandmother (Tr. 33). She did recall that she and a male friend were in a store when the friend stole some merchandise unbeknownst to her. Applicant and the friend were charged with criminal conspiracy and retail theft. Concerning additional information Applicant remembered about the incident, she indicated in her answer to the SOR she pled guilty but, "I did not remember the incident and that was the only reason it was left out on [of] my security paperwork." Though Applicant maintained her innocence, she testified she (1) she was booked, (2) she had to provide fingerprints, (3) the crime did occur, (4) she had to pay a fine (Tr. 21-22), and (5) she recalled at some time that she had to put guilty on a form regarding the 1996 incident (Tr. 32).

In November 2002, Applicant's former husband (father of her child) and his cousin were babysitting her child while she was at work. They were drinking and were not present when Applicant drove by to get her child after work. Her husband was not supposed to be drinking while babysitting the child because he had passed out, and the child had to be returned home by other individuals. There were other occasions when the father was responsible for getting the child and he passed out instead. Also, Applicant observed that her former husband became aggressive and belligerent when he was drinking (Tr. 29). On returning a second time for her child, her husband and his cousin would not allow her to take the child. Instead, they attacked her; the cousin threw her to the ground. She retreated to her car and returned with a knife. When they tried to attack her again, she cut both of them (1.b.), seriously wounding her former husband (Tr. 30). Applicant called the police and was arrested for felonious assault (Tr. 34). The charges were dropped when her husband refused to prosecute. Since November 2002, Applicant has utilized a third party to facilitate visitation access between the child and the father of the child.

Personal Conduct. In August 1997, Applicant signed a United States (U.S.) Army security clearance screening application. (2.a.) She answered "No" in response to question 31 (have you ever been arrested, cited or convicted of shoplifting) of the application. ⁽¹⁾ In her answer to the SOR, Applicant justified her "No" answer by stating she did not steal anything, rather than her explanation in her answer to 1.a. of the SOR that she did not remember the theft. At the hearing, she testified

"No. When I had to fill out the paperwork, as I was taught to do, I read through everything. I talked to my recruiter about it and my command, and I asked them was this something that I needed to answer yes to, and I explained the incident. And when I spoke to my recruiter about it, my recruiter said, "You weren't stealing anything. You didn't do

anything." And he told me that, no, that I didn't need to answer yes, because I wasn't at fault in that case." (Tr. 24) ⁽²⁾

Applicant signed a second security clearance application (SCA) on the same day in August 1997. In response to question 23 (in the last 7 years (2.b.), have you ever been arrested, charged with or convicted of an offense...), Applicant answered "No," and stated in her answer to the SOR (2.b.), "I deny willingly falsifying the information as when I was 16 my understanding of the situation was very different in 1997." At hearing she testified the same recruiter told her not to list the May 1996 theft (Tr. 31).

In explanation of her "No" answer to question 26 (requiring information about arrests, charges or convictions in the last 7 years) of an SCA she signed in September 2002 (2.c.), Applicant indicated in her response to the SOR that she had completely forgotten about the May 1996 theft when she furnished the negative answer. Her reasons were (1) she was age 15 when the crime occurred, (2) she was innocent of the crime, and, (3) she did not think about the May 1996 theft because she did not remember having to make a court appearance or pay a fine. However, at the hearing Applicant was asked whether the recruiter in 1997 or her failure to recall the 1996 theft was the motivating force behind her "No" answer to question 26 in September 2002. In explaining she was initially more influenced by the recruiter in 1997, she admitted she may have told the recruiter she had to pay a fine (Tr. 46). Applicant also rationalized that if she had done something wrong during the 1997 investigation, the investigators would have made her aware of the adverse information (Tr. 46-48).

Since 1996, Applicant has been in intelligence and security field for the military and her current employer. She has been the physical security representative for over three years, and has been responsible for processing new employees for the past two years. Applicant is taking courses toward a degree in information technology at the local community college (Tr. 38).

Applicant's character statements from five coworkers show that she is dependable, honest, and dedicated to her work. Her boyfriend has known Applicant for eight years and considers her very conscientious.

POLICIES

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on

his own common sense.

Burden of Proof

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, or may disqualify, the applicant from being eligible for access to classified information. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) "[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. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *See Egan*, 481 U.S. at 531; *see* Directive E2.2.2.

Personal Conduct (Guideline E)

Deliberately providing false information during a security investigation demonstrates poor judgment and could mean the person is not a suitable candidate to safeguard classified information.

Criminal Conduct (Guideline J)

A pattern of criminal activity reflects poor judgment, unreliability and untrustworthiness.

CONCLUSIONS

Personal Conduct. Personal conduct (PC) involves behavior that translates to dishonesty and questionable judgment. In August 1997, Applicant did not disclose her May 1996 crime on the military screening form requiring information regarding arrests, citations, or convictions. Also, in August 1997, Applicant did not disclose her conviction for May 1996 theft offense on the SCA requiring essentially the same information. Because information was omitted from a security clearance application, PC DC E2.A5.1.2.2. (*the deliberate omission of relevant and material facts from any personnel security questionnaire used to determine security eligibility or trustworthiness*) must be evaluated to determine whether there was a deliberate omission of material information from the security form. Her lack-of-recall explanation for not disclosing the 1996 crime on both August 1997 forms is unequivocally refuted by her discussion with the recruiter in August 1997 about whether she should reveal the crime. The fact Applicant was only 16 years old when she concealed the information on both forms in August 1997 is extenuating. The fact that this was the first time she had filled out security forms is also extenuating. Though Applicant recalled very specific events surrounding the May 1996 crime, when weighed against the whole person model (E2.2.1.) of the Directive, the 1997 omissions are extenuated by Applicant's age and unfamiliarity with the security forms at the time.

However, over the next five years, Applicant continued to be employed in the intelligence or security fields. Based on her experience she acquired between 1997 and September 2002 in intelligence and security, Applicant has not convinced me she completely forgot about the 1996 crime when she certified her answers on the SCA in September 2002 were true. Though she may not have remembered going to court for the 1996 theft offense, she remembered words "booked," "guilty," and "paying a fine," that denote important parts of the criminal process indicating to the reasonable person they had been arrested, charged, or convicted of a crime.

One or more of the first four mitigating conditions (MC) may be potentially applicable to Applicant's deliberate omission in September 2002. PC MC E2.A5.1.3.1. (*the information was unsubstantiated or not pertinent or a determination of judgment, reliability or trustworthiness*) is inapplicable to the circumstances of this case as Applicant's May 1996 theft conviction was independently substantiated through a criminal record check. Applicant's failure to disclose the crime bears negatively on her judgment and trustworthiness.

PC MC E2.A5.1.3.2. (*the falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*) and PC MC E2.A5.1.3.3. (*the individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts*) do not apply here as Applicant continues to deny she deliberately omitted material information from her September 2002 SCA.

There has been testimony that Applicant's "No" answers to the security forms were guided by the advice she received from a recruiter in 1997. Her reliance on the recruiter raises the potential applicability of PC MC E2.A5.1.3.4. (*omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided*). Applicant's misplaced reliance on the

recruiter's advice in 1997 was primarily due to her youthful age plus her naivete, and is therefore extenuated. However, Applicant's continued reliance on the recruiter's advice five years later in 2002 cannot be extenuated for the same reasons. Moreover, Applicant continues to claim her omission in September 2002 was not deliberate. Applicant's current position precludes application of PC MC E2.A5.1.3.4.

Criminal conduct (CC). This guideline refers to a history or pattern of criminal activity that undermines an applicant's judgment, reliability, and trustworthiness. Since the SOR CC allegations include convictions, allegations and admissions of criminal conduct, both disqualifying conditions (DC) of the guideline apply. CC DC E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*) applies to the 1996 theft conviction even though Applicant was only 15 years old and the crime cannot be classified as serious.

CC DC E2.A10.1.2.1. (*allegations or admission of criminal conduct, regardless of the whether the person was formally charged*) is applicable to Applicant's November 2002 felonious assaults because Applicant was charged with very serious crimes that could have resulted in the deaths of not only her husband and his cousin, but also her own child. There is no doubt the confrontation was fraught with provocation for some type of physical response to her former husband's outlandish actions. However, Applicant's reaction is troublesome when weighing her conduct against what she knew about her husband before the confrontation took place. She knew he had been irresponsible on several past occasions when babysitting the child of going to get the child. She knew his behavior became more aggressive when he was drinking. Finally, Applicant was understandably upset after she learned the child was not at the pick-up location and her husband had been drinking. However, the more reasonable course of action would have been to call the police when her husband first refused to release the child rather than taking the law into her own hands, thereby risking the lives of all involved.

Applicant's deliberate omission of the theft offense from her September 2002 SCA (2.c.) also represents a felonious criminal violation of 18 United States Code (U.S.C.) 1001. ⁽³⁾ Her omission of the 1996 crime constitutes the omission of material information the government has a right to know about in order to make an informed decision about Applicant's security suitability.

Criminal behavior under the CC guideline may be mitigated by CC MC E2.A10.1.3.1. (*the behavior was not recent*), CC MC E2.A10.1.3.2. (*the crime was an isolated incident*), and CC MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). Even though the deliberate omission occurred in September 2002, Applicant's ongoing denial she deliberately omitted any information removes CC MC E2.A10.1.3.1. and CC MC E2.A10.1.3.2. from consideration. Applicant's failure to disclose her criminal conduct in 2002 substantially detracts from her favorable job performance evidence, as well as successful rehabilitation evidence following the felonious conduct in November 2002. Considering the evidence as a whole, including the whole person concept, I find for Applicant under 1.a., 2.a. and 2.b., but against her under 1.b., 1.c. and 2.c.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 are:

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

Subparagraph 1.a. For the Applicant.

Subparagraph 1.b. Against the Applicant.

Subparagraph 1.c. Against the Applicant.

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

Subparagraph 2.a. For the Applicant.

Subparagraph 2.b. For the Applicant.

Subparagraph 2.c. 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 Applicant. Clearance is denied.

Paul J. Mason

Administrative Judge

1. The cover page of the application states in underlined capital letters, ANY ADVICE YOU MAY HAVE RECEIVED FROM ANYONE CONCERNING THE WITHHOLDING OF REQUESTED OR APPLICABLE INFORMATION MUST DISREGARDED.
2. Applicant's reliance of the recruiter's advice in answering both military screening form and the SCA is not referenced in her sworn statement in September 2004 (GE 3) or her response to the SOR.
3. 2.a. and 2.b. are extenuated by Applicant's age and lack of familiarity with the security forms.