

KEYWORD: Criminal Conduct

DIGEST: Applicant committed identity theft in late 2001, purchasing computer games and technology equipment totaling about \$1,000 on the victim's credit card. He has failed to show sufficient rehabilitation of this criminal conduct. Clearance is denied.

CASE NO: 04-10239.h1

DATE: 05/08/2006

DATE: May 8, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-10239

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant committed identity theft in late 2001, purchasing computer games and technology equipment totaling about \$1,000 on the victim's credit card. He has failed to show sufficient rehabilitation of this criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On June 9, 2005, the Defense Office of Hearings and Appeals (DOHA) 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 the Applicant. [\(1\)](#) DOHA recommended referral to an administrative judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked. The SOR was based on criminal conduct (Guideline J).

Applicant responded to the SOR on July 1, 2005, and requested a hearing before an administrative judge. The case was assigned to me on January 4, 2006. Pursuant to notice dated January 13, 2006, I convened a hearing on February 28, 2006. Five government exhibits and two Applicant exhibits were admitted and testimony was taken from Applicant, his direct supervisor, and his project manager. A transcript of the hearing was received on March 15, 2006.

FINDINGS OF FACT

The SOR alleges criminal conduct (Guideline J) concerns related to Applicant's delivery of alcohol to a minor in 1999 (reduced to minor in possession of alcohol), for which he paid \$250 in bond forfeiture, and April 2002 charges of

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identity theft, illegal use of a credit card, and 5th degree larceny, for which he was placed on accelerated rehabilitation with restitution and community service. Applicant admitted the criminal conduct, but denied it created doubt about his judgment, reliability and trustworthiness. He described his involvement in identity theft as a "one time mistake," committed when he was "still developing [his] morals and ethics, and was in need of money." Applicant indicated he had been fully rehabilitated and has "come to understand the importance of doing things the right way." Applicant's admissions to the criminal conduct are accepted and incorporated as findings of fact. After a thorough review of the record, I make the following additional findings:

Applicant is a 23-year-old team leader on a defense contractor's paint crew. He has been employed by the company since June 2001, and has held a secret security clearance throughout his tenure.

Applicant started drinking beer at age 16, approximately a six-pack at parties on weekends. The frequency and amount of his consumption declined to a few beers once a month at age 17. During his senior year of high school, Applicant held a party at his home in November 1999 when his mother was out of town. A friend provided beer for the party and some of the attendees brought their own beer. About two hours into the party, the police came to the residence and discovered several juveniles had been drinking alcohol. One intoxicated youth with a blood alcohol content of .18% was transported to the hospital. In December 1999, Applicant was arrested on a warrant and charged with risk of injury to a minor, a felony, and delivery of alcohol to minor. Applicant was found guilty of a substituted charge of minor in possession of liquor in public, for which he paid \$250 in bond forfeiture.

Following his graduation from high school in June 2000, Applicant worked as a dishwasher at a local pasta shop and then as a stocker for a bath shop in a local mall. In June 2001, Applicant started working for his present employer, initially on a contract, part-time on-call basis, as a technician doing fire watch. In conjunction with his defense-related duties on a local military base, Applicant executed a security clearance application (SF 86) on May 23, 2001. He disclosed on his SF 86 the minor in possession of alcohol offense. In June 2001, Applicant was granted a secret security clearance.

In November/December 2001, Applicant took a part-time seasonal position as an engraver with a retailer in the mall. While operating the cash register one day, about one week after he first used a cash register, Applicant illegally copied the credit card number of a female customer from her purchase receipt. He had learned from a classmate in 2000 how to illegally obtain and use credit card information to purchase items online. Over the next few weeks, he twice used the victim's name and credit card information to purchase via the Internet some computer games and electronic equipment (palm pilot, memory cards, Play Station adapter). He had the illegal purchases, which totaled about \$1,000, delivered to a vacant home down the street from his residence. In April 2002, Applicant was charged with identity theft, illegal use of a credit card, and larceny 5th degree. Applicant was granted accelerated rehabilitation with 35 hours of community service and restitution through the court for the cost of the items obtained through identity theft. Applicant successfully completed the accelerated rehabilitation, and the charges were dismissed in late June 2003.

Sometime in late 2001/early 2002, Applicant was given a position on the defense contractor's paint team doing corrosion control work onboard submarines. With his employer a subcontractor to the prime contractor, he had fairly

steady work, but not guaranteed hours. Shortly after he was charged with identity theft in April 2002, Applicant's direct supervisor learned from the newspaper that Applicant had been charged. He called Applicant in, and Applicant informed the supervisor of his impending court appearance without going into the details of his criminal acts. The company's security manager filed a report with the Defense Security Service (DSS).⁽²⁾

On May 28, 2003, Applicant was interviewed by a DSS special agent about his criminal offenses and alcohol consumption. Concerning his theft of identity, Applicant admitted he had obtained the credit card information of a customer of the store employing him in December 2001 with the intent of using it to order items online. He acknowledged knowing his conduct was wrong, but explained he could not afford the items (Palm Pilot, Play Station adapter). He related that when the police came to his home in April 2002, he turned over the items. He indicated that before appearing in court, he voluntarily told his employer that he had been arrested on the charges.

Applicant has proven to be a dependable worker for his employer, with only a few issues early on concerning time and attention to detail. In June 2004, Applicant was commended by the prime contractor and by the military customer for his professionalism and dedication in a recent upkeep of a ship. In November 2004, Applicant was formally commended for his technical expertise and strong leadership as the senior on-site company representative on the preservation (corrosion engineering services) team. As the senior member of the paint team, Applicant is responsible for the time cards of the team members, ensuring their accuracy as well as delivery to management. He also trains new members of the team. His instruction includes information on the nuances of working for a subcontractor rather than the prime contractor.

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, Safeguarding Classified Information within Industry § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. 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.

Considering the evidence as a whole, the following adjudicative guideline is most pertinent to an evaluation of Applicant's security suitability:

Criminal Conduct. A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. (¶ E2.A10.1.1.)

CONCLUSIONS

When he was a 17-year-old high school senior, Applicant hosted a party in his home in November 1999 at which time he furnished alcohol to several juveniles. Charged with a felony offense of risk of injury to a minor, he was convicted of a substituted misdemeanor: minor in possession of alcohol. He committed more egregious criminal conduct as a 19-year-old retail store employee in about December 2001. In a serious breach of the fiduciary relationship he had with his employer, Applicant stole the credit number of a store customer and then used her name and credit card information to purchase about \$1,000 worth of computer and electronic merchandise for his personal enjoyment. Under Guideline J, disqualifying conditions ¶ E2.A10.1.2.1. *Allegations or admission of criminal conduct*, and ¶ E2.A10.1.2.2. *A single serious crime or multiple lesser offenses*, are clearly pertinent to an evaluation of Applicant's security worthiness.

Applicant submits in mitigation his youth and immaturity at the time of the offenses, and his rehabilitation since, citing his successful completion of the accelerated rehabilitation program with no recurrence. While Applicant's supervisor described the offenses as youthful indiscretions, this conclusion can only apply to his furnishing alcohol to minors in 1999. Applicant was only 17 at the time and an underage drinker himself.

Applicant has a substantially heavier burden with demonstrating reform (*see* ¶ E2.A10.1.3.6. *There is clear evidence of successful rehabilitation*) of his identity theft, even though it too is no longer recent (*see* ¶ E2.A10.1.3.1. *The criminal behavior was not recent*). Applicant stole the woman's credit card information once, but used her name and account number on at least two separate occasions. His criminal misconduct was not an isolated incident. Moreover, it involved some premeditation, as he had discussed with a high school classmate in 2000, more than a year before his crimes, the means by which the theft could be successfully perpetrated, including arranging for the delivery of the merchandise to a vacant address. When asked about his motivation at his hearing, Applicant initially attributed his misconduct to a lack of financial resources ("I was a bit in a financial strait that-I guess that was just it. I didn't have a lot of money"). (Tr. 32) Yet, when later asked why he decided to try to purchase merchandise online using someone else's identity and credit, Applicant responded, "Because I thought I could get away with it. I thought I was smart enough to get around everything." (Tr. 41) While it did not involve his defense-related duties, it was clearly inconsistent with the trust obligations imposed on him by virtue of the Department of Defense secret clearance he held at the time, and continues to hold.

Mindful that security clearance determinations are not designed to punish for past wrongdoing, meaningful reform depends in large part on acknowledgment of wrongdoing--appropriate expression of remorse and acceptance of responsibility--as well as demonstration of legal compliance for a sufficient period of time to guarantee against recurrence.⁽³⁾ In his favor, Applicant made restitution to his victim as ordered by the court as a condition of his accelerated rehabilitation. Yet, he also had a personal stake in doing so with a complete erasure of his record the result of completing the accelerated rehabilitation program. While Applicant testified at his hearing to having remorse, he showed little appreciation for how the victim must have felt at discovering her identity had been stolen, as shown by the following exchange:

So you never had to apologize to the victim?

No. I would have if given the opportunity, but it was never presented.

What kind of guarantees can you give me [Applicant], that this kind of conduct is not going to reoccur?

Well, I can honestly say that I'm remorseful that it ever happened and that kind of conduct does not interest me in the least bit anymore. I'm no longer looking for the scam to get away with anything. (Tr. 42)

Moreover, in his Answer to the SOR, Applicant exhibited a troubling tendency to minimize the seriousness of his misconduct, describing it as a "one time mistake" that he made when he was "still developing [his] morals and ethics and was in need of money." Applicant, who was living at home in December 2001, did not need the Palm Pilot or Play Station adapter. While he has a commendable work record, it is not enough to overcome the serious judgment, reliability, and trustworthiness concerns engendered by his identity theft and fraudulent use of his victim's credit. Mitigating condition ¶ E2.A10.1.3.6. does not apply. SOR ¶ 1.b. is resolved against him. However, a favorable finding is returned as to ¶ 1.a., as immaturity and the absence of recurrence mitigate his providing alcohol to minors when he was only 17.

FORMAL FINDINGS

Formal findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: 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.

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued under the authority of Executive Order 10865 (as amended by Executive Orders 10909, 11328, and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4).
2. Applicant testified he told "all his employers" at work as soon as he was charged because he knew it would be a security issue. When asked specifically whom he told, Applicant indicated he told his boss ("I told him I was being charged, yes, but I don't know if I admitted to him exactly what happened." Tr. 37). However, this supervisor testified he found out about the charges through the newspaper ("And my security manager and I go through the paper and we read police reports everyday to make sure that none of our people have any issues, because if they do, then we may have to file a report." Tr. 63). He added that Applicant talked to the security manager at length. The nature of Applicant's discussion with the security manager is not of record. Applicant's supervisor testified to knowing Applicant had used someone else's credit card, but being unaware of the purpose or amount. (Tr. 67)The evidence does not substantiate Applicant's claim that he went to his employer and reported his crime before they found out.
3. *See e.g.*, DISCR Case No. 87-1457 (App. Bd. Mar. 29, 1989); ISCR Case No. 94-1109 (App. Bd. Jan. 31, 1996).