

KEYWORD: Criminal Conduct

DIGEST: In 2001, Applicant stole five checks from his sister-in-law and then forged and negotiated them for his benefit. In 2002, he was convicted of theft and five counts of forgery, and placed on five years probation. He failed to respond to the form and the information in the file record is not sufficient to overcome the criminal conduct security concerns raised by his actions. Clearance is denied.

CASE NO: 04-10933.h1

DATE: 04/10/2006

DATE: April 10, 2006

---

In re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 04-10933

**DECISION OF ADMINISTRATIVE JUDGE**

**JUAN J. RIVERA**

**APPEARANCES**

**FOR GOVERNMENT**

Candance Le'i, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

## **SYNOPSIS**

In 2001, Applicant stole five checks from his sister-in-law and then forged and negotiated them for his benefit. In 2002, he was convicted of theft and five counts of forgery, and placed on five years probation. He failed to respond to the FORM and the information in the file record is not sufficient to overcome the criminal conduct security concerns raised by his actions. Clearance is denied.

## **STATEMENT OF THE CASE**

On August 4, 2005, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline J (Criminal Conduct). The SOR informed Applicant that, based on information available to the government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant him access to classified information. [\(1\)](#) On August 16, 2005, Applicant answered the SOR (Answer) and requested a clearance decision based on the written record without a hearing.

Department Counsel prepared a File of Relevant Material (FORM) on September 15, 2005. The FORM was mailed to Applicant on October 25, 2005. He acknowledged receipt of the FORM on October 31, 2005, and did not object to anything contained in the FORM or submit additional information for consideration within the 30-day time period provided to him. The case was assigned to another administrative judge on December 19, 2005, and reassigned to me on February 10, 2006.

## **FINDINGS OF FACT**

Applicant admitted (with explanations) the underlying facts of the allegation in subparagraph 1.a. His admissions are incorporated herein as findings of fact. After a thorough review of the pleadings and exhibits, I make the following additional findings of fact:

Applicant is 33 years old, single, and reported having no children on his SF 86.<sup>(2)</sup> He arrived in the U.S. in 1993 and became a naturalized U.S. citizen in December 1999. From 1994 to August 2000, he held several unskilled jobs, and in September 2000, he began working as a sandblaster/painter for a defense contractor. He has worked in that capacity since, and requires a clearance to access his job sites. Applicant is regarded as a hard working, reliable and valuable employee. In his answer to the SOR, he submitted two character reference letters from work supervisors. They consider Applicant an honest and forthright person, attest he will not repeat the mistakes that led to the security concerns, and recommend he be granted a security clearance.<sup>(3)</sup>

In early 2001, Applicant stole at least five checks from his sister-in-law, forged her name to the checks, and used them to purchase \$200 worth of parts to fix his car.<sup>(4)</sup> After a police investigation, Applicant confessed. In April 2002, he was convicted of five counts of forgery in the second degree (a felony), and one count of theft in the third degree. He was sentenced, in part, to five years supervised probation. He was also ordered to make restitution and pay a fine. He will be on probation until approximately December 2007. There is no evidence he has been involved in any additional misconduct either before or after the criminal misconduct discussed above.

In March 2004, Applicant submitted a SF 86 in which he disclosed he was convicted of forgery in August 2002 and placed on probation. In July 2004, he provided a written, sworn statement to a defense investigator explaining the circumstances of his criminal misconduct.<sup>(5)</sup> Applicant apologized to his sister-in-law for his actions, made restitution, and asserted he has no intention of ever again engaging in any type of illegal activity.

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's suitability for access to classified information. The administrative judge must take into account both disqualifying and mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive,<sup>(6)</sup> as well as the whole person concept.<sup>(7)</sup> The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the granting or denial of access to classified information. Having considered the record evidence as a whole, I conclude Guideline J (Criminal Conduct) is the applicable relevant adjudicative guideline.

## **BURDEN OF PROOF**

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest<sup>(8)</sup> for an applicant to be eligible to either receive or continue to have access to classified information. The government has the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. To meet its burden, the government must establish a prima facie case that it is not clearly consistent with the national interest for the applicant to have access to classified information. The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries a heavy burden of persuasion.<sup>(9)</sup> A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest to ensure each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.<sup>(10)</sup>

## CONCLUSIONS

Under Guideline J (Criminal Conduct), a history or pattern of criminal conduct is a security concern because it may indicate an unwillingness to abide by rules and regulations and may show the applicant to be lacking in judgment, reliability and trustworthiness.<sup>(11)</sup> Despite Applicant's claims to the contrary, I conclude the government established its case under Guideline J by showing that Applicant stole five checks from his sister-in-law, forged them, and then used them for his benefit. I conclude Guideline J Disqualifying Condition (DC) 1: *Allegations or admission of criminal conduct*,<sup>(12)</sup> and DC 2: *A single serious crime or multiple lesser offenses*,<sup>(13)</sup> apply.

Applicant has been living in the U.S. for 13 years. He was 28 years old at the time he stole, forged, and negotiated the checks. He was also gainfully employed. I must assume he knew better than to steal from his relatives and that he was aware of the criminality of his actions. Under the circumstances, his behavior cannot be attributed to youthful exuberance, foolishness, or stupidity.

After considering all of the Guideline J Mitigating Conditions (MC), I find that only MC 1: *The criminal behavior is not recent*,<sup>(14)</sup> applies. It has been five years since Applicant's criminal behavior. As such, his actions are not that recent. Nevertheless, Applicant's misconduct is disturbing in that he stole from a member of his own family. Considering he is a naturalized U.S. citizen and most of his relatives live abroad, stealing from one of the few family members living nearby seems to reflect a greater degree of callousness, and demonstrates an absolute lack of judgement and trustworthiness. Also, Applicant is still on probation for his offenses.

Applicant failed to respond to the FORM and the record evidence is not sufficient for him to overcome the security concerns raised by his behavior. Under the totality of the circumstances of this case, the passage of time alone is not

sufficient to demonstrate Applicant possesses the requisite judgment and trustworthiness of one who will protect the national interest as his own. He failed to meet his burden to refute, extenuate, or mitigate the government's concerns. The "clearly consistent with the national interest" standard requires any reasonable doubt about this Applicant's suitability for a security clearance must be resolved in favor of protecting national security.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. Considering all relevant and material facts and circumstances present in this case, including Applicant's statement, his misconduct, the whole person concept, and the adjudicative factors listed in the Directive, I find Applicant has not mitigated the security concerns under Guideline J.

### **FORMAL FINDINGS**

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Criminal Conduct (Guideline J) AGAINST APPLICANT

Subparagraph 1.a 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.

Juan J. Rivera

Administrative Judge

1. Required by Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended.
2. Applicant's personal information was obtained from his Office of Personnel Management Security Clearance Application (SF 86), GE 4.
3. FORM, Item 3.
4. FORM, Item 5. Applicant's statement is confusing. It is not clear whether he stole only five checks on one occasion or nine checks at different times. In light of the SOR allegation and GE 6, the FBI Identification record, I conclude he stole five checks, forged them, and used them in different occasions.
5. FORM, Item 5.
6. Directive, Section 6.3. Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate: the nature and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the age of the applicant; the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation; and the probability that the circumstances or conduct will continue or recur in the future.
7. Directive, E2.2.1.
8. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
9. *Id.* at 528, 531.
10. *See Egan*; Directive E2.2.2.
11. Directive, E2.A10.1.1.
12. Directive, E2.A10.1.2.1.
13. Directive, E2.A10.1.2.2.
14. Directive, E2.A10.1.3.1.