

DATE: September 26, 1997

In Re:

Applicant for Security Clearance

ISCR Case No. 97-0284

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR THE GOVERNMENT

Michael H. Leonard, Esquire

Department Counsel

FOR THE APPLICANT

Ellen M. Hayslett

Personal Representative

STATEMENT OF THE CASE

On April 15, 1997, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*," dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6 "*Defense Industrial Personnel Security Clearance Review Program*" (Directive) dated January 2, 1992, as amended by Change 3, dated February 13, 1996, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make a preliminary determination that it was clearly consistent with the national interest to grant or continue a security clearance for him.

A copy of the SOR is attached to this Decision and included herein by reference.

The Applicant responded to the SOR in writing on May 5, 1997⁽¹⁾ and requested a hearing before a DOHA Administrative Judge. The case was assigned to this Administrative Judge on June 6, 1997. On July 10, 1997, a hearing was convened for the purpose of considering whether it is clearly consistent with the national security to grant, continue, deny, or revoke Applicant's security clearance. The Government's case consisted of four exhibits; Applicant relied on six exhibits and on his own testimony. A transcript of the proceedings was received on July 23, 1997.

FINDINGS OF FACT

Applicant has admitted, with explanation, the single, factual allegation pertaining to criminal conduct (Criterion J) set forth under paragraphs 1 the SOR.

After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is a 26 year old paralegal employed by a law firm which does work for defense contractors. He has worked for his current employer since April 1995 and is applying for a secret clearance. A favorable preliminary determination could not be made on Applicant's suitability to hold a security clearance because of criminal conduct.

Applicant's single foray into criminal activity occurred in late October 1993. At the time, he was a college student in City A, employed part-time as a sales clerk in Department Store X. Members of the fraternity--he had just joined--had been encouraging him to obtain computer equipment for the fraternity. Applicant already had a computer so he did not need it for himself. His fraternity brothers suggested that he call Office Supply Company Z, order the equipment over the telephone and charge it to someone else's credit card. A couple fraternity brothers advised him that they had already done this and that it was "harmless" (Tr. 21). Applicant was selected for this task because he was the only member of the fraternity who was working, and thus the only member who had regular access to other people's credit cards. He now admits that when he was approached and asked to obtain the computer equipment, he was "caught up in wanting to be accepted, ... to gain more friends" (Tr. 21).

On the afternoon of October 24, 1993 while at work in Department Store X, Applicant waited on Ms. V, a customer who was there to return merchandise that had been charged on a credit card. According to the Crime Report (Gov. Exh. 5), Applicant ran off a second copy of her "Master Charge" in the course of crediting her account (see p. 6, Gov. Exh. 5). Later the same day, he called Office Supply Company Z and ordered more than \$2900.00 worth of computer equipment; he charged it using the information from Ms. V's credit card. After completing the order, Applicant asked that the equipment be delivered to his home address.

When Office Supply Company Z called Ms. V to verify the order--a common practice in orders of this dollar amount--she advised a company representative that she had not ordered any computer equipment. She informed the company that she had not personally placed the order and had not authorized anyone else to use her credit card. Realizing that she had last used her credit card at Department Store X, she called Security at that store and reported what had happened. The security investigator for Store X determined that Applicant was the clerk who had waited on Ms. V. She checked further and discovered that the address on Applicant's employment application was the same as the address to which the computer equipment was to be delivered (p. 7, Gov. Exh. 5). The equipment was never delivered. When Applicant reported to work on October 28, 1994, he was called in by Security and questioned about the matter. In a hand-written statement, he admitted that he had taken the information from Ms. V's credit card and used it to order the computer equipment. When the security investigator for Department Store X informed Applicant that she was going to report him to the police, he attempted to prevent her from making the telephone call but then left her office before the police arrived.

Applicant was not arrested until March 22, 1994. He was apprehended on that date by the police at his place of employment (another department store) and taken from there to a holding facility where he spent five hours before being released on his own recognizance (Tr. 23). The stress and anxiety which Applicant experienced as a result of the arrest led to a suicide attempt and a month of counseling with Dr. P in May 1994 (Gov. Exh. 2). He was subsequently awarded probation before judgment.⁽²⁾ He was also ordered to perform 400 hours of community service and to pay court and probation costs of \$720.00; and he was sentenced to three years of supervised probation. Applicant completed the 400 hours of community service one year after being awarded probation before judgment (Tr. 26). At the time of the hearing, he had paid the court costs and had been discharged from supervised probation.

Since perpetrating credit card fraud on a single occasion in October 1993, Applicant has graduated from college with a degree in political science. After graduation, he taught second grade at an elementary school in City A, obtained a second degree in paralegal studies, and since April 1, 1995, has worked as a paralegal assistant at the law firm where he is currently employed. According to the "Paralegal Evaluation Forms," which Applicant has submitted, he is very highly regarded by those for whom he has worked (Applicant Exhibits B, C, D, and E). His work has been described as "professional," "efficient," and "thorough." Descriptions of his personal traits include "conscientious," "diligent," and "willing to do whatever is necessary."

Applicant is very ashamed of what he did in October 1993 and has provided assurances that "nothing like this or even closely resembling this will happen again" (Gov. Exh. 1). He attributes his behavior on that occasion to the problems he was experiencing with "being accepted" (Gov. Exh. 1). He wanted to demonstrate that he was "cool" and just like

everyone else in the organization (Tr. 33). However, he has been careful not to make excuses for himself, because he knows that he is the one who "messed up" (Gov. Exh. 1). After his experience with credit card fraud, he went into an "inactive status" with the fraternity and no longer associates with any members of the organization. He realizes now "that's not what brotherhood is about" (Tr. 33).

POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations with reasonable consistency that are clearly consistent with the interests of national security. In making those overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines but in the context of the factors set forth in section F.3. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate that the facts proven have a nexus to an applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter.

CRIMINAL CONDUCT

(Criterion J)

A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

(1) Any criminal conduct, regardless of whether the person was formally charged.

Conditions that could mitigate security concerns include:

(1) The criminal behavior was not recent;

(2) The crime was an isolated incident.

(5) There is clear evidence or successful rehabilitation.

Burden of Proof

The Government has the burden of proving any controverted facts alleged in the Statement of Reasons. If the Government establishes its case, the burden of persuasion shifts to the applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates that it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands that Court's rationale, doubts are to be resolved against an applicant.

CONCLUSIONS

Having considered the record evidence in accordance with the appropriate legal precepts and factors, this Administrative Judge concludes that the Government has established its case with regard to Criterion J.

In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section F.3, as well as those referred to in the section dealing with the Adjudicative Process, both in the Directive.

The Government has established Applicant's involvement in criminal conduct. The information in the Crime Report together with Applicant's admissions--during the hearing and earlier in the Security Clearance Application--describe in considerable detail his participation in credit card fraud--a felony. Applicant knew at the time that it was wrong to use another person's credit card--without authorization--to purchase computer equipment for his fraternity.

Although Applicant committed a serious criminal offense, the evidence in mitigation is persuasive. Almost four years have passed since this offense occurred and Applicant's record since that event has been clean. Not only has he not been involved in any further misconduct, he has done everything within his power to put the matter behind him. Ordinarily four years is not a long time and in most cases would not be a sufficient period to mitigate a serious crime such as credit card fraud. However, four years in the life of a young man in transition from college to the world of work is longer than four years in mid-life. Since October 1993, Applicant has been consistently diligent in his efforts to demonstrate that what happened then was an aberration, and not who he is, or what he wants to be. He finished college, taught school for a year, finished a second degree in paralegal studies; and most recently, he has spent the last two years working and establishing an excellent reputation as a paralegal assistant. Because of all he has accomplished since October 1993, it is fair and accurate to say that Applicant's "criminal behavior" is not a "recent" event in his life.

Applicant's criminal conduct is also mitigated by the fact that there is no evidence or indication that he has ever been involved in any other misconduct. There is no evidence of any misconduct prior to October 1993, and as stated above; there is no evidence of misconduct since that date. Unlike someone who is constantly involved in criminal activities, Applicant experienced considerable stress incident to his arrest and the humiliation of spending time in jail. Because it was an isolated incident in his life, the arrest was a very traumatic event for Applicant. It is likely, and indeed probable, that the stress and anxiety brought on by the arrest caused him to attempt suicide.

Through the manner in which he has conducted himself over the past four years, Applicant has demonstrated his rehabilitation. That rehabilitation began when he confessed his crime to his employer almost immediately after its occurrence, and it has continued up through his testimony at his hearing. Applicant has never attempted to avoid responsibility for his conduct. Instead, he accepted responsibility, and then focused on working and behaving in a manner which proved to himself and to everyone else that criminal conduct is not representative of who he is and what he wants to be. After satisfying all of the terms and conditions of probation before judgment, Applicant completed studies to qualify as a paralegal. He has gotten a job in that profession and has successfully established his reputation as a highly proficient employee. He has severed all relations with the fraternity members who had initially suggested credit card fraud as a means of purchasing computer equipment.

Although the consequences of his misconduct are not mitigating per se, consideration has been given to the fact that Applicant committed a crime in which he was its only victim. The office supply store did not lose any money because it never delivered the computer equipment. The credit card company did not lose any money because it discovered the fraud before paying for the equipment. On the other hand, Applicant has suffered: he was arrested and spent five hours in jail; he had to perform 400 hours of community service; he was on supervised probation for three years; and he had to pay \$720.00 in costs. And Applicant did not achieve social acceptance as a result of his crime. In fact, the opposite occurred; he became totally estranged from the fraternity members whose approval he was seeking. Moreover, the stress and anxiety brought on by the arrest caused him to attempt suicide. If every perpetrator of a crime suffered the same consequences in their first attempt--as did Applicant--crime would be much less of a problem.

Finally, the evidence suggests that Applicant became involved in the credit card fraud because of a confluence of circumstances which are not likely to be repeated. He was in a college environment where he did not feel accepted; he was immature; and the people who he perceived to be the "in crowd" turned out to be either crooks or unscrupulous manipulators. In his desire to be accepted by this "in crowd," Applicant's judgment about right and wrong became clouded. His understanding of what was right and what was wrong was then twisted and distorted by peers who were interested only in exploiting his gullibility and naivete. None of these circumstances change the legality of Applicant's conduct. However, understanding the circumstances in which Applicant committed the credit card fraud causes this Administrative Judge to be confident that Applicant has learned from his lesson and will be much more selective in

choosing peer groups in the future. Criterion J is concluded for Applicant.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7, of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 (Criterion J) FOR THE APPLICANT

Subparagraph 1.a. For the Applicant

DECISION

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

John R. Erck

Administrative Judge

1. Applicant's answer is dated May 2, 1997, but was not notarized until May 5, 1997.
2. The record does not contain any information of the court's disposition of the charge other than the allegation in the SOR and Applicant's answer..