



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 08-05160
)
)
Applicant for Security Clearance)

Appearances

For Government: Emilio Jaksetic, Esquire, Department Counsel

For Applicant: Ronald Wilson, Personal Representative

January 26, 2009

Decision

O'BRIEN, Rita C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised under the guidelines for criminal conduct and personal conduct. Accordingly, his request for a security clearance is denied.

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP), which he signed on March 31, 2006 (GE 2). After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals

(DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request.

On August 12, 2008, DOHA issued to Applicant a Statement of Reasons (SOR), which specified the basis for its decision: security concerns addressed in the Directive under Guidelines J (Criminal Conduct) and E (Personal Conduct) of the Revised Adjudicative Guidelines (AG).²

Applicant received the SOR on August 18, 2008. He signed his notarized Answer on September 3, 2008, in which he admitted to all allegations in the Statement of Reasons, except allegation 2.e. While he admits to the accident alleged in that allegation, he denies that he received a citation or was required to appear in court as a result. He also requested a hearing before an administrative judge.

Department Counsel was prepared to proceed on September 19, 2008, and the case was assigned to me on September 22, 2008. DOHA issued a Notice of Hearing on October 22, 2008 and I convened the hearing as scheduled on November 10, 2008.

During the hearing, the Department Counsel offered 15 exhibits, which were marked as Government Exhibits (GE) 1 through 15, and admitted without objection. Applicant testified and also presented the testimony of six witnesses. He offered three exhibits, Applicant Exhibits (AE) A through C, which were admitted without objection. DOHA received the transcript (Tr) on November 18, 2008.

Findings of Fact

Applicant's admissions to the SOR allegations, as well as those in response to the DOHA interrogatories (GE 3), are admitted as fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the record evidence, I make the following additional findings of fact.

Applicant, 39 years old, graduated high school and attended college for approximately one year. He is unmarried and has no children. Applicant has worked in the information technology field for the past 13 years (GE 1). His current position is Information Systems Security Officer (ISSO) for a defense contractor. The position involves securing government computer systems from illegal access (Tr 121). He has not held a security clearance in the past (Tr.10).

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

² Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. The Revised Adjudicative Guidelines supersede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

In September 1990, when Applicant was 21 years old, he charged goods using a credit card that was not his own, by forging the card-holder's name (Tr 126; 143). He was convicted and sentenced to 90 days in jail, suspended, and two years probation (GE 3). He completed his probation early, after approximately one year (Tr 145). In 1991, while he was still on probation, he engaged in other criminal conduct. He drove through a parking lot with a friend who tried to steal a woman's pocketbook. Applicant was not prosecuted for this offense (Tr 149).

While on probation, in February 1991, Applicant also committed computer fraud. He purchased a used computer through a local newspaper, and decided to see if he could access a bank's computer system (Tr 138). Using the "social engineering" technique, he called a bank receptionist and asked questions about the bank, hoping to learn information that would allow him to "hack" into the bank's computers. The plan succeeded. When his roommate learned what Applicant had done, he asked Applicant to transfer funds from depositors' accounts to the roommate's account. Applicant sought out accounts with large balances of \$100,000 to \$200,000. On six occasions, he transferred from \$500 to \$1,000 from six different accounts, for a total theft of \$5,300 (Tr 116 - 118; GE 3). The police confiscated the computer Applicant used in the crime (Tr 147).

In March 1991, Applicant was charged with one count of Computer Access and Fraud, a felony, and six counts of Grand Theft of Personal Property, also felonies. He pled "No Contest" to all counts and was sentenced to three years incarceration (Tr 128; GE 2; GE 4). He served just over two years and was granted three years parole, which was discharged in 1996 (Tr 148).³

While Applicant was incarcerated, authorities determined that the confiscated computer he used to commit fraud was stolen. He testified that he did not know it was stolen when he bought it through a newspaper advertisement (Tr 147). He was charged with Receiving Stolen Goods. He pled guilty and was sentenced to two years incarceration, to be served concurrently with his sentence for computer fraud (Tr 144).

From 1995 to 1997, Applicant was employed by a motion picture production company as a Branch Systems Specialist (GE 2). In Fall 1997, he received an expense check, which he asked his roommate to deposit. His roommate used the check to produce a counterfeit version, made out in his own name, which he signed and tried to cash. When the roommate was apprehended by police, he contacted Applicant, who refused to help him, and subsequently severed all ties with him. Applicant's employer did not file charges, but informed him that he would be terminated. Rather than have a termination on his record, Applicant resigned (Tr 132 - 138).

³ In 2005, Applicant appealed to the governor of the state in which he was incarcerated for a pardon of his felony convictions. As of the date of the hearing, Applicant had not received a response (Tr 150; AE C).

Over a 12-year period, from 1996 through 2008, Applicant committed 10 civil infractions (GE 5 through 15). His traffic violations included failure to properly display his license tag and county registration, improper turning, and failure to stop. He also received five citations for speeding. Applicant failed to appear in court in response to a November 1996 speeding ticket, and in March 1997, he was charged with failure to appear (GE 5). He testified that because he did not live in the state where he was cited, he mailed the fine to the court, but it might not have been received in time (Tr 159). Another of Applicant's speeding citations, in May 1998, resulted when Applicant's speed and inattention caused an accident. Applicant again failed to appear in court. Applicant admits that police at the scene wrote a report, and that he was at fault in the collision, but denies that he received a citation from the police to appear in court (Tr 130-131). In October 1998, he was charged with failure to appear (GE 6).

Several witnesses testified on Applicant's behalf. Applicant's Personal Representative and friend testified that he knows that Applicant is highly trustworthy. The Personal Representative was involved in a serious accident which left him in a coma for three months. During that time, Applicant had access to a large amount of his friend's cash, but it was intact when the Personal Representative regained consciousness (Tr 36). Applicant's second-line supervisor testified that despite Applicant's computer fraud conviction (Tr 71), he is honest and committed to his work (Tr 64). Two friends who have known Applicant for years testified that he is reliable and trustworthy (Tr 94-95; 106). Appellant is a volunteer with a Community Emergency Response Team, which assists county emergency teams when they are overwhelmed (Tr 120). He is also a 1st Lieutenant with the Air Force Civil Air Patrol, where he teaches cadets about leadership and "how to keep their lives on the straight and narrow." (Tr 121). Applicant has received awards for his work in relation to Y2K preparedness and for preventing security intrusions into federal government computer systems (AE B).

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG).⁴ Decisions must also reflect consideration of the "whole person" factors listed in ¶ 2(a) of the Guidelines.

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 grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline H (drug involvement) and Guideline E (personal conduct).

³ Directive. 6.3.

A security clearance decision is intended only to resolve the questions of whether it is clearly consistent with the national interest⁵ for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an Applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, an Applicant bears a heavy burden of persuasion.⁶ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or his own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.⁷

Analysis

Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

The facts raise three disqualifying conditions: AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*); AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*); and AG ¶ 31(e) (*violation of parole or probation, or failure to complete a court-mandated rehabilitation program*). Applicant admitted to and was convicted on charges of computer fraud and grand theft, a total of seven felony counts. He served 2 years in jail and 3 years on parole. AG ¶ 31(a) and (c) apply. AG 31(e) also applies because while on probation for the forgery charge, Applicant committed the felonies of computer fraud and grand theft, in violation of his probation requirement to obey the law.

Guideline J also includes mitigating conditions, two of which are relevant: AG ¶ 32(a) (*so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the*

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ See *Egan*, 484 U.S. at 528, 531.

⁶ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

individual's reliability, trustworthiness, or good judgment) and AG ¶ 32(d) (there is evidence of successful rehabilitation, including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement).

Neither AG ¶ 32(a) nor AG ¶ 32(d) mitigate Applicant's conduct. Many years have passed since Applicant engaged in the criminal conduct of the early 1990s. However, this mitigating condition requires not only that the criminal behavior occur in the distant past, but that the criminal behavior not cast doubt on Applicant's trustworthiness. Applicant's offenses were fraud, forgery, and theft, crimes of dishonesty that are the opposite of reliability and trust, and do cast doubt on his present trustworthiness and good judgment. As to AG ¶ 32(d), Applicant has demonstrated rehabilitation by admitting his failures, volunteering within his community, and performing commendably in his employment. However, the persistence of Applicant's civil infractions create a disturbing pattern that undermines his rehabilitation, and raises questions about his willingness and/or ability to abide by rules and regulations.

Personal Conduct

AG ¶ 15 expresses the security concern about personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Available evidence supports application of AG ¶ 16(c):

credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

Applicant's behavior demonstrates a consistent willingness to disregard rules and regulations. Applicant's criminal conduct, standing alone, might not raise sufficient doubt to deny a security clearance, because of its distance in time. However, when considered with his continuing civil infractions, a pattern emerges that indicates his willingness to place his own needs above the law. AG ¶ 16(c) applies.

Mitigating condition AG ¶ 17(c) is relevant (*the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*). A significant amount of time has passed since Applicant's criminal conduct—approximately 18 years since Applicant's first criminal offense, and 12 years since his parole on felony charges was discharged in 1996. But the year his parole ended, in 1996, his long series of civil infractions began. They have continued up to July 2008, just 7 months ago. Although these infractions are not criminal in nature, they do demonstrate Applicant's inability or unwillingness to abide by rules and regulations and raise doubts about his good judgment. AG ¶ 17(c) cannot be applied.

Whole Person Analysis

Under the whole person concept, an administrative judge must evaluate the Applicant's security eligibility by considering the totality of the Applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall common-sense judgment based upon careful consideration of the guidelines and the whole person concept. Under each guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

The evidence shows that Applicant engaged in serious criminal conduct in his early 20s, including forgery, attempted robbery, computer fraud, grand theft, and receiving stolen goods. He served time in jail and on parole. A key consideration in this determination is that several of the crimes involved deliberate and calculated dishonesty. Applicant tricked a bank employee into disclosing information that would enable him to gain access to the bank's computer system. He used his computer skills to deprive others of their money and to enrich himself and/or his roommate. In all these acts, he placed his own desires above the rule of law.

In the years since the end of his parole in 1996, Applicant has made commendable changes in his life that cannot be dismissed lightly. He has distinguished himself as a solid employee, and his co-workers, supervisors and friends trust and depend on him. His

computer skills now serve to protect government computer systems from the kind of illegal hacking that he engaged in years ago. He contributes to his community, and seeks to use his own mistakes as a lesson to pass on to the cadets he teaches.

But in 1996, at the very time his parole ended, Applicant began a series of infractions that have continued until just a few months ago. Taken together, they form a disturbing pattern that cannot be ignored. Although superficially they appear minor, in fact, they stem from the same underlying impulse to disregard the law that Applicant displayed when he violated the law in the 1990s. Access to classified information imposes an obligation to adhere to laws and regulations, and it cannot be granted to one who is unwilling to accept that obligation.

Overall, the record evidence fails to satisfy the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative guidelines.

Formal Findings

Paragraph 1, Guideline J	Against Applicant
Subparagraph 1.a. - 1.c.	Against Applicant
Paragraph 2, Guideline E	Against Applicant
Subparagraph 2.a - 2.m.	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge