

DATE: October 31, 2007

In re:)
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 -----) ISCR Case No. 07-00329
 SSN: -----)
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 Applicant for Security Clearance)
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**DECISION OF ADMINISTRATIVE JUDGE
CHRISTOPHER GRAHAM**

APPEARANCES

FOR GOVERNMENT

Emilio Jaksetic, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 46-year-old security receptionist employed by a federal contractor. She has established a pattern of criminal charges over a 15-year period, and she currently is on probation. She falsified answers on a security clearance application. She has a history of unpaid debts. She did not successfully mitigate the security concerns about criminal conduct, personal conduct, and financial considerations. Clearance is denied.

STATEMENT OF THE CASE

On October 18, 2005, Applicant submitted an Electronic Questionnaire for Investigations Proceedings (e-QIP) (SF 86).¹ The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, DOHA issued a Statement of Reasons (SOR) on July 5, 2007, detailing the basis for its decision – security concerns raised under Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline F (Financial Considerations) of the Directive. The President issued revised adjudicative guidelines (Guidelines) on December 30, 2005. DoD implemented them on September 1, 2006. Pending official amendment/reissue of DoD Directive 5220.6, the Guidelines are to be used in all cases when the SOR is dated on or after September 1, 2006. Because the SOR was issued after September 1, 2006, DoD policy requires that this case proceed under the revised guidelines.

Applicant answered the SOR in writing on August 8, 2007, and elected to have a hearing before an administrative judge. DOHA assigned the case to me on September 6, 2007, and issued a Notice of Hearing on September 11, 2007. I convened a hearing on October 10, 2007, to consider whether it is clearly consistent with the national interest to grant or continue Applicant's security clearance. The government offered eleven exhibits, marked as Exhibits 1-11. Applicant offered eight exhibits, marked as Exhibits A-H. All exhibits were admitted without objection. I kept the record open until October 19, 2007, to give Applicant the time to file additional documents. On October 17, 2007, she filed four documents that were marked as Applicant's Exhibits I, J, K, and L. The government had no objection and the exhibits were admitted. DOHA received the transcript (Tr.) on October 18, 2007.

FINDINGS OF FACT

Applicant admitted all of the allegations contained in the SOR except subparagraphs 2.b. and c., and 3.b., c., and f. The admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 46-year-old security receptionist employed by a federal contractor.² She is married and has two grown children. She is a high school graduate, has had no military service, and has held a security clearance since 2002.³

Criminal Conduct

¹Government Exhibit 1 (Electronic Questionnaire for Investigations Proceedings (e-QIP), dated October 18, 2005).

²Tr. at 15-16.

³*Id.* at 15-17, 23.

In October 1991, Applicant was charged with theft less than \$300. The charge was *nolle prosequi*.

In March 1996, Applicant stole a clock from a department store and was charged with (1) theft less than \$300 and (2) battery. She was found guilty of Count 1 and sentenced to 30 days in jail (25 days suspended), placed on probation, and required to pay court costs. Count 2 was *nolle prosequi*.

In May 1997 and March 2001, Applicant was charged as a fugitive from justice by a municipal police department, for failure to pay restitution.⁴

Applicant was charged with petty larceny in February 1999, after stealing merchandise from a department store.⁵

On August 21, 2005, Applicant was charged with three counts of assault in the second degree, and one count of disorderly conduct, after she was involved in a fight outside a bar.⁶ On January 20 6, 2006, the assault charges were *nolle prosequi*, she pled guilty to the disorderly conduct charge, and she was given probation before judgment. She will remain on probation until January 2009.⁷

Personal Conduct

As of October 2005, Applicant resided with a person who had been charged with and/or convicted of several drug related offenses.⁸

On a Questionnaire for National Security Positions (SF 86), executed by Applicant on October 18, 2005, she was asked to disclose any pending criminal charges against her, except certain convictions expunged under the Federal Controlled Substances Act⁹ (Question 23c). She failed to list the charges filed on August 21, 2005, *supra*. She explained that although she had been charged, she had not gone to court and therefore, she thought she did not have to list the charges.¹⁰

On the same questionnaire, Question 23f, Applicant was asked to list any arrests, charges, or convictions, for offenses not listed in response to Question 23 sections a, b, c, d, or e, except traffic fines of less than \$150 unless the violation was alcohol or drug related, and the same exception for certain convictions under the Federal Controlled Substances Act. She failed to disclose

⁴*Id.* at 24.

⁵*Id.* at 43.

⁶*Id.* at 27.

⁷*Id.* at 23-24.

⁸Answer to SOR, dated August 8, 2007, at 1.

⁹21 U.S.C. §844 or 18 U.S.C. 3607. §

¹⁰Tr. at 50-51.

the 1999 petty larceny charge and the 2001 fugitive from justice charge. She said that maybe it slipped her mind.¹¹

Financial Considerations

As of March 8, 2007, Applicant had the following unpaid debts:¹²

- a. Judgment owed to a bail bondsman in the amount of \$1,278; remains unpaid.¹³
- b. Judgment owed to a bail bondsman in the amount of \$5,280; not listed in credit reports.¹⁴
- c. Judgment for apartment rent in the amount of \$1,044; less than \$300 owed.¹⁵
- d. Medical account placed for collection in the amount of \$168.
- e. Medical account placed for collection in the amount of \$117.
- f. Medical account placed for collection in the amount of \$87; the credit report shows this is a debt for medical services; her statement from the collection agency shows the bill was paid but to repay a catalog merchant, and not a medical debt.¹⁶
- g. Medical account placed for collection in the amount of \$208.
- h. Medical account placed for collection in the amount of \$332.
- i. A government debt placed for collection for overpaid unemployment benefits in the amount of \$2,502.
- j. Suit filed to collect medical debt in the amount of \$970; stipulation to pay \$50 per month until paid, to commence November 6, 2007.

Of the remaining unpaid debts, she still owes approximately \$5,800.

¹¹*Id.* at 51.

¹²All debts listed in Government Exhibit 8 (Credit Report, dated March 8, 2007) at 1-3.

¹³*Id.* at 54.

¹⁴*Id.* at 55; Government Exhibit 7 (Credit Report, dated November 9, 2005) at 1-5; Government Exhibit 8, *supra*, note 11, at 1-3.

¹⁵Applicant's Exhibit B (Debt Collector's Statement of Account, dated June 14, 2007).

¹⁶Applicant's Exhibit H (Debt Collector's Statement of Account, dated June 26, 2007).

Applicant is raising her grandchild, because her son is incarcerated, and the mother of the child, age 23, has five children and is expecting another.¹⁷ He is nine years old and has lived with her for five months.¹⁸ She borrowed \$2,500 at the time he moved in with her.¹⁹ She has not sought advice from a credit counselor.²⁰

POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider the "Adjudicative Guidelines for Determining Eligibility For Access to Classified Information" (Guidelines). In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process.²¹ An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge considers all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.²²

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Guideline ¶ 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."

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security."²³ In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based

¹⁷Tr. at 35.

¹⁸*Id.* at 60

¹⁹*Id.* at 60 63.

²⁰*Id.* at 64.

²¹Guideline ¶ 2.

²²Guideline ¶ 2(c).

²³Guideline ¶ 2(b).

on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, facts must be established by “substantial evidence.”²⁴ The Government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant’s access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to present “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.”²⁵ The burden of disproving a mitigating condition never shifts to the Government.²⁶

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The scope of an administrative judge’s decision is limited. Nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism.²⁷

CONCLUSIONS

Guideline J—Criminal Conduct

²⁴“Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge’s] finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). “Substantial evidence” is “more than a scintilla but less than a preponderance.” *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

²⁵Directive ¶ E3.1.15.

²⁶*See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005): “The Administrative Judge considers the record evidence as a whole, both favorable and unfavorable, evaluates Applicant’s past and current circumstances in light of the provisions of the Directive, and decide[s] whether Applicant has met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

²⁷Executive Order 10865, § 7.

Guidelines ¶ 30. The Concern. 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.

Guidelines ¶ 31. Conditions that *could raise* a security concern and may be disqualifying include:

- (a) a single serious crime or multiple lesser offenses;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and
- (d) individual is currently on parole or probation.

The government established its case under Guidelines ¶31 (a), (c), and (d). Applicant was charged, fined, or placed on probation for four crimes. She additionally was served a bench warrant two separate times for failure to pay restitution in a city case. She admitted the arrests and charges, and she is currently on probation until January 2009, for a conviction in January 2006.

Guidelines ¶ 32. Conditions that could *mitigate* security concerns include:

- (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 individual's reliability, trustworthiness, or good judgment;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; and
- (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.

After reviewing the mitigating conditions, I conclude that Guidelines ¶ 32 (a-c) do not apply. The criminal activity is recent - January 2006 - and Applicant is still on probation. She admitted the crimes and charges. Because she is still on probation, Guidelines ¶ 32 (d) cannot apply because the probation runs until January 2009, insufficient time has elapsed since the conduct occurred (August 2005), and she has pattern of conduct that covers a 15-year period. I conclude Guideline J against Applicant.

Guideline E—Personal Conduct

Guidelines ¶ 15. The Concern. 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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation;

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

Guidelines ¶ 16. Conditions that *could raise* a security concern and may be disqualifying include:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(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; and

(g) association with persons involved in criminal activity.

The government established its case under Guideline E. Applicant's reasons for falsifying answers to two questions on her security clearance application were that she did not think she had to list the charges that were filed because she had not gone to court, and that "maybe it slipped my mind." The first answer is not credible because she had enough prior experience with the criminal justice system to know the difference between charges, convictions, probation, and *nolle prosequi*. She knew she had been charged with petty larceny in 1999, and that she had been listed as a fugitive from justice in a municipal court for failing to make court-ordered restitution.

Guidelines ¶ 17. Conditions that could *mitigate* security concerns include:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being

made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) 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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

After considering the testimony and evidence, I do not find any mitigating conditions that are applicable. Applicant did not come forward to correct the omissions. She was not given incorrect advice about the application. Her conduct does raise doubts about her trustworthiness and good judgment. Moreover, she has not sought counseling. However, she has a history of law violations and has not taken steps to reduce vulnerability to coercion. The information was substantiated. And she has lived with a person involved in drug trafficking. In totality she has not mitigated the security concerns regarding personal conduct.

Guideline F—Financial Considerations

Guidelines ¶ 18. The Concern. Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Compulsive gambling is a concern as it may lead to financial crimes including espionage. Affluence that cannot be explained by known sources of income is also a security concern. It may indicate proceeds from financially profitable criminal acts.

Guidelines ¶ 19. Conditions that *could raise* a security concern and may be disqualifying include:

(a) inability or unwillingness to satisfy debts; and

(c) a history of not meeting financial obligations.

The government established its case under Guidelines ¶ 19 (a) and (c). Applicant has a history of unpaid debts and not meeting financial obligations. In examining the evidence, I find that she paid the debt listed in SOR subparagraph 3.b., the debt cited at 3.c. is nearly paid, and she established a payment plan by stipulation to commence November 6, 2007 for the debt in 3.j. The others remain unpaid and total about \$5,800.

Guidelines ¶ 20. Conditions that could *mitigate* security concerns include:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;
- (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts;
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue; and
- (f) the affluence resulted from a legal source of income.

The only potential mitigating condition is the expense of caring for her grand-child. The grand-child has only been living with her for five months so this is not a contributing factor to her indebtedness. She has just started payment plans with one creditor, and has done nothing with at least six creditors. She did not seek financial counseling. There is an insufficient amount of time past to establish a track record of successful debt resolution. I conclude Guideline F against Applicant.

Whole Person Analysis

“The adjudicative process is an examination of a sufficient period of a person’s life to make an affirmative determination that the person is eligible for a security clearance.”²⁸ “Available, reliable information about the person, past and present, favorable and unfavorable, should be

²⁸Directive ¶ E.2.2.1.

Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant

Paragraph 3. Guideline F: AGAINST APPLICANT

Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	For Applicant
Subparagraph 3.c:	For Applicant
Subparagraph 3.d:	Against Applicant
Subparagraph 3.e:	Against Applicant
Subparagraph 3.f:	Against Applicant
Subparagraph 3.g:	Against Applicant
Subparagraph 3.h:	Against Applicant
Subparagraph 3.i:	Against Applicant
Subparagraph 3.j:	For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly not consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Christopher Graham
Administrative Judge