



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



In the matter of:)	
)	
)	ISCR Case No. 18-00042
)	
Applicant for Security Clearance)	

Appearances

For Government: Michelle Tilford, Esq., Department Counsel
For Applicant: *Pro se*

05/09/2019

Decision

BENSON, Pamela C., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). His criminal conduct casts doubt on his reliability, trustworthiness, and good judgment. National security eligibility for access to classified information is denied.

Statement of the Case

On April 20, 2015, Applicant submitted a security clearance application (SCA). On August 20, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guidelines J and E. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) effective within the DOD on June 8, 2017.

Applicant answered the SOR on August 29, 2018. He admitted SOR ¶ 1.a, but he failed to admit or deny SOR ¶ 2.a, which was a cross-reference to SOR ¶ 1.a. I have

interpreted this omission as a denial by Applicant. He requested a hearing before an administrative judge. On December 31, 2018, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for January 16, 2019. On January 4, 2019, the case was assigned to me.

During the hearing, Department Counsel offered Government Exhibit (GE) 1-7, which I admitted into evidence without objection. Applicant offered Applicant Exhibit (AE) A-J, which I entered into evidence without objection. (Tr. 26-32) Applicant testified, and I held the record open until February 16, 2019, in the event either party wanted to submit additional documentation. On February 3, 2019, Applicant provided two additional documents. I admitted AE K and L into evidence without objection. DOHA received the hearing transcript (Tr.) on January 25, 2019, and the record was closed on February 16, 2019.

Findings of Fact

Having thoroughly considered the evidence in the record, I make the following findings of fact: Applicant is 68 years old. He earned a bachelor's degree in 1973, and a master's degree in 1978. He married in 1973 and adopted two children, now adults, from his wife's previous marriage. They also have an adult child from their union. One of his adult children has special needs. Applicant served in the U.S. Army for 22 years in the Air Defense Artillery, including multiple overseas deployments. He retired in 1996 at the rank of lieutenant colonel. Immediately after his retirement, he was employed by a DOD contractor. He has worked for this DOD contractor for nearly 23 years. He currently possesses a DOD security clearance. Applicant has received several certificates, letters of appreciation, and favorable employee evaluations during the course of his employment. (Tr. 21-25; GE 1; AE H, AE I, AE J)

SOR ¶ 1.a alleges that in February 2014, Applicant was arrested and charged with four counts of felony theft for stealing luggage from the local airport between November 2013 and February 2014. Applicant admitted this allegation in his response to the SOR. During the hearing, Applicant admitted his arrest but denied stealing any bags. He mistakenly took a bag in the local airport on the day of his arrest, but it was never his intent to steal it. He claimed the other three pieces of stolen luggage he was charged with did not involve him. (Tr. 26)

In December 2015, Applicant participated in a background interview with an authorized DOD investigator. When questioned about his February 4, 2014 arrest, Applicant stated that he flew into the local airport of State A for a work assignment. He took his two checked bags from the luggage carousel and left the airport. He soon realized he forgot to retrieve a carry-on bag that he was unable to fit in the overhead compartment when he boarded the airplane. He stated this bag had been checked with the airplane's cargo. He did not receive a claim tag for this bag. Applicant called the airline to see if his bag was at the airport. The airline had difficulties tracking his bag since he did not check it in at the airline counter and **the bag was never tagged with a claim tag.** (Emphasis added) A couple days later the airline called him to report several

unclaimed bags had arrived and requested Applicant to come to the airport to see if one of the bags belonged to him. (Tr. 48; GE 2)

During the background interview, Applicant told the investigator that he arrived at the airport at approximately 6:00 p.m. He came in from the outside door near the luggage area and found what he thought was his bag and walked away. He was stopped by the police and questioned about the bag in his possession. He told the officer it was his bag, but after further examination, it was determined to be another individual's bag. He is legally blind in his right eye and believed this contributed to him picking up the wrong bag. He was taken by the police to a holding room for questioning. Applicant had flown into this airport on countless occasions for his employer. Police reviewed security tapes and matched him with three other earlier incidents where luggage had been stolen from the airport. In addition, police noted that on each of these occasions, the suspected thief had come from the outside door to the luggage area with a luggage cart instead of coming directly from the flight arrival gate. The police obtained a search warrant of his hotel room, but they did not find any incriminating evidence. Despite the search warrant result and Applicant's explanations, the police charged him with four felony counts of theft. (GE 2)

Applicant hired a local attorney. He did not want to plead guilty to the charges as he was "in no way involved in the theft of luggage." His attorney advised him that if he did go to trial, Applicant would have to pay him an additional \$10,000¹ in legal fees, and he also indicated the case could drag out for two years or longer. The state's attorney offered a plea bargain. The agreement included conditions that Applicant pay the airline restitution in the approximate amount of \$3,000, and perform 24 hours of community service. After he fulfilled the terms of the agreement, the court would place the charges on the *Stet* docket. If Applicant did not accept the plea bargain, the DA would proceed with the criminal trial. Since Applicant claimed this was the most cost-effective and expedient way to handle the situation, he accepted the plea bargain and fulfilled the specified conditions. (Tr. 38, 58; GE 2)

The police records showed the airline reported a suitcase was stolen on November 17, 2013. The detective reviewed video footage of the luggage area which showed a white male removing the bag and leaving the terminal. Another theft occurred on November 19, 2013. The same white male was witnessed on the video footage, about 50 years old, wearing dark colored shoes, light jeans, and a dark colored waist length jacket, taking a blue suitcase that was reported as stolen. The surveillance footage showed that on both occasions, the male suspect did not walk to the baggage claim from the airline gate. Instead, the male suspect entered the baggage claim area from the outside door with a luggage cart to retrieve the suitcases. The police placed a bulletin of the male suspect's photo for the airline employees to call police if he was seen in the baggage area. There were no thefts of luggage reported from November 21, 2013 through February 1, 2014. (GE 5)

¹ Applicant later said he had paid \$7,000 for his attorney, and if he went to trial, he would have to pay an additional \$13,000-\$15,000. (Tr. 58)

On approximately February 2, 2014, an airline representative notified a police detective that a bag was stolen from the baggage carousel. The surveillance video showed the same male suspect that was posted on the November 2013 bulletin. On this date, he was wearing a dark blue peacoat and blue jeans. On February 4, 2014, an airline employee called a police detective to report that the male suspect from the bulletin was back at the baggage area, wearing a blue coat and blue jeans. At approximately 2:00 p.m., the detective located the male suspect in the hourly garage, with a luggage cart that had a black Samsonite roller suitcase, without a claim tag. The male suspect told the detective that he flew in yesterday and had returned to the airport to claim his lost bag. (Tr. 52; GE 5)

While the detective was talking with Applicant, a phone call came in that a passenger could not locate his black roller suitcase, and he told the airline his name card was located on the outside of the bag. The detective inspected the roller suitcase that was on Applicant's luggage cart which showed the victim's name card on the outside of the bag. The police found the victim's airline claim tag in a trash can inside the hourly garage. Applicant was apprehended by the police for questioning. After reviewing Applicant's travel itinerary, the police discovered Applicant had been in State A during the two incidents of luggage theft in November 2014, and the earlier incident of luggage theft on February 2, 2014. Applicant was charged with four felony counts of theft. (Tr. 52; GE 5)

At the hearing, Applicant was asked about the circumstances which led to his arrest. On February 2, 2014, Applicant carried his bag, filled with books, when he boarded the airplane. It would not fit in the overhead compartment, and the airline attendant checked his bag without placing an airline claim tag on it. When he exited the airplane, Applicant assumed his bag would be in the aisle, but it was not there. He asked the flight attendant about the checked bag, and he was informed that his bag would be located at the baggage claim. He also explained that he never carries his bags for two reasons: (1) he has a bad back, and on the day of his arrest, (2) his lost carry-on bag was filled with books, so it was heavy.² Applicant found his two checked suitcases, but his carry-on bag was not there. He reported his bag missing to the airline and provided his phone number. Since his bag had not been tagged, the airline could not track it. He was told that his bag may arrive on a later flight, and they would give him a call. On the day of his arrest, he claimed he received a call from the airline letting him know his bag may be there, but they did not know for certain **since his bag was not tagged**. (Emphasis added) (Tr. 26-30, 32, 35)

Applicant believed he was identified on the video footage near the baggage claim on dates he did not fly on the airline, which also included some of the dates the suitcases were stolen, because he had visited the USO in the airport to acquire free drinks, snacks, and he enjoyed talking with families. He did not provide any USO sign-in sheets to corroborate his claim. On the day of his arrest, Applicant admitted he had

² Although Applicant carried his heavy bag filled with books when he boarded the airplane on February 2, 2014.

removed the airline tag from the suitcase. Applicant described himself as being a little obsessive. Whenever he retrieves his suitcase, he immediately rips off all of the tags and throws them away. This always has been his consistent habit when traveling. Applicant did not provide any witness statements to corroborate his claim. (Tr. 39-41, 53, 60-61)

Applicant's salary with his current employer is approximately \$260,000. He was asked why, with his significant income, he would not pay the additional money to his attorney to fight the felony theft charges that were filed against him. Applicant claimed that his income in 2014 was significantly lower, about **\$140,000 to \$150,000**. (Emphasis added) When questioned about this substantial difference in salary from the same employer, Applicant said it was due to him not receiving bonuses in 2014. He then stated that his decision to accept the plea bargain was not fully financially based. He also consulted with his lawyer, family, and after management's assertion that his acceptance of the plea bargain would not hurt him in any way, he took the deal. I requested Applicant provide a copy of his filed 2014 tax return while the record was held open for 30 days. The requested 2014 tax return was provided on February 3, 2019. It showed, in part, that Applicant's annual income was \$233,424, plus taking into account his annual pensions and annuities of \$52,817, he had a combined total income of **\$287,466** for 2014. (Emphasis added) (Tr. 63-66; AE K, AE L)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security decision.”

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 include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to 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.

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J; Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

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 guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 31, and the following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

In February 2014, Appellant was arrested on four felony counts of theft. He accepted a plea bargain and paid approximately \$3,000 restitution to the airline, and performed 24 hours of community service. The court placed the charges on the *Stet* docket. The charges were not dismissed for lack of evidence. If Applicant had not fulfilled the conditions of the plea bargain, the DA made it clear they would continue with prosecution of the case against him. The above disqualifying condition applies.

The guideline also includes conditions that could mitigate security concerns arising from criminal conduct. The following mitigating conditions under AG ¶ 32 are potentially applicable:

- (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;
- (c) no reliable evidence to support that the individual committed the offense; and
- (d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Appellant's charges of felony theft were based on two thefts of luggage in late November 2013 and two thefts in February 2014. After the two thefts in November, the police made a bulletin with the male suspect's picture taken from the surveillance footage. The police asked the airline employees to call police if the suspect was seen in the airport. A diligent airline employee saw the male suspect from the bulletin photo and immediately called the police. The suspect spotted near the baggage claim area turned out to be Applicant. He had entered from the outside door with a luggage cart to retrieve a bag, just as the suspect did in the three earlier thefts. While returning to his car, Applicant removed the tags from the suitcase and threw them into the trash can. Applicant claimed it was a fluke that he was in possession of another individual's bag at the time the detective stopped to question him.

Applicant did not provide truthful information when he was questioned about his 2014 income. He claimed he made approximately \$145,000 due to him not receiving employment bonuses that year. A copy of his 2014 tax return showed that his income was almost double the amount he reported. It is important to note, however, that Applicant *consistently reported* that his lost carry-on bag did not have an airline tracking tag on it. The day he arrived at the airport to look for his lost bag, Applicant took a suitcase that had an airline tracking tag on it. The tag should have put him on notice that this was not his bag, or at the very least, he should have taken a closer examination of the bag since a name card was located on the outside of the suitcase. Applicant did not work with an airline representative to claim his lost carry-on bag.

Applicant's travel itinerary showed he was in the area when the three earlier thefts occurred. The video footage also showed him in the airport on days he was not traveling on an airplane. Applicant claimed he would go to the airport's USO for free drinks and snacks. When Applicant was stopped by the detective after an airline employee recognized the suspect from the bulletin, Applicant just happened to be in

possession of a suitcase that was reported missing. I find this an unlikely coincidence. Applicant's explanations are not credible or corroborated. His criminal conduct casts doubt on his reliability, trustworthiness, and good judgment. His failure to accept responsibility or express any remorse for his misconduct demonstrates that he has not been successfully rehabilitated. The above mitigating conditions do not apply.

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern for 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 or sensitive information. Of special interest is any failure to provide truthful and candid answers during national security investigative or adjudicative processes. ...

AG ¶ 16 describes conditions that could raise a security concern and be disqualifying. The following is potentially applicable under the established facts in this case:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant's criminal conduct was addressed under that specific guideline. The same issue was cross-alleged under the personal conduct guideline. No specific personal conduct allegations were raised beyond what was raised under the appropriate guideline. I have previously addressed the issue under Guideline J.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. The following mitigating conditions under AG ¶ 17 are potentially applicable:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, 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 contributed to

untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

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

Applicant has consistently denied that he stole suitcases from an airport when he was on travel for his employer. Having determined that his explanations were not credible or corroborated, the evidence supports he engaged in criminal conduct, and his personal conduct casts doubt on his reliability, trustworthiness, and overall good judgment. None of the mitigating conditions apply.

Whole-Person Concept

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

(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) the 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. This SOR highlights serious offenses that provide insight to a person's character and integrity. Applicant has not accepted responsibility for his misconduct, nor has he expressed any remorse for his deceit. I conclude that Applicant has not mitigated security concerns raised by his criminal conduct and personal conduct. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

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

Pamela C. Benson
Administrative Judge