



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



In the matter of:)
)
) ISCR Case No. 23-01779
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeffrey Kent, Esq., Department Counsel
For Applicant: Pro se

March 4, 2024

Decision

Lokey Anderson, Darlene D., Administrative Judge:

Statement of the Case

On November 3, 2022, Applicant submitted a security clearance application (e-QIP). (Government Exhibit 4.) On August 31, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudications Services (DCSA CAS) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline J, Criminal Conduct, and Guideline E, Personal Conduct. 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 after June 8, 2017.

Applicant answered the SOR on a date uncertain. She requested that her case be decided by an administrative judge on the written record without a hearing. (Item 1.) On October 10, 2023, Department Counsel submitted the Government’s written case. A complete copy of the File of Relevant Material (FORM), containing eight Items, was mailed to Applicant and received by her on November 14, 2023. The FORM notified

Applicant that she had an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of her receipt of the FORM. Applicant submitted no response to the FORM. Applicant did not object to Government Items 1 through 8, and they are admitted into evidence, referenced hereinafter as Government Exhibits 1 through 8.

Findings of Fact

Applicant is 29 years old. She is not married and has no children. She has a Master's degree. She is employed by a defense contractor as a Scheduler and Risk Analyst (Junior position). She is seeking to obtain a security clearance in connection with her employment.

Applicant's recent criminal conduct on July 31, 2022, involves retail theft and receiving stolen property. She has not been open, honest, and upfront with the Government about this misconduct. She has no prior military service.

Applicant graduated from college with her Masters degree in 2022. She began working for her current employer in November 2022. She has never held a security clearance before.

On September 8, 2022, Applicant was charged with Retail Theft-Alter Label/Price Marking and Receiving Stolen Property. She admits to being charged and sentenced for committing these two criminal offenses as set forth in allegation 1.a., of the SOR, but denies that she knowingly and intentionally changed the bar code stickers on the merchandise to steal the items, as set forth in allegation 1.b., of the SOR.

A police report of the incident indicates that on about July 31, 2022, a suspect was observed placing different bar code stickers on approximately 19 items of merchandise at a Walmart. The stickers were of low dollar value, (94 cents which was a bar code for a side plate, 97 cents which was a bar code for a balloon, and \$1.57, which was a bar code for a vase). These low-priced bar codes were used by the Applicant and placed on 19 other items, some which were higher priced items to include a 65-inch television, a vacuum cleaner, and a bed in a bag, among other things. The value of the 19 underpriced items combined was about \$872.67. The police officer investigating this case found Applicant to be the suspect and confronted her. Applicant did not refute the narrative the police confronted her with. She told the police that she immediately wanted to pay Walmart back and not be charged. The police told her that avoiding charges was not an option. Applicant gave her address to the police so that they could send her citation to her. (Government Exhibit 6.)

In response to interrogatories dated June 21, 2023, Applicant was less than candid with the Government in explaining her version of the event. She stated that she used a self-checkout register at a Walmart. After scanning all of the items in her cart, she paid and left the store, thinking that everything had been accounted for as usual. She received a citation for her criminal conduct months later. She stated that she could

not understand how it happened other than a possible malfunction with the self-check out machine. (Government Exhibit 5.) Applicant was not truthful about how this theft occurred. She did not admit her misconduct nor was she upfront, candid, or honest about it.

In her personal subject interview dated January 18, 2023, Applicant stated that the incidents occurred the day before she was leaving the state, and she was in a hurry. She stated that she knows she scanned all of her items, but she is not sure how the items registered differently on the system of receipt. (Government Exhibit 8.) Any reasonable person would know that if you purchased 19 items and some of the items were large items, you should expect to pay a fairly large bill. Instead, Applicant changed the stickers to be able to purchase multiple items of merchandise at a lower price. She deliberately changed the stickers. She knew what she was doing. If there had been a mistake of some sort, or a misprint on something that she did not cause, a reasonable person would have flagged down the store clerk to report the discrepancy.

Applicant has hired an attorney to have her case dismissed and expunged from her record. Because Applicant had no prior criminal history, she was given some leniency on her sentencing. On November 2, 2022, Applicant was accepted into the Accelerated Rehabilitative Disposition program, placed under 12 months of supervision, ordered to perform one day of community service, complete an online course on Retail Theft, pay about \$872 in restitution to Walmart, and pay about \$1,243 in other costs and fees. Applicant is either currently still on probation or has just recently completed her probation for committing these offenses.

Applicant was not completely truthful when she answered interrogatories in June 2023, when she failed to disclose the full extent of her criminal conduct as discussed above. She failed to disclose that she changed the price codes, and then scanned these erroneous price codes for merchandise in order to obtain about \$872 worth of items at a Walmart or about July 31, 2022. Applicant was not truthful about her criminal conduct. In fact, Applicant attempted to deceive the Government by not fully disclosing the truth about it when she answered the interrogatories.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be 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, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), 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.

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

A person who applies for access to classified information seeks to enter 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 the 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.

Section 7 of EO 10865 provides that adverse 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 relating to the guideline 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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgement, reliability, or trustworthiness;
- (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; and
- (c) individual is currently on parole or probation.

The guideline at AG ¶ 31 contains conditions that could mitigate security concerns. None of the conditions are 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; 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.

Applicant is a recent college graduate, who recently engaged in criminal conduct that demonstrates poor judgment, immaturity and a total disregard for the law. Her misconduct is inexcusable. She is young and immature and has not established a sufficient history of reliability and trustworthiness to qualify for access to classified information. Her recent criminal violations are very damaging. They occurred just as she became a new hire in the defense industry and with the requirement of holding a security clearance. To protect the national interest her misconduct is scrutinized and raises serious concerns about her judgment, reliability and trustworthiness, both because of the nature of the offenses, (which involve theft and receiving stolen property), but the fact that she fails to admit her wrong doing and shows no remorse for her misconduct is disturbing. In fact, she denies that she deliberately changed the bar codes on the items she stole. The before-mentioned disqualifying conditions have been established and are not mitigated.

Guideline E- Personal Conduct

The security concern for Personal Conduct is set out in AG ¶ 15:

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 cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

The guideline notes several conditions that could raise security concerns under AG ¶ 16. Two are potentially applicable in this case:

(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 national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(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 individual may not properly safeguard classified or sensitive information.

There are conditions mitigating security concerns under AG ¶ 17. However, none of them are applicable here:

(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; and

(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.

Applicant claims that she did not deliberately or intentionally change the bar codes on the items she scanned at Walmart on the date in question. The matter was investigated by the police. Applicant was identified as the suspect, and it was determined that Applicant changed the bar codes on higher-priced items to lower priced items before scanning the items. In answering questions in her interrogatories about

this incident, she failed to admit to her misconduct by failing to provide details about her escapade. This conduct raises serious questions about her credibility. Applicant has not demonstrated that she can be fully trusted. In totality, her conduct shows a high degree of immaturity and poor judgment. None of the mitigating conditions are applicable here.

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 relevant 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 facts and circumstances surrounding this case. I have incorporated my comments under Guidelines J, and E, in my whole-person analysis. Based upon the facts and analysis set forth above, Applicant has failed to provide sufficient evidence to demonstrate that she meets the qualifications for a security clearance.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Criminal Conduct and Personal Conduct security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 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 interest to grant Applicant national security eligibility for a security clearance. Eligibility for access to classified information is denied.

Darlene Lokey Anderson
Administrative Judge