



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



In the matter of:)
)
) ISCR Case No. 14-02984
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esq., Department Counsel
For Applicant: *Pro se*

03/19/2015

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the personal conduct and criminal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On September 5, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (personal conduct) and J (criminal 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) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on September 26, 2014, and elected to have the case decided on the written record in lieu of a hearing. The Government’s written case was submitted on December 8, 2014. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns.

Applicant received the FORM on January 5, 2015. As of March 11, 2015, he had not responded. The case was assigned to me on March 16, 2015. The Government exhibits included in the FORM (Items 4-9) are admitted.

Findings of Fact

Applicant is a 32-year-old employee of a defense contractor. He has worked for his current employer since 2008. He seeks to retain his security clearance, which he has held since at least 2008. He served on active duty in the U.S. military from 2003 until he was honorably discharged in 2010. He attended college from 2010 through at least September 2013. It is unclear whether he earned a degree. He is married with one child.¹

Applicant has multiple arrests and convictions. He was arrested in July 1999, when he was 17 years old, and charged with simple burglary, simple criminal damage, and violating a state/city law. He pleaded guilty to simple burglary, and was sentenced to probation for two years. Applicant stated that he broke into an abandoned house with an older brother and an older group from his neighborhood in order to “hang out.”²

Applicant was arrested in September 1999 and charged with simple battery, disturbing peace, and contributing to the delinquency of a juvenile. He was still 17 years old, and he did not graduate from high school until 2002. The charges were dismissed.³

Applicant was arrested in December 2000, when he was 18 years old, and charged with theft of cash over \$500, a felony. Applicant was working at a restaurant when the manager reported that \$1,186 was missing from the safe. The manager reported that he must have inadvertently left the safe open. Applicant’s co-worker reported that Applicant told her that he was going into the safe, and then later showed her the money. Applicant denied stealing the money, and the charge was eventually dismissed.⁴

Applicant was arrested in February 2013 and charged with shoplifting less than \$200. He pleaded guilty and was sentenced to a \$91 fine. Applicant admitted he was arrested and convicted, but he denied shoplifting. He stated that he was shopping at a large store when he went through the cashier without paying for the bag of fertilizer that was on the bottom rack of his cart. Applicant stated that he forgot the bag was under the cart. He stated that he pleaded guilty because he did not feel like paying for a lawyer and fighting the case.⁵

¹ Items 4, 9.

² Items 3, 5, 6, 9.

³ Items 3, 5, 9.

⁴ Items 3, 5-7, 9.

⁵ Items 3, 4, 8, 9.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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 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 access to classified information will be resolved in favor of national security."

Under Directive ¶ E3.1.14, the Government must present evidence to establish 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." The applicant has the ultimate burden of persuasion to obtain 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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 single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant has multiple arrests and convictions. The above disqualifying conditions are applicable.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following 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;
- (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.

Applicant's burglary arrest occurred when he was 17 years old and still in high school. He was with his older brother and a group from the neighborhood. Applicant denied committing the crimes associated with his arrests in September 1999 and December 2000. Both sets of charges were dismissed without prosecution. Applicant was still in high school during all three arrests. He went on to serve honorably in the military for seven years. The above mitigating conditions are applicable to Applicant's offenses when he was in high school.

Applicant denied committing the shoplifting offense. However, he pleaded guilty. His failure to accept responsibility for his criminal conduct does not show remorse or rehabilitation. His conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. None of the mitigating conditions are applicable to the shoplifting offense.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

SOR ¶ 2.a cross-alleges Applicant's criminal conduct. That conduct showed poor judgment and an unwillingness to comply with the law. It also created a vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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; and

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

Applicant's conduct while in high school is mitigated under the same rationale discussed under the criminal conduct analysis. Similarly, his shoplifting offense is not mitigated.

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(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) 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. I have incorporated my comments under Guidelines E and J in this whole-person analysis.

I considered Applicant's honorable military service. However, his criminal conduct showed poor judgment and an unwillingness to comply with the law. Those characteristics are inconsistent with holding a security clearance.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the personal conduct and criminal conduct security concerns.

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
Subparagraphs 1.a-1.c:	For Applicant
Subparagraph 1.d:	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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge