



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



In the matter of: )  
)  
) ISCR Case No. 14-01164  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Richard A. Stevens, Esq., Department Counsel  
For Applicant: *Pro se*

09/08/2014

**Decision**

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline J, criminal conduct, and Guideline F, financial considerations. Applicant’s eligibility for a security clearance is denied.

**Statement of the Case**

On May 6, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, criminal conduct, Guideline E, personal conduct, and Guideline F, financial considerations. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense 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 September 1, 2006.

Applicant answered the SOR on June 6, 2014, and requested a hearing before an administrative judge. The case was assigned to me on July 15, 2014. The Defense

Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 24, 2014. I convened the hearing as scheduled on August 19, 2014. The Government offered exhibits (GE) 1 through 5, which were admitted into evidence without objection. Applicant testified on his own behalf. He offered Applicant's Exhibit (AE) A through E, which were admitted into evidence without objection. The record was held open until August 26, 2014, to allow Applicant to submit additional exhibits. AE F through H were received, and they were admitted into evidence without objection.<sup>1</sup> DOHA received the hearing transcript (Tr.) on August 28, 2014.

### **Procedural Issues**

Department Counsel moved to withdraw SOR ¶¶ 2.a, 2.b and 2.c. The motion was granted.<sup>2</sup>

### **Findings of Fact**

Applicant admitted the allegations in ¶¶ 1.a-1.c and 3.a-3.t of the SOR. He denied the remaining allegations of the SOR. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 31 years old. He graduated from high school in 2001. He served in the Navy from December 2001 until he was honorably discharged in March 2004. He married in December 2007. His wife has a seven-year-old child. His wife has been collecting disability payments for approximately two years.<sup>3</sup>

After leaving active duty, Applicant had a series of jobs working as a security officer and police officer. He experienced periods of unemployment. Beginning sometime in 2006, he was unemployed for approximately 18 months.<sup>4</sup>

In September 2007, Applicant was arrested and charged with felony identity theft and six counts of illegal possession and use of credit cards (SOR ¶ 1.a). He was indicted in January 2008. In February 2008, as part of a plea agreement, he pled *nolo contendere* and entered into a pretrial diversion program. He was sentenced to 36 months confinement that was suspended, adjudged a fine, court costs, and was ordered to pay \$4,000 in restitution. In his answer to the SOR, Applicant attributed his criminal conduct to his girlfriend, who is now his wife, who came up with the idea. They found an establishment that would accept credit cards to purchase money orders. He stated he was told by his wife that the theft would just go on the victim's credit report. He indicated that when he was arrested he took the blame because she had a five-month-old baby.

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<sup>1</sup> Hearing Exhibit I is Department Counsel's email memorandum indicating he does not object to the exhibits.

<sup>2</sup> Tr. 96-97.

<sup>3</sup> Tr. 45-48.

<sup>4</sup> Tr. 48-52.

Applicant stated that he and his wife both participated in the criminal activity. They did it a minimum of six times and obtained \$900 each time. He stated he did not recall the circumstances of where he obtained the credit card. They would use the credit card to purchase money orders. His wife would then call the bank and lie claiming she was from the store where the purchase was made and ask that the bank delete the credit card purchase. They would keep the money orders that they purchased with the credit cards. Applicant stated he was duped and blinded by his wife and did not realize his actions were illegal. He stated he made bad decisions because he was young and naive. Applicant's testimony was not credible. His wife was charged with one count of misuse of a credit card. She was also placed on a pretrial diversion program and was required to pay restitution.<sup>5</sup>

In about March 2010, Applicant was arrested and charged with felony larceny (3<sup>rd</sup> degree) and felony passing forged/altered instruments (3<sup>rd</sup> degree) (SOR ¶ 1.b). In July 2010, as part of a plea agreement, Applicant pled *nolo contendere* and entered into a pretrial diversion program. He was sentenced to 100 hours of community service, adjudged a fine and court costs, placed on three years supervised probation, and ordered to pay \$1,250 in restitution. Applicant again stated he was influenced by his wife and was told that writing bad checks and depositing them was not a crime. He was told by his wife that she had done this before, the debt is just charged off, and the victim does not have to pay it. Applicant's wife was also charged with a felony for writing bad checks. She was placed on probation, and they are required to pay the restitution together. Applicant testified that the restitution for this offense is paid. Applicant stated his wife used her disability payment to pay the restitution. Applicant provided documents to show he made some payments. He did not provide documents to show the debt is completely resolved.<sup>6</sup>

In about April 2010, Applicant was arrested and charged with felony theft of property (SOR ¶ 1.c). This offense occurred in a different state than SOR ¶ 1.b. In about November 2010, he was found guilty of felony theft by deception and sentenced to five years confinement, which was suspended. In January 2011, he was placed on probation for three years, adjudged a fine and costs, and ordered to make \$6,816 in restitution to the bank he stole from. Applicant indicated his probation ended in July 2013. As of January 2014, he had not paid the restitution.<sup>7</sup>

Applicant admitted that from about 2007 to 2010 he wrote bad checks and cashed them. He believed he wrote between 10 and 15 checks totaling about \$9,250. He stated he was working at the time, but not earning enough. He was trying to support his family.<sup>8</sup>

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<sup>5</sup> Tr. 25-29, 33-42, 52-61, 75-79; AE A, B.

<sup>6</sup> Tr. 25, 33-44, 62-63, 76-78; AE A, B.

<sup>7</sup> Tr. 30-33, 38-39, 74, 76-79.

<sup>8</sup> Tr. 30-33.

In about May 2010, Applicant was required to appear in court for failing to pay court-ordered restitution related to the February 2008 plea agreement (SOR ¶¶ 1.a and 1.d). In about July 2010, Applicant was sentenced to community service, placed on probation for 26 months, adjudged costs and a fine, and ordered to pay \$25 per month towards restitution. As of December 2011, he had an outstanding restitution balance of approximately \$3,619. Applicant confirmed that because he failed to pay the ordered restitution, he was placed on a restitution repayment plan. He has been making inconsistent payments. He indicated that he receives approximately \$520 for educational expenses from the Department of Veterans Affairs (VA) and he uses some of that money to pay his restitution.<sup>9</sup>

Applicant has 21 delinquent debts (SOR ¶¶ 3.a-3.t) totaling over \$25,000. The debts are listed on his credit report.<sup>10</sup> Of that amount approximately \$10,000 is for restitution related to Applicant's criminal activity. Applicant confirmed he has not paid all the restitution ordered in SOR ¶ 1.a. He stated he began making payments in April 2011 on the debt in SOR ¶ 1.b. He stated he did not make restitution payments in 2012 because he believed his wife's restitution payments counted towards his debts. He stated he believes some of the other debts alleged do not belong to him. He sought assistance from someone about a month ago who is working with him to consolidate his debts and determine which are accurate and those to dispute on his credit report. He disputes the debt in SOR ¶ 1.i belongs to him. He believes the debt in SOR ¶¶ 1.j and 1.n are duplicate debts. The debts have different account numbers. Applicant has not provided proof he has paid any of the remaining delinquent debts. He did not provide any documents to verify his disputes.<sup>11</sup>

Applicant was attending an online school in 2009 and 2010, and used his GI bill to pay for his education and his family's living expenses. He estimated he received about \$14,000 annually in 2009 and 2010. He was on academic probation. In 2011, his income tax refund was seized to repay approximately \$8,000 in educational benefits obtained through the VA. He estimated his annual income in 2011 was about \$15,000. When asked how he was entitled to an \$8,000 refund, Applicant explained that he received unemployment benefits because his wife got sick and the company terminated him. He was unsure of which years his income tax refunds were seized, but stated the VA debt has been paid. He stated he still owes a small balance for tuition at the college he attended.<sup>12</sup>

Applicant provided a character letter that describes him as honest, and his integrity is beyond reproach. The person is aware of Applicant's criminal past, but

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<sup>9</sup> Tr. 29-30, 80-82.

<sup>10</sup> GE 5.

<sup>11</sup> Tr. 20-22, 33-41.

<sup>12</sup> Tr. 63-67.

indicated that Applicant has earned his trust, and has a fine work ethic. Applicant is described as a family man who is active in his church and community.<sup>13</sup>

Applicant stated he changed his life because he did not want to go to prison for 20 years. He admitted that he could not place all the blame on his wife because he chose to engage in the criminal activity. He stated he has learned to manage his finances.<sup>14</sup>

## **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 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 access to classified information will be resolved in favor of 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 not drawn 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. Under 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 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

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<sup>13</sup> Tr. 69-72; AE C, D, E.

<sup>14</sup> Tr. 100-103.

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 Executive Order 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**

### **Criminal Conduct**

AG ¶ 30 sets out the security concern relating 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.

I have considered the disqualifying conditions under criminal conduct AG ¶ 31 and the following two 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 was arrested and charged with felony counts for theft identity, illegal possession and use of credit cards, larceny, and passing forged/altered instruments. He twice pled *nolo contendere* and was placed in pretrial diversion programs, along with being ordered to pay restitution, which he failed to complete. There is sufficient evidence to raise both disqualifying conditions.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 23 and 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; 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 stated his wife duped him into committing the criminal offenses, but he also admitted she was not entirely to blame. He was charged with illegal possession and use of credit cards. He stated he could not remember how he came into possession of a credit card. He was placed in pretrial diversion programs twice. He has failed to pay all of the court-ordered restitution, which he still owes. His criminal acts did not happen under unique circumstances, and I am not convinced that this conduct is unlikely to recur. His criminal conduct casts doubt on his reliability, trustworthiness, and good judgment. AG ¶ 23(a) does not apply. I did not find his statement credible that he did not know what he was doing was illegal. Applicant and his wife continue to live together. If Applicant is to be believed, he is easily influenced by his wife to engage in criminal activity. AG ¶ 23(b) does not apply.

There is insufficient evidence to conclude Applicant has been successfully rehabilitated. Despite being placed in a pretrial diversion program, Applicant committed other felonies. He failed to pay all of the court-ordered restitution, much of which is still outstanding. Although there is some evidence from a coworker that he can be trusted and has a good work ethic, this is insufficient evidence to conclude that he is successfully rehabilitated. Applicant's offenses were violations of trust. His statement that he did not know at the time that using someone else's credit card was illegal is an indication that Applicant cannot be trusted. AG ¶ 23(d) does not apply.

#### **Guideline F, Financial Considerations**

The security concern for financial considerations is set out in AG ¶ 18:

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.

The guideline notes several conditions that could raise security concerns. I have considered all of the disqualifying conditions under AG ¶ 19, and the following two are potentially applicable

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant has 21 delinquent debts totaling over \$25,000 that are not paid, including two court orders for restitution. I find there is sufficient evidence to raise the above disqualifying condition.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following mitigating conditions under AG ¶ 20 are potentially applicable:

- (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; and
- (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 action to resolve the issue.

Applicant has over \$25,000 in delinquent debts. Two of the debts are for court-ordered restitution payments. He stated he is paying a debt alleged, but he did not provide proof. He stated he is working with a person to consolidate his debts and dispute those on his credit report that do not belong to him, but did not know which specific debts he disputes. He stated two debts are duplicates, but did not provide proof to verify his assertion. The debts have different account numbers. Applicant attributes his financial problems to periods of unemployment. AG ¶ 20(b) partially applies. However, Applicant resorted to criminal activity when faced with financial difficulties. Obviously his actions do not constitute responsible behavior. None of the remaining 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 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 J and F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is 31 years old. He has a history of criminal activity involving possession and misuse of credit cards, writing bad checks, and larceny. Applicant was twice placed on pretrial diversion programs, yet failed to make his court-ordered restitution. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the criminal conduct and financial considerations guidelines.

### **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.d:	Against Applicant
Paragraph 2, Guideline E:	WITHDRAWN
Subparagraphs 2.a-2.c:	Withdrawn
Paragraph 3, Guideline F:	AGAINST APPLICANT
Subparagraphs 3.a-3.t:	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 a security clearance. Eligibility for access to classified information is denied.

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Carol G. Ricciardello  
Administrative Judge