



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



In the matter of:)
)
) ISCR Case No. 14-01409
)
Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

11/06/2014

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated the personal conduct, financial considerations, and criminal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On May 29, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (personal conduct), F (financial considerations), 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 July 22, 2014, and requested a hearing before an administrative judge. The case was assigned to me on September 23, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on September 29, 2014, scheduling the hearing for October 22, 2014. The hearing was

convened as scheduled. Government Exhibits (GE) 1 through 7 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibit (AE) A, which was admitted without objection. Department Counsel sent an informational letter to Applicant on August 29, 2014. The letter is included in the record as Hearing Exhibit (HE) I. DOHA received the hearing transcript (Tr.) on November 3, 2014.

Findings of Fact

Applicant is a 36-year-old employee of a defense contractor. She has worked for her current employer since November 2010. She seeks to retain her security clearance, which she has held since about 2009. She attended college for a period, but she did not earn a degree. She is married with two children.¹

Applicant worked for a bank from 2004 until she was terminated in 2007 for "kiting"² two checks between her account at the bank where she worked and a joint account with her husband at another bank. Applicant stated the checks were written for less than \$100.³

Applicant obtained a position with her mother's company after she lost her job at the bank. She held a security clearance at her mother's company. In 2009 and 2010, she embezzled about \$30,000 from her mother's company by writing checks to herself from the company's funds. Applicant stated that it was stressful and difficult to work for her mother. She became increasingly unhappy and depressed. She thought her mother would be upset with her if she quit. She was terminated in 2010 when her mother discovered the embezzlement.⁴

Applicant's mother forgave Applicant for stealing from her company. She does not want Applicant to pay the money back. Instead, she issued Applicant a W-2 form reflecting the \$30,000 as income, which generated a tax liability. Applicant has expressed significant remorse for her conduct. She listed the reason for her termination from the bank on her Questionnaire for National Security Positions (SF 86), which she submitted in April 2009. She also admitted her conduct during her background interview in May 2009. She again listed the reason for her bank termination on her January 2013 SF 86, and she also admitted the embezzlement that led to her termination from her mother's company. She fully discussed the misconduct during her March 2013 background interview.⁵

¹ Tr. at 31-32; GE 1, 2.

² **Check-kiting.** The illegal practice of writing a check against a bank account with insufficient funds to cover the check, in the hope that the funds from a previously deposited check will reach the account before the bank debits the amount of the outstanding check. *Black's Law Dictionary*, Ninth Edition.

³ Tr. at 26-30, 33-34; Applicant's response to SOR; GE 2-4.

⁴ Tr. at 21-22, 35-37; Applicant's response to SOR; GE 1, 4.

⁵ Tr. at 21-23, 30, 35-37, 42-43; Applicant's response to SOR; GE 1-4.

Applicant was unable to pay her tax liability and other debts. Applicant and her husband filed Chapter 13 bankruptcy in May 2010. Under Schedule D, Creditors Holding Secured Claims, the petition listed \$90,218 in claims, consisting of a mortgage loan and two vehicle loans. Under Schedule E, Creditors Holding Unsecured Priority Claims, the petition listed \$10,122 owed to the IRS and \$1,465 owed to the state. Debts totaling \$24,210 were listed under Schedule F, Creditors Holding Unsecured Nonpriority Claim. Student loans made up more than \$22,000 of that amount.⁶

Applicant received financial counseling in conjunction with the bankruptcy. She and her husband have maintained the payments to the trustee as required. If they continue the payments, the plan will be completed in 2015.⁷

Applicant submitted her performance appraisals for the last three years. The appraisals describe her as an outstanding employee. Applicant is active in her church, and she volunteers in her community.⁸

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,

⁶ Tr. at 22-23, 37; Applicant's response to SOR; GE 4-7.

⁷ Tr. at 23-26, 32-33, 37-38; Applicant's response to SOR; GE 4-7.

⁸ Applicant's response to SOR; AE A.

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 kited checks and embezzled \$30,000 from her mother’s company. Both of 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; 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.

The check-kiting offenses are minor and attenuated by time. The concerns raised by that conduct are mitigated. It has been more than four years since Applicant stole money from her mother's company. She is clearly remorseful for her actions. She is highly regarded by her current employer. She fully disclosed the criminal conduct on her SF 86s and during background interviews. However, Applicant committed a serious breach of trust. I remain concerned about her core honesty. Her conduct continues to cast doubt on her current reliability, trustworthiness, and good judgment. I am unable to conclude that such conduct is unlikely to recur. AG ¶¶ 32(a) and 32(d) are partially applicable. Criminal conduct concerns remain despite the presence of some mitigation.

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 under AG ¶ 19. The following are potentially applicable:

- (a) inability or unwillingness to satisfy debts;
- (c) a history of not meeting financial obligations; and
- (d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust.

Applicant was unable or unwilling to pay her financial obligations. She was involved in illegal financial practices. The evidence is sufficient to raise the above disqualifying conditions.

Conditions that could mitigate financial considerations security concerns are provided under AG ¶ 20. The following 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; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant has been paying her debts through a Chapter 13 bankruptcy plan for more than four years. She should complete the plan next year. AG ¶¶ 20(c) and 20(d) are applicable to SOR ¶ 3.b, which alleges Applicant's Chapter 13 bankruptcy. There are no mitigating conditions completely applicable to her embezzlement for the same reasons stated under the criminal conduct analysis.

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.

AG ¶ 16 describes conditions that could raise a trustworthiness 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.

Applicant kited checks while working for a bank. She abused a position of trust when she embezzled \$30,000 from her mother's company. That conduct created a vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. Additionally, the conduct showed dishonesty, poor judgment, and an unwillingness to comply with the law, which raises questions about Applicant's ability to protect classified information. The general concern addressed in AG ¶ 15 is also raised. See ISCR Case No. 12-01683 at 4 (App. Bd. Jun. 10, 2014).

SOR ¶ 1.a alleges the embezzlement from Applicant's mother. SOR ¶ 1.b alleges that Applicant was terminated from her mother's company because of the embezzlement. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3 (same debt alleged twice). SOR ¶ 1.b is concluded for Applicant.

SOR ¶ 1.c alleges Applicant's check-kiting, and SOR ¶ 1.d alleges Applicant's termination from the bank for the check-kiting. As a duplicative allegation, SOR ¶ 1.d is concluded for Applicant.

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.

The check-kiting offenses have been mitigated by time. Applicant has been completely honest about her actions, and she is clearly remorseful. She has reduced her vulnerability to coercion, exploitation, and duress. AG ¶ 14(e) is applicable. However, I remain concerned about Applicant's honesty. Her conduct continues to cast doubt on her current reliability, trustworthiness, and good judgment. I am unable to conclude that such conduct is unlikely to recur. AG ¶¶ 14(c) and 14(d) are not applicable under the same rationale discussed in the criminal conduct analysis. Personal conduct concerns remain despite the presence of some mitigation.

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, F, and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

I considered Applicant's favorable character evidence and her work history. Applicant has done everything possible to make up for her significant breach of trust. Her finances appear to be on the right track, but concerns about her honesty remain.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has not mitigated the personal conduct, financial considerations, 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 E:	Against Applicant
Subparagraph 1.a:	Against Applicant
Subparagraphs 1.b-1.d:	For Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline F:	Against Applicant
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	For 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