



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



In the matter of:)) REDACTED)) Applicant for Security Clearance)	ISCR Case No. 14-02154
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Appearances

For Government: Tara R. Karoian, Esq., Department Counsel
For Applicant: *Pro se*

02/09/2016

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant did not mitigate security concerns raised by his criminal conduct. In August 2013, he stole another’s property and money. At the time, he had been working as a federal contractor and had held a security clearance for over a decade. The circumstances surrounding his conduct and his failure to take responsibility for his criminal behavior raise continuing concerns about his judgment, reliability, and the likelihood of recurrence of similar conduct in the future. Clearance is denied.

History of the Case

On June 10, 2015, the Department of Defense Consolidated Adjudications Facility sent Applicant a Statement of Reasons (SOR) alleging that his past conduct and circumstances raised security concerns under the criminal conduct guideline.¹ On June 30, 2015, Applicant answered the SOR, waived his right to a hearing, and elected to have his case decided on the written record.

¹ This action was taken under Executive Order (E.O.) 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 implemented by the Department of Defense on September 1, 2006.

On August 3, 2015, Department Counsel prepared a file of relevant material (FORM) and sent it to Applicant. The FORM contains the SOR, Applicant's answer, and five documentary exhibits. These documents were admitted into the record without objection as Exhibits (Ex.) 1 – 7.² On August 31, 2015, Applicant received the FORM and was informed he had 30 days to file a response.³ He did not to submit a response.

On December 1, 2015, I was assigned Applicant's case. I opened the record to provide him a final opportunity to submit a response to the FORM and any other documents in support of his case.⁴ Applicant timely submitted three documents, which were admitted into the record without objection as Ex. A – C.⁵ The record originally closed on December 15, 2015.

On January 4, 2016, Applicant submitted an additional document showing that a state court had granted his request for early termination of probation. Department Counsel had no objection to the late submission.⁶ I reopened the record and admitted the document as Ex. D. The record closed on January 4, 2016.

Findings of Fact

Applicant, 35, has a bachelor's and a master's degree in computer engineering. He has been a federal contractor and worked for his current employer since 2002. He has held a security clearance for about 15 years, and previously was granted access to sensitive compartmented information (SCI). On a recent security clearance application, Applicant disclosed that in 2003 he was convicted of driving under the influence (DUI).⁷ (Ex. 5 at 36)

In August 2013, Applicant went out for drinks with a friend. Applicant reports they went to an "open bar" and he consumed two beers and two shots of whiskey. (Ex. 6 at 3) Around midnight, Applicant decided to go to an adult establishment (strip club). He was arrested after a dancer at the establishment accused him of stealing her purse, which contained \$300 in cash and a smart phone. The dancer told police and provided a written statement that while performing she put her purse down and then noticed it had gone missing. She saw Applicant walking away suspiciously, confronted him, and pulled her purse out of his pocket. Another worker at the establishment, a bouncer, corroborated the dancer's accusation to police and also provided a written statement.

² Exhibits 1 – 7 consist of: the SOR, Answer, a police report, a state court order, Applicant's security clearance application, a summary of Applicant's security clearance interview, and an incident report.

³ Hearing Exhibit (Hx.) I.

⁴ Hx. II.

⁵ Exhibits A – C consist of: a letter from Applicant's probation officer, e-mail correspondence from his counsel regarding his criminal case, and a filing in his state court criminal case. See *also*, Hx. III.

⁶ Hx. IV.

⁷ The DUI is only being considered in assessing Applicant's mitigation case and whole-person factors.

When confronted by police, Applicant initially agreed to speak and denied the allegation. After the police informed Applicant that there was a witness to the crime, he refused to answer any further questions. He was arrested on a felony larceny charge. (Ex. 3 at 5) Four days later, Applicant reported the arrest to his employer's facility security officer (FSO). (Ex. 7)

In January 2014, Applicant pled no contest to the felony larceny charge. (Ex. 4; Ex. C) He was placed on probation for three years. He timely reported the disposition of the criminal case to his FSO.

In December 2015, a judge granted Applicant's motion for early termination of probation. The probation department had no objection to Applicant's request for early termination because "[s]ince being placed under supervision, the [Applicant] has reported as instructed, maintained stable housing, employment, and has remained drug free." (Ex. C)

Applicant maintains his innocence. Although he regrets putting himself in the situation that led to his arrest, he states he only entered the no contest plea to avoid the risk of losing his job and security clearance. He believes the dancer was vindictive, but provides no further elaboration for the dancer's purported bad motive. (Ex. 2)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Individual applicants are eligible for access to classified information "only upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865 § 2.

When evaluating an applicant's eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision.

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

In resolving the ultimate question regarding an applicant's eligibility, an administrative judge must resolve "[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security." AG ¶ 2(b). Moreover, recognizing the difficulty at times in making suitability determinations and the

paramount importance of protecting national security, the Supreme Court has held that “security clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

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. 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 an 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.

Analysis

Guideline J, Criminal Conduct

The criminal conduct security concern is explained at 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.

Applicant claims he did not commit the larceny offense for which he was arrested, entered a plea of no contest, and was placed on probation for three years. Recently, a state court granted his request for early termination of probation. However, the state court's action did not absolve him of the crime. He presented no corroborating evidence to substantiate his claim of innocence or that undercuts the Government's evidence, namely, the police report wherein the victim and a witness identified him as the person who stole the purse. He now claims that the victim accused him of the crime because she was vindictive. He provides no evidence to support this claim; much less a reasonable explanation as to why two employees of an adult establishment would conspire to have him arrested on false charges and, thereby, lose his potential patronage. Accordingly, I find that the Government proved by substantial evidence the SOR allegation, namely, that Applicant committed the larceny offense. See ISCR Case No. 05-02422 at 2 (App. Bd. Apr. 9, 2007) (Defining substantial evidence standard as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.”)

Furthermore, I find that Applicant's commission of the larceny offense raises the criminal conduct security concern, and triggers application of the following disqualifying conditions:

AG ¶ 31(a): a single serious crime or multiple lesser offenses; and

AG ¶ 31(c): allegation or admission of criminal conduct, regardless of

whether the person was formally charged, formally prosecuted or convicted.

The guideline also sets forth a number of mitigating conditions. I have considered all the mitigating conditions and only the following warrant further discussion:

AG ¶ 32(a): so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

AG ¶ 32(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.⁸

Applicant's recent criminal offense occurred in 2013. He has complied with the terms of his probation and a state court found that he had established sufficient responsible conduct in the intervening 30 months to grant his request for early termination of probation. However, he refuses to acknowledge and take responsibility for his crime which undercuts this favorable evidence. ISCR Case No. 03-01009 at 5 (Mar. 29, 2005) (an applicant undermines his/her claim of mitigation by refusing to take responsibility for their security-significant conduct).

Moreover, the circumstances under which the crime occurred continue to raise questions about Applicant's judgment, reliability, and the potential of recurrence of a similar incident. Of note, Applicant had been working as a cleared federal contractor for over a decade when he decided to steal another's property and money. He was an adult in his early thirties at the time of the incident.⁹ His good behavior since the incident is commendable and may with additional time without recurrence of questionable behavior indicate true reform that would permit a favorable adjudication. However, at this point, it is too soon for such a favorable conclusion. Of note, Applicant's good behavior over the past 30 months has primarily taken place while he was being regular monitored by state authorities and any violation of the terms of his probation would have resulted in grave legal consequences. It has now only been a little over a month since his probation ended. Under the circumstances, an insufficient amount of time has passed for me to safely conclude that Applicant has re-established his eligibility for continued access to this nation's secrets. Consequently, I find that AG ¶¶ 32(a) and 32(d) partially apply, but are insufficient at this point to mitigate the criminal conduct security concerns.

⁸ AG ¶32(c) does not apply for reasons already discussed above, namely, Applicant failed to establish that he did not commit the larceny offense.

⁹ Furthermore, Applicant had been granted a security clearance after a 2003 DUI. This earlier alcohol-related criminal incident apparently had limited positive effect on Applicant as 10 years later, after consuming alcohol and potentially still under its effects, he decided to once again break the law.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).¹⁰ I hereby incorporate my comments under Guideline J. I gave due consideration to all the favorable and extenuating factors in this case, to include Applicant's self-report of the criminal conduct. However, his failure to acknowledge his criminal behavior and the circumstances under which the criminal conduct occurred continue to raise serious concerns about his judgment, reliability, and the likelihood of recurrence of similar conduct. Accordingly, after weighing the favorable and unfavorable evidence, I find that Applicant failed to meet his burden in mitigating the security concerns at issue. ISCR Case No. 14-00715 at 3 (Dec. 10, 2014) ("once security concerns are raised, either through an applicant's admissions or through evidence provided by the Government, it is the applicant's responsibility to present evidence in mitigation.")

A security clearance determination is not intended to punish a person for past conduct or circumstances. Instead, these decisions serve as predictive judgments about an individual's security suitability, where the person's past conduct is the best indicator of future behavior.¹¹ Here, the record reflects questionable behavior on Applicant's part that led him to commit a serious criminal offense. Overall, the record evidence leaves me with doubts about his eligibility for continued 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 (Criminal Conduct)	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

¹⁰ The non-exhaustive list of factors are: (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.

¹¹ ISCR Case No. 11-13626 at 3-4 (App. Bd. Nov. 7, 2013). See also, ISCR Case No. 01-25941 at 5 (App. Bd. May 7, 2004) ("Security clearance determinations are not an exact science, but rather predicative judgments about a person's security suitability in light of that person's past conduct and present circumstances.") (citing, *Egan*, 484 U.S. at 528-529).

Conclusion

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

Francisco Mendez
Administrative Judge