



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



In the matter of:)
)
) ISCR Case No. 08-02097
)
)
Applicant for Security Clearance)

Appearances

For Government: Robert E. Coacher, Esq., Department Counsel
For Applicant: *Pro Se*

September 8, 2009

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated Personal Conduct and Criminal Conduct security concerns. Eligibility for access to classified information is denied.

On January 14, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E and J, Personal Conduct and Criminal Conduct. The action was taken under Executive Order (EO) 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on February 25, 2009, and requested a hearing before an administrative judge. The case was assigned to me on May 13, 2009. DOHA issued a notice of hearing on June 9, 2009, scheduling the hearing for July 9, 2009. The hearing was convened as scheduled. The Government offered Exhibits (GE) 1 through

5. GE 1, 2, and 4 were admitted without objection. GE 3 and 5 were admitted over Applicant's objection. Applicant testified on her own behalf and submitted Exhibits (AE) A through E, which were received without objection. DOHA received the transcript of the hearing (Tr.) on July 16, 2009.

Findings of Fact

Applicant is a 40-year-old employee of a defense contractor. She served in the U.S. Air Force from 1991 to 1999, and was honorably discharged as a staff sergeant (E-5). She has an associate's degree and some additional college credits. She is married but separated, and has a 16-year-old child.¹

The security concerns in this case are based on an arrest and a series of landlord-tenant issues.

Applicant was arrested on May 9, 2007, and charged with harboring a felon. The charge was dismissed in March 2008. The police report detailed the incident. A police officer (officer-1) was driving an unmarked car at about 8:15 in the morning on May 9, 2007. He recognized a man (fugitive) driving a car (car-A), and thought the man had an outstanding felony warrant. He asked another officer (officer-2) to check if the man had a warrant. Officer-2 confirmed that the man had an outstanding felony warrant for receiving and transferring a stolen vehicle. Officer-1 saw the man drive into an apartment complex. When he arrived in the parking lot of the complex, he saw car-A parked, but the man was not in the car. They set up surveillance on the car.²

At about 10:00 that same morning, officer-2 saw Applicant walk in front of car-A and look around the area. Applicant went into the apartment complex and returned a short time later. She got into another vehicle (car-B), which was parked near car-A, and drove slowly around the parking lot. As she was driving, she looked at the undercover and uniformed officers in the parking lot. She then returned and parked next to car-A. Applicant got out of the car and entered the apartment building. She came out of the building a short time later and drove off in car-B.³

Applicant returned to the apartment complex in car-B at about 10:30 a.m. A man, later identified as the fugitive's brother (brother), was with her. The brother opened car-A and placed a backpack in the car. Applicant and the brother then went into the apartment building.⁴

At about 10:45 a.m., the brother left the apartment building and started to leave the parking lot in car-A. Two officers (officers-3 and 4) stopped the car. Officer-3 asked

¹ Tr. at 24-25, 44-45; GE 1.

² GE 3.

³ *Id.*

⁴ *Id.*

the brother if the fugitive was driving car-A earlier in the day. The brother stated that the fugitive was not with him and he was not at the apartment complex. Officer-3 asked officer-1 to come to the scene to see if the brother was who officer-1 originally saw that morning driving car-A. Officer-1 had arrested the fugitive in the past and confirmed that it was the fugitive, and not the brother, that he observed driving car-A that morning. The brother originally stated that he had not seen the fugitive in several days. He eventually admitted that the fugitive was driving car-A that morning. He stated that Applicant came to the motel where he was staying and told him that undercover police were outside the apartment, and he needed to come and get car-A because the fugitive was hiding in her apartment. He showed the officers the apartment where the fugitive was hiding. It was Applicant's apartment. He told the officers that Applicant and her husband were also in the apartment, and they knew that the police were there. He stated they knew that the fugitive had a felony warrant for his arrest. He told the police that he attempted to lure them away from the scene, in order to allow the fugitive to escape. They hoped that if the police stopped him, the police might think it was the brother who was driving car-A that morning.⁵

The police went to Applicant's apartment. They knocked repeatedly on the door, rang the doorbell, and announced who they were, but nobody answered. They made numerous announcements from outside the apartment with a loudspeaker. The police special weapons and tactics (SWAT) team was called in, and they also made announcements over their loudspeaker. The fugitive eventually called the police on the telephone and told them he was coming out. The police were at the apartment for several hours before the fugitive came out of the apartment. After he was apprehended, he told the police that Applicant and her husband were inside the apartment. The SWAT team continued to make announcements over the loudspeaker, and Applicant came out a short time later. She was arrested. Her husband did not come out of the apartment. Applicant told the police that there was nobody left in the apartment. The police determined that Applicant's husband had a felony warrant from another state for failing to pay child support. The state was contacted and the police were told that the state would not extradite Applicant's husband if he was arrested. They decided not to do anything further about Applicant's husband and they left the scene.⁶

Officer-1 asked the fugitive if he recognized the officer when they passed each other that morning. He stated that he did recognize the officer, and he knew he had a warrant for his arrest. The fugitive asked the officer why they did not go into the apartment and arrest Applicant's husband. The officer told the fugitive it was because the other state would not extradite Applicant's husband. The fugitive stated that he would have come out of the apartment but Applicant's husband told him not to leave.⁷

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

Applicant provided a very different version of events. She gave her side of the story to her facility security officer (FSO), who reported it to the Defense Security Service (DSS) in an incident report dated May 18, 2007. She also described the incident to an investigator from the Office of Personnel Management (OPM) on June 20, 2007; in her response to the SOR; and at her hearing. She has consistently denied knowing that the fugitive had a warrant, any intent to harbor him, and any involvement in a plan for him to elude capture. She was inconsistent in other aspects of the incident.

Applicant told her FSO that the fugitive, who she only knew casually as a friend of a neighbor, came to her apartment to borrow her phone to call his mother to come pick him up. He asked if he could stay at her apartment until his mother arrived. He said he had his brother's car but it hurt too much to drive the standard transmission because he had a broken pelvis. He offered her \$5 in gas money if she would pick up his brother from a nearby location and bring him to the car, which she did. She then took a shower. She did not hear the police come to the door because she was in the shower. After the shower, she heard the police over the loudspeaker and went to open the door, but the fugitive blocked her way. She finally convinced him to call the police, and he left the apartment. She followed the advice of the police negotiator, and left shortly thereafter.⁸

Applicant told the OPM investigator a similar story in her June 2007 interview, except she stated that the fugitive's mother was going to pick Applicant up at the brother's motel after Applicant dropped the car off. Applicant also stated that she took her shower and the police arrived before she went to pick up the brother. The OPM interview was memorialized in a report of investigation (ROI). DOHA sent Applicant a copy of the ROI in an interrogatory and asked her if the ROI accurately reflected the information she provided to the investigator on the day she was interviewed. She was provided the opportunity to explain why the ROI was inaccurate and to add additional information regarding the matters discussed during the interview. She answered that the ROI was accurate and submitted additional information unrelated to the factual details of her arrest.⁹

In her response to the SOR, Applicant stated:

The individual I was accused of harboring was a casual acquaintance with a broken pelvis looking for a ride to the [county] court-house. I did not ask him why he was going to court and he did not tell me he was being chased by police at the time he asked for the favor. I was only interested in the gas money he was going to pay me as compensation for the ride.

Applicant testified essentially similar to her prior statements with some exceptions. She stated that the fugitive offered her gas money to drive him to the courthouse. She also stated that he was waiting on a phone call back from his mother, who might have been able to drive him to court. She stated that she went to the motel in

⁸ GE 4.

⁹ GE 2.

the fugitive's car, car-A, and gave it to the brother, who drove her back to her apartment in car-A. She stated the brother never went into her apartment; he just dropped her off and left. This contradicts the police report that indicated that she and the brother were in her car, car-B, and the brother went into the apartment. She testified that her husband was not in the apartment and that the fugitive was alone in her apartment when she went to give the car to the brother.¹⁰

I did not find Applicant to be a credible witness. To the extent that Applicant's testimony and prior statements varied from the account of events in the police report, I find the facts to be as detailed in the police report. I further find that Applicant provided intentionally false or misleading information to her FSO, to the OPM investigator, in her response to the SOR, and at her hearing.¹¹

The remainder of the allegations against Applicant relate to disputes between Applicant and several landlords, and judgments obtained against her.

SOR ¶ 1.b alleges that Applicant terminated a lease with a realtor in 2005, and a judgment was entered against her in the approximate amount of \$625, which she has satisfied. Applicant admitted that a judgment was entered against her, but denied that she had a lease with the property management company. She had what she felt was a defense to the lawsuit, but she lost the case. She paid the judgment in about 2005.¹²

Applicant terminated a lease with another apartment landlord in 2006. A judgment of \$1,261 was obtained against her. This was alleged in SOR ¶ 1.c. Applicant stated that a maintenance worker at the apartment complex illegally entered her apartment complex and stole some items and more than \$900 in cash. She reported it to the landlord, but the landlord refused to do anything about it. She felt her only recourse was to move out. She owed about \$400 in back rent when she moved, but she felt justified in not paying it because of the money that was stolen from her by the landlord's employee. The judgment has not been satisfied.¹³

Applicant's lease for her next apartment expired in about June 2007. Her landlord chose not to renew the lease, presumably because of the events with the police on May 9, 2007, as described above. The landlord issued an eviction notice in June 2007, notifying Applicant that she had to vacate the apartment. These events were alleged in SOR ¶ 1.d.¹⁴

¹⁰ Tr. at 25-34, 47-53.

¹¹ It was not alleged in the SOR that Applicant provided false information to the FSO or falsified the OPM interview. Applicant's statements will not be used for disqualification purposes. They will be considered in assessing Applicant's credibility; in the application of mitigating conditions; and in evaluating the "whole person."

¹² Tr. at 35, 45; Applicant's response to SOR; GE 2.

¹³ Tr. at 35-37, 45; Applicant's response to SOR; GE 2, 5.

¹⁴ Tr. at 37-39; Applicant's response to SOR; GE 2.

Applicant had a dispute with the landlord of the next apartment where she lived. The landlord obtained a judgment of \$1,024 against her in June 2008. This was alleged in SOR ¶ 1.e. In her response to the SOR, Applicant stated that the judgment resulted from a miscommunication between the landlord and the landlord's son, who acted as the property manager. She stated that she "satisfied the judgment in June 2008." She admitted at the hearing that the judgment was not satisfied. She testified that this apartment was also burglarized. She stated that her documentation for her court case was stolen. She suspected the landlord as the thief. She also indicated that the landlord altered the summons so that she appeared in court the day after the hearing. She admitted that she did not phrase her response to the SOR very well, but she paid what she felt was justified. She never collected her security deposit, so she felt they were even.¹⁵

Applicant stated that she and her current landlord have had no problems. She submitted five letters attesting to her outstanding job performance. She is described as industrious, thorough, well-informed, intuitive, conscientious, responsible, trustworthy, hard-working, and reliable. She is recommended for a security clearance.¹⁶

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised 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 the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial and common-sense 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 avoided drawing inferences grounded on mere speculation or conjecture.

¹⁵ Tr. at 39-42, 45-46; Applicant's response to SOR; GE 2, 5.

¹⁶ Tr. at 43-44; AE A-E.

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 as to obtaining 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 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 Executive Order 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 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’s conduct of harboring a felon, as established by the police report, her arrest, and her charges, is sufficient to raise the above disqualifying conditions.

Four Criminal Conduct mitigating conditions under AG ¶ 32 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 was involved in harboring a felon in May 2007. The charges were eventually dismissed. Applicant has consistently denied her guilt. She indicated that she was unaware that the fugitive was wanted by the police. However, her statements are implausible and inconsistent. She gave false and misleading information to her FSO, to the OPM investigator, and in her response to the SOR; and she knowingly provided false testimony at her hearing. That does not show successful rehabilitation. No mitigating conditions are applicable.

Guideline E, Personal Conduct

The security concern relating to the guideline 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 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 mitigating 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.

It is expected behavior in this society that one will pay his or her just debts. Applicant did not pay two judgments awarded against her. Her conduct as it relates to her unpaid judgments is sufficient to raise AG ¶ 16(e) as a disqualifying condition. The paid judgment and the eviction notice do not raise any disqualifying conditions. SOR ¶¶ 1.b and 1.d are concluded for Applicant.

Applicant's May 2007 criminal activity was alleged under both Guideline J and Guideline E. It is conduct that creates a vulnerability to exploitation, manipulation, and duress. It establishes AG ¶ 16(e) as a disqualifying condition.

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 was dishonest about her criminal conduct on four occasions. No mitigating conditions are applicable to her actions on May 9, 2007, under the same rationale discussed above under the Criminal Conduct guideline.

Applicant provided explanations for why she did not pay the two judgments. However, they are lawful judgments issued by a court. She did not indicate any intent to pay the judgments. The total owed on the judgments does not amount to a large figure. By themselves, the unpaid judgments do not create a security concern. However, when considered with all other evidence, they indicate questionable reliability, trustworthiness, and judgment. No mitigating conditions are applicable to that conduct.

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 the 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 common-sense 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 E 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 service in the Air Force, and her very favorable character evidence. I considered the events of May 2007. Applicant's version of events has been inconsistent and is simply incredible. Without complete candor, it is impossible to find that Applicant is rehabilitated, and that such events are unlikely to recur. Serious doubts remain about Applicant's judgment, honesty, and trustworthiness.

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 has not mitigated 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 E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline J:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge