



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



In the matter of:)	
)	
)	ISCR Case No. 08-02464
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: John B. Glendon, Esquire, Department Counsel
For Applicant: *Pro Se*

April 29, 2009

Decision

HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to classified information is denied.

Applicant submitted her Electronic Questionnaire for Investigations Processing (e-QIP), on November 4, 2005. On October 17, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines J and E. 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 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 acknowledged receipt of the SOR on October 30, 2008. She answered the SOR in writing on November 5, 2008, and requested a hearing before an

administrative judge. DOHA received the request on November 17, 2008. Department Counsel was prepared to proceed on March 2, 2009, and I received the case assignment on March 3, 2009. DOHA issued a notice of hearing on March 9, 2009, and I convened the hearing as scheduled on March 31, 2009. The government offered six exhibits (GE) 1 through 6, which were received and admitted into evidence without objection. Applicant testified on her own behalf. She did not submit any exhibits. The record closed on March 31, 2009. DOHA received the transcript of the hearing (Tr.) on April 10, 2009.

Procedural and Evidentiary Rulings

Notice

Applicant received the hearing notice on March 17, 2009, less than 15 days before the hearing. (Tr. 6.) At the hearing, I advised Applicant of her right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived her right to the notice. (Tr. 8.)

Findings of Fact

In her Answer to the SOR, dated November 5, 2008, Applicant admitted the factual allegations in ¶¶ 1.a-1.e and 2.a of the SOR, with explanations. She denied the factual allegations in ¶ 2.b. of the SOR.¹

Applicant is 39 years old and married. She works as a technical writer for a Department of Defense contractor, a job she has held since July 2005. She received a clearance in January 2007.²

Applicant currently attends a local community college and plans to graduate in December 2009 with an associates degree. She attends church regularly, works for a rescue mission and helps at a soup kitchen. In June 1995, a drunk driver killed her mother in a car accident. As a result, she does advocacy work for Mothers Against Drunk Drivers.³

In 1992 when she was 23 years old, Applicant and two friends drove to a local shopping area. She waited in her car while her two friends entered the store to shop.

¹When SOR allegations are controverted, the government bears the burden of producing evidence sufficient to prove controverted allegations. Directive ¶ E3.1.14. That burden has two components. First, the government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the government must establish a nexus between the existence of the established facts and events and a legitimate security concern. See ISCR Case No. 07-18525 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part).

²GE 1 (e-QIP); Tr. 16, 18.

³Tr. 17-20.

Her two friends shoplifted items from the store, then returned to her car. She drove away, but a witness gave the police her vanity license plate letters. The police arrested her two days later and charged her with theft plus \$300 and conspiracy (SOR ¶ 1.a). She pled guilty and the court sentenced her to one year on probation and community service. The record does not provide information on whether this was a felony or misdemeanor crime.⁴ Immediately after her arrest, Applicant stopped associating with one of these friends, but she still has contact with the other friend. She acknowledged that she was “hanging out” with the wrong people at this time.⁵

In August 1994, Applicant decided to throw a 25th birthday party for herself. She asked her older sister if she could use her credit card to purchase items for her upcoming birthday party. Her sister agreed, provided Applicant paid the debt back quickly. In August and September 1994, Applicant charged \$1,200 on her sister’s credit card. She paid \$200 of these charges. When she did not pay the remainder of the charges, her sister contacted the credit card company and advised that these charges were the result of unauthorized use of the credit card. The credit card company pursued criminal action. In June 1995, just after her mother had been killed, the police issued an arrest warrant for Applicant. She turned herself in to the police on June 21, 1995. After the police booked her on three criminal charges of theft, she appeared before a court commissioner and posted her bond. She was released from the police station sometime after midnight. She does not recall spending the night in jail.⁶

In March 1996, Applicant pled guilty to theft in excess of \$300, a felony. (SOR ¶¶ 1.b and 1.c) The court sentenced her to eight years in jail then suspended the sentence. The court placed her on three years of probation, fined her and directed her to pay restitution, which she did. Applicant complied with the terms of her probation, but sometimes failed to pay the \$25 fee the probation office required her to pay each time she met with her probation officer.⁷

In the fall 1999, Applicant’s stepmother provided her with a check to purchase paint and paint supplies for some painting Applicant intended to do for her father and stepmother. Applicant’s stepmother authorized Applicant to write the check for no more than \$200. Applicant purchased the paint and supplies, but wrote the check for \$300. Applicant retained \$100 for herself, as she believed this was the amount her stepmother intended to pay her for the work. Applicant assumed wrongly. Her stepmother called her for three days, seeking immediate repayment of the \$100. When Applicant did not respond to the calls or immediately repay the money, her stepmother called the police. The police charged Applicant with two counts of theft: less \$300 value; two counts of

⁴The police charged Applicant under State Code Art. 27 §342, which is now State Code, C L §7-104 (revised 2002). Under the revisions, the theft of an item valued at above \$500 is a felony.

⁵GE 3; GE 5; Tr. 22-23.

⁶GE 3; GE 5; Tr. 23-25, 40-41.

⁷Tr. 43-45, 67.

forgery-private documents, and two counts of uttering a false document. Applicant pled guilty to two charges of theft, a misdemeanor offense, and the court *Nolle Prosequi* the remaining charges. (SOR ¶ 1.d) The court sentenced the Applicant to 90 days in jail, which was suspended, placed her on 18 months probation, and fined her \$55. She paid her stepmother the \$100 long before the court hearing.⁸

In December 2003, the court issued a bench warrant for Applicant's arrest for violation of probation related to her 1996 conviction. This arrest related to her failure to pay all the fees required by the Office of Probation and Parole. She appeared at a hearing in January 2004 and paid these monies. The court concluded the proceedings and did not make any findings against Applicant. This arrest is not listed in the SOR.⁹

In February 2007, Applicant left her work site with a computer. She drove in her usual car to a local military base with the intent to take the computer on the base for repairs. She stopped at the entrance gate for a security inspection. When the military personnel opened the trunk of her car, they found a purse with items in a different name than hers (purse belonged to her aunt), and a white powder, which was crushed ice melt. Based on finding these items in her trunk and a concern the white powder was an illegal drug, the military personnel conducted a full search of her car. They found a plastic bag with a brown leafy substance which was identified as marijuana. Applicant denies any knowledge of the marijuana. The record lacks evidence that she uses marijuana, but she admitted at the hearing that family members do smoke marijuana and that these family members ride in her car.¹⁰

The military police arrested Applicant and charged her with possession of a controlled substance with intent to use. She immediately reported her arrest to her supervisor and security officer. Applicant pled guilty to possession of drug paraphernalia, a misdemeanor offense under state law, on the recommendation of her attorney, and to put the matter behind her. (SOR ¶ 1.e) The court placed her on probation for six months, fined her \$250, including costs, and ordered 20 hours of community service. Applicant complied with the terms of her sentence. She acknowledged that she knew her guilty plea could adversely impact her security clearance.¹¹

Applicant completed her e-QIP on November 4, 2005. She listed her felony arrest in 1995, but did not list her misdemeanor theft arrest in 1999 and her probation violation

⁸GE 3; GE 5; Tr. 26-27, 52, 55-58, 69.

⁹GE 3; Tr. 53-55. At the hearing, Department Counsel referenced another possible arrest for violation of her probation following the 1992 arrest and sentencing, but the record contains no documentation regarding this arrest. Since it is not listed in the SOR, no adverse inference will be made against Applicant based on this issue.

¹⁰GE 2; Tr. 27-32, 59-62.

¹¹*Id.*

arrest in 2003. At the hearing, she stated she did not know why she did not list these arrests. She thinks she may have thought she needed only to list her felony arrest or that she misunderstood the question. She denies deliberately falsifying her answers regarding her past criminal conduct.¹²

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 useful 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 over-arching 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.

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 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

¹²GE 1; Tr. 33, 50,

permissible extrapolation as to 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

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining 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.”

Under AG ¶ 31, the following conditions could raise a security concern and may be disqualifying in this case:

- (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.

Although she was not arrested in 1994, Applicant has been arrested five times between 1992 and 2007. With the exception of her 2003 arrest for violation of probation, Applicant has pled guilty in each case to one or more of the charges against her. These disqualifying conditions raise a security concern in this case.

Under AG ¶ 32, the Applicant may mitigate the government's security concerns through the following conditions:

- (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.

The last arrest for theft occurred nearly 10 years ago, and was the result of a family issue. Applicant does not deny the conduct which led to her arrests for theft on three separate occasions. Both her arrest in 1995 and 1999 occurred because she either failed to honor her obligations with a family member or took advantage of a situation with a family member. Since her 1999 arrest, she has improved her relationship with her immediate family members. She has not associated with one of the friends who shoplifted in 1992. She remains friends with the other individual, but has not been involved in any criminal activity with this individual. AG ¶¶ 32(a) and 32(d) have partial application with respect to SOR allegations 1.a, 1.c, and 1.d. SOR allegation 1.b is found in favor of Applicant because the criminal charge referenced is part of the criminal case contained in SOR allegation 1.c.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

Under AG ¶ 16, the following conditions could raise a security concern in this case and may be disqualifying:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(3) a pattern of dishonesty or rule violations; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

For AG ¶ 16(a) to apply, Applicant's omission must be deliberate. The government established that Applicant omitted a material fact from her SF-86 when she answered "no" to the question about other arrests not previously listed which occurred within seven years of completing her e-QIP in November 2005. Applicant did not list her arrest in 1999.¹³ This information is material to the evaluation of Applicant's trustworthiness to hold a security clearance and to her honesty. In her response and at the hearing, she denies, however, that she had an intent to hide information about her these arrests. When a falsification allegation is controverted, the government has the burden of proving the omission was deliberate. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.¹⁴ For DC ¶ 16 (a) to apply, the government must establish that Applicant's omission, concealment or falsification in her answer was deliberate.

Applicant denied intentionally leaving out information about her arrests in 1999 as she knew she needed to be truthful. Even though she had knowledge of these arrests, Applicant's failure to answer "yes" in light of this knowledge is not proof that she intentionally falsified her e-QIP. Applicant, however, could not explain why she failed to list these arrests. She guessed that maybe because she misunderstood the question, even though she writes for a living, or did not believe she needed to list arrests for misdemeanor offenses. I find her lack of a credible explanation indicative of her intent to keep this information from the government. The government has established that Applicant intended to hide these arrests in an effort to minimize her past criminal conduct. Given her involvement with the criminal justice system over a period of 15 years, the government has established a pattern of rules violations which resulted in criminal arrests and convictions. The disqualifying conditions in AG ¶¶ 16(a) and 16(d)(3) apply.

AG ¶ 17 provides conditions that could mitigate security concerns. Of the listed conditions, the following may be applicable in this case:

¹³Although she did not list her 2003 arrest, this issue is not raised in the SOR.

¹⁴See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

(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 acknowledged her additional arrests in response to the SOR and discussed the omitted arrests at the hearing. She immediately contacted her supervisor and security officer when she was arrested in 2007, which shows her understanding that she must report negative information. Although she has acknowledged her arrests, her recent arrest for possession of marijuana indicates she has not yet taken all the steps necessary to ensure that she will not again be involved with the criminal justice system. Her failure to be candid on her e-QIP cannot be mitigated because a recent falsification of a security clearance application is too recent and serious to be mitigated at this time. Falsification of security documents is a fundamental breach that cuts to the heart of reliability and trustworthiness. She has not mitigated the government's security concerns under Guideline E.

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. The decision to grant or deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is attending college with hopes that she will graduate in December 2009 with an Associate of Arts degree. She plans to continue her college education. She performs volunteer work for several agencies and regularly attends church. These activities are very positive in her life. Her continued friendship with one individual involved in her 1992 arrest is not of concern as she and this friend have not been involved in subsequent criminal activity. She has repaired her relationship her family in more recent years. She, however, continues to show poor judgment when she allows family members, whom she knows to use marijuana, in her car. Her family ties are the reason for many of her problems in the past and possibly more recently. She has made decisions which reflect poor judgment not only in the past, but over a substantial period of time. She decided to plead guilty to possession of drug paraphernalia, knowing it could impact her security clearance eligibility. By pleading guilty to possession of drug paraphernalia, she acknowledges she violated the law while holding a security clearance. While she is trying to improve her life, she has not demonstrated that she has taken all the necessary steps to show that the government should not have any concerns about granting her a security clearance.

Overall, the record evidence leaves me with questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from her personal conduct and criminal conduct.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	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.

MARY E. HENRY
Administrative Judge