



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



In the matter of:)
)
-----) ISCR Case No. 08-03726
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Robert E. Coacher, Esquire
For Applicant: *Pro Se*

June 23, 2009

Decision

ABLARD, Charles D., Administrative Judge:

Applicant stole books on a dozen occasions from a bookstore from February to July 2006. After he was arrested in July 2006, he fully disclosed his conduct, received counseling, paid restitution, successfully completed his probation, and did everything reasonable to establish his rehabilitation. Applicant mitigated security concerns arising from personal conduct and criminal conduct. Eligibility for access to classified information is granted.

Statement of the Case

On August 16, 2006, Applicant completed a security clearance application (EPSQ version) (Government Exhibit (GE) 1). On October 29, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, are effective within the Department of Defense for SORs issued after September 1, 2006.

The SOR alleges security concerns under Guidelines J (Criminal Conduct) and E (Personal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On November 20, 2008, Applicant responded to the SOR allegations, and requested a hearing before an administrative judge (GE 8). Department Counsel was prepared to proceed on March 25, 2009. On April 3, 2009, the case was assigned to me. On April 7, 2009, DOHA issued a hearing notice (GE 6). The hearing was held on April 20, 2009. At the hearing, Applicant affirmatively waived the 15-day notice requirement in the Directive (Transcript (Tr. 8-9)). Department Counsel offered five exhibits (GE 1-5) (Transcript (Tr.) 13-14), and Applicant offered 14 exhibits (Tr. 16-22; Applicant Exhibits (AE) A-M2). There were no objections, and I admitted GE 1-5 (Tr. 14) and AE A-M2 (Tr. 23). Additionally, I admitted the Notice of Hearing, SOR, and response to the SOR (GE 6-8). On April 27, 2009, I received three exhibits from Applicant. I received the transcript on April 28, 2009. Department Counsel did not object to my consideration of these three exhibits and I admitted them into evidence (AE N-P).

Findings of Fact¹

In his SOR response, Applicant admitted all of the SOR allegations (GE 8). His admissions are accepted as findings of fact.

Applicant is 39 years old and has worked for a government contractor as an engineer since 1997 (Tr. 30, 37). Applicant married in 1993 and his three children are ages 10, six and 18 months (Tr. 35; GE 1). He and his son enjoy scouting activities (Tr. 36). Applicant said he never cheated in school, always pays his bills, and led an honorable life (Tr. 31). Applicant has a bachelor's degree in behavioral science with a double major in math and English (Tr. 32-33). He has a master's degree in mathematics (Tr. 33). He received excellent grades in college and in his master's degree program (AE J, K). Applicant is certified to teach and did teach secondary-level mathematics and English for 18 months (Tr. 33-34). His security clearance was suspended on July 20, 2006 (Tr. 39).

Criminal conduct and personal conduct

On July 19, 2006, Applicant was arrested and charged with theft over \$50 but less than \$500 for shoplifting from a bookstore (GE 5). He was released on bail the evening of his arrest (GE 2). This is a Class B Misdemeanor (GE 5). He was caught carrying three shopping bags full of books (about 20 books) out of the store (Tr. 40; GE 2). When he was caught, it was the largest amount of books he had ever stolen or

¹Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

attempted to steal from a store (Tr. 40). On one previous occasion, he took a grocery sack full of books from a store; however, on that occasion he was not caught (Tr. 42). He pleaded nolo contendere or no contest, and the court deferred adjudication (GE 5). He was fined \$500 plus court costs, required to pay fees of \$75, and placed on community supervision for nine months starting September 5, 2006 (SOR ¶¶ 1.a, 2.a; Tr. 31; GE 5, 9). The community supervision also involved payment of a monthly fee (GE 5). He completed about 20 hours of community service (GE 2).

On August 18, 2006, Applicant described his arrest and admitted the theft on his security clearance application (GE 1). He also apologized and noted his expectation that he would be sentenced on September 5, 2006 (GE 1).

In March 2007, an Office of Personnel Management (OPM) investigator interviewed Applicant (Tr. 24; GE 2). Applicant admitted that he stole books from three book stores from the same chain of book stores on approximately 10 different occasions from February 2006 to June 2006 without getting caught (SOR ¶¶ 1.b, 2.a; Tr. 27; GE 9). Applicant sometimes took as much as a shopping bag full of books on one occasion (Tr. 27). On other occasions he may have taken a single book valued at \$2-\$3 (GE 2). He told the OPM investigator that he doubted that “he would ever have the nerve to tell [the bookstore] about the other stolen books.” (Tr. 26; GE 2 at 5). At the time of the hearing, he had not told his children about the theft (Tr. 27). In July 2006 after he was caught, he told his wife about the thefts (Tr. 28). He also talked to his parents about it (Tr. 29). The day after he was arrested for theft, he reported the arrest to his security officer and his manager (Tr. 39; AE D).

As part of his probation, Applicant attended an anti-theft class, which was a four-hour course (Tr. 28). The class was not required by the court but he attended it because his attorney advised him he should complete a course of this nature (Tr. 28). Applicant sent a letter to each of the three bookstores (Tr. 25; AE A-C). However, at the time of his hearing, he had not revealed the full scope of his thefts because he was worried about potential criminal proceedings (Tr. 30, 32). In the summer of 2008, he sent the bookstore chain a \$250 donation (Tr. 25).

Over the last three years he has thought about the thefts and he could not explain why he committed the thefts (Tr. 29). In 2006, his annual income was about \$68,000 and his current income is \$70,000 (Tr. 34-35). He was not under any financial strain when he committed the thefts (Tr. 35). He knew what he did was wrong (Tr. 29).

After his hearing, Applicant provided his own letter responding to two areas of concern raised by myself and Department Counsel (AE P). Those concerns focused on Applicant’s failure to fully admit the scope of his thefts to the victim, the bookstore and to his children (AE P).

Applicant provided a handwritten letter from his nine-year-old son (AE N). His son’s letter indicated Applicant admitted the theft of the books to him, and was very sorry for what he did (AE N).

On April 24, 2009, Applicant sent a three-page, certified, return receipt letter to the management of the bookstore chain that was a victim of his larcenies (AE O). He described his efforts to apologize and make restitution for his thefts (AE O). In June 2007 (AE A), and November 2007, he sent letters of apology (AE O). He then discussed the theft and apology with the manager of one bookstore, who accepted his apology (GE 2). In July 2008, he sent another letter of apology and a \$250 check (AE B), which the bookstore donated to charity (AE O). In his April 24, 2009, letter he explained that prior to being caught he had stolen from the bookstore about a dozen times (AE O). He provided a detailed description of his misconduct, including a list of the books he took (AE O). He donated the stolen books to charity in 2006, and his letter offered to make additional restitution, if the bookstore so desired (AE O).

Applicant has fully admitted his misconduct. He was very ashamed of his conduct. He has repeatedly apologized for stealing books to the victim, to his family and to his government. He has shown his heart-felt remorse in his oral and written communications. His demeanor was very sincere, candid and contrite.

Applicant's evaluations described his extraordinary diligence, attention to detail, and responsibility (AE G). He has strong organization skills and is an efficient problem solver. He either met or exceeded all performance standards (AE G). The only flaw in his personnel records relates to his arrest for shoplifting (AE G).

Applicant's manager has supervised him for the last five years (AE E). He is reliable, solid, productive and honest (AE E).

Another manager has supervised Applicant for several years (AE F). He described Applicant as diligent, trustworthy, reliable, forthcoming and committed to his company and the United States. This manager recommended reinstatement of Applicant's security clearance (AE F).

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant Applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the Applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An

administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned." See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the Applicant that may disqualify the Applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an Applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the Applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An Applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concern is under Guidelines J (criminal conduct) and E (personal conduct) with respect to the allegations set forth in the SOR.

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.”

AG ¶ 31 describes two conditions that could raise a security concern and may be disqualifying, ¶ 31(a), “a single serious crime or multiple lesser offenses,” and ¶ 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.”

Applicant admitted that he knowingly and deliberately stole books from a bookstore on about 12 occasions from February to June 2006. These thefts were misdemeanors, rather than felonies, because the value of the books stolen was less than \$500. This admission was re-stated to an OPM investigator, in his SOR response, at his hearing, and in a post-hearing letter to the victim. AG ¶¶ 31(a) and 31(b) are established.

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

(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.

AG ¶¶ 32(b) and 32(c) do not apply. He admitted the thefts and was not pressured to commit the thefts. The thefts occurred about three years ago, which is somewhat recent. Because there are about a dozen criminal offenses, they are not “isolated.”

However, the thefts do not continue to cast doubt on Applicant's current reliability, trustworthiness and good judgment because he has been rehabilitated. The police only had evidence of one theft. He admitted a dozen thefts of books. He expressed his remorse, has continued to receive job training, has a good employment record and some community involvement in the scouts. He apologized to the victim, his family and the government. Criminal activity has not recurred. He eventually accepted

full responsibility for his misconduct. No other employment problems have surfaced. His post-offense behavior is sufficient to fully mitigate the misconduct in this case as described in the SOR. AG ¶¶ 32(a) and 32(d) apply.

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. . . .

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying:

(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:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations;

(4) evidence of significant misuse of Government or other employer's time or resources; 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.

Applicant engaged in a series of misdemeanor-level thefts from February to July 2006 at a bookstore. Such thefts are rule violations and show a pattern of dishonesty.

They show untrustworthy or unreliable behavior. AG ¶ 16(d)(3) applies. Shoplifting is very damaging to one's personal, professional and community standing. Applicant was very reluctant to disclose to his family his thefts. It is clear that he did not want his neighbors and acquaintances in the community to know about his conduct. AG ¶ 16(e)(1) applies.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

AG ¶¶ 17(a), 17(b), 17(f) and 17(g) do not apply. The personal conduct concern does not relate to falsification of security documents. The allegations of theft are substantiated and his decision was not influenced by his associations with others.

AG ¶ 17(c), 17(d) and 17(e) all apply because "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." He is sincerely remorseful about his

misconduct, and it is very unlikely to recur. He acknowledged the behavior and apologized to the victim orally and in writing. He confessed a dozen larcenies to an OPM investigator, and followed up with admitting the multiple thefts to the victim, in his SOR response and at his hearing. Disclosure has reduced his vulnerability to exploitation, manipulation, or duress. He paid restitution, even though it was not required by the court. He completed his probation. He paid his fine. He disclosed his conduct to security officials and his family. His employer knows about the arrest (his supervisor noted his conduct in an evaluation). He does not have a conviction because he received deferred adjudication. He has done everything that he reasonably can do to establish his rehabilitation.

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 commonsense judgment based upon careful consideration of the guidelines and the whole person concept. 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.

There is some evidence supporting continued revocation of Applicant's clearance. He was a mature adult when he committed approximately a dozen misdemeanor-level thefts. Applicant had a problem with shoplifting books from a bookstore from February to July 2006. He was caught when his theft became particularly flagrant. He stole three shopping bags of books and was arrested. He was unable to explain why he was stealing books. His decisions to steal were knowledgeable, voluntary, and intentional. He was sufficiently mature to be fully responsible for his conduct. These thefts show a lack of judgment and a deliberate failure to abide by the law. His thefts show a lack of integrity and such conduct raises a serious security concern.

The evidence supporting approval of Applicant's clearance is more substantial. He pleaded no contest to his theft on July 19, 2006. He received deferred adjudication, and nine months of probation. He completed four hours of counseling and about 20

hours of community service. He paid his fine and court costs. He admitted his theft on his security clearance application. When an OPM investigator questioned Applicant, he admitted a dozen thefts of books from the same chain of bookstores. Since July 19, 2006, he has not committed any more thefts. He frankly and candidly admitted his thefts to his family and to the victim. He subsequently admitted his thefts in his response to DOHA interrogatories and his SOR response. He knows the consequences of criminal activity. Applicant contributes to his company and the Department of Defense. There is no evidence at work of any other disciplinary problems. There is no evidence of disloyalty or that he would intentionally violate national security. His character and good work performance show his responsibility, rehabilitation and mitigation. His supervisors evidently support him or he would not have been able to retain his employment after his security clearance was called into question. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has mitigated the security concerns pertaining to criminal conduct and personal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole person factors and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has mitigated and overcome the government's case. For the reasons stated, I conclude he is eligible for 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:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's eligibility for a security clearance. Eligibility for a security clearance is granted.

CHARLES D. ABLARD
Administrative Judge