



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



In the matter of:)	
)	
-----)	ISCR Case No. 09-03251
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

November 15, 2010

Decision

ROSS, Wilford H., Administrative Judge:

Applicant submitted her Electronic Questionnaires for Investigations Processing (e-QIP), on February 10, 2009. (Government Exhibit 1.) On September 4, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J (Criminal Activity), E (Personal Conduct), and F (Financial Considerations) about Applicant. 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on October 5, 2009, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on November 2, 2009. This case was assigned to me on November 5, 2009. DOHA issued a notice of hearing on December 16, 2009, and I convened the hearing as scheduled on January 28, 2010. The Government offered Government Exhibits 1

through 8, which were received without objection. Applicant testified and submitted Applicant Exhibits A through D, which were also received without objection. The record was left open to allow Applicant to submit additional information. On February 10, 2010, Applicant submitted Applicant Exhibit E, which was received without objection. DOHA received the transcript of the hearing on February 12, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

Applicant is 35 and divorced. She is employed by a defense contractor and seeks to obtain a security clearance in connection with her employment in the defense industry. Applicant admits the allegations in Paragraphs 1 and 2 of the SOR. Those admissions are deemed findings of fact. She denies the allegations under Paragraph 3.

Paragraph 1 (Guideline J, Criminal Conduct)

The Government alleges in this paragraph that the Applicant is ineligible for clearance because she has engaged in criminal conduct.

1.a. Between January 2006 and September 2007 Applicant stole approximately \$8,000 of cash and merchandise from her employer, the Army and Air Force Exchange Service (AAFES). Applicant testified that she stole the money and items in part because of some events that happened in her personal life, including the deaths of her father and brother. She testified:

And I just got depressed and I did what I did because I didn't know where my life was headed. I just said you know what, maybe just - - if I just go to jail, stay there, it's an easy life, so I didn't care if I got caught. I didn't need the money, you know. I had two jobs. I didn't need the money. I just did it and once I did it, it became a habit and I wanted to stop. I didn't know how to stop. (Transcript at 49.)

Her theft was uncovered by loss prevention at AAFES. She was questioned and admitted everything. Military police authorities were not called in. AAFES did not demand Applicant's resignation, nor did they terminate her. However, after several weeks of leave, Applicant made the voluntary decision to resign her position. At the time she left, Applicant had been successfully employed by AAFES for 13 years at various locations around the world. (Transcript at 36, 49-50; Government Exhibit 4.)

Applicant was given, and accepted, the opportunity to pay AAFES back for the money and goods that she stole, an amount determined to be \$8,320. She is supposed to pay AAFES \$173.34 a month. Between October 2007 and September 2009 the Applicant made five payments totaling \$1,520.57. She still owes \$6,779.43. Applicant had not been able to make any other payments as of the date of the hearing because of

other financial issues that came up, some connected to deaths in her family. She stated repeatedly her desire to repay AAFES as soon as she is able to do so. (Transcript at 36-38, 45, 66-68.)

Paragraph 2 (Guideline E, Personal Conduct)

The Government alleges in this paragraph that the Applicant has engaged in personal conduct which shows questionable judgment, lack of candor or dishonesty.

2.a. The facts set forth under Paragraph 1, above, will be considered under this Guideline as well.

2.b. Applicant filled out her Electronic Questionnaires for Investigations Processing (e-QIP) on February 10, 2009. (Government Exhibit 1.) Question 13a. of Government Exhibit 1 asks the Applicant to describe her employment activities going back seven years. She sets forth work for AAFES up to May 2005, and her full-time employer, who was not AAFES, from May 2005 to April 2008. She does not set forth her work at AAFES during the time she stole money.

However, question 13c of the same exhibit asks whether, in the last seven years, Applicant had, "Left a job by mutual agreement following charges or allegations of misconduct." Applicant answered yes to this statement, gives the date of occurrence as September 2007, gives the employer as AAFES, and stated:

I left by mutual agreement following allegations of misconduct. I was engaged in criminal activity (taking merchandise) and left because I felt as if I didn't deserve to work there. It was dealt internally with loss prevention and neither CID or Military Police were involved. I am now in the process of making payments to AAFES for the lost (*sic*) and both AAFES and I had come to an agreement in the end. It was the best decision for both my supervisor and I.

Applicant testified that she thought the questionnaire was complete and that she had included all the locations and times where she worked for AAFES. (Transcript at 31-36; Government Exhibit 4.) From all available evidence, it appears that Applicant's failure to put AAFES down as her place of employment on question 13a was a simple mistake, and not done with the intent to deceive. The Government was put on notice of Applicant's employment with AAFES, the date of it, and the reason it ended, by her other answers. This allegation is found for the Applicant.

Paragraph 3 (Guideline F, Financial Considerations)

The Government alleges that Applicant is ineligible for clearance because she is financially overextended and therefore at risk of having to engage in illegal acts to generate funds.

3.a. As set forth above under allegation 1.a., Applicant has made five payments towards her indebtedness to AAFES.

3.b. Applicant paid off the \$627.01 she owed in Federal back taxes in July 2009. (Transcript at 40-41; Applicant Exhibit A.)

Mitigation

Applicant submitted letters of recommendation from her former employer, current supervisor, fellow employee, and her pastor. (Applicant Exhibits C, D and E.) She is described as “a great asset,” a person who has “maintained high moral standards,” and “a sincere and hardworking individual.”

Her pastor, who has counseled her both before and after the AAFES incident, wrote a letter on Applicant’s behalf. He states that she has progressed and, if granted a clearance, she “will uphold the highest caliber of helping to insure protection of our National Security.” (Applicant Exhibit E at 3.)

Policies

When evaluating an Applicant’s suitability for a security clearance, the Administrative Judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must 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, 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 commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision. In addition, the Administrative Judge may also rely on his own common sense, as well as his knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “Any 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, and 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 about potential, rather than actual, risk of compromise of classified information.

Finally, as emphasized by President Eisenhower in Section 7 of Executive Order 10865, "Any determination under this order adverse to an applicant shall be a determination 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

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him or her a security clearance.

In this case the Government has met its initial burden of proving by substantial evidence that the Applicant has engaged in criminal conduct, personal conduct and has financial difficulties, which may affect her ability to safeguard classified information. The Applicant, on the other hand, has successfully mitigated the Government's case.

Paragraph 1 (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 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 was involved in a serious case of theft from her employer, AAFES. Her conduct occurred over a prolonged period, well over a year and half. It also involved a great deal of cash and merchandise, found to be over \$8,000.

Under the Criminal Conduct guideline, the following Disqualifying Conditions are applicable. AG ¶ 31.(a) “a single serious crime or multiple lesser offenses.” AG ¶ 31.(c) “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.”

After considering the evidence in the record, I find that the following applicable Mitigating Conditions under Criminal Conduct apply to this case. AG ¶ 32.(a) states it may be mitigating where, “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.” In addition, AG ¶ 32.(d) states that it can be mitigating where, “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’s misconduct happened over three years ago, and was at least in part brought about by her depression over the deaths in her family, and other issues. She admitted the thefts when confronted and is paying AAFES back. In her actions and testimony she shows sincere remorse over her conduct. Applicant has a good employment record and has successfully mitigated the security significance of this conduct. Paragraph 1 is found for the Applicant.

Paragraph 2 (Guideline E, Personal Conduct)

The security concern relating to Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty or unwillingness to comply with rules or regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information.

The Applicant’s conduct set forth under Paragraph 1, brings into play disqualifying condition ¶ 16(c) under Guideline E:

credible adverse information in several adjudicative areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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.

The following mitigating conditions under Guideline E ¶ 17 apply to her conduct:

AG ¶ 17(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, and

AG ¶ 17(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.

For the same reasons that Applicant established mitigation under Paragraph 1, discussed above, she met her burden with respect to this paragraph as well. Based on her testimony, and the available evidence, it is clear that her misconduct was singular in nature, brought about by family pressures, and will not recur. She has obtained counseling from her pastor, and taken positive steps to make sure that the conduct will not recur. Paragraph 2 is found for the Applicant.

Paragraph 3 (Guideline F, Financial Considerations)

The security concern for Financial Considerations is set out in AG ¶ 18:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly under AG ¶ 19(c), "a history of not meeting financial obligations" may raise security concerns. Applicant, by her own admission, owes over \$6,000 to AAFES. The evidence is sufficient to raise these potentially disqualifying conditions.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where "the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment."

As stated above, Applicant's primary remaining debt is owed to AAFES for her misconduct. The evidence shows that the conduct is very unlikely to recur and she currently is reliable, trustworthy and shows good judgment. In addition, the deaths in her

family made it very difficult for her to make her payments in a continuous manner. However, the evidence shows not only a sincere desire to make the payments, but the fact that she has made the equivalent of nine monthly payments of \$173.34.

As the Appeal Board has stated, “An applicant is not required to show that she has completely paid off her indebtedness, only that she has established a reasonable plan to resolve her debts and has taken significant actions to implement that plan.”¹

Applicant has initiated a good-faith effort to pay off her largest debt. Accordingly, AG ¶ 20(d) is applicable. Finally, I find that “there are clear indications that the problem is being resolved or is under control,” as required by AG ¶ 20(c). Paragraph 3 is found for the Applicant.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant stole from her employer a considerable amount of money and goods over a long time. She is paying the money back. The actions took place three years ago and she has shown good judgment since then, and expresses not only extreme remorse, but a credible intent not to engage in such conduct in the future. Her employers and her pastor strongly recommend that she be found eligible for a position of trust.

Applicant’s conduct was serious, but there is considerable evidence of rehabilitation. Based on the state of the record, I find that there have been permanent

¹ISCR Case No. 06-12930 at 2 (App. Bd. Mar. 17, 2008) (quoting ISCR Case No. 04-09684 at 2-3 (App. Bd. Jul. 6, 2006)).

behavioral changes under AG ¶ 2(a)(6). Accordingly, at the present time, I find that there is no potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); and that there is not a high likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, the record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from her criminal conduct, personal conduct, and financial situation. On balance, I conclude that Applicant has successfully overcome the Government's case opposing her request for a DoD security clearance.

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 THE APPLICANT
Subparagraph 1.a.:	For the Applicant
Paragraph 2, Guideline E:	FOR THE APPLICANT
Subparagraph 2.a.:	For the Applicant
Subparagraph 2.b.:	For the Applicant
Paragraph 3, Guideline F:	FOR THE APPLICANT
Subparagraph 3.a.:	For the Applicant
Subparagraph 3.b.:	For the Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS
Administrative Judge