



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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SSN: -----) ISCR Case No. 09-04748
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Applicant for Security Clearance)

Appearances

For Government: Richard A. Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

August 24, 2010

Decision

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and transcript, Applicant's request for a security clearance is denied.

On March 17, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for her job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a set of interrogatories¹ to clarify or augment potentially disqualifying information in her background. After reviewing the results of the background investigation and Applicant's responses to the interrogatories, DOHA adjudicators were unable to make a preliminary affirmative finding² that it is clearly consistent with the

¹ Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

national interest to grant Applicant's request for access to classified information. On January 13, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which, if proven, raise security concerns addressed in the adjudicative guidelines (AG)³ for criminal conduct (Guideline J) and financial considerations (Guideline F).

Applicant timely answered the SOR and requested a hearing. The case was assigned to me on April 1, 2010. Pursuant to a Notice of Hearing issued on April 6, 2010, I convened a hearing in this matter on April 29, 2010. The parties appeared as scheduled. The Government presented eight exhibits that were admitted without objection as Government's Exhibits (Gx.) 1 - 8. Applicant testified on her own behalf, and submitted four documents that were admitted without objection as Applicant's Exhibits (Ax.) A - D. I left the record open after the hearing to give Applicant time to submit additional relevant information. DOHA received a transcript (Tr.) of the hearing on May 7, 2010. The record closed on May 20, 2010, when I received Applicant's post-hearing submission, which is included in the record without objection as Ax. E.

Findings of Fact

Under Guideline J, the Government alleged that, in 1992, Applicant was charged with two counts of fraud by insufficient funds checks (SOR 1.a); that in February 2007, she was arrested and charged with three counts of negotiating worthless checks, the charges were nolle prosequi when she paid restitution (SOR 1.b); that in February 2007, she was also arrested and charged with second degree theft by taking, a felony, of which she was convicted and sentenced to three years in jail, which was suspended. Further, it was alleged that she was fined, assessed court costs, placed on two years probation, and ordered to pay restitution. As of March 18, 2009, she allegedly had not made restitution and her probation was extended until 2012 (SOR 1.c). Finally, under Guideline J, the Government alleged that Applicant was arrested and charged in 2008 with domestic violence, a charge that was later nolle prosequi.

Under Guideline F, the Government alleged as a financial consideration the conduct alleged in SOR 1.a - 1.c (SOR 2.a). Applicant admitted all of the allegations in the SOR. Applicant's admissions are incorporated in my findings of fact. Having reviewed Applicant's response to the SOR, the transcript, and exhibits, I make the following additional findings of relevant fact.

Applicant is 45 years old and has been employed since February 2009 as an integration technician for a defense contractor. She requires a security clearance primarily for access to facilities at work. (Gx. 1; Tr. 67 - 68) Applicant and her husband have been married since May 1988. They have two children together (now ages 21 and 19), and they are guardians her friend's two children (ages 12 and 13).

³ The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006). Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

Applicant avers that her husband and she have not shared their finances as most married people do. He uses his money for his needs and she uses her money for hers. (Tr. 75 - 76) As a result, Applicant has experienced financial difficulties over the past 15 years or so. At least one car was repossessed, and several unpaid bills were satisfied through involuntary wage garnishments. She incurred debts when she had to pay for her children's medical needs while she held jobs that offered no medical insurance benefits. She also has had to help her mother financially when her mother became ill, oftentimes taking time from work without pay for her mother's care. She volunteered in 2005 to raise her friend's children after her own children were grown, because her friend could not responsibly care for them. Applicant also testified that she is now paying her husband's car note as well as her own.

Although Applicant is currently making ends meet, she has, in the past, engaged in several instances of financial fraud because she did not have enough money. In 1992, she was charged with two counts of issuing checks with insufficient funds. In February 2007, she was charged with three counts of negotiating worthless checks. The charges were not prosecuted after she made restitution; however, she knew when she wrote the checks that she did not have enough money in her account to cover them. Applicant currently meets her present obligations each month (Ax. D), but she has very little remaining after expenses. (Tr. 50; Gx. 2; Gx, 3)

In August 2003, Applicant was laid off from her job as an assembly solderer. She testified that she was unemployed for a year (Tr. 56 - 57), but her e-QIP reflects that she was employed as an electronics technician from August 2003 until October 2004, when she left for a better job. (Gx. 1) What is not in doubt is that Applicant applied for state unemployment benefits when she was laid off in August 2003. She received about \$200 weekly for about eight weeks. Applicant never advised the relevant state agency that she had found employment. The state notified her that she was required to repay the unemployment benefits she received, but she never acted to resolve the debt. (Tr. 59 - 60)

In February 2007, Applicant went to the courthouse to answer for the worthless check charges, discussed above. She was arrested and charged with second degree theft of property, a felony, for taking and not repaying state unemployment benefits. She pleaded guilty and was sentenced to three years in jail, which was suspended. She was assessed fines and court costs, placed on two years probation, and ordered to repay the unemployment benefits she had taken from the state while employed. The total amount Applicant was required to pay was \$3,175. Of that amount, \$1,693 was for the unemployment benefits she received. (Ax. E) After sentencing, she agreed to pay at least \$20 each month on that amount. (Tr. 62)

In March 2009, Applicant's probation was extended for three years because she had failed to make restitution to the state as ordered. Applicant acknowledged that she made only four or five of the required monthly payments. (Tr. 63) Of the amount due on the state unemployment benefits, she still owes about \$690; however, as of May 19, 2010, Applicant still owes \$2,142 for the entire court-ordered payment. (Ax. E)

On November 23, 2008, Applicant violated her probation when she was arrested for domestic violence assault. She and a friend, who is also a co-worker, got into a fight at the friend's house and Applicant hit her friend in the head with a shower rod. The charge was not prosecuted because the fight was determined to be a case of mutual affray. However, Applicant spent 10 days in jail because of the probation violation. (Gx. 3; Tr. 51)

Applicant has a good reputation at work. Her supervisor recently promoted her "because she consistently meets and often exceeds her job requirements." (Ax. B) Applicant is known for her enthusiasm, reliability, dedication, and willingness to help others. Applicant is also active in community volunteer projects and charity fund-raising efforts. (Ax. E)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁴ for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁵ and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole-person" concept, those factors are:

- (1) The nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ Directive. 6.3.

security clearance, an applicant bears a heavy burden of persuasion.⁶ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government.⁷

Analysis

Criminal Conduct

The Government presented information sufficient to support the allegations in SOR ¶¶ 1.b - 1.d. The facts established by the Government’s information and Applicant’s admissions are sufficient to support the allegations in SOR 1.a - 1.d. Between 1992 and 2008, Applicant was charged with several counts of unlawfully passing bad checks and fraudulently taking state money by false pretenses. She was also charged with assault, although that charge was dismissed for lack of evidence. Finally, in 2007, she entered into a plea agreement, whereby she pleaded guilty to taking state unemployment benefits and agreed to make restitution, in exchange for which the state suspended a three-year jail sentence. Three years later, as of her hearing in this matter, Applicant has repaid only about 30% of the court-ordered restitution. In March 2009, her probation was extended until at least 2012. All of the foregoing raises a security concern that is expressed at AG ¶ 30 as follows:

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.

More specifically, available information requires application of the disqualifying conditions at 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*); AG ¶ 31(d) (*individual is currently on parole or probation*); and AG ¶ 31(e) (*violation of parole or probation, or failure to complete a court-mandated rehabilitation program*).

I have also considered the potential applicability of the mitigating conditions listed under AG ¶ 32. None apply. The financial conditions that Applicant has experienced for the past 15 years, and which have motivated her criminal conduct, have not changed. There is no reason to think that she will not resort to similar criminal conduct in the future should she experience further financial difficulty. Additionally, given her lack of progress in making court-ordered restitution since 2007, it is likely her probation will continue for at least another two years. Her criminal conduct must be considered as

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

recent and ongoing, and the information she presented does not clearly show rehabilitation or changed circumstances. Accordingly, Applicant has failed to mitigate the security concerns about her criminal conduct.

Financial

The security concern about Applicant's finances, as stated in AG ¶ 18, is that:

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 Government presented sufficient information to support the allegation in SOR ¶ 2.a; that is, that Applicant has a history of engaging in "illegal acts to generate funds." The Government also established that Applicant has had financial problems since at least 1992 in the form of repossessions, garnishments, and multiple unpaid debts. She is still struggling to meet her obligations, to the point where she has failed to comply with court-ordered restitution despite the possibility of being sent to jail. Thus, the record requires application of the disqualifying conditions listed at AG ¶ 19(a) (*inability or unwillingness to satisfy debts*); AG ¶ 19(c) (*a history of not meeting financial obligations*); and AG ¶ 19(d) (*deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust*).

By contrast, Applicant established that some of her financial problems stem from her husband's lack of support and her obligation to help her mother. This requires consideration of the mitigating condition at AG ¶ 20(b) (*the conditions that resulted in the financial problem were largely beyond the person's control (e.g. loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances*). However, Applicant has not established that she acted responsibly when faced with her financial problems. Rather, she resorted to illegal means such as writing checks when she knew she has no money in the bank, and taking unemployment benefits for two months when she had actually found work. Her ongoing failure to pay restitution further undermines any claim of mitigation under this guideline. Applicant has failed to mitigate the security concerns about her finances.

Whole-Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guideline I. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant is 45 years old and presents as mature adult who is concerned with the well-being of her family. She has incurred financial stress by caring for her mother, her own children, and two children of a friend who could not care for them. She has a good record at work and appeared

sincere in her remorse over her past conduct. However, the circumstances that led to that conduct have not changed. Applicant is still on probation and faces possible incarceration if she does not make restitution as ordered in her 2007 theft conviction. Her adverse conduct is recent and likely to continue. The favorable employment and personal information is insufficient to overcome the security concerns about her finances and current probationary status. A fair and commonsense assessment⁸ of all available information bearing on Applicant's past and current circumstances shows she has not satisfactorily addressed the government's doubts about her ability or willingness to protect the government's interests as her own. Because protection of the national interest is paramount in these determinations, such doubts must be resolved in favor of the government.⁹

Formal Findings

Formal findings 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
Subparagraphs 1.a - 1.d:	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. Request for security clearance is denied.

MATTHEW E. MALONE
Administrative Judge

⁸ See footnote 5, *supra*.

⁹ See footnote 7, *supra*.