



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



In the matter of:)	
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)	ISCR Case No. 09-08261
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

June 14, 2011

Decision

MOGUL, Martin H., Administrative Judge:

On August 25, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and E for 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 after September 1, 2006.

On September 7, 2010, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on March 4, 2011. DOHA issued a notice of hearing on March 4, 2011, and I convened the hearing as scheduled on March 30, 2011. The Government offered Exhibits 1 through 3, which were received without objection. Applicant testified on his own behalf and submitted no exhibits. DOHA received the transcript of the hearing (Tr) on April 7, 2011. I granted Applicant's request to keep the record open until April 13, 2011, to submit additional documents, but no additional documents were received. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is denied.

Findings of Fact

In his RSOR, Applicant admitted both SOR allegations, 1.a. under Guideline J, and 2.a., under Guideline E. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 23 years old. He is not married, and he has no children. Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline J - Criminal Conduct)

The SOR alleges that Applicant has engaged in criminal acts.

1.a. The SOR alleges that Applicant was arrested in 2007, and charged with Grand Theft/Exceeds \$400, a Felony. Applicant plead guilty to a reduced charge and was sentenced to three years of probation, ordered to serve 120 days in jail to be served on consecutive weekends and ordered to pay restitution and probation revocation restitution. Applicant was scheduled to be on probation until April 2010.

Applicant testified that in approximately 2004, when he was 16 years of age, he began working as a volunteer for a county fire department. He went through a six month training program, meeting on Tuesdays and Sundays, and he became qualified to do everything a full-time firefighter could do. He received certificates indicating that he passed the training at the academy, and he testified that he was planning to become a full-time firefighter. (Tr at 23-25.)

During a month period in 2007 when Applicant was 19, he stole money on three occasions from a volunteers cash box that was for general use at the fire station. Applicant had access to the cash box because he was the president of the volunteers. The authorities accused him of taking \$1,200, and Applicant stated that he did not believe he took that much, but he did not know the total amount that was actually taken. It was discovered because Applicant felt bad about taking the money, and he confessed to another volunteer who was the treasurer. He took the money because he was having car problems and other issues where he needed money. (Tr at 25-29.) Applicant conceded that each of the three times that he stole money from the cash box, he knew it was illegal and dishonest, and that he was stealing from his fellow volunteers. (Tr at 37-39.)

After Applicant was caught, he was ultimately placed on probation until April 2010, and he testified that his probation is now over. Applicant averred that he has now met all of his sentencing requirements, including community service of picking up trash for 120 consecutive weekend days. However, Applicant conceded that he has not completely paid the fine. He believed that he still owes \$800 for the fine. He had initially been on a payment plan, where he paid \$100 a month, on a fine of what he estimated to be \$2,000. After he missed a payment, he was ordered to pay the full amount in

restitution at once, but he convinced the authorities to give him more time to finish paying off the fine. (Tr at 29-32.) Exhibit 2 establishes that Applicant's total fine was \$2,200

At the time of the hearing, it was almost one year past the date when the fine was required to be paid in full. At the hearing, Applicant testified that he planned to make the final payment shortly. (Tr at 32.) He conceded that he has been working continuously for the last four years, but he still had not paid the fine in full. (Tr at 50-51.) The record was kept open until April 13, 2011, for Applicant to submit evidence as to the status of the fine, and whether he had paid it off. Also, Applicant was given the opportunity to submit evidence about his character from people who know and work with him. Applicant submitted no post hearing evidence.

Paragraph 2 (Guideline E - Personal Conduct)

The SOR alleges in this paragraph that Applicant is ineligible for clearance because he exhibited conduct involving questionable judgement, lack of candor, dishonesty or unwillingness to comply with rules and regulations.

2.a. The SOR alleges that Applicant was charged, as set forth under paragraph 1.a., above, of taking cash from the State Department of Forestry while serving as a volunteer and president of a County Fire Department volunteer program.

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 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.

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 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

Paragraph 1 (Guideline J - Criminal Conduct)

The Government has established that Applicant engaged in criminal conduct, by his theft of money totaling \$1,200 on three occasions from the cash box of an organization of which Applicant was the president.

I find that ¶ 31(a), “a single serious crime or multiple lesser offenses,” applies in this case. ¶ 31(c), “allegations or admissions of criminal conduct, regardless of whether the person was formally charged,” is also applicable to this case. Because Applicant has failed to fulfill his requirement of paying his fine in full, several years after it was imposed and almost one year after it was ordered to be paid in full, I do not find any Mitigating Condition under ¶ 32 is applicable. Paragraph 1, Guideline J is found against Applicant.

Paragraph 2 (Guideline E - Personal Conduct)

With respect to Guideline E, I find that Applicant’s conduct supports Disqualifying Condition ¶ 16(d) “a whole-person assessment of questionable judgement, untrustworthiness, unreliability” under this guideline. I do not find any Mitigating Condition under ¶ 17 is applicable. I therefore, resolve Guideline E against 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. Based on all of the reasons cited above as to why the Disqualifying Conditions apply and the Mitigating Conditions do not apply, I find that the record evidence leaves me with significant questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has not mitigated the security concerns.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a.:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Martin H. Mogul
Administrative Judge