



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



In the matter of:)
)
) ISCR Case No. 10-01638
)
)
Applicant for Security Clearance)

Appearances

For Government: James F. Duffy, Esquire, Department Counsel

For Applicant: *Pro se*

August 31, 2010

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the case file, pleadings, testimony, and exhibits, I conclude that Applicant has mitigated the security concerns related to criminal conduct and personal conduct. Accordingly, his request for a security clearance is granted.

Statement of the Case

Applicant requested a security clearance by submitting an Electronic Questionnaire for Investigations Processing (e-QIP), signed on September 8, 2008. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary

affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request.

On April 14, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) that specified the basis for its decision: security concerns addressed in the Directive under Guidelines J and E of the Adjudicative Guidelines (AG).² Applicant signed his notarized Answer on May 10, 2010. Applicant admitted the three allegations under Guideline J, Criminal Conduct and Guideline E, Personal Conduct. Department Counsel was prepared to proceed on June 25, 2010, and the case was assigned to me on July 2, 2010. DOHA issued a Notice of Hearing on July 20, 2010, and I convened the hearing as scheduled on August 10, 2010. The Government offered three exhibits, which I admitted as Government Exhibits (GE) 1 through 3. Applicant testified, but did not present exhibits or additional witnesses. DOHA received the transcript (Tr.) on August 16, 2010.

Findings of Fact

Applicant's admissions in response to the SOR are incorporated as findings of fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the record evidence, I make the following additional findings of fact.

Applicant, 40 years old, completed high school, and then received vocational training as a computer electronics technician. He submitted an application to request a security clearance as part of his employment with a defense contractor. He has worked for his current employer since September 2008 and is a senior network engineer. Applicant has been married since November 2007 and has two children who are 14 and 16 years old, and four step-children ranging in age from 9 to 16. He held an interim secret security clearance from June 2005 to 2008. (GE 1; Tr. 14-18)

From March 2001 to January 2005, Applicant worked as a network engineer and did not hold a security clearance. He stole computer equipment from his employer between January 2004 and January 2005. The items consisted of the following: five routers, which he estimates were worth about \$900 each; 10 to 15 pieces of router equipment, with varied values between \$300 and \$1,500; and 20 hard drives, valued at about \$250. Applicant periodically sold items using the newspaper or online sites. He did not keep a record of the amount he received for the goods. His employer installed a camera in the storeroom where the goods were kept, and discovered Applicant was taking company property. Applicant was confronted, and admitted the theft. He was not prosecuted, but he was terminated in January 2005. He returned some of the stolen

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

² Adjudication of this case is controlled by the Adjudicative Guidelines implemented by the Department of Defense on September 1, 2006.

items approximately one week later. Applicant disclosed his theft and his termination on his security clearance application.³ (GE 1, 2; Tr. 18-26, 32)

The company did not prosecute Applicant. Applicant hired an attorney to work with the company on restitution. Between January and April 2005, company officials spoke with Applicant's attorney and requested a list of the items Applicant stole so that a value and punishment could be determined. Applicant's attorney contacted the company several times about coming to an agreement on restitution, but received no response. As of the date of the hearing, Applicant had not heard from the company. (GE 2; Tr. 33, 38)

Applicant realized at the time he stole the items that he was committing a crime. During his security interview in 2007, he explained that he was a single parent of two children at the time. He had no adult relationships, and was lonely and depressed. He received some satisfaction from receiving money for what he stole. He testified that the investigator used the word "addicted" and he agreed. He did not get a thrill from it, but felt an urge to do it. He wondered afterward why he was doing it and could not understand his actions. He believes it was a result of his loneliness and depression. He consulted a therapist one time, but could not provide the date. Subsequently, in October 2009, he consulted a psychological practice and is now taking a prescribed medication for depression. He admits that his conduct was a bad decision. He has not stolen any property before or after the events listed in the SOR. His father and various friends know of his theft. He has become involved in his daughter's sports activities, and coached one daughter's soccer team in the past year. (GE 2; Tr. 25-31, 37)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the AG.⁴ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the "whole-person" concept. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines are followed whenever a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guidelines J and E.

³ Applicant entered the theft in his application, but explained during his testimony that he mistakenly identified the wrong employer. (Tr. 35)

⁴ Directive. 6.3.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁵ for an applicant to either receive or continue to have 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 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. Therefore, the Government has a compelling interest in ensuring that 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

Guideline E, Personal Conduct

The security concern under the personal conduct guideline is that

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. (AG ¶ 15)

The facts presented support application of the following disqualifying condition under AG ¶ 16:

(c) credible adverse information in several adjudicative issue 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.

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁶ See *Egan*, 484 U.S. at 528, 531.

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

Applicant stole company equipment over a period of one year, and sold it for his own profit, which implicates AG ¶ 16(c). Between 2004 and 2005, he was a single parent, raising two children. He was lonely and depressed, and expressed his psychological issues through the theft and sales. He was caught by his employer, and terminated.

The following mitigating conditions under AG ¶ 17 are relevant to Applicant's job termination:

(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;

Applicant's offense was not minor, but it did happen under a set of circumstances that were unique. He was alone and raising two children. He experienced depression, which was untreated at the time. He acted responsibly by hiring an attorney to work with the company to determine a plan of restitution, although the company did not respond to that effort. Moreover, he is now married, and is being treated for the depression that played a large part in his negative conduct. It is unlikely that such circumstances will recur. Five years have passed since this termination and the record shows no indication of work-related problems that would raise questions about his current reliability or trustworthiness. AG ¶ 17 (c) and (d) apply.

Guideline J, Criminal Conduct

AG ¶ 30 describes the security concern under this guideline:

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.

The following disqualifying conditions apply under AG ¶ 31:

(a) a single serious crime or multiple lesser offenses;

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Between 2004 and 2005, Applicant committed theft by repeatedly stealing computer equipment from his employer. He also profited from the theft by selling the stolen goods. He was caught, and admitted his action. AG ¶ 31 (a) and (c) apply.

Two mitigating conditions are relevant under AG ¶ 32:

(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; 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.

As discussed under Guideline E, Applicant's action occurred under circumstances that are not likely to recur. He admits his conduct was wrong. He has sought psychological help for his depression, and is on medication. Both actions demonstrate his current good judgment. A significant amount of time has passed, and the record contains no evidence of any other criminal conduct since 2005. AG ¶ 32 (a) and (d) apply.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the relevant circumstances. I have evaluated the facts presented and have applied the appropriate adjudicative factors under the cited guidelines. I have also reviewed the record before me in the context of the whole-person factors listed in 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guidelines, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant engaged in serious criminal conduct for approximately one year by repeatedly stealing equipment belonging to his employer. He profited from the theft by selling these items. His actions likely resulted from psychological problems he had at the time. Applicant was raising two children alone. He felt lonely and depressed, and he was subsequently diagnosed with clinical depression. Several factors weigh strongly in Applicant's favor. Throughout the events that occurred, Applicant has been honest in admitting his conduct: in his disclosure of the theft on his security clearance application, during his security interview in 2007, and at the hearing. He knows he made poor decisions in 2004-2005. His actions occurred five years ago. He has made changes that augur well for the future. He is now married, and has a different lifestyle than he when he engaged in these actions. He is involved with his daughter's sports team. He has sought professional help for his depression, and is on medication to treat it.

For all these reasons, I conclude Applicant has mitigated the cited security concerns. A fair and commonsense assessment of the available information bearing on Applicant's suitability for a security clearance shows he has satisfied the doubts raised under the guidelines for criminal conduct and personal conduct.

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 as follows:

Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraphs 1.a. – 1.b.	For Applicant
Paragraph 2, Guideline J	FOR APPLICANT
Subparagraph 2.a.:	For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest to allow Applicant access to classified information. Applicant's request for a security clearance is granted.

RITA C. O'BRIEN
Administrative Judge