



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



In the matter of:

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ISCR Case No. 10-06281

Applicant for Security Clearance

Appearances

For Government: Julie Mendez, Esq., Department Counsel
For Applicant: *Pro se*

May 23, 2011

Decision

LYNCH, Noreen, A., Administrative Judge:

On December 23, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) alleging security concerns arising under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). 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) implemented in September 2006.

Applicant timely answered the SOR and requested a hearing. DOHA assigned the case to me on March 21, 2011. DOHA issued a Notice of Hearing on March 23, 2011, and I convened the hearing on April 12, 2011. Department Counsel offered 16 exhibits, which were admitted as Government Exhibits (GE) 1-16. Applicant testified, presented one witnesses, and submitted three exhibits (AE) A through C, which were admitted into the record. DOHA received the transcript on April 18, 2011. Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In her answer to the SOR, Applicant admitted the factual allegations under Guideline J (Criminal Activity), and under Guideline E (Personal Conduct). At the hearing, Department Counsel moved to strike allegations 1.f and 1.g because they were duplicates. The motion was granted.

Applicant is a 39-year-old employee of a defense contractor. She graduated from high school in 1989. She attended a technical school from 2004 until 2006. She is divorced and has three children. Applicant has worked for her current employer since April 2010. This is her first application for a security clearance. (Tr. 38)

Criminal Conduct

Applicant has numerous criminal arrests and convictions for theft from 1995 until 2009. (GE 5) She admits that she committed the acts. On several occasions, Applicant failed to appear in court according to her court records. Applicant also admitted that she spent time in jail for four of the offenses. (GE 16)

Applicant's explanation for her behavior rests with her marriage to a husband who abused her. He was a drug addict and did not provide financial support for Applicant and her children. During the course of the marriage from 1997 until 2007, when she divorced, Applicant admits using poor judgment and stealing items from food stores. She also cashed checks or used stolen credit cards that her husband told her to use. (Tr. 48) When she became frustrated with the situation at home, she went to a store and stole a shower curtain. She believed she needed to remain in the marriage for the sake of her children. (Tr. 32)

Applicant also received a drug-related charge in 2007. Her husband was using marijuana when driving in a car with Applicant. They were pulled over by the police, and Applicant's husband told her to put the marijuana in her purse. They were both arrested for possession of marijuana. Applicant pled guilty and was sentenced to seven days in jail. (GE 7) She recalls that she took court-ordered drug classes. She does not use drugs. (GE 15)

Personal Conduct

Applicant also received several traffic citations for speeding in 2004, 2008, 2009, and 2010. She has not paid her fines. (GE 12; Tr. 61) She hopes to pay them with a tax refund.

Applicant also admitted that she was fired from state employment in August 2009 due to her failure to disclose a theft charge from July 2009 to her employer. She also admitted that she did not list her other criminal charges on her employment application. (Tr. 41) She admitted that she did not check the appropriate box for any arrests because she knew she would not get the job. (GE 1)

On April 16, 2010, Applicant completed an application for a security clearance. In response to Section 22: Police Record, she listed her 2007 and 2009 arrests, but neglected to list her 2005 conviction for theft. She stated that she completely forgot about the 2005 conviction for which she spent time in jail. Applicant used the state judiciary online system to recall her various charges. The 2005 charge was not on the list according to Applicant. She was credible in her explanation that she forgot about it. She elaborated that during the marriage there were so many times that her husband was arrested or that something occurred that she did not remember. (Tr. 64)

In May 2010, Applicant was interviewed by an OPM investigator. During the interview, Applicant was asked to provide more details about her criminal record. Applicant believed that she only had to go back seven years. However, the time frame of seven years did not enter into the discussion. Applicant did not mention the years from 1995 until 2002.

In December 2010, Applicant was arrested due to a confrontation that occurred with her former husband. (AE C) She explained that she was found not guilty. The arrest involved negligent driving when her ex-husband threatened her. Applicant backed up her car to get away from him, and he slipped and fell on the snow. She reported the incident to the police. When she went to court, Applicant was found not guilty.

At the hearing, Applicant accepted full responsibility for her actions and acknowledged that it took many years before she realized that her life needed to change. She is now divorced. She obtained a protective order in December 2010 due to harassment from her former spouse. (AE C)

At the hearing, Applicant submitted two letters of recommendation. They attest to her responsibility, integrity and character. Each characterizes Applicant as a diligent, contributing member of society. (AE A-B)

At the hearing, Applicant's coworker testified that she has known her for one year. (Tr. 25) She describes Applicant as reliable and honest. Applicant disclosed that she had been fired from a previous job due to her criminal record. The co-worker believes that Applicant realizes the poor judgments that she has made in the past. (Tr.27)

Policies

When evaluating an applicant's suitability for a security clearance, an 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. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”¹ The burden of proof is something less than a preponderance of evidence.² The ultimate burden of persuasion is on the applicant.³

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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.”⁴ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁵ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁶ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

¹ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

² *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁴ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁵ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁶ *Id.*

Analysis

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 conditions that could raise a security concern and may be disqualifying:

- (a) a single serious crime or multiple lesser offenses;
- (b) discharge or dismissal from the Armed Forces under dishonorable conditions;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;
- (d) individual is currently on parole or probation; and
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Applicant's admissions and the evidence of arrests and convictions from 1995 until 2010 for theft are sufficient to raise AG ¶¶ 31(a) and (c).

AG ¶ 32 provides four conditions that could 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.

After reviewing the mitigating conditions, I find that none of them fully apply in this case. Applicant's behavior has been longstanding and continuous. She

acknowledged that the last incident was in 2010. Although she has been divorced since 2007, is trying to change her life, and is on the right track, based on the record evidence and Applicant's testimony, I find that she has not mitigated the security concern under criminal conduct.

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 conditions that could raise a security concern and may be disqualifying:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(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;

(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; and

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

(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;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

Applicant's poor judgment over a period of many years gives rise to disqualifying conditions AG ¶¶ 16(a),(b), and (d). She knowingly broke the law and received many speeding tickets. She did not disclose her criminal record on an employment application because she believed she would not get the job. She admitted that she sometimes acted out of frustration due to her abusive marriage. She also realizes that is no excuse for her behavior. Her conduct shows a pattern of dishonesty and rule violations. Applicant also deliberately hid her criminal arrest record from a state employer because she knew she would probably not get the job. She was terminated from the position.

AG ¶ 17 provides conditions that could mitigate security concerns:

(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.

Applicant admitted that she was influenced by her abusive husband, However, she was an adult when she made bad choices. She did not disclose the information to her employer because she knew she would not get the job. This was dishonest. Her illegal behavior (thefts) occurred over a long period of time. Her numerous arrests are not minor offenses or isolated ones. Her behavior has shown a disregard for laws and regulations. I have doubts about her judgment and reliability.

After considering the mitigating conditions outlined in AG ¶ 17, I conclude Applicant has not mitigated the security concern under personal conduct.

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 an 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the “whole-person” factors. Applicant has a history of criminal conduct beginning in 1995 through 2010 which includes arrests, convictions, guilty pleas, and incarcerations. Granted, a few of her cases were dismissed. The choices she made over the years show poor judgment. She lied to get a job by falsifying her state employment application. Her last theft-related arrest was in 2009. She did not disclose her 2005 arrest in her security clearance application. Her last arrest was in 2010, although she was found not guilty.

Applicant divorced in 2007. She left an abusive marriage. She is trying to change her life. She is taking responsibility for her actions and realizes that she needs to make better decisions. However, after 15 years of such behavior, one year is not sufficient time to demonstrate the required responsibility and judgment to safeguard classified information.

Applicant states that she is a changed person. She is on the right track. At this point, I have doubts about her judgment and reliability. Any doubts must be resolved in favor of the Government. Applicant has not met her burden in this case. She has not mitigated the security concerns under criminal conduct and personal conduct. Clearance is denied.

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
Subparagraphs 1.a- 1.e:	Against Applicant
Subparagraphs 1.f-1.g:	Withdrawn
Subparagraphs 1.h-1.j:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.f:	Against Applicant
Subparagraph 2.g:	For Applicant
Subparagraphs 2.h-2.i:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant a security clearance. Clearance is denied.

NOREEN A. LYNCH.
Administrative Judge