



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



In the matter of:)	
)	
)	ISCR Case No. 10-08388
)	
Applicant for Security Clearance)	

Appearances

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

August 16, 2011

Decision

CURRY, Marc E., Administrative Judge:

Between 2003 and 2007, Applicant stole approximately \$2,000 worth of cash and inventory from two previous employers. He has not committed such conduct in more than four years, and has been an exemplary employee with his current employer since 2007. These positive factors are insufficient to overcome the seriousness of the misconduct. Clearance is denied.

Statement of the Case

On April 8, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under 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 by the Department of Defense on December 1, 2006.

Applicant answered the SOR on April 29, 2011, admitting all of the allegations.¹ He requested a hearing, and the case was assigned to me on June 15, 2011. On June 30, 2011, a notice of hearing was issued scheduling the case for July 13, 2011. The hearing was conducted as scheduled. I received five Government exhibits, four Applicant exhibits, and Applicant's testimony. The transcript was received on July 21, 2011.

Findings of Fact

Applicant is a 26-year-old married man with two children, both toddlers, and a six-year-old stepdaughter. He earned an associate's degree in electronics in 2006, and has been working for a defense contractor since 2007. His duties include designing and assembling electronics. (Tr. 17)

Applicant is highly respected on the job. According to his 2010 performance evaluation, "his performance over the past year [was] an example for fellow technicians." (AE B at 4) A coworker characterized him as one of the company's hardest working employees. (AE A)

From 2003 to 2005, Applicant worked for an auto parts store as an assistant manager. (AE 5 at 2) On one occasion, Applicant stole a safe from his employer, and disguised the theft to "make it look as though it was an outside job." (Tr. 20) Specifically, one night when he was in charge of closing the store, Applicant took the safe out of the store, locked the store for the night, then broke the back door and left it open. (GE 2 at 2)

Because of Applicant's position at the store, he knew the combination to the safe. It contained \$2,100. Applicant kept \$500 and an accomplice kept the remainder. Applicant then dumped the safe in the woods. (*Id.*) The store's risk manager questioned Applicant the next day. Applicant told him that he locked the store before leaving work the previous night. (*Id.*)

On two or three occasions, Applicant stole oil, additives, and auto parts from his employer. This merchandise totalled \$250 to \$500. (GE 3 at 8)

Applicant also participated in a "returned parts scheme" while working at the auto parts store. Specifically, he removed overstock inventory, which was unlisted in the company's computer, from the store without authorization. He then returned the inventory to the store, and manufactured phony receipts with fake names and phone numbers to make the transactions appear as if different customers were getting their money back for products that they were returning. Using this scheme, he stole approximately \$1,000 from his employer. (GE 2 at 2; GE 3 at 2)

¹Department Counsel withdrew SOR subparagraph 1.f.

Applicant also allowed another employee to participate in the scheme. With Applicant's help, the other employee stole approximately \$2,000 to \$3,000. (GE 2 at 2)

Applicant's employer became suspicious. After confirming that the receipts were fake, Applicant's employer confronted him. Applicant admitted the fraud. Instead of pressing charges, Applicant's employer required him to write a resignation letter explaining the fraud, and promising to reimburse the company. Applicant wrote the letter, but never provided restitution. (GE 2 at 2)

From October 2004 to approximately October 2007, Applicant worked for a department store as a loss prevention associate. (GE 1 at 3) His responsibilities included observing customers, apprehending suspected shoplifters, and "turning them over to authorities." (Tr. 21) Also, he collected money from the cashiers' registers at closing time, and "closed out the building." (Tr. 21) While in this position, Applicant purchased items from a coworker that he knew had been stolen from their employer. The retail price of the merchandise collectively totalled \$200; Applicant purchased it from the coworker for \$50. (GE 3)

Applicant also stole approximately ten DVDs while working at the department store. Because he was a loss prevention associate, he was able to walk out of the store with the merchandise without being questioned. (AE 3 at 4)

In March 2010, Applicant completed a security clearance application. Question 22 required him to disclose, among other things, whether he had "left a job by mutual agreement following allegations of misconduct." (GE 1 at 4) Applicant left this section blank. When asked on cross-examination about the omission, Applicant responded, "I always looked at it as I quit." (Tr. 34)

Policies

In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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. 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."

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.

Analysis

Guideline E, Personal Conduct

Under this guideline, “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 ¶ 15) Between 2003 and 2007, Applicant stole cash and merchandise from two employers. AG ¶ 16(e), “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, or duress, such as . . . engaging in activities which, if known, may affect the person’s personal, professional, or community standing . . .” applies.

Applicant was in his late teens and early twenties when the conduct occurred. Since then, he has gotten married and obtained another job. He is a good employee, highly respected by his coworkers, and he has not engaged in any misconduct for more than four years. AG ¶ 16(e), “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress,” applies.

Applicant was not forthcoming about his work-related misconduct on his security clearance application, as required in response to Question 22. Given the nature and seriousness of the conduct and his failure to disclose it on his security clearance application, I conclude that it remains a security concern.

Whole-Person Concept

Under the whole-person concept, 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.

Applicant was young and immature when he committed the work-related misconduct. Moreover, such misconduct has not recurred for more than four years. Conversely, the misconduct was extremely serious. Applicant was in positions of trust

with two employers between 2003 and 2007. He abused both positions by stealing from the employers. Moreover, his theft was not limited to mere shoplifting. Applicant masterminded a fraudulent criminal enterprise to misappropriate money from his employer, and on another occasion, burglarized this employer and staged the burglary to look like an outside job. Most important, he did not disclose, as required on his security clearance application, the fact that his criminal behavior led to his forced resignation from his job at the auto parts store. His explanation for the omission was not credible. Under these circumstances, I conclude that Applicant failed to mitigate the security concern.

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 E:	AGAINST APPLICANT
Subparagraphs 1.a - 1.e:	Against Applicant
Subparagraph 1.f:	WITHDRAWN

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 eligibility for a security clearance. Eligibility for access to classified information is denied.

MARC E. CURRY
Administrative Judge