



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



In the matter of:)	
)	
-----)	ISCR Case No. 11-02936
)	
Applicant for Security Clearance)	

Appearances

For Government: Ray T. Blank, Jr., Esq., Department Counsel
For Applicant: *Pro se*

January 12, 2012

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

On July 14, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) noting security concerns arising under Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline F (Financial Considerations). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG).

In an August 17, 2011, response, Applicant admitted all allegations raised under Guideline J and Guideline E and two of three allegations noted under Guideline F. He failed to admit or deny the third allegation raised under Guideline F. Applicant requested an administrative determination in lieu of a hearing. On October 7, 2011, Department Counsel submitted a File of Relevant Material (FORM), which included ten attached items. Applicant failed to submit a timely response to the FORM. The case was assigned to me on January 3, 2010. Based on a review of the evidence, I find Applicant failed to meet his burden regarding the security concerns raised. Security clearance is denied.

Findings of Fact

Applicant is a 56-year-old employee of a defense contractor. He attended high school from 1969 through 1973, eventually earning a diploma or its equivalent in 1981. He served in the U.S. Army National Guard from 1974 through 1997. He is currently single and the father of one adult child.¹

After completing his high school studies, Applicant joined the Army National Guard. In September 1974, he received nonjudicial punishment for shoplifting of government property. In August 1989, Applicant married. In August 1990, he and his wife had a baby. The couple eventually divorced in 1994. In 1996, Applicant filed for Chapter 13 bankruptcy protection. His petition was dismissed in about May 2000.

In 2008, Applicant began helping several unidentified family members address their own financial difficulties. While some of the loaned money was repaid, his largesse left him unable to cover his own financial obligations. Consequently, debt was acquired. Applicant filed for Chapter 13 bankruptcy protection in March 2009, and listed liabilities totaling approximately \$94,074. At some unidentified time, he also acquired approximately \$34,000 in debt related to an arrearage in child support. That obligation remains unpaid.

In July 2010, Applicant stole a laptop computer from his employer by placing the laptop in a box for a toaster oven, paying for the toaster oven, put the box in his car, then returned to work. Consequently, in early August 2010, he was fired from his job and charged for theft of property. He initially denied the theft, but ultimately stated that he does not know why he stole the item.² After his arrest, he entered into an agreement for deferred prosecution.³

Shortly after the theft, Applicant executed Electronic Questionnaires for Investigations Processing (e-QIP) on or about August 27, 2010. On the e-QIP, in response to Section 13C: Employment Record, Applicant wrote that he left that job by mutual agreement following charges or allegations of misconduct, noting that "property was taken at supervisor permission, but later supervisor denied it."⁴ On that same e-QIP, Applicant also failed to disclose that he had filed for Chapter 13 bankruptcy protection in 2009.

¹ The record is unclear, but it appears Applicant may have three children in total. See FORM at 4; FORM, Item 5 at 4; FORM, Item 4, at 26-31.

² FORM, Item 5, at 3.

³ On December 13, 2010, Applicant completed a pretrial intervention program related to the theft charge.

⁴ See SOR; FORM, Item 4, at 20 of 43.

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the AG. The AG lists 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 over-arching 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.

The United States Government (Government) must present evidence to establish controverted facts alleged in the SOR. It is an applicant's responsibility to present "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." ⁵ The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant. ⁶

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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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." ⁷ "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." ⁸ Any reasonable doubt

⁵ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

⁶ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁷ See also EO 12968, § 3.1(b) and EO 10865 § 7.

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

about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁹ A security clearance denial 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.

Analysis

Guideline J – Criminal Conduct

The concern under this guideline is that “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.”¹⁰ In this case, Appellant admitted he was arrested for theft in August 2010 and entered into an agreement to defer prosecution of related charges. He also admitted that he falsified material facts while executing an August 2010 e-QIP, acts which constitute violations of 18 U.S.C. ¶ 1001 and are felonies. Such facts are sufficient to raise both Criminal Conduct Disqualifying Condition AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*). Consequently, it is Applicant’s burden to mitigate the security concerns raised.

In stating that he does not know why he stole the laptop in 2010, Applicant substantially concedes that he was responsible for its theft. That theft, as well as his intentional falsifications on his e-QIP, took place between July 2010 and August 2010, only about a year-and-a-half ago. Moreover, while nearly three-and-a-half decades separate the incidents in time, the recent laptop theft from his former employer revives concerns first raised by Applicant’s 1974 nonjudicial punishment for shoplifting of government property while serving in the Army National Guard. Furthermore, the record only shows that Applicant completed a pretrial intervention program as evidence demonstrating any rehabilitative efforts that Applicant may have performed to mitigate related security concerns. Consequently, none of the Criminal Conduct Mitigating Conditions noted at AG ¶ 32(a)-(e) apply.

Guideline E – Personal Conduct

Security concerns arise from matters of personal conduct because “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.”¹¹ In addition, “any failure to

⁹ *Id.*

¹⁰ AG ¶ 30.

¹¹ AG ¶ 15.

provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process” is of special interest.¹²

Applicant admitted that he was arrested and charged with theft in August 2010, and that he consequently entered into an agreement to defer prosecution of the charges. That incident echoes a similar shoplifting charge from 1974. Moreover, Applicant falsified material facts in completing an August 2010 e-QIP. Personal Conduct Disqualifying Condition (PC DC) AG ¶ 16 (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*) and AG ¶ 16 (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 regulation, or other characteristics indicating that the person may not properly safeguard protected information*) apply. Therefore, the burden shifts to Applicant to mitigated related security concerns.

Theft from an employer constitutes both a disregard of the law and a significant violation of trust. Intentional falsifications on an executed e-QIP are a clear violation of 18 U.S.C. § 1001 and constitute a felony. Consequently, these incidents are not only recent, they are particularly grievous. Applicant provided no evidence tending to mitigate the personal conduct security concerns raised. Therefore, none of the available Personal Conduct Mitigating Conditions apply.

Guideline F – Financial Considerations

In this case, Guideline F is the appropriate guideline for consideration. Under that guideline, “failure or an 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.”¹³ Here, Applicant filed for bankruptcy in 1996 and in 2009. He is also in arrears for approximately \$34,000 in child support; there is no evidence that he has satisfied that debt. Financial Considerations Disqualifying Conditions AG ¶ 19(a) (*inability or unwillingness to satisfy debts*) and AG ¶ 19(c) (*a history of not meeting financial obligations*) apply. With such conditions raised, the burden moves to Applicant to mitigate related security concerns.

In admitting the allegations related to his bankruptcy petitions and child support arrearage, Applicant provided scant facts related to their acquisition or any attempts to address them. The 2009 bankruptcy petition is recent and the child support arrearage

¹² *Id.*

¹³ AG ¶ 18.

remains unresolved. His most recent bankruptcy petition was apparently the result of overextending himself while helping family members with their own debts. Applicant failed to identify and substantiate any other origins for these debts, or obstacles to his ability to address them in some manner. In relying on the record in an administrative determination, Applicant's situation must be assessed based on the limited facts offered. Without more information or documentary evidence, the record does not include sufficient substantiated evidence to raise any of the Financial Considerations Mitigating Conditions found at AG ¶ 19. Therefore, none of the available Financial Considerations Mitigating Conditions apply.

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 factors listed at AG ¶ 2(a). 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. In choosing a decision without a hearing, however, there are scant facts of record to fully explore the admitted allegations. It is noted that Applicant is a mature man who is currently single and the father of at least one child. He formerly served in the Army National Guard. Although he received nonjudicial punishment in the 1970s for a shoplifting incident during his service, his only other significant issue occurred prior to 2010 and involved finances. While the exact origin and extent of his financial issues were not detailed, some of his debt was apparently attributable to his helping family members through their own periods of financial difficulty. Also unexplored is a child support arrearage that has yet to be addressed.

In relying on an administrative determination, an administrative judge is left with those facts contained in the written record. Applicant provided scant information in response to the SOR and he declined to respond to the FORM. Other than his admission to all but one of the SOR allegations, the record yields no significant information tending to raise mitigating conditions in response to the disqualifying conditions raised under the guidelines at issue. This may be due to the recency of the majority of the incidents at issue, i.e., the 2010 theft arrest and falsifications. Regardless, the burden in these proceedings is squarely put on an applicant when disqualifying conditions are raised. Without evidence tending to mitigate related security concerns, those concerns remain unmitigated. Given the scant facts of record, I conclude that Applicant failed to meet his burden. Criminal conduct, personal conduct, and financial considerations security concerns remain unmitigated. 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.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.e:	Against Applicant
Paragraph 3, Guideline F:	AGAINST APPLICANT
Subparagraphs 3.a-3.c:	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 access to classified information. Clearance denied.

ARTHUR E. MARSHALL, JR.
Administrative Judge