



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



In the matter of:)
)
) ISCR Case No. 16-02772
)
Applicant for Security Clearance)

Appearances

For Government: Erin P. Thompson, Esq., Department Counsel
For Applicant: Gregory F. Greiner, Esq.

01/19/2018

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the personal conduct, financial considerations, and criminal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On November 4, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (personal conduct), F (financial considerations), and J (criminal conduct). Applicant responded to the SOR on November 17, 2016, and December 23, 2016, and requested a hearing before an administrative judge. On February 27, 2017, Department Counsel amended the SOR by adding an allegation under Guideline F. Applicant responded to the amendment on February 28, 2017.

The case was assigned to me on August 16, 2017. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 23, 2017, scheduling the hearing for September 22, 2017. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 8 were admitted in evidence without

objection. Applicant testified and submitted Applicant's Exhibits (AE) A through I, which were admitted without objection. I also admitted the attachments to Applicant's SOR response. The record was held open for Applicant to submit additional information. She submitted AE J through N, which were admitted without objection.¹ DOHA received the hearing transcript (Tr.) on October 2, 2017.

Findings of Fact

Applicant is a 57-year-old employee of a government contractor. She worked for a defense contractor from 1986 to 2007. She has worked for her current employer or a predecessor contractor since 2007. She seeks to retain a security clearance, which she has held for decades. She attended college for a period without earning a degree. Her first marriage ended in divorce in 1986. Her first husband is deceased. Her second husband was an abusive drug addict who committed suicide in 2002. She has three adult children.²

Applicant has a history of criminal conduct and financial problems. She filed Chapter 7 bankruptcy cases in about 1986, 1997, and 2015. Her debts were discharged in all three cases. She has been convicted on five occasions as follows: misdemeanor charge of filing a false police report (1992); misdemeanor larceny (1999); misdemeanor contempt of court for failure to appear (2000); misdemeanor issuing bad checks (2001); and felony larceny, third or subsequent conviction (2015).³

In the most recent conviction, Applicant was arrested in December 2014. The grand jury indicted her on the felony offenses of conspiracy and larceny of more than \$200, committed on or about December 18, 2014, and conspiracy and attempted larceny, committed on or about December 26, 2014. In August 2015, Applicant entered an *Alford* plea⁴ to the amended felony charge of larceny on December 18, 2014, third or

¹ The response to the SOR was missing several attachments and pages to attachments. AE K through N contain copies of pages that were missing from the SOR response.

² Tr. at 17-23, 63; Applicant's response to SOR; GE 1-3.

³ Tr. at 35-42, 45-50; Applicant's response to SOR; GE 5-8. The SOR did not allege the 1986 bankruptcy or the convictions for filing a false police report and contempt of court. Any matter that was not alleged in the SOR will not be used for disqualification purposes. It may be considered when assessing Applicant's credibility, in the application of mitigating conditions, and during the whole-person analysis.

⁴ See *Cortese v. Black*, 838 F. Supp. 485, 492 (D. Colo. 1993) (citing *North Carolina v. Alford*, 400 U.S. 25 at 37 (1972):

Under an *Alford* plea, a defendant maintains innocence while entering a plea of guilty because the defendant concludes that his interests require entry of a guilty plea and the record before the court contains strong evidence of actual guilt. . . . Guilty pleas must be rooted in fact before they may be accepted. Accordingly, courts treat *Alford* pleas as having the same preclusive effect as a guilty plea.

An appellate court in Applicant's state found that the appellant who entered an *Alford* plea waived the right to appeal the sufficiency of the evidence:

subsequent conviction. In accordance with her plea bargain, she was sentenced to two years in the penitentiary, with both years suspended. She was placed on supervised probation for an indefinite period and on good behavior for five years. She was deemed suitable and was released from supervised probation in August 2017, conditioned on her future good behavior. The suspended sentence remains in effect.⁵

Applicant does not accept responsibility for any of the convictions, except the contempt of court. She stated that her late husband committed the 1999 larceny and was responsible for issuing the bad checks because he took money out of her checking account without telling her and did not make good on the checks, as he promised. She stated she filed an accurate police report alleging her late husband's physical abuse, but later retracted the information. The contempt of court resulted when she failed to appear to testify against her late husband. She pleaded guilty at least three of the first four times she was convicted.⁶

Applicant stated that she is innocent of the 2014 larceny charge. Her version is as follows. She went to the department store on Black Friday to buy an advertised television as a present for her son. It was sold out, but she was able to purchase it online at the sale price and then pick it up at the store. She was notified on several occasions that it was available. She went to the store, but that specific television was not available. On December 18, 2014, she went with her brother-in-law to customer service at the store where the wrong television was mistakenly put in their cart. While it was being sorted out at customer service, her brother-in-law took it to their car. She told him it was the wrong television. He bought it back and left it by customer service. The surveillance camera showed him leaving the store with the television, but it did not show him returning it. She accepted the *Alford* plea because her brother-in-law had already pleaded guilty and was sentenced to two years for the offense. She did not want to risk going to jail. Her brother-in-law wrote a letter stating that Applicant was unaware of his actions and did not take part in the incident.⁷ I did not find her statements credible.

Applicant stated the 1986 and 1997 bankruptcies resulted from the financial irresponsibility of her two late husbands. Her 2015 bankruptcy occurred after she cosigned car loans for two of her children. The cars were repossessed when the children developed substance abuse and legal problems. Applicant was unable to pay both car loans and the costs of her child's substance-abuse rehabilitation. A February

Thus, under the circumstances of this case, by freely and intelligently entering an *Alford* plea to the breaking and entering charge, Appellant waived his right to appeal the issue of whether the evidence was sufficient to prove beyond a reasonable doubt that he was guilty of that charge. (Citation omitted to not reveal Applicant's state of residence.)

⁵ Tr. at 23-24, 32-35; Applicant's response to SOR; GE 5, 6; AE F, G.

⁶ Tr. at 37-42, 45-47, 55, 62; Applicant's response to SOR; GE 2-4.

⁷ Tr. at 24-34, 41-44, 55-57, 62; Applicant's response to SOR; GE 1, 3, 4; AE D, E.

2017 credit report lists one of the defaulted car loans with a \$9,521 balance (SOR 2.f), but that debt was discharged in the bankruptcy.⁸

Applicant received financial counseling as a requirement of her bankruptcy case. She stated that her finances are better. She lives by herself in an apartment. She stated that all her current responsibilities are paid on time. She has a good salary, and her budget shows a healthy amount remaining each month after paying her expenses. She no longer provides financial support to her children.⁹

Applicant submitted numerous documents and letters attesting to her excellent job performance. She is praised for her work ethic, professionalism, judgment, discretion, dedication, trustworthiness, loyalty to the United States, reliability, and integrity.¹⁰

Policies

This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), which became effective on June 8, 2017.

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching 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 national security eligibility will be resolved in favor of the national security."

⁸ Tr. at 36-37, 47-52, 57-59; Applicant's response to SOR; GE 1, 3, 4, 7; AE B, C.

⁹ Tr. at 50-54; Applicant's response to SOR; AE A.

¹⁰ Applicant's response to SOR; AE H-J.

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 the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain 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 safeguard 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 EO 10865 provides that adverse 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

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant’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. The following are potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted; and

(c) individual is currently on parole or probation.

Applicant entered an *Alford* plea to the felony charge of larceny, third or subsequent conviction. In accordance with her plea bargain, she was sentenced to two years in the penitentiary, with both years suspended. She was placed on supervised probation for an indefinite period and on good behavior for five years. She was released from supervised probation in August 2017, conditioned on her future good behavior. The suspended sentence remains in effect. The suspended sentence and the

requirement of good behavior is the equivalent of unsupervised probation. The above disqualifying conditions are applicable.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

(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;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant denied committing the larceny that resulted in her conviction. I did not find her testimony credible. Moreover, by entering an *Alford* plea, she accepted that her plea would have the same preclusive effect as a guilty plea. Her criminal conduct is not mitigated.

Guideline F, Financial Considerations

The security concern for financial considerations is set out in AG ¶ 18:

Failure 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal or otherwise questionable acts to generate funds.

The guideline notes several conditions that could raise security concerns under AG ¶ 19. The following are potentially applicable in this case:

(a) inability to satisfy debts;

(b) unwillingness to satisfy debts regardless of the ability to do so;

(c) a history of not meeting financial obligations; and

(d) deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, expense account fraud, mortgage fraud, filing deceptive loan statements and other intentional financial breaches of trust.

Applicant has a history of financial problems including two bankruptcy cases. She also has misdemeanor convictions for larceny and issuing bad checks and a felony conviction for larceny. The evidence is sufficient to raise the above disqualifying conditions.

SOR ¶ 2.f alleges a debt that was discharged in bankruptcy. That debt does not raise any security concerns that are not already alleged in SOR ¶ 2.e, which alleges the bankruptcy. SOR ¶ 2.f is concluded for Applicant.

Conditions that could mitigate the financial considerations security concerns are provided under AG ¶ 20. The following are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, a death, divorce or separation, clear victimization by predatory lending practices, or identity theft), and the individual acted responsibly under the circumstances;

(c) the individual has received or is receiving financial counseling for the problem from a legitimate and credible source, such as a non-profit credit counseling service, and there are clear indications that the problem is being resolved or is under control; and

(d) the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts.

Applicant did not accept responsibility for the three convictions. She blamed the bankruptcies on her late husband and because she cosigned car loans for her two children who developed substance abuse and legal problems. Her debts were discharged in bankruptcy, and she stated that her current finances are stable. However, I am not convinced that they will remain so or that she will not commit additional financial crimes. Applicant's financial issues continue to cast doubt on her current reliability, trustworthiness, and good judgment. Financial considerations security concerns are not mitigated.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security clearance investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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 individual may not properly safeguard classified or sensitive information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant's misdemeanor convictions for larceny and issuing bad checks and felony conviction for larceny reflect questionable judgment and an unwillingness to comply with rules and regulations. They also created vulnerability to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable. AG ¶ 16(c) is not perfectly applicable because Applicant's conduct is sufficient for an adverse determination under the criminal conduct and financial considerations guidelines. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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 contributed to 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; and

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant has not acknowledged her behavior; in spite of the multiple guilty pleas and convictions, she denies her guilt. Her personal conduct is not mitigated under the same rationale addressed under the criminal conduct and financial considerations guidelines.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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. I have incorporated my comments under Guidelines E, F, and J in my whole-person analysis.

I considered Applicant's long and steady work history, and her highly favorable character evidence. However, she has multiple bankruptcies and five convictions, and I did not find her credible.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not

mitigate the personal conduct, financial considerations, and criminal conduct 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 F:	Against Applicant
Subparagraphs 2.a-2.e:	Against Applicant
Subparagraph 2.f:	For Applicant
Paragraph 3, Guideline E:	Against Applicant
Subparagraph 3.a:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge