



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



In the matter of:)
)
) ISCR Case No. 15-02983
)
Applicant for Security Clearance)

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: *Pro se*

08/11/2015

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline J, criminal conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On April 10, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, criminal 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) effective within the DOD on September 1, 2006.

On May 18, 2015, Applicant answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on June 19, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 24, 2015. I convened the hearing as scheduled on July 28, 2015. The Government offered exhibits

(GE) 1 through 8, which were admitted into evidence without objection. Applicant testified and did not offer any exhibits. The record was held open to allow Applicant to submit documents. Applicant offered Exhibits (AE) A through C, which were admitted into evidence without objection.¹ The record closed on August 4, 2015. DOHA received the hearing transcript (Tr.) on August 5, 2015.

Findings of Fact

Applicant provided explanations for all of the allegations in the SOR but did not affirmatively admit or deny each one. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 44 years old. He married in 2005 and has a stepson who is in college. He served in the Army from 2002 to 2009 and received an honorable discharge. While in the Army he deployed twice to Iraq and was in Kuwait for a year.² He has worked for a federal contractor since 2011.³

Applicant was arrested in October 1992, and charged with fraud-insufficient funds worthless check, a 3rd degree felony. He pled guilty in January 1993 to a lesser offense and was sentenced to a day in jail and a fine.

In September 1999, Applicant was arrested and charged with failure to appear for a misdemeanor offense and habitual driving with a suspended license with knowledge. In October 1999, he pled nolo contendere on both counts. He was found guilty and fined.

In May 2000, Applicant was arrested and charged with failure to appear for a misdemeanor charge and contempt of court. This was a result of his failure to pay a fine for a traffic offense and then subsequently driving on a suspended license. The disposition is unknown.⁴

In September 2000, Applicant was charged with traffic violator failure to appear and contempt of court. In November 2000, he pled nolo contendere to both counts and was sentenced to one day in jail. This charge was a result of his failure to pay for traffic violation fines and driving on a suspended license.⁵

¹ Hearing Exhibit I is Department Counsel's email memorandum noting he did not object to the Applicant's exhibits.

² AE B.

³ Tr. 37-40.

⁴ Answer to the SOR.

⁵ GE 2 and Applicant's explanations in his Answer to the SOR provide sufficient evidence of the SOR allegations.

With regards to the above charges and convictions, Applicant stated they occurred 15 to 20 years ago, and he has changed since then. He no longer drives the way he used to. He did not have a lot of money then when he wrote the checks without funds. He did not recall some of the charges.⁶

In July 2014, Applicant was arrested and charged with felony grand theft retail. In November 2014, he appeared in circuit court and pled guilty to grand theft. He was sentenced to unsupervised probation for two days and sentenced to two days in jail, with two days credit.

The police report details that Applicant purchased a camera online from a retail store. Approximately ten days later, Applicant went to the store to return it and received a full refund of \$4,279. Applicant went back to the store weeks later to return another item he purchased online. At that point, the store security recognized Applicant and contacted the police to report that the expensive camera purchased by Applicant was not the item that he returned, but rather Applicant returned an inexpensive camera. It was alleged that Applicant replaced the expensive camera with the inexpensive camera to obtain the large cash refund. Applicant denied the charges at the time he was arrested.⁷

Applicant testified he purchased a camera online that he then returned to the retail store. He stated the clerk checked the camera and verified it before providing him with the refund. He believes someone in the store replaced the camera after he returned it. Applicant hired an attorney. He stated his security manager told him he should “fight it.” He pled not guilty to the charge when he was arraigned. The attorney initially cost him \$5,000, and he was concerned that he faced a trial that would cost him more, and he did not know how long the trial would take and it would “drag on.” He explained he had a friend who spent \$23,000 for attorney’s fees and his attorney did not know how much her fees would be. He stated he agreed to plead guilty to the charge to save the cost and time, but he still maintained his innocence. He stated: “So, I just didn’t want to spend all that money, you know, to clear my name and have it drag on forever.”⁸ He believed he was not really pleading guilty, but was only doing it because it was convenient to do so. He did not know it would affect his clearance.⁹

Applicant provided a document that states “plea of guilty and negotiated sentence.” Handwritten on the document and inserted after the word guilty it states “by convenience.” Throughout the document, prior to the word “guilty” the handwritten term “by convenience” is inserted.” The terms of the plea agreement are: 1. “Withheld adjudication; 2. Payment in full of \$4,279.99 in restitution to [retail store and location] (it

⁶ Tr. 35-37.

⁷ Tr. 22-32; GE 3.

⁸ Tr. 34.

⁹ Tr. 22-33.

is noted it was paid on the date of the agreement); 3. Fines and costs in the amount of \$721 plus \$50 (and an illegible note.)” The document was signed on November 13, 2014, by all of the parties, including the circuit judge.¹⁰

An official court document dated December 9, 2014, regarding the disposition of Applicant’s charge states:

Offense: Grand Theft
Plea: Guilty
Adjudication: Withheld
Disposition Date: November 13, 2014
Disposition: On 11/13/2014, Defendant permitted to withdraw plea of not guilty and plead guilty. Adjudication of guilt withheld, Defendant placed on unsupervised probation for 2 days, serve 2 days in [local] county jail with 2 days credit.

Court costs and fees of \$771.00 imposed.¹¹

Applicant testified he pled guilty to the felony charge of grand theft so he could resolve the case. He did not believe it would go on his record. He did not know what the status was of the “withheld adjudication” but he indicated he was not currently on probation. When asked why he purchased the expensive camera, he stated photography is a hobby, but he did not know why he purchased it.¹²

Applicant’s supervisor provided a character letter. He indicated Applicant has never received any disciplinary actions or warnings since working for him beginning in 2011. Applicant is diligent and punctual and has a positive attitude. He manages professional relationships with class and patience.¹³

Policies

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 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, these guidelines are applied in conjunction with the

¹⁰ AE A.

¹¹ GE 4.

¹² Tr. 49-53.

¹³ AE C.

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 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 not drawn inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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 and 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 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." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 sets out the security concern relating 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.

I have considered the disqualifying conditions under criminal conduct AG ¶ 31 and the following two are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was arrested and convicted of charges four times from 1992 to 2000. The offenses he was charged with included a felony fraud for insufficient funds worthless check that he pled to a reduced charge; repeated failure to appear charges; habitual driving with a suspended license with knowledge; and repeated contempt of court charges. Applicant pled guilty to felony grand theft in 2014. I find the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and the following two 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) 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.

Applicant repeatedly violated the law when he was a younger man from 1992 to 2000. It appears he did not have any other criminal arrests or charges until 2014 when he was arrested and charged with felony grand theft. Applicant pled guilty to the felony charge. Although he has maintained his innocence, I do not have credible evidence to conclude he did not commit the offense. Due to the seriousness of the offense, and that it has been less than a year since the disposition, insufficient time has elapsed since the criminal behavior occurred. Insufficient evidence was produced to conclude the offense happened under unique circumstances such that it is unlikely to recur and does not cast doubt on his reliability, trustworthiness, and good judgement. AG ¶¶ 32(a) and 32(c) do not apply. There is some evidence of rehabilitation provided by Applicant's supervisor. AG ¶ 32(d) has some application.

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(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.

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 Guideline J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a 44-year-old married man who is a military veteran. He honorably served from 2002 to 2009, including two tours in Iraq and Kuwait for one year. He had a series of arrests and convictions when he was younger. In 2014, he pled guilty to felony grand theft. Despite his assertions that he did not commit the offense, he nevertheless pled guilty to save the expense and time of going to trial. He did not provide any further evidence to show the status of the "adjudication withheld." He has not met his burden of persuasion. Overall the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the criminal conduct guideline.

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

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. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge