



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-08507
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel

For Applicant: *Pro se*

September 30, 2008

Decision

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

Applicant completed Electronic Questionnaires for Investigations Processing (e-QIP), on September 20, 2006. On April 28, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns regarding criminal conduct (Guideline J) and personal conduct (Guideline E). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised Adjudicative Guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

On June 20, 2008, Applicant signed a notarized document in which she admitted all allegations. This occurred one day following her request that a determination be made without a hearing. On August 8, 2008, Department Counsel submitted its File of Relevant Material (FORM). Applicant received the FORM on August 26, 2008, and timely responded with additional argument on September 15, 2008. The case was

assigned to me on September 25, 2008, for administrative determination. Based upon a review of the limited case file and exhibits presented, Applicant failed to carry her burden and mitigate security concerns. Clearance is denied.

Findings of Fact

Applicant is a 36-year-old supply specialist who has worked for the same defense contractor since 2002. Academically, she has earned both a bachelor's and a master's degree. After a first marriage that lasted from 1992 through 1998, Applicant remarried in December 1999. By 2005, that marriage soured and the two decided to divorce. At first, the separation was amicable. Indeed, in the absence of any children, the couple decided to expedite the process by making certain verbal agreements outside the oversight of the courts. Consequently, when the couple was divorced in February 2006, there existed certain non-binding promises between the two. One of those agreements was that the ex-husband would pay Applicant \$1,250 "alimony" per month for two years even though she was gainfully employed. She understood the agreement was unenforceable when he stopped making the payments by June 2006. Applicant felt betrayed. She was also convinced he was monitoring her bank accounts and income. In her anger, she went on-line, opened a credit card account in his name, and paid off one of her own credit cards. In the application process, Applicant gave her own home address and email address.

Applicant's husband eventually became aware that a fraudulent use of his identity had taken place. He reported his suspicion to the credit card company, then made a report to the local sheriff's department on October 10, 2006. The subsequent investigation revealed that Applicant had used her own addresses in opening the account. Advised of the investigation's results, Applicant's ex-husband chose to press charges for the identity theft and theft. Applicant was ultimately arrested for the crimes on January 16, 2007. In March 2007, Applicant agreed to plead guilty to misrepresentation of another person's identity and theft of \$4,500.¹ As a result, judgement was deferred on the condition she complete a diversion program with ten hours of community service per month, appointments with a diversion specialist, attendance in group decision making sessions for 18 to 36 sessions, and make restitution of \$4,500 to the bank.² She began the program on or about April 2007. Upon completion of her program, the matter is to be removed from her permanent record.

At no time between her arrest and her plea did Applicant inform the government, her employer, or her security officer of her situation. She first mentioned the incident during a security clearance investigation in June 2007. In stating that she thought that her admission to those investigators, who apparently already knew the facts, constituted her official notification, Applicant remarked: "I have never attempted to

¹ Item 6 (Interrogatories) at 4.

² *Id.*

withhold information regarding my security clearance.”³ The incident was subsequently noted on Applicant’s February 2008 up-date to her e-QIP.

Applicant notes that she attended and completed 18 Adult Decision Making and Responsibility Sessions, but has not produced any documentary evidence supporting this assertion. She states she has learned how to manage her anger. She recognizes she was weak and felt betrayed by her ex-husband. She alleges that she has made restitution and completed all requirements of her diversion program, although she failed to offer any corroborative documentation. She writes: “It is expected that I will complete that program in October 2008.”⁴ Applicant is contrite and feels genuine remorse; she feels she is fully rehabilitated and notes that she has not committed any other crimes.⁵

Policies

When evaluating an Applicant’s suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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. The Administrative Judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. Under AG ¶ 2(c), this 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 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

³ SOR Response, dated June 20, 2008.

⁴ FORM Response, dated September 15, 2008.

⁵ *Id.*

Department Counsel. . . .”⁶ The burden of proof is something less than a preponderance of evidence.⁷ The ultimate burden of persuasion is on the applicant.⁸

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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁹ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.¹⁰ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Analysis

Based upon consideration of the evidence, I find Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) to be the most pertinent to the case.

Guideline J, 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. With respect to Guideline J (Criminal Conduct), the Government has established its case. Applicant admits she fraudulently obtained a credit card in her ex-husband’s name and used it to pay her own debts. Criminal Conduct Disqualifying Conditions (CC DC) AG ¶ 31(a) (“a single serious crime

⁶ See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

⁷ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

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

⁹ *Id.*

¹⁰ Executive Order 10865 § 7.

or multiple lesser offenses”), and CC DC AG ¶ 31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”) apply.

The crime at issue occurred only two years ago and Applicant has yet to complete her diversion program. While the circumstances were unique, they were not unforeseeable. Applicant knew her agreement for alimony was informally made outside of the divorce decree and unenforceable. Yet she still felt betrayed and sought revenge when he reneged on the scheme. As a result, she committed fraud. She may never again find herself in a similar situation. Her knee-jerk reflex or reckless pursuit to seek revenge, however, affects current consideration of her present judgment. Similarly, the actual fraud she perpetrated calls into question her recent reliability and trustworthiness. Consequently, Criminal Conduct Mitigating Condition (CC MC) AG ¶ 32(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”) does not apply.

Applicant admits she committed the crime at issue. She also admits she pled to the charges. Consequently, CC MC AG ¶ 32(b) (“the person was pressured or coerced into committing the act and those pressures are no longer present in the person’s life”) and AG ¶ 32(c) (“evidence the person did not commit the act”) do not apply.

Today, Applicant feels she is rehabilitated. She points to her completion of 18 Adult Decision Making and Responsibility Sessions and the sense she has regained her ability to deal with anger. She also points to her completion of all diversion program requirements, including restitution, and states she expects to be released from the program in October 2008. The fact that Applicant feels she has been rehabilitated is important; her contrition is apparent. She failed, however, to introduce any corroborative documentation establishing that she has completed this minimum number of sessions required by her diversion program. She similarly declined to submit any certifications, evaluations, or other paperwork supporting her contention that she has completed all diversion program requirements or that she has been evaluated as rehabilitated. Most importantly, she is still a participant in her diversion program. Given these considerations, CC MC AG ¶ 32(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”) does not apply. In sum, Applicant is still a participant in a diversion program after committing a fraudulent act. She failed to produce any documentation as to her diversion program progress and has not yet had time to demonstrate post-program rehabilitation. Therefore, Applicant has failed to mitigate criminal conduct security concerns.

Guideline E – Personal Conduct

Security concerns arising from matters of personal conduct are controlled by Guideline E, ¶ 15 of the AG. Such security concerns arise in the presence of questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or

unwillingness to comply with rules and regulations which could indicate that the person may not properly safeguard classified information.

In January 2007, Applicant was arrested for her crime. She accepted a guilty plea in March 2007 and entered into a diversion program in April 2007. It was not until she was interviewed by investigators in June 2007 that she disclosed her arrest, plea, and subsequent diversion program to the government or her employer. Such facts give rise to Personal Conduct Disqualifying Condition AG ¶ 16(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. . . .”).

Arrested in January 2007, Applicant did not inform her security officer, employer, or the government of her predicament. Nor did she contemporaneously disclose her subsequent plea in March 2007 or her entry into a diversion program in April 2007. Instead, such information was withheld until she met with investigators in June 2007. Personal Conduct Mitigating Condition (PC MC) AG ¶ 17(a) (“the individual made prompt, good faith efforts to correct the omission, concealment, or falsification before being confronted with the facts”) does not apply.

Moreover, although Applicant’s concealment of her arrest and plea occurred over a year ago, such concealment directly undermines that level of reliability, judgment, and candor expected of one possessing a security clearance. Consequently, it raises issues of concern that cannot be erased simply by the passage of one year and the expectation one might soon be released from a diversion program. Personal Conduct Mitigating Condition (PC MC) ¶ 17(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”) does not apply. Further, inasmuch as Applicant failed to offer little more than words of contrition and uncorroborated testimony that she is soon to be released from her diversion program, an assessment under PC MC AG ¶ 17(e) (“the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress”) cannot be explored. Taken together, Applicant failed to carry her burden in mitigating personal conduct security concerns.

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 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) 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 public trust position must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of the facts and circumstances surrounding this case, as well as the “whole person” factors. Applicant is a mature woman with years of work experience and a master’s degree. Feeling betrayed by her ex-husband, she sought revenge. She stealthily and illegally obtained a credit card in his name, although she carelessly used her home and email address in the process. The passions that enraged her are not unique, given the emotions often accompanying divorce. Her revenge, however, was puerile and amateurishly executed. It demonstrated rash judgment, not the sound judgment expected of one seeking to be entrusted with classified information. Similarly, her failure to timely report her arrest and her plea to the government or to her employer demonstrated poor reliability and trustworthiness. While Applicant may feel she is rehabilitated, she failed to document her progress within her diversion program, which she has yet to complete. Upon release from her diversion program, Applicant may better demonstrate genuine rehabilitation. At present, however, security concerns remain with regard to her 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
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

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

ARTHUR E. MARSHALL, JR.
Administrative Judge