



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



In the matter of:)	
)	
)	ISCR Case No. 14-05603
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: Ryan C. Nerney, Esquire

September 22, 2015

Decision

CEFOLA, Richard A., Administrative Judge:

Applicant submitted her Electronic Questionnaires for Investigations Processing (e-QIP) on February 11, 2013. On January 15, 2015, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines F, J and E for Applicant. 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 Department of Defense after September 1, 2006.

Applicant acknowledged receipt of the SOR on January 26, 2015. She answered the SOR in writing on February 9, 2015, attaching thereto what were received into evidence as Exhibits (AppXs) A and B, and requested a hearing before an Administrative Judge. The Defense Office of Hearings and Appeals (DOHA) received the request soon thereafter, and I received the case assignment on April 27, 2015. DOHA issued a notice of hearing on May 6, 2015, and I convened the hearing as

scheduled on May 29, 2015. The Government offered Exhibits (GXs) 1 through 7, which were received without objection. Applicant testified on her own behalf, as did a former supervisor, and submitted AppXs C through O, which were received without objection. DOHA received the transcript of the hearing (TR) on June 8, 2015. I granted Applicant's request to keep the record open until June 5, 2015, to submit additional matters. On June 1, 2015, she submitted AppX P, which was received without objection. The record closed on June 5, 2015. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In her Answer to the SOR, Applicant admitted the factual allegations in Subparagraphs 1.h.~1.j., and 3.a.~3.c. of the SOR, with explanations. She denied the factual allegations in Subparagraphs 1.a.~1.g., and 2.a. and 2.b. of the SOR. She also provided additional information to support her request for eligibility for a security clearance.

Guideline F - Financial Considerations

Applicant is a 44 year-old "Field Service Technician." (TR at page 42 line 8 to page 45 line 12.) She retired from the Air Force as a Senior Airman (E-4) in November of 2008. (*Id.*, and AppX P.) At present, Applicant has a positive monthly cash flow of about \$796. (AppX 3.)

1.j. and 3.c. In about "February of 2005," Applicant's brother borrowed "about \$2,600," which he never paid back. (TR at page 45 line 13 to page 48 line 4, and at page 77 line 13 to page 80 line 7.) As a result, this caused her finances to "snowball," and she filed for protection of a Chapter 7 Bankruptcy in September of 2005. (*Id.*) Her debts were discharged in 2006.

1.i. 1.h. and 3.c. As noted above, Applicant retired from the Air Force as an E-4 in November of 2008. She was unemployed for about seven months, until June of 2009, and also "had transmission go out in . . . [her] car, so . . . [she] had to get a new car." (TR at page 48 lines 9~22, and GX 1 at pages 11~12.) As a result, Applicant "got behind in [her] bills," and eventually filed for the protection of a Chapter 13 Bankruptcy in September of 2011. (TR at page 48 line 5 to page 51 line 16, at page 80 line 8 to page 81 line 10, and AppX A.) Pursuant to the Chapter 13, she made about \$10,000 in payments, but this "didn't resolve all . . . [of her] debt"; and as a result, this bankruptcy was dismissed in 2013, and Applicant filed for protection of a Chapter 7 Bankruptcy in July of 2014. (TR at page 51 line 17 to page 53 line 13, and AppXs B and C.) Her debts were discharged in November of 2014. (*Id.*)

1.a. It is alleged that Applicant is indebted to Creditor A for a past-due debt in the amount of about \$807. (GX 5 at page 2.) This debt has been discharged by her most recent Chapter 7 Bankruptcy, as evidenced by that bankruptcy, and by the

Government's two most recent 2015 credit reports (CRs). (TR at page 53 lines 14~18, at page 75 line 16 to page 76 line 5, GXs 6 and 7, and AppX C at page 22.)

1.b. It is alleged that Applicant is indebted to Creditor B for a past-due debt in the amount of about \$8,284. This debt has been discharged by her most recent Chapter 7 Bankruptcy, as evidenced by that bankruptcy, and by the Government's two most recent CRs. (TR at page 53 lines 14~18, at page 75 line 16 to page 76 line 5, GXs 6 and 7, and AppX C at page 21.)

1.c. It is alleged that Applicant is indebted to Creditor C for a past-due debt in the amount of about \$3,500. This debt has been discharged by her most recent Chapter 7 Bankruptcy, as evidenced by that bankruptcy, and by the Government's two most recent CRs. (TR at page 53 lines 14~18, at page 75 line 16 to page 76 line 5, GXs 6 and 7, and AppX C at page 21.)

1.d. It is alleged that Applicant is indebted to Creditor D for a past-due debt in the amount of about \$4,041. (GX 4 at page 13.) This debt has been discharged by her most recent Chapter 7 Bankruptcy, as evidenced by that bankruptcy, and by the Government's two most recent CRs. (TR at page 53 lines 14~18, at page 75 line 16 to page 76 line 5, GXs 5~7, and AppX C at page 23.)

1.e. It is alleged that Applicant is indebted to Creditor E for a past-due debt in the amount of about \$5,037. This debt has been discharged by her most recent Chapter 7 Bankruptcy, as evidenced by the Government's two most recent 2015 CRs. (TR at page 53 lines 14~18, at page 75 line 16 to page 76 line 5, and GXs 6 and 7.)

1.f. It is alleged that Applicant is indebted to Creditor F for a past-due debt in the amount of about \$2,463. (GX 5 at page 2.) This debt has been discharged by her most recent Chapter 7 Bankruptcy, as evidenced by that bankruptcy, and by the Government's two most recent 2015 CRs. (TR at page 53 lines 14~18, at page 75 line 16 to page 76 line 5, GXs 6 and 7, and AppX C at page 22.)

1.g. It is alleged that Applicant is indebted to Creditor E for a past-due debt in the amount of about \$1,500. This debt has been discharged by her most recent Chapter 7 Bankruptcy, as evidenced by the Government's two most recent 2015 CRs. (TR at page 53 lines 14~18, at page 75 line 16 to page 76 line 5, and GXs 6 and 7.)

Guideline J - Criminal Conduct

2.a. and 2.b. In 2005, Applicant was the president of an Air Force squadron booster club. (TR at page 56 line 9 to page 57 line 14, and GX 2.) At the beginning of her six month tenure, which ran from April of 2005 to October of 2005, she began to wrongfully appropriate monies, totaling about \$39,000, from the club's bank account. On seventeen occasions during her tenure, Applicant withdrew funds to cover her own personal debts, then redeposited those funds in the club's bank account, at a later date. (TR at page 57 line 15 to page 58 line 24, and at page 59 line 20 to page 60 line 13.) In

October, the club was to fund a non-TDY trip; and as Applicant knew the club's funds would be short, she reported her conduct to her commander. (TR at page 61 lines 12~20, and at page 92 lines 4~11, and GX 2.)

As a result of a May 2006 investigation (GX 2), Applicant was charged at a General Court-Martial with Wrongful Appropriation (17 counts), and Dereliction of Duty. (TR at page 64 line 6 to page 67 line 8, at page 96 line 25 to page 99 line 13, and GX 3 at page 3.) She was found guilty, reduced from the rank of E-6 to E-4, and fined. (*Id.*) The date of the court-martial is unclear from the exhibits, but Applicant testified she believed it to be in August of 2006. (TR at page 99 lines 14~25.)

Guideline E - Personal Conduct

3.a. **Section 15 - Military History**, of Applicant's February 2013 e-QIP, posits the following question: "In the last 7 years, have you been subject to court martial . . ." To which she answered "No." Applicant testified that she miscalculated the time between her court-martial and the date she executed her e-QIP. (TR at page 69 line 5 to page 70 line 5, at page 82 line 17 to page 83 line 25, and at page 99 line 14 to page 100 line 6.) I find this to be a wilful falsification as her court-martial was clearly less than seven years old, by about six months, when Applicant executed her e-QIP.

3.b. **Section 22 - Police Record**, of Applicant's February 2013 e-QIP, posits the following question: "Have you **EVER** been charged with any felony offense? (Include those under the Uniform Code of Military Justice [USMJ]. . .)" To which she answered "No." Applicant testified that she did not know whether Wrongful Appropriation was a "felony offense." (TR at page 70 line 6 to page 71 line 18, and at page 84 line 1 to page 89 line 23.) No evidence was posited by either counsel as to what constitutes a felony offense. Although the UCMJ does not specifically define a "felony offense," it is generally recognized at common law as an offense punishable by imprisonment for one year or more. Under the UCMJ, the maximum punishment for "Article 121 - wrongful appropriation" is "confinement for 6 months."¹ As Wrongful Appropriation is not a "felony offense," I find no wilful falsification here.

3.c. See discussion under Guideline F, above.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the 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.

¹The maximum punishment for "Article 92(2) . . . dereliction in the performance of duties" is "confinement for 3 months" under the UCMJ.

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 commonsense decision. According to AG Paragraph 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. Paragraph 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.

Under Directive Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph 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.

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).

Analysis

Guideline F - Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in Paragraph 18:

Failure or 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. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 19(a), an *"inability or unwillingness to satisfy debts"* is potentially disqualifying. Similarly under Subparagraph 19(c), *"a history of not meeting financial obligations"* may raise security concerns. Applicant has had difficulty meeting her financial obligations. However, I find two countervailing Mitigating Conditions that are applicable here. Under Subparagraph 20(b), it may be mitigating where *"the conditions that resulted in the financial problem were largely beyond the person's control (e.g. loss of employment . . .), and the individual acted responsibly under the circumstances."* Applicant's past-due indebtedness can be attributed to her initial period of unemployment when she retired from the Air Force. Under Subparagraph 20(d), it may also be mitigating where *"the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."* Applicant has resolved her debts through the protection of a Chapter 7 Bankruptcy.

Guideline J - Criminal Conduct

Paragraph 30 of the adjudicative guidelines 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.

The adjudicative guidelines set out certain conditions that could raise security concerns. Subparagraph 31(a) provides that an *"a single serious crime or multiple lesser offenses,"* may raise security concerns. From April of 2005 to October of 2005, Applicant committed 17 acts of wrongful appropriation.² However, under Subparagraph 32(a) it may be mitigating where *"so much time has elapsed since the criminal behavior happened"* This mitigating condition applies as the admitted criminal conduct occurred about ten years ago.

²The Government does not allege the February 2013 wilful falsification to be criminal conduct.

Guideline E - Personal Conduct

The security concern for Personal Conduct is set out in AG Paragraph 15:

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.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 16(a), "*deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . or similar form*" may raise security concerns. Here, Applicant was not candid about her general court-martial on her February 2013 e-QIP. I find no countervailing mitigating condition that is applicable here. Applicant's willful falsification was about two and a half years ago. I also find "*a pattern of dishonesty or rule violations*" under Subparagraph 16(d)(2), when her falsification is coupled with her repeated acts of wrongful appropriation in 2005.

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. Under AG Paragraph 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.

The Administrative Judge should also consider the nine adjudicative process factors listed at AG Paragraph 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.

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. Applicant is apparently highly thought of in the work place. (TR at page 27 line 4 to page 40 line 23, and AppXs N and O.) However, the record evidence leaves me with questions and doubts as to her eligibility and suitability for a security clearance. She was not candid with the government, and has demonstrated a pattern of rule violations. For these reasons, I conclude Applicant

has not mitigated the security concerns under the whole-person concept arising from her Personal Conduct.

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 F:	FOR APPLICANT
Subparagraphs 1.a.~1.j.	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a. and 2.b.	For Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a.	Against Applicant
Subparagraph 3.b. and 3.c.	For 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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Richard A. Cefola
Administrative Judge