



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



In the matter of:)
)
) ISCR Case No. 18-01351
)
Applicant for Security Clearance)

Appearances

For Government: Bryan Olmos, Esq., Department Counsel
For Applicant: *Pro se*

12/17/2018

Decision

KILMARTIN, Robert J., Administrative Judge:

Applicant did not mitigate the security concerns under Guideline J (criminal conduct). Applicant’s eligibility for access to classified information is denied.

Statement of the Case

On May 23, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J. Applicant timely answered the SOR and elected to have her case decided on the written record in lieu of a hearing.

Department Counsel submitted the Government’s file of relevant material (FORM) on August 2, 2018. Applicant received the FORM on August 13, 2018, and had 30 days to file objections and submit material in refutation, extenuation, and mitigation. Applicant provided no response to the FORM. The Government’s evidence, identified as Items 1 through 7, is admitted without objection. The case was assigned to me on December 6, 2018.

Findings of Fact¹

Applicant is 37 years old. She obtained her associate's degree in 2011 and her bachelor's degree in 2013. She has been employed as a human resources manager for a federal contractor since July 2016. Applicant was unemployed briefly from May 2016 to June 2016 when she was terminated for alleged theft from her employer by uttering a forged instrument. Applicant reports no military service. She married in June 2001 and divorced in June 2009. Applicant is a single mother of three children. Applicant has not previously held a security clearance.

On May 25, 2017, Applicant completed a Security Clearance Application (SCA), and in section 22 (Police Record) she disclosed her arrest in May 2016 when her previous employer accused her of forgery and grand larceny alleging that she forged and cashed phony payroll checks. She also disclosed that she was fired from this job. She stated that the case was dismissed by the court in December 2016.² Applicant responded to the SOR on June 21, 2018 (Answer) and denied creating the duplicate payroll checks, then cashing them. An arrest warrant was issued on June 18, 2018, and she turned herself in to police. Since she could not afford an attorney, a public defender was assigned to her case. The public defender advised her to pay restitution for the duplicate payroll checks that were fraudulently cashed, and she did. In return, the prosecutor dropped the charges. (Answer)

Applicant's FBI criminal history record reflects the arrest for larceny by check on September 12, 2016, and the case dismissal on December 12, 2016. (Item 6) However, the offense report from the sheriff's department involved, reflects that on May 4, 2016, Applicant came in to report that persons unknown cashed two false payroll checks in her name at local retail stores after Applicant cashed the original check at a bank. (Item 5) Interestingly, when sheriff's deputies checked the loss detection video tapes in these local stores, they clearly show Applicant cashing the two checks. In her personal subject interview (PSI), Applicant stated she left this employer by mutual agreement. (Item 4) This contradicts her assertion in section 13A of her SCA (Employment Activities) that she was fired. She also stated "I have absolutely no idea how these checks were printed or cashed." (Answer) She also stated it "was a poor decision on my part."

Policies

DOD took action in this case 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 (AGs) implemented by DOD on June 8, 2017.

¹ Unless stated otherwise, the source of the information in this section is Applicant's May 25, 2017 Security Clearance Application (SCA) (Item 2) and her summary of clearance interviews by background investigators dated January 22, 2017 and March 7, 2018 (item 3).

² Item 2, p. 34.

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, 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 factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is 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." 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 ¶ 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 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 that an applicant may deliberately or inadvertently fail to 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 EO 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

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

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.

The guideline notes conditions that could raise security concerns under AG ¶ 31. The disqualifying conditions potentially applicable in this case include:

(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.

In her Answer, Appellant denied the allegation in the SOR and persists that she has no idea how this could happen. Yet, she admitted to the warrant for her arrest and a plea deal by which she paid restitution for the two false payroll checks. There is ample evidence that she committed grand larceny by check according to the offense report from the sheriff's office. It reflects that she was clearly visible on video tape committing these two crimes. The above disqualifying condition is applicable.

AG ¶ 32 provides conditions that could mitigate security concerns. 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; 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.

Appellant provided no evidence of counseling, acceptance of responsibility, or rehabilitation. She was fired for lying to her boss when confronted with the video evidence showing she had uttered the false instruments in question. She presented no evidence of community involvement or character references. There is no evidence of unusual circumstances when she committed the offenses. Instead, they were crimes of opportunity since she received a hard copy of her payroll check because the direct deposit system was down. She continues to deny knowledge or culpability in the matter of the false payroll checks. She has not been forthcoming and completely cooperative in the

security clearance application process. Her arrest was two years ago. Insufficient time has elapsed without recidivism to conclude that her criminal behavior will not recur. AG ¶¶ 32(a) and 32(d) do not 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 the applicant's conduct and all the 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 Guideline J in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines. Most importantly, Applicant did not resolve the specific violation alleged in the SOR, and she has not accepted responsibility for her crimes.

Applicant's criminal conduct remains a security concern. These offenses were not minor, and they were not committed under such unusual circumstances that they are unlikely to recur. Applicant minimized her termination for theft from her employer by stating that it was by mutual agreement for her to leave the job. She benefitted by a plea deal arranged by her public defender to pay restitution, but she has yet to accept responsibility or express remorse about the fraudulent check offenses. There is insufficient evidence to conclude that Applicant has acknowledged the egregiousness of her behavior and she has not met her burden of persuasion. The record evidence leaves me with serious questions and doubts as to Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising under Guideline J.

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: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Robert J. Kilmartin
Administrative Judge