



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



In the matter of:)
)
) ISCR Case No. 20-02898
)
)
Applicant for Security Clearance)

Appearances

For Government:
Adrienne Driskill, Esquire, Department Counsel

For Applicant:
Alan V. Edmunds, Esq.

February 23, 2022

Decision

GLENDON, John Bayard, Administrative Judge:

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on September 6, 2019. On February 25, 2021, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline E (Personal 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 effective within the Department of Defense after June 8, 2017.

On April 27, 2021, Applicant answered the SOR in writing with attachments (Answer) and requested a hearing before an administrative judge. Department Counsel

was prepared to proceed on July 20, 2021. The case was initially assigned to another administrative judge and then was reassigned to me on October 29, 2021. The Defense Office of Hearings and Appeals issued a Notice of Hearing on November 1, 2021. The case was heard on December 3, 2021. DOHA received the transcript of the hearing on December 10, 2021.

The Government offered Government Exhibits (GE) 1 through 3, which I admitted without objection. Applicant testified on her own behalf and submitted Applicant Exhibits (AE) A through K, which I also admitted without objection. The record closed at the conclusion of the hearing.

Findings of Fact

Applicant's personal information is extracted from her e-QIP unless otherwise indicated by a parenthetical citation to the record. After a thorough and careful review of the pleadings, Applicant's testimony, and the documentary evidence in the record, I make the following findings of fact.

Applicant is 34 years old and has married twice, first in 2005 and later in 2012. Both marriages ended in divorce. She has one child. She receives no child support from the father of the child. She earned an associate's degree in 2016 and a bachelor's degree in May 2018. She put herself through college as an adult. Since June 2018, Applicant has been employed by a large defense contractor as a manufacturing engineer earning an annual salary of \$110,000. She is seeking to obtain a security clearance in relation to her employment. She is a first-time applicant. (Tr. at 15-17, 21.)

Paragraph 1 (Guideline E, Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because of her conviction on a felony charge in May 2007 and because she falsified information in her e-QIP by failing to disclose the conviction, a related criminal charge, and her sentence of probation. In her Answer Applicant admitted the three SOR allegations with clarifications.

Applicant testified that she was arrested in May 2007 in Georgia and charged with two felonies, Murder and Concealing the Death of Another. She pled guilty to the second charge, and in December 2009, she was sentenced to probation for ten years. (Tr. at 17-18; GE 2 at 11.)

Applicant described the events that gave rise to her arrest. A male friend was driving Applicant and a female friend inside a parking lot to drop them off at Applicant's car. Applicant was sitting in the front passenger seat next to her male friend, and the female friend was sitting in the backseat behind the driver. While in the rear seat, Applicant's female friend was playing with a loaded handgun, which belong to her boyfriend. The driver stopped the car suddenly when he dropped a marijuana cigarette

and burned himself. Applicant's female friend accidentally fired the gun and the bullet struck the driver. The car sped up running into other vehicles and finally stopped. Applicant and her female friend jumped out of the car, heard police sirens, and fled out of fear. Applicant was 20 years old at the time. Her girlfriend was 16. Applicant got into her car with her girlfriend and drove to a neighboring state where her parents lived. Applicant subsequently learned that her male friend died of the gunshot. (Tr. at 18-21, 31-40; GE 2 at 5.)

Applicant believes that her deceased friend was involved in selling drugs based on how he carried himself and his lack of a legitimate job. Applicant was never involved in his drug-related activities. She subsequently turned herself in to the local police where the shooting occurred. She was originally charged with murder. She hired a criminal attorney. The murder charge was eventually dropped before Applicant went to court. Applicant pled guilty to the felony charge of Concealing the Death of Another. After five years of probation, the court terminated her probation for good behavior in response to a motion by her defense attorney. She had completed all of the terms and conditions of her probation. The court subsequently ordered that the court record in her case be sealed. Her female friend was convicted of involuntary manslaughter and was sentenced to serve some prison time. Applicant has had no contact with that friend for the last five years. (Tr. at 19-21, 25, 28-29, 31-40; GE 2 at 5-6, 15; AE H; AE I.)

Since 2007, Applicant has consulted with her attorney whenever she has a question about the criminal case and in particular the early termination of her probation and the sealing of the court record. She consulted with him in September 2018 when she was preparing her e-QIP. She testified that she was not comfortable with the legal terms used in the e-QIP question about her criminal record. In a phone call, her defense attorney advised her to answer these questions in the negative because her case was sealed. He did not have the e-QIP in front of him when she spoke with him. As a result, he did not read the introductory language to Section 22 of the e-QIP, which reads: "For this section report information regardless of whether the record in your case has been sealed, expunged, or otherwise stricken from the court record, or the charge was dismissed." He also advised her that she can disclose her record and provide the details about her criminal record at her background interview. Accordingly, she did not disclose her record in her e-QIP. She testified that this advice made sense to her at the time because she thought her answers on the e-QIP would then be consistent with the available criminal records, which she believed would not show her arrest and conviction because they were sealed. (Tr. at 21-24, 28, 41-47, 52, 59-62; GE 1 at 40.)

In her testimony she confirmed her statement in her Answer that she never intended to conceal her criminal record. She credibly testified that she believed that her criminal record would come up in the interview. She explained how the interview was conducted. She told the interviewer at the beginning of the interview that she had a concern about an e-QIP question. The interviewer told her that they would get to her question when they discussed the relevant section of her e-QIP. When the e-QIP section regarding the subject of a police record was discussed, she brought up the events of 2007

and provided a detailed statement of the facts and documentation from the criminal case. She was the first to mention that she had experienced a criminal charge that was not listed on her e-QIP. She disputed the wording of the interview summary in which the investigator wrote that he “confronted” Applicant about the events in May 2007. She voluntarily disclosed her criminal record during her background interview and made no attempt to conceal it. (Answer at 2; Tr. at 21-24, 28, 41-47, 52, 59-62.)

Mitigation

Applicant submitted significant whole-person evidence. A lot has changed in Applicant’s life since 2007. She no longer associates with people like the shooting victim or others involved in criminal activities. One exhibit was a picture of the home she owns in which she raises her child. Her mother also lives with her. She purchased the property with a mortgage loan. (Answer at 3; Tr. 44-47; AE K.)

Applicant testified that she was not vulnerable to blackmail by what happened when she was 20. She said that it was a “tragedy,” but she does not feel responsible for what happened. She is not embarrassed by the event. Her direct manager is aware of this incident. Two others co-workers are also aware of it. (Tr. at 27, 44-47.)

Applicant is a highly respected employee of her clearance sponsor. Supervisors and coworkers identify Applicant as a successful, respected, and honest employee and person. They praise her integrity, professionalism, and motivation to excel. One coworker, who is also a friend, described Applicant’s significant leadership skills. A supervisor wrote that Applicant “is self-driven and takes on new challenges with keen intelligence.” (AE A at 1-4; AE B.)

Policies

When evaluating an applicant’s suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant’s national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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, “Any 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 national security eligibility. 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 or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Paragraph 1 (Guideline E, Personal Conduct)

The security concerns relating to the guideline for personal conduct are set out in AG ¶ 15, which states:

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 investigative or adjudicative processes.

AG ¶ 16 describes the following conditions that could raise security concerns and may be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

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

(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; and

(g) association with persons involved in criminal activity.

Applicant has a criminal record of a felony conviction. Also, she did not report on her e-QIP that she had another felony charge, that she had been charged with an offense involving a firearm, and that she had been on probation within the seven-year period preceding her submission of the e-QIP. Also, her actions and associations in the past when she was 20 years old raise independent security concerns. The above disqualifying conditions apply in this case.

The adjudicative guideline includes five conditions in AG ¶ 17 that could mitigate the security concerns arising from Applicant's alleged falsifications and past actions:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed by the advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

All of the above mitigating conditions apply. The criminal charge occurred so long ago, when Applicant was 20 years old, that it no longer raises serious security concerns in light of how she has turned her life around. She is now a college graduate with an impressive career. She is a single mother raising a child in a house, which she owns. She is not ashamed of her past and is proud of her present circumstances and her future. She is not vulnerable to exploitation. She no longer associates with individuals involved in criminal activities. Her past behavior does not cast doubt on Applicant's reliability, trustworthiness, or good judgment.

Moreover, Applicant has established that her e-QIP responses to the questions regarding her police record were not deliberate falsifications. She relied upon the advice of the attorney who had successfully represented her for more than ten years in navigating the criminal justice system. Although his advice was incorrect, she relied upon that advice in good faith knowing that she could disclose her criminal record and the surrounding facts and circumstances at the time of her background interview, which is exactly what she did. She also established that she made a prompt good-faith effort to correct the omissions of her criminal record and probation before being confronted with the facts. The investigator's summary of the interview during which she made these disclosures states that he "confronted" her initially. Applicant credibly testified that this was incorrect. The Government offered no witness to contradict her testimony on the issue of confrontation. Based on the available evidence, I find that Applicant did not have the requisite intent to deceive when she filled out the e-QIP and made a prompt good-faith disclosure of her criminal record during her interview before being confronted. SOR Paragraph 1 is found for Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for national security eligibility 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 national security 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 pertinent facts and circumstances surrounding this case. Applicant has mitigated the concerns regarding her personal conduct. On her own initiative, she turned her life around and has become an impressive, well-educated young woman with a brilliant career and life ahead of her. She has minimized the potential for pressure, coercion, or duress, as well as the likelihood of recurrence. Overall, the record evidence does not raise any questions or doubts as to Applicant's present suitability for national security eligibility and a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraphs 1.a through 1.c:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's national security eligibility for a security clearance. Eligibility for access to classified information is granted.

John Bayard Glendon
Administrative Judge