



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 05-02001
)	
Applicant for Security Clearance)	

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

September 16, 2008

Decision

MASON, Paul J., Administrative Judge:

Applicant submitted her Security Clearance Application (SCA) on June 5, 2001. On November 27, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under criminal conduct (Guideline J) and personal conduct (Guideline E). The action was taken pursuant to 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and made effective within the Department of Defense for SORs issued on or after September 1, 2006.

Applicant submitted her answer to the SOR on December 11, 2007. DOHA issued a notice of hearing on April 7, 2008, and the hearing was held on May 9, 2008. At the hearing, eight exhibits (GE 1 through 7, GE 9) were admitted in evidence over objection, to support the government's case. Applicant testified. In the time allowed for her to furnish additional documentation, she submitted AE A through AE C, character references from her friend and her mother. DOHA received a copy of the transcript of

the proceedings on May 15, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Rulings on Procedure

I decided not to admit GE 8. In response to the government's argument that the financial issue was being alleged under personal conduct (PC) disqualifying condition (DC) 16.c. and 16.d. of the AG, the government had more than a reasonable period of time to amend the SOR to embrace the financial issue as representing additional, credible, adverse information that could support a whole person assessment of poor judgment and unreliability and poor judgment. Furthermore, the exhibit displays only three delinquent debts totaling less than \$2,000.00. The modest, delinquent amount has negligible probative value in a whole person assessment of unreliability or other characteristics indicating Applicant may not properly safeguard classified information. Finally, Applicant has held a security clearance since February 2003 with no record of security violations.

Findings of Fact

In Applicant's answer to the SOR, she denied the criminal conduct and personal conduct allegations without explanation.

Applicant is 32 years old and married. She has worked as an administrative assistant for her current employer (defense contractor) since May 2001, and has held a security clearance since February 2003. She has a Bachelor's degree in Business.

Criminal Conduct

GE 3 contains a series of criminal investigative reports dated April 7 through April 23, 2003 regarding a homicide that occurred on April 7, 2003. These reports cover interviews the investigating detective had with Applicant, her current husband (who was her boyfriend in April 2003), and her boyfriend's mother. (The investigating detective testified at the hearing.) There are two interviews of Applicant's husband and one interview of Applicant.

On April 7, 2003, the mother of Applicant's husband (her boyfriend in April 2003) called the sheriff's department about a homicide of a woman that had been in a relationship with Applicant's husband. Based on information from the mother and other information, Applicant's husband agreed to meet with law enforcement on April 8, 2008 at the sheriff's station to provide information of his whereabouts on April 7, 2003. The boyfriend stated he was home all day on April 7, 2003. At about 3:30 P.M., according to him, Applicant returned home, and they watched movies. The detective then asked the boyfriend about child support of \$1,200.00 and \$200.00 a month he owed to "Shelly," the murder victim. The boyfriend replied that she (victim) did not need the child support, as she would use the money to get her hair prepared.

After receiving the cellular telephone (cell-phone) records for Appellant's husband for the date of April 7, 2003, law enforcement individuals, including the investigating detective, discovered that three calls were placed from the cell phone at 7:20 A.M., 7:25 A.M., and 7:53 A.M. to Applicant's home phone. In short, the calls had been placed at locations other than where the home was located.

On April 19, 2003, the detective traveled to the home where Applicant and her boyfriend lived to interview Applicant about the events of April 7, 2003. She claimed (GE 3) she left home for work that day about 7:45 A.M. to 8 A.M. because she was running late. She returned home between 5 P.M. and 6 P.M. that afternoon. Her husband was not at home when she returned. The investigator noted that her account of when she left for work differed from her boyfriend's account. The report does not, however, reference what her boyfriend initially stated when she left their home in the morning of April 7, 2003. Regarding her return home, the report reveals an initial inconsistency in their accounts on when she returned home. In a subsequent interview, Applicant's husband changed his account by stating that Applicant returned home about 6:30 P.M.

In his last interview on April 23, 2003 (the last two pages of GE 3), the investigator confronted Applicant's husband with the inconsistencies about when his wife came home. The investigator asked about the three cell-phone calls made to his number from locations other than his home. He stated he was unconcerned about the information in the cell records. He maintained he was at home the entire day of April 7, 2003. In addition, he was the only person who used his cell phone, and his cell phone was always with him. Except for the time Applicant returned home from work, he maintained his original account provided on April 8, 2003 was truthful. Regarding the time Applicant came home, her husband changed his earlier account by indicating that she returned home about 6:30 P.M., rather than 3:30 P.M., as he had stated on April 8, 2003.

SOR 1.a. On April 19, 2003, Applicant was interviewed by at least one detective and the testifying detective from the sheriff's department regarding her schedule and contact with her then co-habitant (now spouse) on April 7, 2003 (Tr. 70, 98), the date of a homicide of a woman known by her co-habitant.

SOR 1.b. The allegation reflects the investigation is "active." On page 51 of the transcript, the investigative detective testified that no evidence has been uncovered since the homicide to exonerate Applicant's husband, and that her husband remains a "prime suspect." Then, the detective indicated he is no longer assigned to the case due to a promotion. Occasionally, as the detective noted, he looks into the case and became aware Applicant and her husband moved to another location. (*Id.*) When asked at the hearing by Applicant to disclose evidence that connects her husband to the homicide, the detective responded that he could not answer the question because the case is an "active homicide investigation," and, "Well, - - we can't talk about the evidence. It's an ongoing investigation and - - and I could get - - could very well jeopardize the case." (Tr. 63-65) I find the homicide investigation of Applicant's husband to still be "active," even though more than five years have passed since GE 3 was prepared.

Regarding the second half of SOR 1.b., “whether you were involved in the crime or in an attempt to cover up your spouse’s involvement,” I find that Applicant made a false statement when she indicated she was with her husband in her apartment on April 7, 2003, until she left for work, and denying the cell phone calls. The false statement was and still is material to the “active” murder investigation of her husband.

Personal Conduct (PC)

SOR 2.a. On April 15, 2003, the investigating detective received cellular telephone (cell phone) records of Applicant’s husband disclosing that three cell phone calls were made to her husband’s home telephone number on April 7, 2003. (GE 3) The calls were made at 7:20 A.M., 7:25 A.M., and 7:53 A.M. (*Id.*)

On April 18, 2003, the investigating detective also received additional cell phone records from a telecommunications company revealing that the cell phone records of Applicant’s husband disclose that his cell phone was used to make two phone calls to his home phone on April 7, 2003, at 7:20 A.M. and 7:25 A.M. (*Id.*) Applicant claimed she was with her husband at home until she left for work, and they received no calls. (Tr. 79-83) In support of her claim the telephone companies and/or sheriff’s department were fabricating the cell phone calls on April 7, 2003, Applicant stated:

I believe the cell phone companies are not a trustworthy source. There’s been plenty of times when I’ve been places and people’s cell have called me and they didn’t even know. It was just the last number dialed. And if you accidentally hit a button, it will ring. That’s happened several times to me and nobody has even been on the phone. I just heard their entire conversation while they were talking and they had talked to me last but it (cell phone) just redialed the number. They were unaware of it as well. (Tr. 81)

It is common knowledge that cellular phone towers relay cell calls from tower to tower until the call reaches its destination. Just as telephone companies keep records on land-based telephone calls, they also keep records of cell calls for public safety and billing reasons. Applicant’s explanation for denying calls were made to her home on April 7, 2003, seem to relate to operation of the cell phone rather than record keeping for cell phone transmissions. Hence, I find her explanation not credible.

There are other areas of Applicant’s testimony that negatively impact her credibility. When asked certain questions at the hearing about her April 19, 2003 interview concerning when she left her apartment for work on April 7, 2003 (GE 3), she disputed the statement in the exhibit indicating she was behind schedule. (Tr. 72) She, then stated she did not recall when she left. (Tr. 75) Later in her testimony, she testified that she did not believe she left home between 7:45 A.M. and 8 P.M., “because a lot of things in the statement are not true.” (Tr. 76) Still later in her testimony (Tr. 88), she claimed her husband transported her to work that day. She did agree that her memory of

the time she left the house for work on April 7, 2003 would have been better when she was interviewed on April 19, 2003 than it was at the hearing. (Tr. 75)

During her direct testimony, Applicant repeated her claim that she was cooperative during the investigation. She testified:

I would like to say that I have been very cooperative throughout this entire investigation every time I've been asked any questions and haven't hesitated to give any answers that they wanted. I even let them search my home without a search warrant. And just on [in the] nick of time. I would also like to say that based on [detective's] interview - -Yes. Based on Detective's interview, these are all allegations and all hearsay I have never seen him. That's why I couldn't really direct a conversation towards him. Because I don't even remember him coming to my house. I remember someone short and kind of bald that searched my home that day. So - - - - so just based on his testimony, they were all allegations and hearsay. And it was I think maybe someone conducted the interview and then he [testifying detective] wrote the report up and that's how it went. I don't believe that anything they have is a fact. And that's all I have to say. (Tr. 90-92)

The search of Applicant's dwelling took place on April 19, 2003. The detective testified he asked Applicant for consent to search. After allowing her to remove illegal drugs from the apartment (Tr. 61), the detective conducted a search. In explaining that Applicant was not uncooperative during the search of Applicant's apartment, the detective testified:

She [Applicant] referenced there may be some items in there that were not legal. I told her unless they were related to my investigation, I likely was not worried about them.
And if she needed - - you know, I - - I - - I stressed to her it was not a matter, that I was dealing with a homicide investigation. I wasn't necessarily concerned with things that were not related to that. (Tr. 62)

When the government asked Applicant to explain (before the search) what the testifying detective thought Applicant was talking about when she referred to items that were not legal, the detective believed Applicant was referring to illegal drugs. (Tr. 65) Applicant denied she had any exchange with the testifying detective about drugs or anything else, because she had never seen the detective before the hearing. (Tr. 92) Even though drug possession is unalleged in the SOR, the evidence regarding Applicant's concern over illegal drugs being present in her apartment undercuts her credibility even further.

Character Evidence

A personal friend of Applicant who graduated from high school with her in April 1994 considers her an ethical person who is also a good communicator and leader. Applicant's mother describes Applicant, her youngest daughter, to be considerate, supportive, and a self-starter. Applicant's initiative has helped her gain a Bachelor's degree in business.

An unsigned letter from Applicant's deputy director dated May 14, 2008, reflects that Applicant has been working for "INL" for a year. The director confirms she is a hardworking, dependable employee who is dedicated to her work tasks, even when her son is ill. Applicant's oldest sister submitted an unsigned character statement extolling Applicant's character for dedication and intelligence. Her sister recommends Applicant for a position of trust based on Applicant's honesty, professionalism, and communication skills.

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 flexible rules of law. Recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's ultimate adjudicative goal is a fair, impartial and common sense decision. According to the AG, the entire process is a careful, thorough evaluation 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 ¶ 2b. 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 ¶ E3.1.14, the Government must 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 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 is not restricted to normal duty hours. Rather, the relationship is an-around-the-clock responsibility between an applicant and the federal government. 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.

Criminal Conduct (CC)

Violating the law immediately raises questions about a person's judgment which are not easily mitigated by simply the passage of time.

Personal Conduct (PC)

Deliberately concealing information during the course of a security clearance process demonstrates dishonesty and poor judgment while representing a serious security concern.

Analysis

Criminal Conduct (CC)

30. *The Concern.* "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." AG ¶ 30

Cell telephone records (GE 3) reflect that three cellular telephone calls were made to the Applicant's apartment phone on April 7, 2003, between 7 and 8 A.M. Applicant claims she was at home with her husband during the pertinent time period and denies she received any calls. Applicant's conduct falls within CC disqualifying condition (DC) 31.a. (*a single serious crime or multiple lesser included offenses*) and CC DC 31.c. (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*) Applicant was interviewed (as alleged in SOR 1.a.) by the sheriff's office on April 19, 2003 regarding her schedule on April 7, 2003. I determine she made a false statement regarding her husband's whereabouts and regarding the three phone calls, as alleged in SOR 1.b.

The three elements of the state criminal defining false statements made to a law enforcement officer (GE 5) are also satisfied by Applicant's false statement in April 2003. Even though Applicant continues to claim the cell records are inaccurate or fabricated, her uncorroborated explanations in support of her claim are not credible. The third element of the statute is that Applicant provided her false statement to a law

enforcement officer, the detective who testified at the hearing.¹ Even though the state statute does not include “materiality” as an element of the offense,” Applicant’s false statement is material to the active criminal investigation.

I have considered the mitigating conditions and have concluded that none apply based on Applicant’s persistent contention she received no cellular phone calls on April 7, 2003. CC MC 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*) cannot be considered as long as Applicant denies she received the cell calls. CC 32.b. (*the person was pressured or coerced into committing the act and those pressures are no longer present in the person’s life*) is unavailable for mitigation as there is no evidence to infer or suggest that any pressure was applied on Applicant to provide the false statement. CC MC 32.c. (*evidence that the person did not commit the act*) must also be removed from consideration because there is no evidence that Applicant did not make the false statement. CC MC 32.d. (*there is evidence of successful rehabilitation; including, but not limited to the passage of time without recurrence or criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*) The key to successful rehabilitation is accepting dishonest conduct. Applicant refuses to acknowledge the cellular phone records belie her claim of being with her husband at her apartment on April 7, 2003. Her husband stated his cell phone was always in his possession. Applicant’s favorable character traits as a friend and daughter do not overcome her intentional false statement to law enforcement in April 2003 that she continues to deny.

Personal Conduct (PC)

15. *The Concern.* “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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.” AG ¶ 15

PC DC 16.a. (*deliberate omission, falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine security clearance eligibility or trustworthiness*) applies. Cellular phone records referenced in GE 3 reflect that three cell calls were made from the cell phone of Applicant’s husband to Applicant’s apartment on April 7, 2003, at 7:20 A.M., 7:25 A.M., and 7:53 A.M. Applicant’s strenuous claim that she was with her husband throughout the time period in issue represents a false statement concerning the location of her husband when the calls were placed. Applicant’s false statement

¹ There is insufficient evidence to meet the four elements of the state criminal statute of “accessory after the fact.” See, GE 6, GE 7.

demonstrates poor judgment under the PC guideline. SOR 2.a. and 2.b. are resolved against Applicant.

I have carefully considered the following mitigating conditions to determine whether Applicant's intentional omissions are mitigated: PC MC 17.a. (*the individual made prompt, good-faith efforts to correct the omission or falsification before being confronted with the facts*); 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*); and, PC MC 17.d. (*the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur*)

PC MC 17. a. does not apply because Applicant made no prompt, good-faith attempt to correct the falsification, as she still does not consider she furnished a false statement about the phone records. PC MC 17.b. (*the offense was so minor, or such time 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. While Applicant articulated her false statement in April 2003, she continues to deny the veracity of the cell records. Finally, PC MC 17.d. (*the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur*) does not apply because Applicant does not admit to the illegality of her conduct. The only other mitigating condition that could apply is PC MC 17.e. (*the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress*) PC MC 17.e. does not become pertinent for mitigation purposes until Applicant takes a positive step (to acknowledge) the accuracy of the cell records. This she has not done. In sum, Applicant's evidence in mitigation does not satisfy her ultimate burden of persuasion under the PC guideline.

Whole Person Concept (WPC)

I have weighed the circumstances of this case under the general factors of the whole person concept. Applicant was twenty seven years of age when she provided a false statement to law enforcement about her husband's cell records on April 7, 2003. She provided no corroborative evidence substantiating her complaints about evidence gathered during the investigation, and a motive the testifying detective would have to fabricate the investigation. Though Applicant claims she was cooperative during the course of the search of her apartment on April 19, 2003, the testifying officer took a different view of her cooperation, because the search did not begin until after she removed some items from her apartment. Having weighed the disqualifying evidence against Applicant's favorable record showing no security violations, and the positive

character evidence from her director, friend, mother, and oldest sister, Applicant still has not satisfied her ultimate burden of persuasion under the CC and PC guidelines.

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 (Criminal Conduct, Guideline J): AGAINST APPLICANT

Subparagraph 1.a.	Against Applicant
Subparagraph 1.b.	Against Applicant

Paragraph 2 (Personal Conduct, Guideline E): AGAINST APPLICANT

Subparagraph 2.a.	Against Applicant
Subparagraph 2.b.	Against Applicant

Conclusion

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

Paul J. Mason
Administrative Judge