

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: On or about January 21, 2005, Applicant was fired from a job for taking money, without authorization, from her employer. Subsequently, she lied about the firing on a Declaration for Federal Employment, on a security clearance application (SF-86), executed in February 2005, and in an interview with an authorized investigator. Applicant failed to mitigate security concerns under the Personal Conduct and Criminal Conduct adjudicative guidelines. Clearance is denied.

CASENO: 06-19962.h1

DATE: 07/17/2007

DATE: July 17, 2007

In Re:)	
)	
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SSN: -----)	ISCR Case No. 06-19962
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
JOAN CATON ANTHONY**

APPEARANCES

FOR GOVERNMENT

J. Theodore Hammer, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

On or about January 21, 2005, Applicant was fired from a job for taking money, without authorization, from her employer. Subsequently, she lied about the firing on a Declaration for Federal Employment, on a security clearance application (SF-86), executed in February 2005, and in an interview with an authorized investigator. Applicant failed to mitigate security concerns under the Personal Conduct and Criminal Conduct adjudicative guidelines. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On November 14, 2006, under the applicable Executive Order¹ and Department of Defense Directive,² DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision—security concerns raised under Adjudicative Guidelines E (Personal Conduct) and J (Criminal Conduct), promulgated December 29, 2005, and applicable in DoD adjudications of SORs issued as of September 1, 2006, and thereafter. With the SOR, DOHA provided Applicant with a copy of DoD Directive 5220.6, as amended.

On December 13, 2006, Applicant filed a notarized response to the SOR. In her response, she answered the Personal Conduct allegations (SOR ¶ 1) but did not answer the Criminal Conduct allegation (SOR ¶ 2). She requested her case be determined on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) on April 17, 2007. The FORM contained documents identified as Items 1 through 8. Item 8 of the FORM was a copy of the Department of Defense Directive incorporating the applicable Adjudicative Guidelines.

On April 20, 2007, Applicant was sent a copy of the FORM, with instructions to file objections and submit material to refute, extenuate, or mitigate the Personal Conduct and Criminal Conduct disqualifying conditions within 30 days of receipt. On April 23, 2007, Applicant signed an acknowledgment of receipt of the FORM. She did not submit any information within the 30-day time period. On June 28, 2007, the case was assigned to me for a decision.

FINDINGS OF FACT

The SOR contains five allegations under Guideline E, Personal Conduct, and one allegation under Guideline J, Criminal Conduct. Applicant admitted all five Guideline E allegations. She did not address the Guideline J allegation, which identified three of the Guideline E allegations as criminal conduct pursuant to 18 U.S.C § 1001. I interpret Applicant's failure to respond to the Criminal Conduct allegations in the SOR as a general denial of the allegations. Applicant's admissions are incorporated herein as findings of fact. (Item 6, Item 7.)

_____ Applicant is 24 years old, unmarried, and employed as a staff auditor by a defense contractor. She graduated from college in May 2005 and holds a bachelor of science degree in accounting. (Item 2, Item 4.)

From March 2003 until about January 21, 2005, Applicant was employed as a bartender/waitress at a club in a resort community. She ran low on money and was overdue on a

¹Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.

²Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.

payment owed to her personal trainer. In order to pay her debt to the trainer, Applicant took \$120 from her employer's petty cash bag without the employer's permission. She left a note in the petty cash bag explaining she had taken the money and planned to pay it back. Applicant's unauthorized use of the employer's petty cash was a violation of company policy. She was fired for theft by the employer on about January 21, 2005. (Item 2, Item 5, Item 7.) (SOR ¶ 1.a.)

In her notarized answer to the SOR, Applicant stated:

I was indeed fired from my employment with [Employer] for theft. I had endured a financial hardship I had never experienced before. I did take some money from the petty cash bag so I could pay a bill but I had every intention to give it back. I did indeed pay back the money; however, my employer made the decision to terminate my employment anyways. (Item 7 at 2.)

On January 25, 2005, Applicant signed a Declaration for Federal Employment, Optional Form 306 (OF 306). Question 11 on the OF 306 reads as follows:

During the last 5 years, were you fired from any job for any reason, did you quit after being told that you would be fired, did you leave any job by mutual agreement because of specific problems, or were you debarred from Federal employment by the Office of Personnel Management? *If "Yes, use Item 15 to provide the date, an explanation of the problem and reason for leaving, and the employer's name and address.*

Appellant responded "no" to Question 11, and she failed to list the fact she had been fired for theft on or about January 21, 2005. (Item 1.) (SOR ¶ 1.b.) After executing the OF 306, Applicant signed and dated the following certification, which appears as Item 16 on the OF 306:

I certify that, to the best of my knowledge and belief, all of the information on and attached to this Declaration for Federal Employment, including any attached application materials, is true, correct, complete, and made in good faith. I understand that a false or fraudulent answer to any question on any part of this declaration or its attachments may be grounds for not hiring me, or for firing me after I begin to work, and may be punishable by fine or imprisonment.

On February 2, 2005, Appellant sought employment with Department of Defense agency A. She executed and signed a security clearance application (SF-86). Question 20 on the SF-86 reads as follows:

Your Employment Record

Has any of the following happened to you in the past 7 years?

- Fired from a job
- Quit a job after being told you'd be fired

- Left a job by mutual agreement following allegations of misconduct
- Left a job by mutual agreement following allegations of unsatisfactory performance
- Left a job for other reason under unfavorable circumstances

Appellant responded “no” to Question 20.³ Item 43 on the SF-86 is entitled “General Remarks” and asks: “Do you have any additional remarks to enter in your application?” Applicant responded “yes” to Item 43 and stated: “In reference to my credit card debt I am trying to get both of those debts settled. As a full time student I only work part time so it is going to be a few months before I can settle them.” (Item 2 at 5-6, 9.)

After executing the SF-86, Applicant signed and dated the following certification:

CERTIFICATION BY PERSON COMPLETING FORM

My statement on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See section 1001 of title 18, United States Code).

(Item 2.) (SOR ¶¶ 1.c., 2.a.)

Applicant was subject to a security investigation, as she was under consideration for a position that required eligibility for access to Sensitive Compartmented Information (SCI). She was interviewed by a Department of Defense authorized investigator on April 28, 2005. In response to questions about leaving her bartender/waitress job with the club at the resort, Applicant stated she left the job because she was not making enough money. She also stated she had no problems in that employment and received no disciplinary actions (Item 3.) She failed to disclose she had been fired from the job for stealing her employer’s money. (SOR ¶ 1.d.)

On June 3, 2005, Applicant was interviewed again by an authorized investigator of the U.S. Office of Personnel Management. Pursuant to that interview, she signed an affidavit admitting she had been fired from her bartended/waitress job for stealing money from her employer to pay her personal trainer. She attributed her failure to admit she had been fired in her April 2005 interview to nervousness. (Item 5.)

Defense agency A served Applicant with a statement of reasons and an undated memorandum stating its intent TO deny her eligibility for access to SCI, due, in part, to her personal conduct and the fact she failed to disclose she had been fired from her job in January 2005 for unlawfully taking money

³In her signed affidavit, executed in June 2005, Applicant asserted that when she executed her SF-86 on February 2, 2005, she was still employed by her employer and had not yet been fired. In her response to SOR allegation 1.a., Applicant admitted she was fired by her employer for theft on January 21, 2005. (Item 5; Item 7.)

from her employer. On or about February 7, 2006, Applicant withdrew her application for eligibility for access to SCI as an employee of agency A.⁴ (Item 3, Item 7.) (SOR ¶ 1.e.)

Applicant sought employment with a federal contractor. As a part of her employment process, she executed, signed, and certified a second SF-86 on July 1, 2005. She again responded “no” to Question 20, which asked whether she had ever been fired from any job in the last seven years. (Item 4)

In her answer to the SOR, Applicant asserted her belief she was a person of integrity who had made a bad decision and that “[her] continuous unwillingness to disclose information regarding [her] previous employment is not a reflection of [her] character.” (Item 7.)

POLICIES

“[No one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has “the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information.” *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens “whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information.” Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

By Memorandum dated August 30, 2006, the Under Secretary of Defense directed implementation of revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, promulgated December 29, 2005, and effective September 1, 2006, as modified. The revised Adjudicative Guidelines replaced the guidelines published in Enclosure 2 to DoD Directive 5220.6 and Appendix 8 to DoD 5200.2-R, and they apply to all adjudications and other determinations in which a SOR had not been issued by September 1, 2006. Accordingly, since the SOR in this case was issued November 14, 2006, the revised Adjudicative Guidelines apply.

The revised Adjudicative Guidelines set forth personal security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. 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 security clearance.

⁴Because Agency A’s letter of intent and statement of reasons are not dated, it is unclear whether Applicant withdrew her application before or after receiving these communications.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

CONCLUSIONS

Guideline E - Personal Conduct

Personal 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.* Guideline E, ¶ 15.

Applicant completed and signed a OF 306 on January 25, 2005. On that form, in response to Question 11, she denied being fired from a job in the previous five years. On February 2, 2005, Applicant executed, signed, and certified a SF-86. In her response to Question 20 on both versions of the SF-86, Applicant denied being fired from a job in the past seven years. When she was interviewed by an authorized investigator in April 2005, Applicant lied about her reason for leaving the job from which she had been fired. She said she left the job because it did not pay her enough, and she denied she had any problems with or disciplinary actions from her employer. Then, in a signed affidavit witnessed by an authorized investigator in June 2005, Applicant admitted taking \$120 from her employer's petty cash, which violated the employer's policy, and being fired because she took the employer's money without authorization. Through Applicant's admissions and the record evidence, the Government established a prima facie case that Applicant falsified her answers to Question 11 on the OF-306, to Question 20 on the SF-86, and to the investigator's inquiries what caused her to leave her job on January 21, 2005. The burden of proof thus shifted to Applicant to rebut or mitigate the Government's allegations. Applicant admitted the falsifications and attributed them in part to nervousness. She asserted she was a person of reliable character who had made a bad decision.

Under Guideline E, a security concern is raised by an individual's *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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities.* Guideline E, ¶ 16(a). Applicant's admitted conduct also raises security concerns under Guideline E Disqualifying Conditions (DC) 16(b), and 16 (e)(1). DC 16(b) reads as follows: *deliberately providing false or misleading information concerning relevant facts to*

an employer, investigator, security official, competent medical authority, or other official government representative. DC 16(e)(1) reads as follows: 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.

Two Guideline E mitigating conditions (MC) might be applicable to Applicant's conduct. Pursuant to MC 17(a), personal conduct security concerns might be mitigated if *the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.* Pursuant to MC 17(e), personal conduct security concerns might be mitigated if *the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.*

Applicant provided no credible evidence to mitigate her failure to disclose she had been fired for theft on her OF 306 and SF-86. Applicant was a mature adult with a college education when she failed to disclose she had been fired for cause. Although she knew, or should have known, the importance of telling the truth to the Government, she had reason to attempt to conceal this derogatory information about her trustworthiness. Her assertions that her falsifications were due to nervousness were not credible. She did not make good-faith efforts to correct her omissions, concealment, or falsifications before being confronted with the facts, and she did not take positive steps to reduce or eliminate the vulnerability to exploitation, manipulation, or duress caused by her concealment of this derogatory information relating to her lack of trustworthiness. I conclude that MC 17(a) and MC 17(e) do not apply to the facts of Applicant's case.

Guideline J - Criminal Conduct

Applicant falsified her response to Question 11 on her January 25, 2005 OF 306 by denying she had been fired from a job in the past five years. She also falsified her response to Question 20 on the SF-86 she executed, signed, and certified on February 2, 2005 by denying she had been fired from a job in the past seven years. She deliberately concealed this information from an authorized investigator in a security interview. She failed to offer credible information in mitigation or to rebut the Government's prima facie case that her falsifications were deliberate and therefore criminal conduct under 18 U.S.C. section 1001.

Criminal conduct creates a security concern because it raises doubts about an individual's judgment, reliability, and trustworthiness. Additionally, it raises doubts about a person's ability or willingness to comply with laws, rules, and regulations. Applicant's admitted criminal activity raises security concerns under Disqualifying Condition (DC) 31(c)⁵ of Guideline J.

Two mitigating conditions under Guideline J might apply to the facts of Applicant's case. Applicant's admitted criminal conduct might be mitigated under Mitigating Condition (MC) 32(a) if she provided credible evidence to show that *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.* MC 32(d) might apply

⁵DC 31(c) reads: "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

if 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.

Applicant's criminal behavior took place in January 2005, approximately 2 ½ years ago. She perpetuated the criminal conduct by lying on her OF 306 and SF-86 and by lying to an authorized investigator in April 2005. It wasn't until she was interviewed a second time by an authorized investigator in June 2005 that she admitted her criminal conduct. Applicant's criminal conduct is recent and it casts doubt on her reliability, trustworthiness, and good judgment. She provided no credible evidence that her conduct would not recur. In her answer to the SOR, Applicant continued to insist upon her good character and trustworthiness, but she provided no credible evidence that she comprehended the seriousness of her actions and she failed to offer evidence of successful rehabilitation. Applicant's criminal conduct raises serious doubts not only about her reliability, trustworthiness, and good judgment but also about her ability to follow laws, rules, and regulations. Applicant failed to provide credible evidence under MC 32(a) and MC 32(d) to mitigate the criminal conduct alleged in the SOR. No other MCs apply.

Whole Person Analysis

In addition to evaluating the disqualifying and mitigating conditions under each guideline, an administrative judge must thoroughly consider and review all available reliable information about the appellant, past and present, favorable and unfavorable, to arrive at a balanced decision. DoD Directive 5220.6, as amended, describes this process of scrutiny and evaluation as "the whole person concept." The factors to be considered in a whole person analysis include the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the voluntariness of participation; the presence or absence of rehabilitation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; and, the likelihood for continuation or recurrence.

I do not find, under a whole person analysis, that Applicant's decision to withdraw her application for access to SCI with Agency A reflected negatively on her personal conduct under Guideline E. Accordingly, I find for Applicant on SOR allegation 1.e.

Applicant is well-educated and holds a college degree. Her admissions and the record evidence establish she took money from her employer and was fired for doing so. She deliberately falsified her OF 306 and SF-86 by concealing her criminal conduct and its consequences—being fired from her job. She signed her name and certified that her statements on her OF 306 and SF-86 were "true, complete, and correct to the best of [her] knowledge and belief and. . . made in good faith." She then concealed her criminal conduct from an authorized investigator in a security interview. These actions cast serious doubts on her security worthiness.

Because the federal government has a compelling interest in protecting classified information, it must be able to place a high degree of trust and confidence in individuals granted access to classified information. An applicant who deliberately tries to deceive or mislead the federal government does not demonstrate the high degree of judgment, reliability and trustworthiness required of those granted access to classified information

In ISCR Case No. 98-0761 at 3 (Dec. 27, 1999), DOHA’s Appeal Board states that an administrative judge, in deciding an Applicant’s security worthiness, “must consider the record as a whole (Directive Section F.3.) and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa*.” I have considered the record as a whole and have evaluated Applicant’s conduct under the whole person concept of the Directive. I conclude that Applicant has neither rebutted nor mitigated the security concerns raised by the allegations in the SOR, and she has not demonstrated that it is clearly consistent with the national interest to grant her a security clearance.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1.: Guideline E: AGAINST APPLICANT

- Subparagraph 1.a.: Against Applicant
- Subparagraph 1.b.: Against Applicant
- Subparagraph 1.c.: Against Applicant
- Subparagraph 1.d.: Against Applicant
- Subparagraph 1.e.: For Applicant

Paragraph 2.: Guideline J.: AGAINST APPLICANT

- Subparagraph 2.a.: Against Applicant

DECISION

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 or continue a security clearance for Applicant. Clearance is denied.

Joan Caton Anthony
Administrative Judge