



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 XXXXXX, Xxxxx Xxxxx) ISCR Case No. 12-04955
)
 Applicant for Security Clearance)

Appearances

For Government: Tovah A. Minster, Esquire, Department Counsel
For Applicant: *Pro se*

01/22/2013

Decision

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,¹ I deny Applicant's clearance.

On 22 October 2012, the Department of Defense (DoD) sent Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal Conduct.² Applicant timely answered the SOR, requesting a hearing before the Defense Office of Hearings and Appeals (DOHA). DOHA assigned the case to me 29 November 2012 and I convened a hearing 8 January 2013. DOHA received the transcript 15 January 2013.

¹Consisting of the transcript (Tr.) and Government's exhibits (GE) 1-3.

²DoD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on 1 September 2006.

Findings of Fact

Applicant admitted the SOR allegations. She is a 39-year-old administrative assistant employed by a defense contractor since December 2010. She is the never-married mother of an 18-year-old daughter and a five-year-old son. She has not previously held a clearance.

In August 2008, Applicant was fired by her employer after allegations of theft, employee misconduct, and abuse of position. Applicant admits she was terminated, but denies any misconduct.

Applicant's employer (the owner of the company) testified credibly (Tr. 24-36) about the circumstances that led her to conclude that Applicant had stolen a cash payment for company services, had abused her position by using a company credit card without authorization to pay her utility bill, and had engaged in employee misconduct by borrowing money from her subordinates. Applicant was the office manager for her employer. As such, she was responsible for logging payments for company services—whether cash or check—and making bank deposits. Office security cameras showed Applicant taking a cash payment from the office. Later investigation revealed that she had not logged the payment in as required. Applicant acknowledges she took the cash, but states that she intended to return the money the next day. The owner did not believe her story, and decided that the theft and the other conduct warranted her firing.

In some respects, it matters little whether Applicant stole the money or not. She was an "at will" employee, meaning the owner could fire her for any reason, or for no reason, at anytime. What matters is that the owner's stated reason was Applicant's misconduct, and Applicant knew that.

When Applicant completed her clearance application in February 2011, she falsely explained her reason for leaving the above job (§13A): "position was going from full-time to part-time." She deliberately failed to disclose her August 2008 firing and the alleged reason for it because she feared she would not get her clearance or keep her job if she told the truth. Responding to a question (§13C) requiring her to disclose any unfavorable job actions within the last seven years, she categorically denied leaving any job under adverse circumstances within the last seven years.

Applicant was interviewed by a Government investigator in March 2011. The investigator reviewed the clearance application with Applicant, and although Applicant had an opportunity to correct the record, she did not because she was afraid of the adverse consequences to her employment. Between March 2011 and May 2011, the investigator spoke to Applicant by telephone six times to gather additional information. Applicant did not disclose her firing, although none of the six interviews concerned that employer. Not until Applicant was confronted by the investigator during a June 2011 in-person interview did she disclose her version of the circumstances that led to her firing.

She has a favorable character reference from her long-time friend (Tr. 41-45).

Policies

The adjudicative guidelines (AG) list factors for evaluating a person's suitability for access to classified information. Administrative judges must assess disqualifying and mitigating conditions under each issue fairly raised by the facts and situation presented. Each decision must also reflect a fair, impartial, and commonsense consideration of the factors listed in AG ¶ 2(a). Any one disqualifying or mitigating condition is not, by itself, conclusive. However, specific adjudicative guidelines should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guideline is Guideline E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.³

Analysis

The Government established a case for disqualification under Guideline E, and Applicant did not mitigate the security concerns. The Government produced substantial evidence that Applicant was fired for stealing money from her employer and other violations of company policy. While she denied that she stole money, she admits that was the stated reason for her firing. Furthermore, she falsified her February 2011 clearance application in two respects. First, she falsely asserted that she left the company because her hours were going to be cut. Second, she categorically denied leaving any job under adverse circumstances within the last seven years.⁴ The

³See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁴¶16 (a) deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, . . . [or] determine security clearance eligibility or trustworthiness. . . ; (b) deliberately providing false or misleading information regarding relevant facts to an . . . investigator . . . ;

Government having established both the theft and the falsifications, the burden of persuasion shifted to Applicant to refute or mitigate the Government's information.

None of the mitigating conditions apply. Applicant's firing was directly caused by her breach of her fiduciary duty to her employer, and directly implicates her honesty and trustworthiness. The falsifications consist of both an affirmative statement designed to misdirect the Government's investigative efforts and a deliberate omission designed to conceal Applicant's adverse employment history.

The concealed information was relevant to a clearance decision. Applicant's failure to disclose this information demonstrates a lack of candor required of cleared personnel. The Government has an interest in examining all relevant and material adverse information about an applicant before making a clearance decision. The Government relies on applicants to truthfully disclose that adverse information in a timely fashion, not when they perceive disclosure to be prudent or convenient. Further, an applicant's willingness to report adverse information about herself provides some indication of her willingness to report inadvertent security violations or other security concerns in the future, something the Government relies on to perform damage assessments and limit the compromise of classified information. Applicant's conduct suggests she is willing to put her personal needs ahead of legitimate Government interests. Applicant made no effort to correct her application during her March 2011 personal interview or any of the six later telephone interviews, before she was confronted with the information during her June 2011 subject interview,⁵ and her omission was not significantly aided by incorrect advice given to her about completing her clearance application.⁶ The whole-person factors require no other result, as there is no evidence in the record about Applicant that could overcome the negative inferences to be drawn by her conduct. I resolve Guideline E against Applicant.

Formal Findings

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|---------------------------|-------------------|
| Paragraph 1. Guideline E: | AGAINST APPLICANT |
| Subparagraphs a-c: | Against Applicant |

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

⁶17(b) the refusal or failure to cooperate, omission, or concealment, was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process . . .

Conclusion

Under 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 denied.

JOHN GRATTAN METZ, JR
Administrative Judge