



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



In the matter of:)
)
) ISCR Case No. 14-02336
)
)
Applicant for Security Clearance)

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel
For Applicant: Gregory D. McCormack, Esq.

01/15/2015

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted. Applicant presented sufficient information to mitigate security concerns for personal conduct under Guideline E, and financial considerations under Guideline F.

Statement of the Case

On September 5, 2012, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for a position with a defense contractor. Applicant was granted eligibility for access to classified information. On April 18, 2013, Applicant's former employer filled an incident report in the Joint Personnel Adjudication System (JPAS) alleging personal conduct and financial consideration security concerns. Applicant was interviewed by an investigator from the Office of Personnel Management (OPM) on June 25, 2013. The Department of Defense (DOD) could not make the preliminary affirmative findings required to issue a security clearance. On July 9, 2014, DOD issued a Statement of Reasons (SOR) to Applicant detailing security concerns for personal conduct under Guideline E and financial

considerations under Guideline F. These actions were 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 (AG). Applicant acknowledged receipt of the SOR on April 7, 2014.

Applicant answered the SOR on July 18, 2014. She admitted one and denied one allegation under Guideline E. She denied the one allegation under Guideline F. Applicant requested a decision on the record. Department Counsel timely requested a hearing on the matter and was prepared to proceed on September 23, 2014. The case was assigned to me on September 26, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on October 21, 2014, for a hearing on November 19, 2014. I convened the hearing as scheduled. The Government offered four exhibits that I marked and admitted into the record without objection as Government exhibits (GX) 1 through 4. Applicant and one witness testified. Applicant offered seven exhibits that I marked and admitted into the record without objection as Applicant Exhibits (AX) A through G. DOHA received the transcript of the hearing (Tr.) on December 2, 2014.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is 41 years old. She has been married to her present husband for three years. She was previously married and had two children. Her husband was previously married and had two children. Four children, ranging in age from ten years to college age, live with Applicant and her present husband. Applicant has a bachelor's degree in psychology, a master's degree in social work, and a doctorate in psychology received in 2014. She is a licensed clinical social worker in two states. She has certificates in knowledge management, clinical trauma, and homeland security. Applicant was employed as a case manager for a government mental health facility from December 2010 until her employment was terminated in October 2011. Applicant then worked as a clinical director for a civilian mental health hospital from December 2011 until April 2012. She worked as the human resources manager and facility security officer for a defense contractor from April 2012 until she left the company in April 2013. She has been selected for a psychology position with a Government agency that requires access to classified information. (Tr. 81-87; GX 1, e-QIP, dated September 5, 2012; AX A, Resume, undated; AX B, Social Worker License, dated November 23, 2010; AX C, Master's Degree, dated August 9, 1998)

The Government's security concerns for personal conduct and financial considerations security concerns are partly based on the April 18, 2014 JPAS incident report. (GX 4) The incident report alleges that when Applicant was employed by a defense contractor in 2012-2013, she published a company personnel policy in the

wrong computer format. Her husband, also employed by the defense contractor, submitted a personnel form contrary to company policy that was not processed or supervised by Applicant or submitted for approval to the Company Executive Officer (CEO). The incident report alleges that Applicant was grossly negligent in her oversight duties as human resource manager. The allegation states that there was evidence of unethical behavior, favoritism, and an appearance of impropriety. (SOR 1.a) The SOR also alleges that Applicant's action resulted in a financial loss to the defense contractor. (SOR 2.a) Applicant admitted that she was terminated in November 2011 from a previous government position for crossing the boundary of the counselor-patient relationship. (SOR 1.b)

Applicant started work for a government family services agency as a probationary employee in December 2010 doing domestic violence and marriage counseling. She was highly recommended for the position by her supervisors from a previous psychological position. (AX F, letters, dated July 2011) She was granted access to classified information for this position. In October 2011, Applicant received some unfavorable personal information. She was distraught, and, late at night, attempted to call a cousin for advice. His name was similar to the name of one of her clients who was also in her phone contact list. She miss-dialed and called her client rather than her cousin. As soon as the phone was answered, Applicant started to tell the individual about the unfavorable personal information. The client told her that she was talking to the wrong person and the call was terminated. Applicant had not disclosed any personal information about any client. The conversation was one-sided with Applicant doing all of the talking. Later, the girlfriend of the person she called filed a complaint against Applicant. Since Applicant was only a probationary employee at the time, she was terminated.

The supervisor who had to terminate Applicant wrote that he would not have terminated her if she had not been a probationary employee. Applicant's work was excellent and she was well-regarded. He did not feel that there were any serious or negative consequences to the client that should have resulted in immediate dismissal. He believes she made an inadvertent mistake in judgment, not unlike mistakes in judgment made by other social workers. He believes Applicant is a bright, capable, and competent professional. In December 2011 after being fired from the government position, Applicant became the Director of Clinical Services for a large behavioral health medical facility. She left this position in April 2012 to work for the defense contractor. (Tr. 83-91, 111-113; GX 2, Interview Summary, dated June 25, 2013; AX D, Letter, dated July 17, 2014, at 4-7)

Applicant's husband testified that he and Applicant have been married since September 2011. He is a college graduate with three master's degrees. He served on active duty in the Army from 1991 until he retired after 22 years of service as a lieutenant colonel in 2012. When he retired, he worked for a start-up defense contractor from April 2012 until April 2013 as the Director of Intelligence and Homeland Security. He then served for a few months in Afghanistan as an intelligence analyst for another defense contractor. He returned to the United States and continued working as an

intelligence analyst, this time for the North Atlantic Treaty Organization (NATO), until early 2014. He is now employed as an intelligence analyst by a defense contractor. He has been eligible for access to classified information since he first started serving in the Army in 1991. (Tr. 30-35)

Applicant's husband stated that he was recruited by a former Army supervisor and mentor, an Army colonel, to work for the defense contractor when he left active duty. His supervisor was the company's Chief Operating Officer (COO). The owner who established the company was the CEO. The company was a new family-owned business that was just forming. The initial headquarters was in one state, and Applicant's husband and his supervisor were located in another state. The company was so new that the headquarters office was in the owner's house. Applicant's husband and his supervisor worked out of their houses for a few months until the company could rent office space. There were two types of employees, those that were hired to work overseas and those that were hired to work state-side. Applicant was a state-side employee. A number of married couples worked for the company. Applicant's wife had operated her own company so she was hired by the owner as the company's human resource manager. There was no human resources department except for just Applicant and the owner's daughter who was working personnel issues in the other location. The company also had a contract with a personnel management company that assisted the company with drafting personnel policies and managing payroll. Applicant had retained her eligibility for access to classified information from her previous government employment for December 2010 to October 2011. (Tr.35-39, 91-5)

The company was sub-contractor supplying information technology personnel, known as knowledge managers, to a large defense contractor for assignment to agencies in Afghanistan. Applicant and her husband had significant issues with the owner's management of the company. Applicant's husband's former supervisor had an excellent vision for the company. But that vision was not shared by the CEO. The CEO talked about the vision but he did not implement it. Applicant's husband and others believed that the CEO permitted security practices violations under the contract. Employees were being sent overseas to a war zone without the proper equipment, training, and preparation as required by the contract. When employees announced that they were leaving the company, the CEO withheld their last paycheck for no apparent reason. He also immediately cut off all health benefits. No one left the company without tension and issues. The CEO also required that individuals that did not require a security clearance be sponsored by the company for a clearance. (Tr. 46-49, 66-74)

In August 2012, Applicant prepared a company policy on advanced pay benefits and had it approved by the CEO. The policy stated that if the company pays for your education and professional development, you had to reimburse the company if you did not stay with the company for at least a year after completion of the training. However, the written policy was vague and seemed to apply to reimbursement for travel of any type. At this time, the company had approximately 25 to 30 employees in three locations, including Afghanistan. The document was sent to all employees in "word" format and not in "PDF" format. All documents prepared by or for the company in the

past were in “word.” Applicant’s husband was aware that when some employees tried to leave the company, the CEO had their last paycheck withheld. Since Applicant’s husband was traveling extensively for the company doing business development, he amended the form to comply with the intent and spirit of the policy by clearly stating that he would reimburse the company if he departed within a year for travel related to education and professional development and not for travel related to company business. Following the instructions on the form, Applicant’s husband returned the amended form to another company employee in the other state and not to Applicant. Applicant’s husband did not discuss the amended form with his wife. Applicant did not have any involvement with husband concerning this form until he told her of his amendments when he decided to leave the firm in April 2013. (Tr. 39-46, 96-104, 114-121; GX 2, Interview Summary, dated June 25, 2013).

Applicant had a difficult relationship with both the CEO and his daughter who was an officer in the company and one of Applicant’s supervisors. Applicant decided to change positions in late 2012 from human resource manager to a knowledge manager. Applicant had left her previous employment to work for the defense contractor on the promise of a comparable salary within a few months. She was never paid the promised salary. When the COO questioned the CEO about the salary, the CEO accused him of lying. The COO left the company in January 2013 because of these conflicts and other issues with the CEO. Applicant and her husband knew about the issues with the CEO and the operation of the company. They knew that the former COO was no longer with the company to serve as a filter between them and the CEO.

The company was awarded a new sub-contract to provide more personnel to work in Afghanistan. Applicant’s husband was advised that he would deploy to Afghanistan in support of the new contract even though he was hired for state-side duty and did not have the qualifications for the position. The CEO wanted to send as many people to Afghanistan as soon as possible. The CEO was willing to send unqualified people to Afghanistan so he could get revenue under the contract. Applicant’s husband raised the issue of deploying unqualified people with a newly hired COO. He told the CEO and new COO that if he was sent to Afghanistan without the proper qualifications and training, he would be required to report the circumstance to the government contracting officer and to the prime contractor. Applicant’s husband was immediately fired by the company on April 12, 2013. Applicant’s husband did not discuss the company’s management with either the prime contractor or the contracting officer. The company’s contract was terminated by the prime contractor a few months later. (Tr. 54-59, 74-81, 96-98, 105-111; AX G, e-mails, dated April 11 and 12, 2013)

Applicant and her husband decided to leave the company and look for other employment in February 2013. Applicant’s husband immediately found employment with another defense contractor. Before he left the company, Applicant’s husband discussed with the new human resource manager how to time his leaving the company so his last paycheck would not be withheld. Following the human resource manager’s advice, Applicant’s husband did not plan to provide advance notice of his leaving the company, but to resign on April 15, 2013. His last pay had been posted to his bank account on

April 12, 2013. When he was fired on April 12, 2013, his last pay had already been electronically transferred to his bank account. When he checked his bank account again on April 15, 2013, the funds had been withdrawn. He called his bank and learned that the company had reversed the electronic transfer. Applicant's husband called the company and had the funds returned to him by check. The company did not suffer a financial loss by paying Applicant's husband because the pay was due him for the work he already performed. (Tr. 46-62; Response to SOR, Enclosure C, e-mails, April 5 to April 8, 2013)

Applicant had been accepted for a new position but her professional certificates had to be re-accredited. On April 12, 2013 when her husband left the company, Applicant was told the company needed her and she could remain on the job until her credentials were re-accredited. When the company CEO learned that Applicant's husband planned to file a grievance against the company and that both Applicant and her husband had new positions, he fired Applicant and sent the JPAS incident reports on both applicant and her husband. Applicant's husband believes that the incident reports were filed in retaliation for his threats to report the company to the prime contractor and the contracting officer, and for both of them leaving the company. Applicant's husband's access to classified information was subsequently investigated and adjudicated, and he retained his eligibility for access to classified information. (Tr. 59-66)

The original COO for the company wrote that the negative information in GX 2 is suspect and from a source of questionable reliability. The former COO was aware of the policies Applicant drafted for the company as the human resources manager and knows that all policies were approved by senior management and never changed without approval. He is not aware of any financial loss suffered by the company because of any action by Applicant. He stated that the company routinely retaliated against employees who resigned or were fired. He stated that the incident report in JPAS is false. He strongly feels that Applicant is trustworthy, honest, and ethical. Her judgment is without fault. Her actual conduct and character are opposite from that portrait in the incident report. (AX D, Letter, dated July 15, 2014 at 1)

Applicant's immediate supervisor at the company, a company director, wrote that Applicant's performance was satisfactory and she always displayed integrity and reliability. All of the company documents were sent in "word" format and not in "PDF" format. So the policy she sent to all employees on advance pay was in the correct format. He shared Applicant's husband's concern about the advanced pay policy and he never returned his completed form to the company. He also stated that departing company employees routinely either did not receive their final pay or the final pay was electronically withdrawn from their bank accounts. The CEO routinely threatened employees with negative action on their security clearances. The CEO's filing of the JPAS entry against Applicant came immediately after her husband threatened action against the company with the prime contractor or the contracting officer. The number of similar complaints the CEO filed against other employees raises substantial questions about the credibility of the charges against Applicant. (AX D, Letter, undated, at 2-3)

Applicant presented three letters of recommendation from friends and former colleagues. They all wrote that they have known Applicant for many years. They characterize her as honest, trustworthy, professional and hardworking. All have eligibility for access to classified information and recommend that she be granted a security clearance. (AX E, Letter, dated July 2014)

Policies

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 for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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(c), the entire process is a conscientious scrutiny 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 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 for 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 the Applicant may deliberately or inadvertently fail to protect or protect classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Analysis

Personal Conduct

A security concern is raised because conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. (AG ¶ 15) Personal conduct is always a security concern because it asks the central question does the person's past conduct justify confidence the person can be entrusted to properly safeguard classified information.

The Government presented a JPAS incident report alleging misconduct by Applicant. Applicant admits that she was terminated from a previous government position for a violation of a counselor-patient relationship. The JPAS incident report and Applicant's admission that she was terminated are sufficient to raise the following Personal Conduct Disqualifying Conditions under AG ¶ 16:

(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 the person may not properly safeguard protected information; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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 the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; (3) a pattern of dishonesty or rule violations.

In regard to the misconduct offense at SOR 1.a, I considered the Personal Conduct Mitigating Condition at AG ¶ 17(f) (the information was unsubstantiated or from a source of questionable reliability.)

The basis of this personal conduct security concern is the JPAS incident report. Applicant presented information that the company CEO who filed the unfavorable JPAS report has questionable veracity and reliability. Applicant's husband testified about the concerns many of his fellow employees had about the truthfulness and reliability of the

CEO. Two former senior executives of the company wrote that the report filed by the CEO was false and the CEO was a source of questionable reliability. There was ample evidence that the CEO retaliated against employees who left the company and even withheld their final pay. Applicant presented sufficient information to refute, rebut, and mitigate the security concern raised in the JPAS incident report.

In regard to the personal conduct allegation at SOR 1.b, I considered the following Personal Conduct Mitigating Conditions under AG ¶ 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 is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment); and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken positive steps to alleviate the stressors, circumstances, or factors that caused the untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

This incident happened under the unique circumstances of an inadvertent telephone call when Applicant was a probationary employee. Applicant did not realize she was talking to the wrong person. The supervisor that terminated her employment wrote that if she had not been a probationary employee, she would not have been terminated. He characterized her mistaken behavior as one that other social workers would make. This conduct is unlikely to recur. Applicant admitted the error in judgment and went on to work in the social worker field without incident for over two more years. This indicates that she has overcome the factors that cause her to take the inappropriate behavior. Applicant has refuted and mitigated the personal conduct security concerns. I find for Applicant as to personal conduct.

Financial Considerations

The JPAS incident report alleges that Applicant's company suffered a financial loss because Applicant was negligent in her human resource manager's oversight duties in regard to her husband's submission of a form. The JPAS report does not specify the financial loss suffered by the company. There was no specific information as to the financial loss. The evidence shows that Applicant performed her duties properly. She sent the form as required to all of the company employees. Her husband altered the form and sent it to another employee as he was directed. Applicant did not know her husband altered the form until a few days before she was terminated. The only potential financial loss to the company was that the company paid Applicant's husband his final salary. Upon leaving the company, Applicant's husband received only the pay he was entitled to receive. The CEO may believe this was a financial loss, but paying a salary that has been earned and is due is not a financial loss. The information shows that the

company did not suffer a financial loss. The financial consideration security concern has not been established. I find for Applicant as to financial consideration.

Whole-Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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 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 considered the favorable information concerning Applicant provided by her supervisor, friends, and colleagues. Applicant presented sufficient information to refute and mitigate the personal conduct security concerns. The source of one of the personal conduct security concerns has been established as being of questionable reliability and the security concern was not substantiated. The other personal conduct security concern was mitigated. No evidence of a financial security concern was established or substantiated. The totality of the information shows that Applicant has acted reasonably and responsibly. There is no credible information to indicate that Applicant may not be concerned or act irresponsibly in regard to classified information. Overall, the record evidence leaves me without questions and doubts as to Applicant's judgment, reliability, trustworthiness, and eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant has mitigated security concerns arising under personal conduct guideline. Eligibility for access to classified information is granted.

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 E:

FOR APPLICANT

Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2, Guideline F:	FOR APPLICANT
Subparagraph 2.a:	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 Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

THOMAS M. CREAN
Administrative Judge