

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant provided incomplete information in a security clearance application, and incorrect information in a statement she provided, both on October 15, 1998. She drove an auto in 1997 and 1998 after her driving privileges were revoked. She has mitigated the security clearance concern caused by her conduct. Clearance is granted.

CASENO: 02-28665.h1

DATE: 02/28/2005

DATE: February 28, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28665

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

FOR APPLICANT

SYNOPSIS

Applicant provided incomplete information in a security clearance application, and incorrect information in a statement she provided, both on October 15, 1998. She drove an auto in 1997 and 1998 after her driving privileges were revoked. She has mitigated the security clearance concern caused by her conduct. Clearance is granted.

STATEMENT OF THE CASE

On October 1, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline E (personal conduct), and Guideline J (criminal conduct). Applicant submitted an answer to the SOR, dated November 6, 2003, that was unsworn and in which she failed to indicate if she was admitting or denying each SOR allegation. She submitted a sworn answer to the SOR, dated December 8, 2003, and denied all allegations except that contained in SOR subparagraph 1.e. Applicant requested a hearing.

The case was assigned to another administrative judge on October 20, 2004, and reassigned to me on December 6, 2004, due to regional rotations. ⁽²⁾ A notice of hearing was issued on December 8, 2004, scheduling the hearing for December 30, 2004. The hearing was convened on December 30, 2004, in the absence of Applicant. At that time, Department Counsel stated he had been notified by Applicant's facility security officer that Applicant's work site was operationally locked down and that Applicant was unable to appear. Accordingly, the hearing date was vacated. An amended notice of hearing was issued on January 3, 2005, rescheduling the hearing for January 14, 2005. The hearing was conducted as rescheduled.

The government submitted seven documentary exhibits that were marked as Government Exhibits (GE) 1-7, and admitted into the record without objection. Applicant testified and submitted six documentary exhibits that were marked as Applicant Exhibits (AE) 1-6, and admitted into the record without objection. The transcript was received January 28, 2005.

FINDINGS OF FACT

Applicant's admission to the one SOR allegation is incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is a 46-year-old woman who has been employed by a government contractor, presently as a telemetry technician, on a remote and secluded downrange island missile tracking site since October 1998. She graduated from high school in 1976, and held a variety of jobs for relatively short periods of time from at least 1987 until she was hired by her present employer. Applicant was married in July 1992, and that marriage ended in divorce in August 1996. She has no children or other dependents.

Applicant submitted a number of letters from current supervisors and other persons attesting to her reputation as a valued employee and an honest, trustworthy, and dependable individual. She has held a security clearance since May 1999. No allegations of mishandling classified information have ever been made against her, and no action, other than administrative action taken to assure her level of access to classified information was consistent with her employment responsibilities, was ever taken to revoke or downgrade that clearance.

Applicant was convicted of driving under the influence (DUI) in May 1996, and again in January 1997.⁽³⁾ She submitted a security clearance application (SF 86) on October 15, 1998 in which she listed the 1997 DUI but omitted the 1996 DUI. Additionally, she failed to disclose she had been a party to a civil court action, when in fact she was named as the defendant in a complaint for eviction filed in June 1998. She was interviewed by a special agent from the Defense Security Service (DSS) the same day she submitted the SF 86, and, while she revealed the details of her 1997 DUI, she affirmatively stated she had no other arrests.

Applicant testified she was unaware of the eviction proceedings when she submitted the SF 86. GE 4 contains a clerk of court's certification that Applicant was furnished a copy of the complaint in the eviction case on June 29, 1998. However, that certification does not indicate whether service was in person, by mail, by leaving a copy of the complaint at Applicant's abode, or otherwise. An order of eviction was entered on October 13, 1998, but there is no evidence that order was ever served or executed. Applicant vacated the apartment October 16, 1998, and left for her new island home October 21, 1998. She had a roommate residing in the apartment in June 1998, and after she vacated the apartment. Thus, there is, at best, only circumstantial evidence Applicant received a copy of the complaint and/or was aware of the eviction proceedings. Considering the totality of the evidence, Applicant's testimony, and her appearance and demeanor while testifying, I find her denial credible.

Applicant describes her experiences on October 15, 1998 as hectic and consisting of the submission of numerous forms and submitting to interviews in preparation for her departure to her new island home that same month. She claims her failure to list the 1996 DUI in the SF 86 and discuss it with the DSS agent was inadvertent. She provided another statement to the same DSS agent on March 1, 1999 in which she acknowledged her first statement was not truthful and stated she did not disclose the first DUI because she was scared and embarrassed. The second statement was written by the DSS agent and signed by Applicant. In response to Department Counsel's questions, Applicant reconciled the appearance of an inconsistency between the second statement and her claim that the omission of the 1996 DUI was unintentional. Considering her disclosure of the 1997 DUI, the totality of her testimony, and her appearance and demeanor while testifying, I find her explanation credible.

As a result of the 1997 DUI conviction, Applicant's driving privileges were suspended for five years. Despite the suspension, she continued to drive to and from work before leaving for the island in 1998. She explains her reason for driving during that time was because she lost her other source of transportation and needed to drive to work to support herself. Although the driving suspension ended in 2002, Applicant has not been able to renew her license in her state of residence because she has been unable to provide the state with satisfactory completion of a required course that she has completed. She does, however, have a valid driver's license issued from the island where she resides.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline E, pertaining to personal conduct, and Guideline J, pertaining to criminal conduct, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁶⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

No one has a right to a security clearance⁽¹¹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹²⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹³⁾

CONCLUSIONS

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

Application failed to disclose a DUI conviction and a civil court action in the SF 86 and statement she provided on October 15, 1998. Her omissions were not intentional, and, accordingly, Disqualifying Condition (DC) 2: *The 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, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;* and DC 3: *Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other representative in connection with a personnel security or trustworthiness determination* do not apply.

Although it does not easily fit under any specific disqualifying condition, her driving an automobile in 1997 and 1998 after her driving privileges had been revoked is conduct that exhibits questionable judgment, and a failure to comply with rules and regulations. However, that conduct occurred a number of years ago and there is no indication she has committed any infractions since that time. Further, as evidenced by the letters of recommendation she submitted, Applicant has earned a reputation as an honest, trustworthy, and dependable person in the following six and one-half years while she has resided in her remote island workplace.

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information. The criminal conduct SOR allegations are all based upon the alleged falsifications of the SF 86 and in the statement provided to the DSS agent. Because there was no deliberate falsification in either instance, there is no criminal conduct that might raise a security concern in this case.

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Considering all relevant and material facts and circumstances present in this case, including the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant has overcome the case against her and satisfied her ultimate burden of persuasion. Guidelines E and J are decided for Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline E: For Applicant

Subparagraph a-e: For Applicant

SOR ¶ 2-Guideline J: For Applicant

Subparagraph a: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. A note in the file indicates the previously assigned administrative judge was unable to schedule a hearing sooner because Applicant was out of the country and unavailable.
3. These incidents are not alleged in the SOR as independent security concerns.
4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15

11. *Egan*, 484 U.S. at 528, 531.

12. *Id.* at 531.

13. *Egan*, Executive Order 10865, and the Directive.