



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



In the matter of:)
)
) ISCR Case No. 07-09877
)
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel

For Applicant: *Pro se*

June 10, 2010

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the case file, pleadings, testimony, and exhibits, I conclude that Applicant has mitigated the security concerns related to criminal conduct and personal conduct. Accordingly, her request for a security clearance is granted.

Statement of the Case

Applicant requested a security clearance by submitting an Electronic Questionnaire for Investigations Processing (e-QIP), signed on September 26, 2006. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary

affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request.

On September 25, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) that specified the basis for its decision: security concerns addressed in the Directive under Guidelines J and E of the Adjudicative Guidelines (AG).² Applicant signed and notarized her first Answer on November 3, 2009. However, she failed to either admit or deny each allegation, and DOHA requested that she resubmit her Answer. She notarized a complete second Answer on November 22, 2009. Applicant admitted the five allegations under Guideline J, Criminal Conduct, with explanations. Under Guideline E, Personal Conduct, she admitted allegation 1.a. and denied the remaining allegations.³ Department Counsel was prepared to proceed on January 26, 2010, and the case was assigned to me on February 2, 2010. DOHA issued a Notice of Hearing on March 3, 2010, and I convened the hearing as scheduled on March 23, 2010. The Government offered four exhibits, which I admitted as Government Exhibits (GE) 1 through 4. Applicant offered three exhibits, which I admitted as Applicant's Exhibits (AE) A through C.⁴ DOHA received the transcript (Tr.) on March 30, 2010.

Findings of Fact

Applicant's admissions in response to the SOR are incorporated as findings of fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the record evidence, I make the following additional findings of fact.

Applicant, 50 years old, submitted an application to request a security clearance as part of her job as a security officer for a defense contractor. She completed high school in 1978. She has been married for 30 years and has four adult children and one 13-year-old son. She also cares for and has legal custody of a mentally disabled neighbor. She has worked as a security officer for federal contractors since 1998. She

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

² Adjudication of this case is controlled by the Adjudicative Guidelines implemented by the Department of Defense on September 1, 2006.

³ Department Counsel stated at the hearing that the Government would not pursue the falsification allegation at subparagraph 2.b. under Guideline E, which Applicant had denied. I note that Applicant's answer to allegation 1.e. under Guideline J contradicted her answers to allegations under Guideline E. In her response to allegation 1.e., she admitted falsification of answers on her security clearance application. However, she denied falsifying these same answers in her response to the allegations under Guideline E. Viewing this contradiction in the light most favorable to the Applicant, and supported by Applicant's hearing testimony, I find that her intent was to deny all falsification allegations in the SOR.

⁴ For administrative convenience, I severed these three documents from Applicant's first Answer so that they could be offered by Applicant as exhibits.

has held a secret security clearance, but has not worked with classified information as part of her jobs. (GE 1; Tr. 20-23)

During a weekend in 1996, Applicant had an argument with her 16-year-old daughter. Applicant admits that she hit her daughter, who called the police. Applicant was arrested on a charge of domestic assault. She remained in jail over the weekend until court was in session on Monday. She admitted her actions to the judge, and he dismissed the case. (GE 4; Tr. 30-32)

In 1998, Applicant was at a nightclub on a weekend with a friend. When they left, the friend saw her boyfriend in a car with another woman. She went to the car and used a broken bottle to puncture the tire. The other woman started fighting with Applicant's friend, and Applicant went to her friend's aid. When the police arrived on the scene, they thought Applicant and/or her friend had a knife. They arrested the three women on charges of Assault/Dangerous Weapon. Applicant denied that she or anyone else had a knife. She was incarcerated until Monday morning, when she appeared in court and the case was dismissed, or in the local court's terminology, "No papered." Applicant testified that "...I guess I've just been so stupid getting involved in other people's stuff." (GE 2, 3; AE A; Tr. 34-37)

Applicant was involved in an incident in 2002, when she was visiting a close friend, who was the godmother of her son. While in a back room of her friend's home, Applicant heard her friend open the front door and then start arguing with another woman. The other woman stabbed Applicant's friend. Applicant called for an ambulance, and a neighbor called the police. When they arrived, Applicant was holding her injured friend, and there was blood on her. Applicant testified that "...[name], she started falling out. I wouldn't leave. I'm not going to leave from my friend." The police could not be sure who had attacked Applicant's friend, and arrested both Applicant and the other woman. The charge against Applicant was Simple Assault/Domestic. Later, when the police interviewed Applicant's friend at the hospital, she informed them that it was not Applicant but the other woman who had assaulted her. The police interviewed Applicant and then released her. She did not spend time in jail, and was not required to appear in court. The charge was "no papered." (GE 2, 3; AE B; Tr. 37-43)

Applicant's neighbor is a middle-aged man who is physically and mentally impaired. He had been cared for by his aunt. In 2004, before she died, the aunt asked Applicant to care for her nephew, because his family would not. From 2004 to 2006, Applicant took care of him without financial assistance. She became his legal guardian in 2006, and now receives monthly Social Security disability payments to help support him. He is 58 years old and resides in House B, next door to Applicant's home, House A. She owns both houses. Applicant also took care of her brother's two children after he was murdered. She took care of them from 2003 to 2004 until their mother was financially able to support them. (GE 2; Tr. 44, 46)

In 2004, police received reports of illegal drug activity in House B. as Applicant and her husband owned both House A and House B, the police investigated both houses. Applicant allowed the police to search her home, where they found a gun, ammunition, and a bag of marijuana. Applicant admits that the ammunition was hers. As part of her job as a security officer, Applicant is required to be proficient in shooting. She has a license for the gun she uses in her job, which is stored at her work site. She practices regularly at a firing range, where she rents a gun. Around the time of this event, she had been practicing at a firing range. She had excess ammunition, and decided to bring it home because she was planning to go back and practice again in a few days. She was aware that it was illegal to have the ammunition in her home, and admitted at the hearing that it was wrong to bring it home. (GE 2; AE C; Tr. 43-49)

The gun and marijuana belonged to Applicant's son. She was not aware that he had them in the house. Her son had a history of using and selling marijuana, and was involved in illegal drug activities since the age of 16. At the time of her security interview in late 2007, Applicant's son was serving a six-year jail sentence for possessing an unregistered weapon and distributing illegal drugs. At the time of the hearing, he had just been released. At her security interview, she told the agent that she would not allow her son to live with her in the future. (GE 2; Tr. 49-51)

As a result of the police search, Applicant and her husband were arrested and charged with having an unregistered gun, unregistered ammunition, and possession of cannabis. They spent the night in jail and appeared in court, without counsel, the next day. The charges were listed as "unregistered gun; ammunition violation." The case was "no papered." Applicant and her husband did not have the services of an attorney. (GE 2, 3; AE C; Tr. 52-53)

Applicant disclosed on her security clearance application that she was terminated from a job in 2004. Several events were occurring at that time: her car needed repairs because her husband had left her and had taken the better car; she wished to attend her grandfather's funeral in another state; and she needed dental surgery. Applicant discussed these issues with her supervisor, and showed him the paperwork about her surgery. She asked if she could add some additional unpaid leave to her two weeks vacation. He denied the unpaid leave. She took the vacation time, but called to tell him that she could not get back by the end of her vacation because of the car problems. He said that if she took additional time, she would be terminated. When she returned one day late, the supervisor told her to leave. Her current employers are aware of this termination. (GE 2; Tr. 23-26)

Applicant's 2006 security clearance application contained questions about her criminal record. Specifically, three questions asked whether she had ever been charged with or convicted of a firearms offense; ever been charged with or convicted of a drug-related offense; or been arrested, charged, or convicted of any other offense within the previous seven years. Applicant answered "No" to these questions. In her security interview, and at the hearing, Applicant stated that thought these questions were

concerned with convictions. As each of her cases was dismissed, Applicant believed that she had no convictions to disclose. She testified,

I just didn't understand...And I didn't know that charge is – I thought charge is something you charge and it's on your record, and you went to court and everything. I didn't go all through court.

She also stated that she only learned that she was charged when the security agent explained it to her. Applicant testified,

And I told her I didn't know. I said, 'What – what do you mean charge? I was never charged.' I kept saying that. And she said, 'You were charged because you was [sic] arrested.'

Applicant provided court documents at the hearing that showed the charges and disposition in the 1998, 2002, and 2004 incidents. They explained the distinction between an arrest and a conviction, and the meaning of an arrest record. Applicant obtained these documents in November 2009. (GE 2; AE A, B, C; Tr. 59-63)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the AG.⁵ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the "whole-person" concept. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines are followed whenever a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guidelines J and E.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁶ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case.

⁵ Directive. 6.3.

⁶ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁷ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the government has a compelling interest in ensuring that each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her 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.⁸

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 describes the security concern under this guideline:

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.

The following disqualifying conditions apply under AG ¶ 31:

- (a) a single serious crime or multiple lesser offenses;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Between 1996 and 2004, Applicant was charged with several crimes including domestic assault, assault with a dangerous weapon, and firearms and drug possession. For the domestic assault charge in 2002, she was questioned and released. In the other instances, she admits that she spent a night or two in jail awaiting a court appearance. All charges were “no papered” or dismissed. AG ¶ 31 (a) and (c) apply.

Two mitigating conditions are relevant under AG ¶ 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; and
- (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or

⁷ See *Egan*, 484 U.S. at 528, 531.

⁸ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

restitution, job training or higher education, good employment record, or constructive community involvement.

AG ¶ 32 (a) applies. The most recent event occurred in 2004, six years ago, and the most distant in time occurred in 1996, 14 years ago. In one event, Applicant committed assault, when she hit her daughter. However, Applicant is now 14 years older, her daughter is an adult, and Applicant has only one son to care for, all facts that indicate similar circumstances are unlikely to recur. In two other criminal incidents, Applicant was not the key player, but simply sought to help friends, which reflects well on her character. AG ¶ 32 (d) is relevant because there is no evidence Applicant engaged in criminal conduct, or has even been present when others engaged in criminal conduct, in the past six years. In the instance where she did violate a local law by storing her ammunition in her home, she admitted that she was wrong to do it, and there is no evidence that she has repeated that action since 2004. Her statements and conduct show rehabilitation, and AG ¶ 32(d) applies.

Guideline E, Personal Conduct

The security concern under the personal conduct guideline is that

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)

The facts presented support application of the following disqualifying condition under AG ¶ 16:

(a) 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; 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...

The SOR alleges that Applicant deliberately falsified information she provided on her 2006 security clearance application, which implicates AG ¶ 16(a). She was involved in four criminal incidents. She spent one or two nights in jail and appeared in court in relation to three of these events. The charges were dismissed in all four cases. Applicant answered “No” on the application because she misunderstood the term “charge.” It appears that she conflated the meaning of the terms “charge” and “conviction” and believed a “charge” only existed if a judge found a person guilty in court. Because the judge dismissed each of her cases, and she was never found guilty, she believed she had nothing to disclose. Applicant did not have the services of an attorney in these cases to explain the implications of these events or the meaning of the terms. She did obtain court documents that explained the legal terminology, but she did not have these documents until 2009, almost three years after she completed her security clearance application. Moreover, Applicant disclosed negative information on her application, including her termination from a job, and a financial delinquency. Based on these disclosures, as well as Applicant's statements and demeanor at the hearing, I find her explanation credible. As Applicant did not deliberately falsify her responses, no mitigation is required concerning falsification.

Applicant was terminated from a job in 2004 because she took unapproved leave, which implicates disqualifying condition AG ¶ 16 (d) (1). The following mitigating condition under AG ¶ 17 is relevant to Applicant's job termination:

(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.

Applicant's was experiencing a confluence of several stressful events at the time, including a medical condition requiring surgery, a car that required repairs and was unreliable, and the death of a family member that required out-of-state travel. It is unlikely that such a unique set of circumstances will recur. Moreover, she acted responsibly by requesting the time in advance from her supervisor, and documenting her medical condition. Six years have passed since this termination and the record shows no recent indication of work-related problems that would raise questions as to her reliability or trustworthiness. AG ¶ 17 (c) applies.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the relevant circumstances. I have evaluated the facts presented and have applied the appropriate adjudicative factors under the cited guidelines. I have also reviewed the record before me in the context of the whole-person factors listed in 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guidelines, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant used poor judgment when she struck her teenaged daughter during a heated argument. However, that conduct occurred 14 years ago, and Applicant was candid in admitting the conduct. She also admitted that she should not have brought home the ammunition she intended to use in future target practice, required for her job. The most serious charges related to drug and gun possession. However, these charges were dismissed because they related not to Applicant's actions, but her son's. Two other criminal events, the most recent of which was six years ago, involved Applicant helping friends who were in trouble. Applicant misunderstood the questions on her security clearance application about criminal conduct, and credibly testified that she believed she was not required to report events that had been dismissed by a judge.

Applicant has also demonstrated maturity and character through her willingness to take in her brother's children when their mother was financially unable to do so; and by taking legal and financial responsibility for a neighbor when his family refused to do so. The record also shows that Applicant has provided more than a decade of service to the federal government through her employment with defense contractors.

For all these reasons, I conclude Applicant has mitigated the cited security concerns. A fair and commonsense assessment of the available information bearing on Applicant's suitability for a security clearance shows she has satisfied the doubts raised under the guidelines for criminal conduct and personal conduct.

Formal Findings

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1, Guideline J: FOR APPLICANT

Subparagraphs 1.a. – 1.e. For Applicant

Paragraph 2, Guideline E

FOR APPLICANT

Subparagraphs 2.a. – 2.e.

For Applicant

Conclusion

In light of all of the foregoing, it is clearly consistent with the national interest to allow Applicant access to classified information. Applicant's request for a security clearance is granted.

RITA C. O'BRIEN
Administrative Judge