



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 07-12013
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace Le'i, Esq., Department Counsel
For Applicant: *Pro se*

September 16, 2008

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has not mitigated security concerns pertaining to Criminal Conduct. Clearance is denied.

Statement of the Case

Applicant submitted her Electronic Questionnaire for Investigations Processing (e-QIP), on October 4, 2005. On March 10, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines J. The action was 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on March 31, 2008, and requested a hearing before an Administrative Judge. DOHA received her response on April 2, 2008. Department Counsel was prepared to proceed on April 11, 2008, and I received the

case assignment on April 22, 2008. DOHA issued a notice of hearing on May 8, 2008, scheduling the hearing for June 4, 2008. The hearing was held as scheduled.

The government offered Government Exhibits (GE) 1 through 11, which were received without objection. Applicant offered Applicant Exhibits (AE) A through E, which were received without objection, and she testified on her own behalf. DOHA received the hearing transcript (Tr.) on June 16, 2008.

Findings of Fact

Applicant admitted all of the SOR allegations as alleged. Her admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence, I make the following additional findings of fact.

Applicant is a 42-year-old “team lead”¹, who has been employed by a defense contractor since April 2004. GE 1, Tr. 32-33. She is a first time applicant for a security clearance and stated she believes obtaining a security clearance is a condition of employment. Tr. 33-34.

Applicant graduated from high school in May 1984. Tr. 31. Applicant married in August 2001. She has three of her own children, a 22-year-old son, a 19-year-old daughter, and an 18-year-old daughter. She has three stepchildren, a 25-year-old stepson, a 15-year-old stepdaughter, and a 14-year-old stepdaughter. Her 19 and 18 year old daughters live with her and her husband. Tr. 30.

The SOR alleges seven separate line items under Criminal Conduct spanning a 16-year period from 1991 to 2007. They are discussed *infra* beginning with the most recent incident.

In January 2007, Applicant was charged with felony 2nd degree assault. In July 2007, the charge was nolle prossed. (SOR ¶ 1a.) GE 3, GE 4, Tr. 12-15. Applicant explained, “Some girl came to my house to fight my daughter. Then she said I hit her.” GE 2. In July 2005, Applicant was charged with disorderly conduct and failure to obey a reasonable/lawful order. In October 2005, the charges were merged and Applicant was convicted of failure to obey a reasonable/lawful order. She was sentenced to serve three days in jail and pay court costs. (¶ 1.b.) Applicant was involved in a confrontation with a group of juveniles who were attempting to fight with her daughter. Applicant disputes the fact she used profanity or spoke in a loud voice after being ordered not to do so by a police officer. GE 5, GE 6, Tr. 17-20.

In June 1995, Applicant was charged with being disorderly in a public place and battery. In August 1995, these two charges were placed on the stet docket. (SOR ¶ 1.c.) GE 7. Applicant testified she does not recall that incident. Tr. 20. In March 1994, Applicant was charged with assault and malicious destruction of property. In June 1994, the assault charged was nolle prossed and she was convicted of malicious destruction

¹ Applicant described her job as “I am the team lead for the other administrative assistants.” Tr. 32.

of property. She was sentenced to 60 days in jail of which 30 days was suspended, and placed on two years probation. (SOR ¶ 1.d.) GE 8. Applicant testified, "Me and this girl was friends, and me and her got in a fuss, and I pushed her car door and dented her car." Applicant explained the underlying basis of the dispute, "Oh, it was about another friend – she was messing with the friend's boyfriend and I didn't like it." Tr. 21-21.

In December 1993, Applicant was charged with assault, harass – a course of conduct, telephone call repeat/abuse, and trespass private property. In June 1994, the assault, harass – a course of conduct, and trespass private property charges were nolle prossed, and she was convicted of telephone call repeat/abuse. She was sentenced to six months in jail of which five months was suspended, ordered to pay costs, and placed on two years probation. (SOR ¶ 1.e.) GE 9, Tr. 22-24. Applicant testified, "Me and this girl was friends, and her and my cousin had started dating the same boy, and I think I called her up on the phone, and me and her got a fussing about it, and she had me arrested for all of this. Because I kept calling her." Tr. 22.

In September 1993, Applicant was charged with battery, and in January 1994, she was convicted of this charge. She was sentenced to 60 days in jail, which was suspended, ordered to pay costs, and was placed on one year of probation. (SOR ¶ 1.f.) GE 10. Applicant testified she was at a club and a woman, "said I pushed her – I pushed and I hit her or something. And we went to court and she had witnesses to say that I pushed her or hit her." When asked whether she did in fact push or hit her, Applicant answered, "Probably, yes." Tr. 25-26.

In April 1991, Applicant was charged with obstructing and hindering, and in August 1991, she was convicted of this charge. She was fined \$235, which was suspended, and was placed on one year of probation. (SOR ¶ 1.g.) GE 11. Applicant explained, "My brother stole my car and he went to the store and stole something, and the police towed my car away, and I was out there fussing and arguing with them." Tr. 26-27.

Applicant denied being arrested or charged with any offense since January 2007. In response to being asked what she would do if she found herself in another altercation, she said, "I don't find myself – I mean, I had to learn from my mistakes and how it could cost me my career, so I don't sit and argue – just like I said back in 2007, 2005 – back in 1995, back them years, I never really had to have responsibility, because my mother was living and she helped me take care of my kids."

Applicant stated she sought counseling with her pastor regarding her anger issues in 2006. Tr. 36, 38. Applicant submitted three work-related character references all offering positive comments. AE A – AE C. She also submitted two recent employee performance reviews reflecting above average performance. AE D, AE E.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition

to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense 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.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence,"² demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).³

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

² See Directive ¶ E3.1.14. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

³ "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968 (Aug. 2, 1995), Section 3.

Conclusions

Guideline J, Criminal Conduct

The security concern relating to the Guideline for Criminal Conduct is set out in AG ¶ 30:

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 Government established its case under Guideline J by Applicant's admissions and evidence presented that Applicant was involved in seven separate criminal offenses spanning a 16-year period from 1993 to 2007.

Of the six Criminal Conduct Disqualifying Conditions listed under AG ¶ 31, two are applicable:

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

Of the five Criminal Conduct Mitigating Conditions listed under AG ¶ 32, two are potentially applicable:

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

Applicant's recent arrest, which occurred after she submitted her e-QIP, brings to the forefront the criminal conduct concerns raised by her past behavior. I am required to consider Applicant's overall questionable behavior when evaluating the seriousness of the conduct alleged in the SOR to determine factors such as the extent to which her behavior is recent; the likelihood of recurrence; Applicant's explanations concerning the circumstances of the incidents alleged; and her rehabilitation.⁴

Under the totality of the circumstances, I find Applicant's criminal behavior is recent and not isolated. Considering her past criminal behavior, the nature and seriousness of her misconduct, and her unwillingness to avoid unlawful conduct, I find her favorable information is not sufficient to mitigate Guideline J security concerns. Her behavior raises questions about her ability and willingness to follow the law, and ultimately, to protect classified information. Her conduct spanning a 16-year period requiring repeated law enforcement intervention weighs against a finding of rehabilitation and positive behavioral changes. I find that none of the mitigating conditions apply.

To conclude, Applicant presented little or no evidence to explain, extenuate, or mitigate the criminal conduct security concerns. Applicant did not meet her ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole person concept was given due consideration and that analysis does not support a favorable decision.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"⁵ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude she is not eligible for access to classified information.

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 J:	AGAINST APPLICANT
Subparagraphs 1.a. – 1.g.:	Against Applicant

⁴ ISCR Case No. 04-09959 at 3 (App. Bd. May 19, 2006).

⁵ See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

Conclusion

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 Applicant's security clearance. Eligibility for access to classified information is denied.

ROBERT J. TUIDER
Administrative Judge