



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



In the matter of:)
)
-----) ISCR Case No. 07-12461
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

July 25, 2008

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct) and E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted her security clearance application on May 29, 2007 (Government Exhibit (GX) 4). On January 14, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny her application, citing security concerns under Guidelines J and E. 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 acknowledged receipt of the SOR on January 18, 2008, and answered it on January 30, 2008; but she did not state whether she requested a hearing. She resubmitted her answer on March 12, 2008, but again did not state whether she requested a hearing. On April 11, 2008, she stated she did not desire a hearing before an administrative judge. DOHA received her response April 16, 2008. Department Counsel submitted the government's written case on April 30, 2008. On May 7, 2008, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the government's evidence. Applicant received the FORM on May 14, 2008. She did not respond. The case was assigned to me on July 7, 2008.

Evidentiary Ruling

The FORM includes responses to DOHA interrogatories that include a personal subject interview from a report of investigation (GX 5), without the authentication required by Directive ¶ E3.1.20. Because Applicant did not object to any items in the FORM, she waived any objection based on lack of authentication. Accordingly, I have considered the personal subject interview in my decision.

Findings of Fact

In her answer to the SOR dated March 12, 2008, Applicant admitted all the allegations in the SOR. Her admissions are incorporated in my findings of fact.

Applicant is a 24-year-old draftsman for a defense contractor. She has worked for her current employer since May 2007. She has never held a security clearance.

Applicant's police records reflect the arrests and citations listed in the table below. She admitted all the arrests and citations in her answer to the SOR.

SOR	Offense	Date	Disposition	Evidence
1.a	Shoplifting	Apr. 02	Nolo contendere; fined	GX 7, 8
2.a	No proof of insurance	Oct. 03	Summons; disposition not indicated	GX 12
2.b	Unregistered vehicle; Improper use of registration	Jan. 04	Charged; disposition not indicated	GX 11
2,c	Unregistered vehicle; Improper use of registration	Feb. 04	Charged; disposition not indicated	GX 10
1.b	Driving with suspended license	Oct. 04	Nolo contendere; fined	GX 14
1.c	Driving with suspended license	Feb. 05	Nolo contendere; fined	GX 13
1.d	Driving with suspended license	Nov. 05	Fined, jail for one night	GX 4 at 19-20

When Applicant submitted her security clearance application in May 2007, she disclosed the November 2005 conviction of driving on a suspended license in response

to question 23f, asking about her police record. She did not disclose any of the earlier offenses.

During an interview with a security investigator in July 2007, she stated she did not actively steal any items during the alleged shoplifting but she falsely told the police she had taken some of the items to prevent her friend from being charged with stealing property worth more than \$500, a felony. In her answer to the SOR, she admitted her denial of active participation in the shoplifting was false. She also told the investigator she did not disclose the shoplifting incident on her security clearance application because she thought it would be deleted from her police record after five years and no one would discover it.

In her answer to the SOR, Applicant admitted the shoplifting, admitted falsifying her security clearance application by omitting all her arrests and citations except for the November 2005 incident, and admitted lying to the security investigator.

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a

determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline J, Criminal Conduct

The SOR alleges shoplifting in April 2002 (SOR ¶ 1.a) and three instances of driving with a suspended license (SOR ¶¶ 1.b, 1.c, and 1.d). It also alleges Applicant falsified her security clearance application and lied to a security investigator (SOR ¶ 1.e). The concern raised by criminal conduct is that it "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." AG ¶ 30. Conditions that could raise a security concern and may be disqualifying include "a single serious crime or multiple lesser offenses" and "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted." AG ¶¶ 31(a) and (c).

It is a felony, punishable by a fine or imprisonment for not more than five years, or both, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the government of the United States. 18 U.S.C. § 1001. Security clearances are matters within the jurisdiction of the executive branch of the government of the United States. A deliberately false answer on a security clearance application is a serious crime within the meaning of Guideline J. Applicant's false answers on her security clearance application and her long record of minor offenses raise AG ¶ 31(a) and (c).

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 31(a) and (e), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline may be mitigated by evidence that “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.” AG ¶ 32(a). Applicant’s latest criminal conduct was recent, when she falsified her security clearance application. None of the offenses happened under unusual circumstances, and they cast serious doubt on her reliability, trustworthiness, and good judgment. I conclude AG ¶ 32(a) is not established.

Security concerns also may be mitigated if “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.” AG ¶ 32(d). Applicant’s falsification was recent, and she presented no evidence of rehabilitation.

Guideline E, Personal Conduct

The SOR alleges three motor vehicle offenses not alleged under Guideline J: driving with no proof of insurance (SOR ¶ 2.a), and driving an unregistered vehicle, and improperly using the registration for another vehicle (SOR ¶ 2.b and 2.c). It also alleges falsification of the security clearance application (SOR ¶ 2.d) and lying to the security investigator (SOR ¶¶ 2.e and 2.f).

The concern under this guideline is set out in AG ¶ 15 as follows:

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.

A disqualifying condition under this guideline may be raised by “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.” AG ¶ 16(a). Applicant’s falsification of her security clearance application and false statements to the security investigator raise this disqualifying condition.

A disqualifying condition may arise from “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.” AG ¶ 16(c). Finally, a disqualifying condition under this guideline may arise from “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,” such as “a pattern of dishonesty or rule violations” AG ¶ 16(d)(3). Applicant’s police record raises AG ¶¶ 16(c) and (d)(3).

Security concerns raised by false or misleading answers on a security clearance application may be mitigated by showing that “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” AG ¶ 17(a). Applicant made no effort to correct the omissions from her security clearance application until she was confronted with the evidence by a security investigator. Even then, she worsened the situation by lying to the investigator. AG ¶ 17(a) is not established.

Security concerns under this guideline also may be mitigated if “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.” AG ¶ 17(c). None of the elements of this mitigating condition are established. Applicant’s falsifications are serious offenses and recent, her minor offenses are numerous, her conduct is not attributable to “unique circumstances,” and her pattern of conduct casts doubt on her reliability, trustworthiness, and good judgment.

Whole Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all the 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 eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. Some of the factors in AG ¶ 2(a) were addressed above, but some warrant additional comment.

Applicant is a young person who has not yet learned the importance of responsible behavior. Her lack of candor during the security clearance process casts serious doubt on her ability to protect classified or sensitive information. After weighing the disqualifying and mitigating conditions under Guideline J and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on criminal conduct and personal conduct. Accordingly, I conclude she has not carried her burden of showing that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

Paragraph 1, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraphs 1.a-1.e:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a-2.f:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge