



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 07-13460
)	
Applicant for Security Clearance)	

Appearances

For Government: Nichole L. Noel, Esquire, Department Counsel
For Applicant: *Pro se*

July 31, 2008

Decision

METZ, John Grattan, Jr., Administrative Judge:

On 17 December 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns raised under Guideline E.¹ Applicant answered the SOR 9 January 2008, and requested a hearing. DOHA assigned the case to me 21 May 2008, and I convened a hearing 17 July 2008. DOHA received the transcript (Tr.) 25 July 2008.

Findings of Fact

Applicant admitted the SOR allegations, except for SOR 1.b., She is a 45-year-old software developer employed by a defense contractor since February 2003. She

¹DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), 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 (RAG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

seeks to retain the security clearance she has held since at least February 1999, when she was employed by a different contractor.

In November 2004, Applicant completed a national security form (SF-86) for access to government information at another government agency. She had previously had her security clearance renewed in March 2003. She answered “no” to a question in the form requiring her to report any illegal use of a controlled substance within the last seven years.

In May 2005, during a polygraph examination with the other government agency, Applicant stated that after moving into her new home in April 2004, she discovered a bag filled with what appeared to be ecstasy and cocaine above a ceiling tile in the basement. Shortly thereafter, she tried the ecstasy on two occasions. She also put some of the cocaine on her tongue. In June 2005, the other agency disapproved her for access to classified information (G.E. 3). She was advised of her appeal rights.

On a February 2006 clearance application, Applicant again answered “no” to a question requiring her to report any illegal use of a controlled substance within the last seven years (G.E. 1). She did report the adverse clearance action taken by the other agency.

In a November 2006 unsworn declaration to a government investigator, Applicant described her May 2005 polygraph with the other government agency (G.E. 2). There she is recorded as having stated that she failed her lifestyle polygraph because of her elusive answers to the drug-related questions. She hired an attorney who specializes in security clearance matters, who arranged for an independent polygraph. When the polygrapher opined that the results on the drug questions were inconclusive, the attorney advised Applicant not to pursue an appeal with the agency. Applicant testified that the attorney was willing to proceed with the appeal, but Applicant decided not to pursue it (Tr. 40). Applicant was not tested on the question of whether her claimed drug use was false (Tr. 39).

In her October 2007 response to DOHA interrogatories (G.E. 2), Applicant provided a “clarification” of her November 2006 unsworn declaration. She recounted her polygraph experience with a harrowing tale, that—if true—would likely constitute misconduct by the polygrapher. She reiterated that experience at hearing. The gist of her complaint is that the polygrapher so badgered her during a five-hour polygraph that she made up the story of her drug use to satisfy him. However, she acknowledged that the polygrapher had advised her before the polygraph of her absolute right to terminate the polygraph at any time. She did not do so. She wrote a complaint to the agency about the polygrapher’s conduct. The agency response reiterated her right to appeal the clearance decision (Tr. 42-3).

Applicant’s character reference, who has known her over years, considers her reliable and trustworthy (Tr. 45-49). Her supervisor for the last three years rates her an above-average employee. He also considers her reliable and trustworthy. She handles

stress well, is not known to be a pushover in work-related conversations, and has never lost control of a situation (Tr. 54-55).

Policies

The Revised Adjudicative Guidelines (RAG) list factors to be considered in evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in RAG ¶ 2(a). The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative guidelines should be followed where a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guideline is Guideline E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their 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.²

Analysis

The government established a case for disqualification under Guideline E, and Applicant did not mitigate the security concerns. Applicant either falsified clearance forms in November 2004 and February 2006, or she deliberately lied to a polygrapher in May 2005.³ Thus, the burden of persuasion shifted to Applicant to refute or mitigate the government's information.

²See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

³¶16 (a) 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, . . . [or] determine security clearance eligibility or trustworthiness. . . ; (b) deliberately providing false or misleading information regarding relevant facts to an . . . investigator . . . ;

Applicant faces numerous hurdles in proving her version of her polygraph examination in May 2005. While it is relatively easy to allege polygrapher misconduct, it is extremely difficult to prove it. It is difficult to believe Applicant would invent a lie about drug use (creating adverse information) just to get the polygrapher to stop the alleged badgering, especially where she knew she was free to terminate the polygraph at any time. She did not terminate the polygraph, and offered no explanation why she didn't if she felt she was being so abused.

In addition, there are two reported versions of Applicant's polygraph experience, the November 2006 summary of Applicant's unsworn declaration to the government investigator and Applicant's October 2007 sworn "clarification," substantially repeated at hearing. It is impossible to know if the investigator's summary accurately relates the gist of what Applicant said, or merely reflects the investigator's distillation of what Applicant said. What is clear is that the first clear allegation of polygrapher misconduct appears in October 2007. Finally, although Applicant complained about the polygrapher's conduct, and went so far as to retain counsel to examine her appeal options, by her own admission her independent polygraph was inconclusive on the drug questions and she was not tested on the truth of her claim that she made up the drug use she reported to the polygrapher. Ultimately, Applicant chose to not pursue an appeal. It matters not whether that decision was recommended by her counsel, or was hers alone.

Applicant finds herself in a difficult position, but it is a position largely of her own making. The best case view of the facts in this case has Applicant lying to the polygrapher in a misguided attempt to get access to the other agency's information. The government met its burden of establishing doubts about Applicant's veracity and her ultimate fitness for access to classified information. I need not decide which of the SOR allegations is actually true. I need only conclude that Applicant has not met her burden of demonstrating that it is clearly consistent with the national interest to continue her access to classified information. I resolve Guideline E against Applicant.

Formal Findings

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph a: Against Applicant
Subparagraph b: Against Applicant
Subparagraph c: Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance denied.

JOHN GRATTAN METZ, JR
Administrative Judge