



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 07-16144
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: James S. DelSordo, Esq.

May 14, 2009

Decision

TUIDER, Robert J., Administrative Judge:

Applicant successfully mitigated personal conduct concerns that arose from her past employment. Clearance is granted.

Statement of the Case

Applicant submitted an Electronic Questionnaires Investigations Processing (e-QIP) on June 11, 2007. On December 10, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline E (Personal Conduct) for Applicant. 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 January 1, 2009, and requested a hearing before an administrative judge. DOHA received her response on January 7, 2009. Department Counsel was prepared to proceed on February 5, 2009, and I received the case assignment on February 10, 2009. DOHA issued a notice of hearing on February 18, 2009, scheduling the hearing for March 3, 2009. On March 2, 2009, Counsel for Applicant entered an Appearance and a Request for a Continuance, which I granted. On March 3, 2009, DOHA issued an amended notice of hearing scheduling the hearing for March 18, 2009. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 8, and an Administrative Notice Document, Exhibit (Ex.) I. The Government also offered a List of Government Exhibits, Ex. II. GE 1 through 5 were received without objection; however, Counsel for Applicant objected to GE 6 through 8 (except for page 1 of GE 8, which was contained in GE 4) and Ex. I on relevancy grounds. After argument by counsel, I sustained Counsel for Applicant's objection. Tr. 15-27, 106-107.

The Applicant offered Applicant Exhibits (AE) A through C, which were received without objection, and testified on her own behalf. Tr. 28-29. I held the record open until April 1, 2009 to afford the Applicant an opportunity to submit additional documents. Applicant timely submitted AE D, which was received without objection. DOHA received the hearing transcript (Tr.) on March 25, 2009.

Findings of Fact

Applicant admitted all of the SOR allegations with explanations. 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 32-year-old supervisor for a company that provides security services. She has been employed by her sponsoring defense contractor employer since June 2007. One month after being employed, she was promoted to lieutenant. GE 1, Tr. 114. She seeks a security clearance to enhance her opportunities with her employer. Tr. 24-27. She also works part-time for a second employer that provides security services.

Applicant graduated from high school in May 1994. Tr. 113. She estimates she has completed a "year-and-a-half" of college. Tr. 73. She has never married and has three children, ages 14, 12, and 8. She is her children's primary caretaker, and the father of her children shares financial responsibility with her. GE 1, Tr. 75-76.

Personal Conduct

In August 1998, Applicant resigned under adverse circumstances from her position as a clothing store sales clerk. She had been employed for two months when a conflict developed between her and the store owner over her leaving the store during her lunch hour to cash her pay check. SOR ¶ 1.e. In 2005, she held three jobs as a security guard in which she resigned under adverse circumstances. The resignations occurred in April 2005, May 2005, and July 2005. Following her April 2005 resignation,

her two subsequent resignations followed jobs she held for a very short duration, i.e. one-to-two weeks. Applicant's resignations primarily followed scheduling conflicts over her inability to exercise flexibility while fulfilling her responsibility as a single parent. SOR ¶¶ 1.b. – 1. d.

The most significant concern identified from Applicant's past employment stem from her termination in May 2007. At the time, she was a security guard for a company that provided contract security services, and failed to turn in her firearm upon completion of her shift to her supervisor. Such a failure was a violation of state law and company policy. She explained her failure to turn in her firearm was an honest mistake, and but for this mistake, she would still be employed by that company. Response to SOR. At the time of her termination, she had worked for this company for one year without a firearm incident. Tr. 115-116. She explained at the time she was hired by this company, she received one day of weapons training that was "kind of rushed through" because her employer was under pressure to fill positions to meet the terms of their contract. Tr. 116.

Two current supervisory personnel testified on Applicant's behalf. The first witness was a Project Manager, who has supervised her for two years. He has held a top secret clearance for "probably 30 years." He stated Applicant has received considerable training to include a 40-hour weapons course. He added that Applicant is a trustworthy employee, complies with all company rules and regulations, and is "very reliable." He views her as one of his "key supervisors" and if granted a security clearance, he would place her in a position of greater responsibility. He would rank her among the top 10 of his 20 supervisors. Tr. 30-45.

The second witness was a Training Instructor for her part-time employer. He has held a secret clearance for nine years. He stated Applicant has had no weapons violations while employed with his company and if she did, she would be immediately terminated. He described Applicant as an "exceptional employee." Tr. 46-58.

Applicant submitted two reference letters. The first letter was from her Shift Supervisor, who described her as "great officer" who has strong inter-personal skills adding she was a "tremendous asset" on a recent high profile event. AE C. The second letter was from another Project Manager, who described Applicant as "dependable, reliable, hard working, and [e]xtremely dedicated to her family morals." AE D.

Policies

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.¹

¹ See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

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 controlling 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 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."² 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

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 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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

² *Egan, supra*, at 528, 531.

Analysis

Guideline E (Personal Conduct)

Under Adjudicative Guideline ¶ 15, the Government's concern is:

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.

AG ¶¶ 16 sets out two conditions that could raise a security concern and may be disqualifying in this case:

(c) 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;

(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:

(3) a pattern of dishonesty or rule violations.

Applicant's conduct leading up to her dismissal in May 2007 for failing to turn in her firearm warrants application of these two disqualifying conditions in whole or in part. Her failure to comply with company policy and state law led to her immediate dismissal. Application of these disqualifying conditions is less evident when attempting to apply them to her four previous resignations in 1998 and 2005, which in large part stemmed from personality and/or scheduling conflicts.

Two mitigating conditions under AG ¶ 17 are potentially applicable to these disqualifying conditions:

(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; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant receives credit under AG ¶¶ 17(c) and (d) for taking responsibility for her actions, receiving substantial additional firearms training, and having had no similar recurrences. She credibly explained her failure to turn in her firearm at the end of her shift was an honest mistake. Understandably, her employer took a no tolerance policy for her oversight and she paid the consequences. She understands similar mistakes are not acceptable. Applicant's performance under her sponsoring employer as well as with her part-time employer has been commendable. Shortly after she was hired in June 2007, she was promoted to lieutenant and fulfills a supervisory role.

Her 1998 and 2005 resignations occurred eleven and four years ago, respectively. In 1998, her two oldest children were ages 3 and 1, and in 2005 her children were 10, 8, and 4. As the primary caretaker for her children, she did not have the flexibility of being able to adjust her schedule on short notice. In any event, this chapter on her life appears to be behind her as her children have matured and there have been no reported incidents of similar employment conflicts.

Since her 2007 termination, she has built up an impressive employment history to the extent that two supervisors testified on her behalf and two additional supervisors submitted reference letters on her behalf. They collectively describe her as trustworthy, reliable, personable, and an asset to their respective companies.

Under the totality of the circumstances, I find Applicant's behavior as it pertains to the 1998 and 2005 resignations as not recent and her 2007 termination as isolated. Considering the subsequent rehabilitative measures she has taken coupled with her increased maturity and favorable employment record, and other factors identified *supra*, I find her favorable information outweighs her past employment difficulties. Her record and accomplishments over the past two years alleviates questions about her ability and willingness to follow the law and/or company policy. Applicant appears to be doing her level best to balance between the competing interests and responsibility owed to her family and employers. Based on the evidence presented, Applicant has sufficiently addressed concerns related to judgment, reliability and trustworthiness.

To conclude, Applicant presented insufficient evidence to explain, extenuate, or mitigate the personal conduct concerns raised as a result of her past employment record. She has met 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 supports 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”³ and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the Guidelines. Applicant has mitigated or overcome the Government’s case. For the reasons stated, I conclude she is 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 E: FOR APPLICANT

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

Conclusion

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

ROBERT J. TUIDER
Administrative Judge

³ See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).