



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-17728
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Jr., Esquire, Department Counsel
For Applicant: *Pro Se*

October 8, 2008

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny or revoke her eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on June 12, 2008. The SOR is equivalent to an administrative complaint and it details the factual basis for the action. The SOR alleges security concerns under Guideline J for criminal conduct and Guideline E for personal conduct based on falsification of a security-clearance application. For the reasons discussed below, this case is decided against Applicant.

In addition to the Executive Order and Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005.

¹ Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended, and DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive).

The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.² The Directive is pending revision or amendment. The Revised Guidelines apply here because the SOR is dated after the effective date.

Applicant's Answer to the SOR is dated July 7, 2008, and she elected a decision without a hearing. Accordingly, the case will be decided based on the written record in lieu of a hearing.

On August 15, 2008, the government submitted its written case consisting of all relevant and material information that could be adduced at a hearing. This so-called file of relevant material (FORM)³ was mailed to Applicant on August 18, 2008, and it was received by her on September 10, 2008. She replied to the FORM within the allowed 30-day period, and her reply consists of a one-page letter, which is admitted as Exhibit A. The case was assigned to me on September 24, 2008.

Findings of Fact

In her Answer, Applicant admits the SOR allegations. Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 46-year-old employee of a federal contractor. She has worked for her current employer since 2003. Her current position or job title is geo-spatial technician.

It appears Applicant is seeking to obtain an industrial security clearance for the first time. She completed a security-clearance application on or about November 29, 2006 (Exhibits 4 and 5). She was required to answer various questions about her background, to include her police record. She denied having ever been charged with or convicted of any felony offense in response to Question 23a. Likewise, she denied having ever been charged with or convicted of any drug- or alcohol-related offenses in response to Question 23d. Indeed, she replied in the negative to all questions about her police record, thereby denying any police record.

The record evidence shows Applicant was involved in two incidents of criminal conduct. The first was in 1983 when Applicant was arrested and charged in state court with felony violations of the state's controlled substances act. She was subsequently convicted and sentenced to ten years imprisonment, with eight years suspended. She

² See Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

³ The government's brief includes several attachments referred to as items. They are referred to as exhibits herein.

ended up serving about seven months. Second, on or about November 17, 2006, Applicant was arrested and charged with disorderly intoxication. She was subsequently convicted of disorderly conduct and sentenced to a fine and court costs.

In her reply letter to the FORM (Exhibit A), Applicant states the following: 1) that she has no desire to jeopardize her country; 2) that she likes her job and desires a clearance so that she may continue working and learning; and 3) that she is looking for a chance to better herself.

Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. To start, no one has a right to a security clearance.⁴ As noted by the Supreme Court in 1988 in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁵ A favorable decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.⁶ An unfavorable decision: (1) denies any application; (2) revokes any existing security clearance; and (3) prevents access to classified information at any level.⁷ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.⁸ The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.⁹ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁰ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹¹ In *Egan*, the Supreme

⁴ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (“It is likewise plain that there is no ‘right’ to a security clearance, so that full-scale due process standards do not apply to cases such as Duane’s.”).

⁵ *Egan*, 484 U.S. at 531.

⁶ Directive, ¶ 3.2.

⁷ Directive, ¶ 3.2.

⁸ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

⁹ Directive, Enclosure 3, ¶ E3.1.14.

¹⁰ Directive, Enclosure 3, ¶ E3.1.15.

¹¹ Directive, Enclosure 3, ¶ E3.1.15.

Court stated that the burden of proof is less than a preponderance of the evidence.¹² The agency appellate authority has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.¹³

The Revised Guidelines set forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.¹⁴ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

Analysis

Personal conduct under Guideline E¹⁵ includes issues of false statements and credible adverse information that may not be enough to support action under any other guideline. In particular, a security concern may arise due to:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] 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.¹⁶

A statement is false when it is made deliberately (knowingly and willfully). An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported.

¹² *Egan*, 484 U.S. at 531.

¹³ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

¹⁴ Executive Order 10865, § 7.

¹⁵ Revised Guidelines at 10–12 (setting forth the security concern and the disqualifying and mitigating conditions).

¹⁶ Revised Guidelines at 10.

The issue here is the truthfulness of Applicant's answers to Questions 23a and 23d of her security-clearance application. In making this determination, I note that I have not had the opportunity to listen to her testimony and observe her demeanor. She appears to contend that she did not knowingly and willfully make false statements. In an interview, she explained that she did not report the 2006 alcohol-related offense because it was not yet adjudicated (Exhibit 7). In response to interrogatories, she explained that she did not report the 1983 drug-related offenses because she applied for a pardon in 1990 and assumed she obtained it (Exhibit 6).

Applicant's contentions and explanations are not credible. First, her pardon contention is not supported by the record evidence, as she failed to submit any reliable evidence showing that she sought a pardon. Second, it is simply too difficult to accept as true that a person of Applicant's age and maturity could honestly believe that she did not have to report a police record consisting of both drug- and alcohol-related offenses, the most recent of which took place about two weeks before she submitted the security-clearance application. The record evidence does not support a conclusion that Applicant misunderstood the questions, genuinely thought the information did not need to be reported, or made an honest mistake. Indeed, her explanations are merely after-the-fact rationalizations.

All of the MC under Guideline E have been considered and none apply in Applicant's favor. Making false statements to the federal government during the security-clearance process is serious misconduct, and it is not easily explained away, extenuated, or mitigated. Accordingly, Guideline E is decided against Applicant.

Under Guideline J for criminal conduct,¹⁷ the concern is that "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."¹⁸

In general, a security concern is raised by Applicant's history of criminal conduct. In particular, DC 1¹⁹ and DC 3²⁰ apply against Applicant as evidenced by her 1983 drug-related offenses (which resulted in her imprisonment) and her 2006 alcohol-related offense. Applicant's involvement in these two incidents of criminal conduct calls into question her judgment, reliability, and trustworthiness.

¹⁷ Revised Guidelines at 21–22 (setting forth the security concern and the disqualifying and mitigating conditions).

¹⁸ Revised Guidelines at 21.

¹⁹ DC 1 is "a single serious crime or multiple lesser offenses."

²⁰ DC 3 is the "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

The guideline also contains several conditions that could mitigate security concerns. All the MC have been considered and none apply in Applicant's favor. Any evidence of reform and rehabilitation is undermined by Applicant's conduct in 2006 when she made deliberately false statements on her security-clearance application. Accordingly, Guideline J is decided against Applicant.

Applicant did not present sufficient evidence to rebut, explain, extenuate, or mitigate the 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. This case is decided against Applicant.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	Against Applicant
Subparagraphs 1.a–1.b:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 1.a:	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.

Michael H. Leonard
Administrative Judge