



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



In the matter of:)
)
-----) ISCR Case No. 09-03135
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro se*

July 20, 2010

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department’s intent to deny or revoke her eligibility for a security clearance to work in the defense industry. The record evidence shows Applicant was denied access to sensitive compartmented information (SCI) in 2005. The other governmental agency (OGA) took this action based her involvement in drug-related activity from 1997 to about 2003 or 2004, minor employee theft, and failure to fully disclose her drug-related activity during the security clearance process. In 2007, she completed her current security clearance application, and she did not provide a full, frank, and candid response to a question about her involvement in drug-related activity. Although Applicant has done a magnificent job at building a new life and removing herself from an unsavory environment where illegal activity was the norm, her deliberate falsification of the post-2005 security clearance application cannot be overlooked. Accordingly, as explained in further detail below, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on February 26, 2010, the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) explaining it was unable to find it is clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the factual basis for the action under the security guidelines known as Guideline E for personal conduct and Guideline J for criminal conduct. The criminal conduct allegations refer to the personal conduct allegations as these matters are factually interrelated. In brief, the SOR alleges Applicant engaged in employee theft, illegal drug-related activity by assisting her mother, boyfriend, and brother in their conduct, and six instances of making false statements during the security clearance process. The SOR also recommended that the case be submitted to an administrative judge to decide whether to deny or revoke Applicant's security clearance.

Applicant answered the SOR in a timely fashion, and she requested a hearing. In her Answer, she admitted the SOR allegations except for ¶ 1.f. The case was assigned to me May 3, 2010. The hearing took place June 2, 2010. The hearing transcript (Tr.) was received June 9, 2010.

Findings of Fact

Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 28-year-old employee of a federal contractor. She has never married and has no children. She has a bachelor's degree in computer science. Since July 2004, she has worked as a software engineer for a large publicly-traded company engaged in defense contracting. Her job performance has been good and she has developed a reputation as a loyal and dependable employee.² She is currently working part-time because she is also a part-time student in her second year of law school. Upon completing law school, her long-term goals are to work in the areas of intellectual property and litigation.

The genesis of this case may be traced to about March 2005, when the OGA denied Applicant access to SCI. The OGA's clearance decision statement described in detail Applicant's involvement drug-related activity 1997 to about 2003 or 2004, minor

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

² Exhibits A and B.

employee theft, and failure to fully disclose her drug-related activity during the security clearance process. These matters are the basis for the allegations in SOR ¶¶ 1.a–1.l and will not be repeated further. The primary source for those facts was information Applicant provided during a series of interviews facilitated by polygraph examination. The polygraph examination results are not in evidence here.

The OGA's clearance decision statement also provided the specific reasons for the denial as follows:

[Applicant] is 22 years old. From at least 1994 to the present, she has demonstrated a pattern that reveals herself to be an individual lacking in maturity, judgment, trustworthiness, reliability, honesty, and a willingness to abide by rules and regulations. She has been involved in various drug-related activities from at least 1997 to the present, to include removing and hiding evidence from the police, and has stolen from two previous employers (one employment she did not report on her forms). During her [OGA] SCI processing, she failed to fully disclose her involvement with illegal drugs on her forms and during her first interview with an [OGA] representative. In addition, [Applicant] did not initially report her theft from previous employers, disclosing only during her second [OGA] interview. Finally, [Applicant] agreed to abide by the [OGA's] Drug Policy (by signing the [OGA's] Personnel Security Policy Advisory on 5 December 2003), which states that the improper use of illegal drugs is strictly prohibited. Improper use includes the use, transfer, possession, sale, or purchase of any drug. She then violated this policy by driving her brother to purchase drugs, assisting her boyfriend in the dividing and packaging of cocaine for sale, and transporting her brother's cocaine (in September 2004 and Christmas time, December 2003).³

The OGA concluded that her actions in the past several years were inconsistent with the applicable standards for access to SCI.

After receiving and reviewing the OGA's clearance decision statement, Applicant reserved the right to appeal the denial.⁴ Subsequently, she decided to not pursue it because she was demoralized, embarrassed, and lacked the confidence to do so.

More than two years later in August 2007, Applicant completed another security clearance application, which is the basis for this case.⁵ In response to Question 26, she acknowledged having a clearance or access authorization denied. In response to Question 24a, Applicant admitted using illegal drugs in the last seven years and she

³ Exhibit 6 at 4–5.

⁴ Tr. 58–59.

⁵ Exhibit 4.

reported a one-time use of marijuana at a college party. In response to Question 24c, Applicant denied having any drug-related involvement in the last seven years (the question specified “the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale or any narcotic, depressant, stimulant, hallucinogen, or cannabis for your own intended use or that of another”). Nowhere in her application did Applicant report her involvement with drug-related activity as previously disclosed during the OGA security clearance process.

Applicant was raised in a neighborhood in a large city where illegal drug activity was rampant. Her mother, until recently, was addicted to cocaine. Her boyfriend from about 1999 to 2003, was a drug dealer, and her brother was involved as well. Applicant described her situation as follows:

I grew up in [a large city] and I had a lot of negative things around me, particularly drugs, a lot of illegal activity. It’s not something that I’m a stranger to, it was in my house, it was outside, it was where I played. It was all around me.

So a lot of what I did when I was young was a result of my environment and thinking that those things were normal. It was a part of my norm to see illegal activity. And it became part of me to some extent, until I started to develop into my own person which didn’t happen until post-college when I started to get help and guidance from other people.⁶

* * * *

So I haven’t done these things or anything close to illegal since college. It just took until now for me to realize that even if I don’t include this as a part of my self definition, in a process like that and when I’m going to work for the government, the importance of candor and I really thought that at one point that if I don’t consider these things a part of me then they won’t be.

But going through this process twice, once in 2004 and once again now, I’m realizing that it’s best to just say whatever it is and let whoever decide for themselves whether they want to think that it’s me or not, rather than approaching this like a job application and trying to make it look the best possible way it can look. So that’s that background.⁷

⁶ Tr. 39.

⁷ Tr. 41.

Applicant's primary focus now is work, education, and changing her family history beginning with her.⁸ She has taken multiple steps to remove herself from her previous environment as follows: (1) she bought a home and moved away from her mother's home; (2) she has not used marijuana since she was a college student; (3) she urged her mother to seek drug rehabilitation and her efforts were successful; (4) she ended her relationship with her drug-dealing boyfriend in 2003; (5) she established and maintains a mentor-relationship with a former manager and actively seeks her mentor's advice on professional and personal issues; (6) she is advancing in her career as a software engineer; (7) in addition to classes, she is involved in other law-school activities; (8) she mentors truant teenage girls at a local middle school; and (9) she spends free time with her young nieces to expose them to positive activities such as swimming and gymnastics.

Concerning her 2007 security clearance application, Applicant explained she answered Question 24c, about drug-related activity, in the negative because she still believed that she had not done anything wrong, she was not a drug dealer, and her involvement with drugs, via her boyfriend and brother, was not part of her life.⁹ Applicant explained her thinking as follows:

I know it's probably not the best thing but I've always considered those things, I kind of block them out. I mean at these points I think I just did not consider them me, just a part of what was going on around me. It's hard for me to explain how I'm separating this but it was things that were just happening because I was there not because I wanted to do it or I initiated it. And so I mentally separated the two.¹⁰

Applicant's thought process has now changed and she no longer separates or compartmentalizes that part of her life.¹¹ She credits receiving the SOR and going through this process as one factor for the change. She credits her law school education as the second factor.

Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. The only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information. The Department of Defense takes the handling and safeguarding of classified information seriously because it affects our national security, the lives of our servicemembers, and our operations abroad.

⁸ Tr. 40.

⁹ Tr. 75–84.

¹⁰ Tr. 83–84.

¹¹ Tr. 92–96.

It is well-established law that no one has a right to a security clearance.¹² As noted by the Supreme Court 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.”¹³ 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.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.¹⁴ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁵

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁶ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁷ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁸ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁹ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²⁰ The DOHA Appeal Board has followed the Court’s reasoning, and a judge’s findings of fact are reviewed under the substantial-evidence standard.²¹

The AG set forth the relevant standards 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 commonsense decision based upon consideration of the relevant and material

¹² *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) (no right to a security clearance).

¹³ 484 U.S. at 531.

¹⁴ Directive, ¶ 3.2.

¹⁵ Directive, ¶ 3.2.

¹⁶ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁷ Directive, Enclosure 3, ¶ E3.1.14.

¹⁸ Directive, Enclosure 3, ¶ E3.1.15.

¹⁹ Directive, Enclosure 3, ¶ E3.1.15.

²⁰ *Egan*, 484 U.S. at 531.

²¹ ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust persuaded 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.²² Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Analysis

To start, I have no concerns about the underlying personal conduct or criminal conduct (i.e., the employee theft, drug-related activity, and false statements) that formed the basis for the OGA's adverse decision in 2005. Those matters are summarily decided for Applicant. The evidence shows this chapter of Applicant's life is over. She has done a magnificent job at building a new life and removing herself from an unsavory environment where illegal activity was the norm. She did so through a combination of education, a good employment record, determination, self-discipline, and what appears to be a great work ethic. I am both impressed and persuaded that these matters are now in Applicant's past, and I assess the likelihood of recurrence as essentially nil. But the post-2005 security clearance application is a different matter, and it is addressed below.

Under Guideline E for personal conduct,²³ the suitability of an applicant may be questioned or put into doubt due to false statements and credible adverse information that may not be enough to support action under any other guideline. The overall concern under Guideline E is that:

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.²⁴

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.

²² Executive Order 10865, § 7.

²³ AG ¶¶ 15, 16, and 17 (setting forth the security concerns and the disqualifying and mitigating conditions).

²⁴ AG ¶ 15.

The issue here is the truthfulness of Applicant's response to a question seeking information about her drug-related activity when she completed the security clearance application in 2007. She answered the question in the negative, her answer was clearly incorrect, and the evidence shows her answer was deliberately false. Indeed, she admitted the falsification when answering the SOR. The most likely explanation for this is she was still compartmentalizing that part of her life in order to paint herself in the most favorable light. She viewed the security clearance application as another type of job application in which she sought to put her best foot forward. Although her thought process is understandable, Question 24c of the security clearance application required her to provide a full, frank, and truthful answer about her drug-related activity and she failed to do so. To some extent, her false answer is aggravated by the facts surrounding the denial of SCI in 2005. When she completed the security clearance application in 2007, she had then worked as a software engineer for a defense contractor for about three years, and she was on notice that she was required to report such information to security officials.

The established falsification supports application of the relevant disqualifying condition that addresses the deliberate omission, concealment, or falsification of relevant facts from a security questionnaire.²⁵ I reviewed all the potential mitigating conditions under the Guideline E²⁶ and conclude none apply to the falsification. Making false or misleading statements to the federal government during the security clearance process is serious misconduct. A deliberate falsification is not easily explained away, excused, or mitigated. Accordingly, Guideline E is decided against Applicant.

The established falsification is also evidence of criminal conduct under Guideline J.²⁷ Making a false statement on a security clearance application is a violation of federal law, specifically 18 U.S.C. § 1001 (making a false statement within the jurisdiction of a federal agency). It is likewise unmitigated. Accordingly, Guideline J is decided against Applicant.

To conclude, the facts and circumstances surrounding Applicant's falsification of her 2007 security clearance application justifies current doubts about her judgment, reliability, and trustworthiness. Following *Egan* and the clearly-consistent standard, I resolve these doubts in favor of protecting national security. In reaching this conclusion, I gave due consideration to the whole-person concept²⁸ and Applicant's favorable evidence. Nevertheless, Applicant did not meet her ultimate burden of persuasion to obtain a favorable clearance decision. At this point, Applicant's suitability or fitness for a security clearance is still a work in progress.

²⁵ Revised Guidelines, ¶ 16(a).

²⁶ AG ¶ 17(a) – (g).

²⁷ AG ¶¶ 30, 31, and 32 (setting forth the security concern and the disqualifying and mitigating conditions).

²⁸ AG ¶ 2(a)(1) – (9).

I carefully observed Applicant's demeanor and listened to her testimony during the hearing. And I reviewed the record in detail and thought about this case for several days. Having done so, I am persuaded that Applicant has outstanding potential for a bright future, and she would be unwise to allow this clearance decision to discourage or deter her. She has proven that she can accomplish whatever she sets her mind to despite the challenges. Now that she understands that a core value of the security clearance process is the willingness and ability to self-report adverse information, I trust Applicant will provide full, frank, and candid answers should she apply for a security clearance in the future.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline E:	Against Applicant
Subparagraphs 1.a–1.l:	For Applicant
Subparagraph 1.m:	Against Applicant
Subparagraph 1.n:	For Applicant ²⁹
Paragraph 2, Guideline J:	For Applicant
Subparagraph 2.a:	Against Applicant (on ¶ 1.m)
Subparagraph 2.b:	For Applicant

Conclusion

In light of the record as a whole, 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

²⁹ This falsification allegation is decided for Applicant because the summary of the interview (Exhibits 4 and 5) was insufficient evidence, and the investigator who interviewed Applicant did not testify.