



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



In the matter of:

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ISCR Case No. 09-07322

Applicant for Security Clearance

Appearances

For Government: Michael Lyles, Esq., Department Counsel
For Applicant: Mark Zaid, Esq.

July 13, 2011

Decision

LYNCH, Noreen, A., Administrative Judge:

On November 15, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) alleging security concerns arising under Guideline E (Personal Conduct). 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 Adjudicative Guidelines (AG) implemented in September 2006.

Applicant timely answered the SOR and requested a hearing. DOHA assigned the case to me on February 24, 2011. DOHA issued a notice of hearing on March 30, 2011, and I convened the hearing on May 17, 2011. Department Counsel offered six exhibits, which were admitted as Government Exhibits (GE) 1-6. Applicant testified, presented four witnesses, and submitted 13 exhibits (AE) A through M, which were admitted into the record. Applicant submitted additional documents which were marked as AE O-P and admitted into the record without objection. DOHA received the transcript on May 25, 2011. Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In her answer to the SOR, Applicant denied the factual allegations under Guideline E (Personal Conduct).

Applicant is a 66-year-old employee of a defense contractor. She obtained her undergraduate degree in 1965. Applicant received her first master's degree in 1975. In 1988, she obtained a second graduate degree in national security studies. (AE G) She is divorced and has an adopted child. Applicant has worked for her current employer since 2004. She had held a security clearance since 1975. (GE 1)

Applicant served in various capacities in federal government for 28 years. From 1975 until 2003, Applicant served abroad with a federal agency. In her last post, Applicant stated that she was successful but was resented by some of her male colleagues. (GE 5) She filed an Equal Employment Opportunity (EEO) complaint because she believed she was being harassed. An issue arose about Applicant's handling of an issue. She was ordered to return to the United States.

A Personnel Evaluation Board (PEB) was convened in the United States to evaluate Applicant's suitability for her position. They recommended termination based on "suitability." Applicant states that she was not given any documentation and the matter was handled orally. (GE 2) The recommended decision is not in the record, nor was Applicant ever provided with a copy. She did not want to pursue the PEB process. She decided that after 28 years it was time to change her career. (Tr. 85) Her SF 50 notes a resignation because she was accepting another position. (GE 3)

In 2003, Applicant returned to the United States with her adopted daughter, aged six years. She worked at home for one year. In 2004, she wanted to return to government service to use her experience and background. She worked for a senior level defense official to write strategy for homeland defense. (Tr. 77)

On March 29, 2006, Applicant completed an application for a security clearance. In response to Section 22: Your Employment Record, Applicant answered "No" as to whether she had been fired or quit after being told; left a job by mutual agreement after allegations of misconduct unsatisfactory performance; or under other unfavorable circumstances. She stated that she did not respond "yes" to the questions concerning leaving her former position because she did not believe the descriptions as written truly fit her situation. Upon further reflection and discussion, she states that she should have answered "yes" and provided an explanation. She was credible in her explanation that the PEB recommended that "Complainant be separated from the Agency for suitability reasons and gave Complainant the option to retire in lieu of separation". In light of her circumstances, she elected to retire after 28 years of service. She also retired with her security clearance intact. (GE 4) Applicant again cited to her SF 50, which notes in the section for remarks that the reason for resignation was to accept another position.

In June 2006, Applicant was interviewed by an Office of Personnel Management (OPM) investigator. During the interview, Applicant was asked to provide more details

about leaving the federal agency in 2003. (Tr. 90) Applicant refuted the information contained in the investigative report that stated that she was “fired due to dishonesty.” She explained that the situation arose out of a disagreement over handling an issue. She noted that the PEB was not a final decision and had not yet been acted upon by the government agency. She tried to make clear to the investigator that she was not fired or terminated at all. She again referred to her SF 50. She believed that she was discriminated against and filed the unsuccessful EEO complaint. Given that, she decided to resign because she had 28 years and was eligible for retirement.

At the hearing, Applicant admitted that she puzzled over Section 22 and discussed it with her ex-husband. She consulted him because he held a security clearance and was also familiar with the SF 86. He knew about her situation and he told her that none of the options given for Section 22 applied in her case. He believed she left the job but it was because “the old boy network” was trying to force her out. (Tr. 63) He explained that because she had done an outstanding job (per her evaluations) that she was not unfit and it was not an unfavorable situation. (Tr. 64) He finally told her that it was not “a big deal.” (Tr. 64) She firmly believed that she was not fired; she did not leave the job by mutual agreement; nor were there allegations of misconduct in her mind because she had excellent evaluations for that year. (AE O) She decided that none of the conditions applied and she answered “NO” to the question. (Tr. 88) She also acknowledged that she puzzled over whether she left under circumstances that were unfavorable. After consideration, Applicant answered the question “No”. She was not trying to mislead the government.

Applicant elaborated at the hearing that she had no intention to falsify her application or mislead the government by not answering section 22 with a “yes” She has been polygraphed every three to five years for the past 28 years. She firmly believed that none of the conditions applied to her. She also denies that she was playing “semantics” with the words. (Tr. 93) She firmly believes she was not terminated. (GE 4)

During the course of her career, Applicant has received awards, certificates and letters of appreciation. (AE D, I, J, and H) At the hearing, Applicant submitted numerous letters of recommendation. They attest to her responsibility, integrity and character. Each characterizes Applicant as a diligent, trustworthy individual. (AE B, C, and P) She served in Afghanistan with the task force, and she was involved in a counter-terrorism project in Afghanistan. She received an award in 2006 for that service. (AE K and L) In 2009, Applicant received a Department of Defense certificate of appreciation for work in security of the homeland. (AE M) In 2010, Applicant received a letter from an assistant secretary of defense recognizing her efforts for the past six years. She was congratulated on her attention to detail and knowledge of science and technology. (AE N)

Applicant’s colleague, a former military officer, testified that she is aware of the SOR and the security clearance questionnaire due to her own clearance. She has known Applicant since 2008 and does not believe that Applicant would deliberately falsify a document. Based on the colleague’s knowledge of Applicant’s professional

demeanor and character, Applicant has an excellent reputation. She is an excellent team player. She highly recommends Applicant for a security clearance. (Tr. 34)

A highly respected government official (retired) testified that she has known Applicant since the 1990's. (Tr. 40) She still maintains contact with Applicant, and is aware of the SOR allegations. The official worked in the same agency with Applicant and described her reputation as good. Since the community was small, any adverse information about someone is quickly learned. (Tr. 42) She did not believe that Applicant would falsify her SF 86. She stated that Applicant has always been forthright and trustworthy in her service to the government. (Tr. 46) Finally, the witness testified that she knows that discrimination against women was rampant in the government agency where Applicant worked in 2003.

Applicant's ex-husband, who is a retired military officer, described Applicant as a very courageous person who takes risks, is innovative and is extremely dedicated to the national security of the United States. He also worked for the same government agency in the 1970's. He attests that Applicant's last post had severe problems. (Tr. 57) He mentioned sexual harassment and discrimination. Specifically, he knew of the problems that were occurring in 2003 with respect to Applicant's supervisor. He believed that there was a conflict between Applicant and her boss. Applicant had an excellent reputation and high marks for her job but was uncomfortable with the environment. As to the specific issue for the SOR allegations, Applicant's ex-husband was well aware of the situation and how Applicant was given a choice to resign/retire.

Applicant and her ex-husband lived together from 2003 until 2006 - that is why he has this information (Tr. 61) He discussed the 2006 SF 86 with Applicant while she was completing it. They specifically talked about Section 22. He told her that none of the options applied. Applicant thought about the question, but did not believe that any of the conditions applied. She was credible in her explanation.

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the 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." 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.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”¹ The burden of proof is something less than a preponderance of evidence.² The ultimate burden of persuasion is on the applicant.³

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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.”⁴ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁵ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁶ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

Analysis

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

¹ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

² *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

³ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁴ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁵ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁶ *Id.*

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 describes conditions that could raise a security concern and may be disqualifying:

(a) 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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(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:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

Applicant resigned in 2003, after 28 years of federal service. Her SF 50 notes that she “resigned to accept another position.” The PEB recommended separation based on “suitability” based on an incident. AG ¶ 16(d) applies.

When Applicant completed her March 2006, security clearance application, she responded “No” to section 22 concerning her prior employment record. She denies that she falsified her SF 86 with respect to answering this question. She was candid that in retrospect, she should have chosen to mark the box that the circumstances were “unfavorable”. However, when she answered the question in 2006, she firmly believed that because the PEB was a recommended decision and that her SF 50 noted that she “resigned to accept another position”, none of the wording applied. This was an emotional issue for Applicant. She acknowledged that she paused at the question, and consulted her ex-husband, but after careful consideration, she responded, “No.” Mere omission is not sufficient to prove an intentional falsification. I find that Applicant did not falsify her March 2006 security clearance application. Thus, no additional disqualifying condition applies.

AG ¶ 17 provides conditions that could mitigate security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

In this case, Applicant has mitigated the concern alleged about her retirement in lieu of separation. The action occurred in 2003 and under unique circumstances as noted above. AG ¶ 17(c) applies.

Applicant completed her security clearance application in 2006 and did not respond affirmatively to Section 22 based on her careful assessment of the question and the five options that were presented. She now recognizes that she should have noted "unfavorable" circumstances. At the time, her intent was not to mislead.

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the circumstances. The 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 commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the "whole-person"

factors. Applicant served in federal service for 28 years. She distinguished herself in her career as noted by the many letters of recommendation and awards during her long career. She held a security clearance since 1975 without incident except for the issue in 2003. She has excellent evaluations. She chose to retire in 2003 rather than go through a process in the PEB. Her SF 50 clearly notes that she resigned to accept another position.

Applicant is a career service federal employee. She has many awards and served her country in Afghanistan. She has distinguished herself with praise from high level officials. She has been recommended for retention of her security clearance. She has worked since resigning from her previous employer and has received high praise.

At this point, I have no doubts about her judgment and reliability. Applicant was credible that she did not falsify her March 2006 security clearance application. She acknowledged in retrospect that she probably should have noted something but at the time she firmly believed that the conditions that were listed in section 22 did not apply to her. Applicant has met her burden in this case. She has mitigated the security concerns under personal conduct. Clearance is granted.

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.b.:	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 a security clearance. Clearance is granted.

NOREEN A. LYNCH.
Administrative Judge