



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



In the matter of:)
)
) ISCR Case No. 10-00948
)
)
Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esquire, Department Counsel
For Applicant: *Pro se*

05/09/2012

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Statement of the Case

On October 16, 2009, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for a position with a defense contractor. After an investigation conducted by the Office of Personnel Management (OPM), the Defense Office of Hearing and Appeals (DOHA) issued interrogatories to Applicant to clarify or augment potentially disqualifying information in her background. After reviewing the results of the background investigation, and Applicant's responses to the interrogatories, DOHA could not make the preliminary affirmative findings required to grant a security clearance. On August 31, 2011, DOHA issued a Statement of Reasons (SOR) to Applicant detailing security concerns for criminal conduct under Guideline J, and personal conduct under Guideline E. These actions were 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). Applicant acknowledged receipt of the SOR on September 7, 2011.

Applicant answered the SOR on September 24, 2011. She admitted the allegation under Guideline J, but denied the two allegations under Guideline E of providing false information on her security clearance application and to a security investigator. She requested a hearing before an administrative judge. Department Counsel was prepared to proceed on December 9, 2011. The case was assigned to me on February 21, 2012. DOHA issued a Notice of Hearing on February 27, 2012, for a hearing on March 21, 2012. I convened the hearing as scheduled. The Government offered three exhibits, which I marked and admitted into the record without objections as Government Exhibits (Gov. Ex.) 1 through 3. Applicant testified, and submitted five exhibits, which I marked and admitted into the record without objection as Applicant Exhibits (App. Ex.) A through E. DOHA received the transcript of the hearing (Tr.) on March 29, 2012.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact. Applicant admitted the allegation under the criminal conduct guideline. Her admission is included in my findings of fact.

Applicant is a 58-year-old instructor for a defense contractor. She is a college graduate. She was married from 1984 until 1994 and has one grown child. (Tr. 10-12; Gov. Ex. 1, e-QIP, dated October 16, 2009)

Applicant was employed as the administrative service manager for a museum from approximately 1990 to 1997. She was the only accountant in the organization, and was responsible for the museum's accounts and financial records. Part of her duties involved accounting for funds for admission and gift shop cash registers. The museum had a process of automatic cash replacement with their bank to provide for change. A bank courier would bring change money to the museum, and Applicant would give the courier the money the museum received during the week. Applicant oversaw the process, and she was the only person that knew how to operate the museum's internal software accounting system.

When Applicant left the museum in September 1996, her successor noted discrepancies in the museum's accounts. A forensic audit was performed by the museum's certified public accounting firm, which revealed an embezzlement of museum funds of approximately \$155,800 from 1994 until 1997. When questioned by police officers, Applicant was evasive in her responses to questions and hid or minimized her involvement in the loss of funds. In January 1999, Applicant pled guilty to embezzlement, and was sentenced to 10 years imprisonment, suspended to probation not to exceed 60 months, restitution to the museum of \$114,800, and court cost. She

completed the probation in August 2004. A part of the \$155,000 loss was covered by insurance, so Applicant only had to make restitution of \$114,800. (Tr. 26-33; Gov. Ex. 3, Response to Interrogatory, dated April 8, 2011, at 106-119 (Summary of police interview), and 159-161 (Indictment Judgment, Termination of Probation))

Applicant was interviewed by a security investigator on December 22, 2009. In this interview, Applicant claimed that she realized there were problems with the museum accounts, and thought she was doing something wrong in the accounting. She stated she never took or received any of the missing funds. She was responsible for the accounts, and chose to cover up the problem. She believed a volunteer at the museum, who is now deceased, was involved in the loss, but she could not prove it. In her January 12, 2011 response to the interrogatory, she admitted that she embezzled money, but it was no more than \$20,000 from the museum funds. She denied she told the investigator that she never took any funds. She believes his account of the interview is inaccurate. She explained she tried to convey to the investigator that she took funds but was unsure of the amount and believed she took no more than \$20,000. There was a misunderstanding between them. (Tr. 35-39; Gov. Ex. 2, Answers to Interrogatory, dated January 12, 2011, at 178-179)

Applicant explained that she pled guilty to embezzlement in June 1999 because she was responsible for the accounts and the missing funds. At the time, she was a single mother, with an abusive and drug addicted husband, and her mother was ill. She paid some of the restitution, but believes she still owes approximately \$100,000. (Tr. 21-26)

Applicant completed her e-QIP security clearance application on October 16, 2009. In response to question 22c, which asked whether she had "EVER" (Capitalization is in the e-QIP) been charged with any felony offense, Applicant responded "no". As noted above, she was arrested and convicted of embezzlement in 1999. Applicant testified that she did not realize the question pertained to "EVER" being charged with a felony. She completed the form on line and thought that the information requested was only for the last ten years. Her embezzlement conviction was slightly more than ten years before she completed the form. (Tr. 36-38)

Applicant stated that she is not the same person she was when she committed the embezzlement. At that time, she was in an abusive marriage and her then-husband was addicted to drugs. She was a single mother raising her daughter. She tried to protect her daughter and help her husband recover from his addiction. She lost her perspective and her good sense. Since that time, she has been rehabilitated. She raised her daughter, who is now in her 20s, and completed school receiving her bachelor's degree. She has a clean driving record. She has worked for the same company for over ten years, received promotions, and been transferred to different offices. She is proud of the work she does now in support of warfighters. She received an interim security clearance over two years ago and there were no violations of security rules. She volunteers in the community, uses her experience to mentor her daughter, nieces, and other people, and is an active member of her church. She has

learned from her experience and will never let something like the embezzlement happen to her again. (Tr. 14-20, 26-27; App. Ex. A, diploma, dated December 2006; App. Ex. B, Driving Record, dated January 13, 2012)

Applicant presented character references and letters of recommendation. Attached to her response to the SOR was a letter from the director of the military *command supported by Applicant. She noted the excellent and timely support provided* by Applicant's team. She noted the team's willingness to put forth extra effort in support of the command. (Response to SOR, Letter, dated June 3, 2011) One of Applicant's supervisors noted that he is a retired military officer who has known Applicant for over ten years. Applicant is stable, honest, has integrity, and a truthful work ethic. He recommends that she be granted access to classified information. (App. Ex. C, Letter, dated January 8, 2012) Another supervisor has known Applicant since September 2009. Applicant is a person of great integrity, and is dedicated to her work and her company. She is honest, trustworthy, respectful, and follows rules and regulations. He recommends she be granted access to classified information. (App. Ex. D, letter, undated). Applicant's senior pastor has known Applicant for many years, and finds her to be a reliable person. She is hardworking, intelligent, honest, and dependable. She is one of the church leaders. She has high moral integrity and good values. (App. Ex. E, Letter, undated)

Policies

When evaluating an applicant's suitability for a security clearance, the 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, which must be considered 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 overarching adjudicative goal is a fair, impartial, and commonsense 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 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.

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 for 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 protect classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Analysis

Criminal Conduct

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 (AG ¶ 30). Appellant was arrested, pled guilty, and was convicted of embezzlement in 1999 for taking funds from her employer from 1994 until 1996. Her criminal actions raise Criminal Conduct Disqualifying Conditions AG ¶ 31(a) (a single serious crime or multiple lesser offenses), and AG ¶ 31(c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted).

Applicant raised, by her testimony, Criminal Conduct Mitigating Condition AG ¶ 32(a) (so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment); and AG ¶ 32(d) (there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement). These mitigating conditions do not apply. The incident happened over ten years ago, and is her only criminal activity. Applicant was a single mother in an abusive relationship. But these unusual circumstances do not justify or explain her actions. Her crime cast doubt on her reliability, trustworthiness, and good judgment. Embezzlement is a crime that strikes at the core of trust and confidence that an employer places in an individual. The responsibility to safeguard the funds of a business is in the same category as the requirement to safeguard classified information. Applicant violated the trust and responsibility placed in her by embezzling funds.

Applicant has a heavy burden to show that she can be trusted to safeguard classified information. She presented evidence of rehabilitation. Applicant completed college and earned a degree. She worked for the same defense contractor for ten years and has been lauded for her support of the warfighters. She successfully raised her daughter. She is active in her community and church. She is highly regarded by her supervisors, coworkers, and pastor. However, this rehabilitation is not sufficient to overcome the negative impact her conduct of violating the trust of the employer by embezzling funds. Her conviction for embezzlement continues to cast doubt on her reliability, trustworthiness, or good judgment. I find against Applicant under the criminal conduct guideline.

Personal Conduct

A security concern is raised because conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations can 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. (AG ¶ 15) Personal conduct is always a security concern because it addresses whether the person's past conduct justifies confidence the person can be entrusted to properly safeguard classified information. The security clearance system depends on the individual providing correct and accurate information. If a person conceals or provides false information, the security clearance process cannot function properly to ensure that granting access to classified information is in the best interest of the United States Government.

Applicant told a security investigator that she did not take money from the museum, but that she was responsible for the fund and she covered up the missing funds. Applicant also answered "no" to the question on the security clearance application asking if she was ever charged with a felony offense. Applicant's response to the investigator and her answer on the security clearance application raise a security concern under Personal Conduct Disqualifying Condition AG ¶ 16(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); and AG ¶ 16(b) (deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative).

Applicant denies that she intentionally provided false information to the investigator. She said she admitted the embezzlement but told the investigator that she could only account for about \$20,000 in missing funds. Later, in response to an interrogatory, she admitted she embezzled at least \$20,000 of her employer's funds. She claims there was a misunderstanding between her and the investigator. Applicant's statements are not credible. Applicant skirted and minimized her involvement in the

embezzlement from the very beginning. She was not candid with the police officers that questioned her and she was not candid with the security investigator. She continued to minimize the amount she embezzled. Her statement that she was only responsible for the funds and covered up the loss is not totally accurate, and is misleading. She was responsible for the funds and intentionally covered up the loss to hide her actions in embezzling the funds. I find that she intentionally provided false information to the security investigator.

Applicant states that she did not deliberately provide false information on the security clearance application when she did not list the embezzlement conviction as a felony offense. She thought she only had to report felony offenses in the last ten years and her conviction was just over ten years ago. The question is very clear. The word "EVER" is in capital letters. Even though the application was completed on line, it is very difficult to miss the wording of "EVER." I find that she intentionally did not report the embezzlement conviction on her security clearance application.

I considered Personal Conduct Mitigating Conditions AG ¶ 17(a) (the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts: AG ¶ (17(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 AG ¶17(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). These mitigating conditions do not apply. Applicant lied to criminal investigators and only admitted her involvement when she answered the interrogatory. She acknowledged her action at the hearing but still admits to only \$20,000 in embezzlement. The amount of the funds embezzled is less important than the act of embezzlement itself. Applicant intentionally provided false information to government investigators about her involvement in the embezzlement and then intentionally omitted her conviction from the security clearance application. She continued to minimize her involvement. Her statements lack credibility.

Whole-Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. An 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 a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant embezzled funds from her employer which is a criminal offense that goes to the core of her reliability, trustworthiness, and good judgment. Applicant lied to criminal investigators about her role in the embezzlement, and did not include the conviction on her security clearance application. Her violation of the trust placed in her to safeguard funds, and her lack of candor raises questions about her reliability, untrustworthiness, and ability to protect classified information. Her behavior raises questions about whether she will properly handle, manage, and safeguard classified information. The record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the criminal conduct and personal conduct security concerns.

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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAI SNT APPLICANT
Subparagraphs 2.a and 2.b:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

THOMAS M. CREAN
Administrative Judge