



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



In the matter of:)
)
) ISCR Case No. 11-04212
)
Applicant for Security Clearance)

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
For Applicant: *Pro se*

November 30, 2011

Decision

MENDEZ, Francisco, Administrative Judge:

Applicant failed to mitigate the Personal Conduct concerns. She has been fired twice in the past four years for workplace misconduct. The most recent incident involved a breach of security. She failed to demonstrate that the inappropriate behavior that led to her employment terminations is unlikely to recur in the future. Clearance is denied.

Procedural History

On July 25, 2011, the Defense Office of Hearings and Appeals (DOHA) made a preliminary determination to deny Applicant access to classified information.¹ The basis for this decision is set forth in a Statement of Reasons (SOR) that alleges the security concern under Guideline E (Personal Conduct). Applicant responded to the SOR on August 31, 2011 (Answer). She admitted the SOR allegations and requested a hearing.

¹ This action was taken pursuant to 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 by the Department of Defense on September 1, 2006.

On September 29, 2011, Department Counsel filed its ready-to-proceed. I was assigned the case on October 6, 2011 and, after coordinating with the parties, scheduled the hearing for November 16, 2011.

At hearing, Department Counsel offered Government Exhibits (GE) 1 through 3, which were admitted into evidence without objection. Applicant appeared at the hearing and testified on her own behalf. She did not offer any exhibits or call any witnesses. The transcript (Tr.) was received on November 28, 2011.

Findings of Fact

Applicant is 37 years old. She recently married in April 2011. She has an 11-year-old son, who lives with his grandmother due to her work schedule. She has an associate's degree and has been working for her present employer as a security officer for the past three years. She was granted a security clearance in 2008.² She did not present any evidence regarding her current duty performance.

Applicant was employed as a security officer for security firm number 1 (SF 1) from February 2005 to October 2007. In 2006, Applicant was involved in a verbal altercation on the job with another security officer. During the course of the altercation, the other security officer assaulted her. Following an investigation by the company, the other officer was terminated and Applicant was retained by SF 1. In 2007, Applicant was involved in another verbal altercation on the job with a different security officer. The other security officer reported to their supervisor that Applicant had assaulted him during the altercation. The police and the company investigated the incident, including reviewing a videotape of the incident. Applicant testified that the video of the incident did not support the other officer's claim of assault, but she has never actually viewed the video. Applicant was immediately suspended from her job. After SF 1 completed its investigation, Applicant was fired from her job. She then filed a grievance through her union and appealed the matter to SF 1's corporate headquarters which, after conducting its own review of the matter, upheld her termination.³

Applicant denies that she assaulted the other security officer in 2007, but admits that they were engaged in a verbal altercation on the job. She claims to have been fired from SF 1 because she was viewed as an employee who caused problems. The termination notice from SF 1 listed a history of issues with her duty performance, including the 2007 incident. Applicant claims that her union grievance is still pending arbitration, but did not submit any evidence regarding the grievance or arbitration.⁴ In her Answer, Applicant stated "I'm sure I can get witnesses to back me up at this time."

² GE 1; Tr. at 26-28.

³ GE 1 at 23-24 and 32; GE 2, Subject Interview at 2-3 [the other officer alleged that "(Applicant) was in his face and (Applicant) put her finger on his chin"]; Tr. at 29, 31-37, 41-48.

⁴ Tr. at 41-48, 58-59. See *also* GE 1 at 32 ("This incident is still in arbitration status with the [] union. They swept my case under the rug and will not answer and justify my case.").

She did not call any witnesses at the hearing or submit letters from any witness to corroborate her position that she did not assault a fellow security officer in 2007, which led to her termination from SF 1.

Applicant began working as a security officer for security firm number 2 (SF 2) in August 2008. Applicant's job with SF 2 was to provide security for office buildings, whose tenants included government agencies and their personnel. She was fired from SF 2 in October 2010 because she failed to safeguard her firearm as required by the company's rules and regulations. This was considered by SF 2 as a breach of security. Applicant had recently arrived to work at SF 2 from her other job when she called her supervisor requesting to be relieved from her post, so she could run some personal errands before going on vacation the following day. The supervisor denied the request and Applicant decided to leave her post without being properly relieved. She placed her firearm and ammunition in another officer's unlocked drawer at what was designated by SF 2 as an unarmed post. The proper procedure was for Applicant to be relieved by her supervisor and her weapon properly secured. Applicant was aware of this procedure and knowingly violated it. She was caught by a DoD police officer, who pulled her over when, in her haste to accomplish her errands, she drove down a one-way street in the wrong direction. The DoD police officer recognized Applicant as the security officer who was supposed to be at a specific post. Applicant confessed to the DoD police officer that she had left her post without being properly relieved. The DoD police officer then discovered that Applicant had also improperly stored her weapon. Applicant was sent home and told by her supervisor to report the following day to the Vice President's office to discuss the incident. She did not show up for the meeting and, instead, went on vacation. Applicant was then terminated from SF 2. Applicant testified that she accepts responsibility for the conduct that led to her termination from SF 2 in 2010.⁵

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines 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.

⁵ GE 1 at 19-23 and 31; GE 2, Subject Interview at 2; GE 3; Tr. at 41, 48-60.

The Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. On the other hand, an applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” Directive ¶ E3.1.15. An applicant has the ultimate burden of persuasion to obtain a favorable security decision. In resolving this ultimate question, an administrative judge must resolve “[a]ny doubt concerning personnel being considered for access to classified information . . . in favor of national security.” AG ¶ 2(b).

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

Analysis

Guideline E, Personal Conduct

The personal conduct concern is set forth at AG ¶ 15:

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. 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.

Applicant’s employment terminations and, more specifically, the conduct that led to the terminations directly implicate this concern. Before proceeding further, I would note that although Applicant admitted SOR ¶ 1.a, which alleges she was terminated in 2007 after getting into a confrontation with a co-worker, she has repeatedly denied assaulting her co-worker. The Government established by substantial evidence that Applicant assaulted her co-worker in 2007 and that incident led to her termination. SF 1 clearly takes allegations of assault by one of its employees on a fellow co-worker seriously, as evidenced by the investigation and subsequent discharge of the employee who had assaulted Applicant in 2006. They followed suit in 2007 by conducting a thorough investigation, including reviewing the videotape of the incident, and determined that Applicant had assaulted her co-worker. She was subsequently fired for this conduct and a history of other work-related issues. When Applicant appealed her termination to SF 1’s corporate headquarters, the decision was independently reviewed by others and sustained. Even though Applicant was aware that this matter was a

security concern and promised to call witnesses to refute this allegation, she failed to present any evidence. Accordingly, I find by substantial evidence that Applicant assaulted a fellow co-worker during an altercation at work in 2007 and that she was subsequently fired as a result of this workplace violence.

Applicant's misconduct that led to her terminations also raises the following disqualifying conditions under AG ¶ 16:

(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 safeguard protected information; and

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

Applicant's 2010 employment termination evidences her willingness to put her own self-interest ahead of rules and regulations established by her employer to provide for the security of others. She intentionally left her post without permission. Her employer, the tenants of the facility, and her fellow security officer's placed their trust in Applicant to be at her post until properly relieved. Applicant's conduct, in light of the real world dangers present today, cannot be taken lightly. She then compounded the situation by placing her firearm in an unlocked drawer in violation of the company's rules and regulations. These serious rules violations, in conjunction with Applicant's failure to accept responsibility for the conduct that led to her employment termination in 2007, establishes AG ¶ 16(c) and (f).⁶

Applicant may mitigate the serious security concerns raised by her conduct by establishing one or more of the mitigating conditions listed at AG ¶ 17. I have considered all the mitigating conditions and find that the following warrant further discussion:

(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;

⁶ I considered AG ¶ 16(d). Although the "credible adverse information" in this case was arguably "not explicitly covered under any other guideline", it was "sufficient *by itself* for an adverse determination" under Guideline E. See ISCR Case No 06-21537 at 5 (App. Bd. Feb. 21, 2008) ("the plain meaning of ¶ 16(c) anticipates that the adjudicating official will reach a favorable determination, after considering disqualifying and mitigating conditions, under another single guideline, but then, under this paragraph, consider the same conduct applying a whole-person analysis, which could result in an unfavorable determination.").

(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; and

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

Applicant's conduct that led to her discharge in 2010 was recent. She placed the safety of others in jeopardy through her selfish act of leaving her post without permission. Such conduct is not minor, nor did it occur under unusual circumstances. Applicant continues to work as a security officer for a government contractor and failed to present any evidence that she now follows her employer's rules and regulations without fault. She failed to demonstrate that the likelihood of this type of conduct reoccurring has completely dissipated. AG ¶ 17(a) does not apply.

Applicant testified that she accepts responsibility for the conduct that led to her discharge in 2010. However, when she had the opportunity to take responsibility for her misconduct at the time the incident occurred, she did not show up to the meeting with her boss and, instead, went on vacation. Her immediate response to this incident speaks volumes as to the seriousness with which she took her security responsibility and leaves me with grave concern as to the manner in which she would discharge her responsibility vis-à-vis classified information in the future. She also did not present any evidence demonstrating she has changed the behavior that led her to put her own self-interest above her employer's rules and regulations. Further, she continues to deny culpability for the facts and circumstances that led to her discharge from SF 1 in 2007. AG ¶ 17(b) does not apply.

As already discussed above, the Government established by substantial evidence the facts that led to Applicant's employment termination from SF 1 in 2007. There was no credible evidence presented to rebut this evidence. Moreover, Applicant fully admits the serious misconduct that led to her employment termination in 2010. AG ¶ 17(f) does not apply.

Applicant failed to mitigate the personal conduct concern. The conduct that led to her employment terminations in 2007 and 2010 continues to cast doubt on her current reliability, trustworthiness, and judgment.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the relevant circumstances. An administrative judge should consider the nine factors listed at AG ¶ 2(a).⁷ I have considered all the favorable and extenuating

⁷ (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

