



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 11-05195
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Esq., Department Counsel
For Applicant: *Pro se*

07/26/2013

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline E (personal conduct). Clearance is denied.

Statement of the Case

On October 27, 2006, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On December 6, 2012, the Department of Defense (DOD) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline E. The SOR detailed reasons why DOD was unable to find that it is clearly consistent with the national interest to continue a security clearance for Applicant, and it recommended that her

case be submitted to an administrative judge for a determination whether her clearance should be continued or revoked.

Applicant answered the SOR on December 27, 2012, and elected to have her case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM), dated March 26, 2013, was provided to her by letter dated March 26, 2013. Applicant received the FORM on March 30, 2013. She was given 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit any information within the 30 days after receipt of copy of the FORM. The case was assigned to me on May 24, 2013.

Findings of Fact

Applicant admitted the two SOR allegations of falsification, but contends her false answers were due to negligence and were unintentional.

Background Information

Applicant is a 49-year-old senior consultant, who has been employed by a defense contractor since January 2010. She had previously worked as a computer graphics technician for a defense contractor from July 1987 until she was involuntarily terminated in December 2009, discussed *infra*. (Items 4 and 6.)

According to her October 2006 e-QIP, Applicant attended an on-line university from March 2001 to June 2002. The FORM contains no further information regarding her education background. Applicant has been married since September 1983, and has two adult children. She did not serve in the U.S. armed forces. (Items 4 and 5.)

Personal Conduct

In October 2009, Applicant's former employer received an anonymous letter reporting that she had been engaged in insurance fraud over the past seven years. The employee who submitted the anonymous letter subsequently came forward, but requested to remain confidential. Applicant had bragged to coworkers over the years that she continued to enroll her adult daughter and two granddaughters in the company health insurance plan. Applicant claimed them as dependents through the company for medical, dental, and vision insurance even though her daughter was married in 2002 and the grandchildren had not lived continuously in her household. Company investigators also discovered that Applicant had enrolled her adult son and his daughter in the company health insurance plan.

Company investigators substantiated that Applicant falsely claimed her children and grandchildren as dependents at various periods from at least 2002 through 2009. During this time, she continued enrollment of her son and daughter, her son-in-law, and her three grandchildren who no longer met eligibility requirements. Applicant failed to notify the company of qualified status changes, failed to remove the ineligible

dependents over a period of years, and submitted false certifications to the company in 2007, 2008, and 2009. (Item 5.)

During the company investigation, Applicant's deception continued as she intentionally misled and provided false information to company investigators. She repeatedly stated that her daughter married her husband on June 1, 2009, that her daughter was unmarried until 2009, and that her daughter's husband was no more than a boyfriend prior to 2009. Applicant finally acknowledged that she had been untruthful when confronted with her daughter's June 1, 2002 marriage certificate obtained from county public records. Applicant then acknowledged the true year of her daughter's marriage and that she was aware that her daughter had not been an eligible dependent since that time. (Item 5.)

Applicant minimized her deception to company investigators by saying that listing her dependents was a "mistake" or that she did not pay attention and just clicked buttons when recertifying her dependents. (Item 5.) Applicant continued to minimize her deception regarding dependent status to her former employer when interviewed by an Office of Personnel Management (OPM) investigator in January 2012. She claimed that until recently, she never accepted her daughter's marriage to her husband as a "real marriage" even though they were legally married in June 2002 and further claimed that due to the stress of the investigation, she "inadvertently" said her daughter was married on June 1, 2009. Applicant stated that she thought she was doing everything correctly with regard to her daughter's children (granddaughters) and at no time did she intend to mislead anyone's eligibility listed on her insurance.

During her January 2012 OPM interview, Applicant discussed her motivation to help her family, which I accept as true. She concluded by saying, "I was wrong to falsify insurance documents, but at the time I didn't realize I had done anything wrong." She added, "Concerning my children, in hindsight, I realize I lied." (Item 6.) Applicant's SOR answer similarly minimizes her culpability by suggesting that her conduct regarding listing ineligible dependents was inadvertent or unintentional. (Item 2.)

Policies

The President of the United States has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that 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. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Personal Conduct

Under Guideline E, the concern is that 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. (AG ¶ 15.)

The Government established its case under Guideline E through Applicant's admissions and the evidence presented. AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case:

- (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
- (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 deliberately provided false information to her employer regarding her dependents' eligibility for health care program benefits at various periods from at least 2002 to 2009 and attempted to mislead the company's investigation into the matter. The Government established the SOR allegations through the evidence presented. Disqualifying conditions in AG ¶¶ 16(a) and 16(b) apply.

AG ¶ 17 lists seven potential mitigating conditions under this concern:

- (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.

I do not accept Applicant's explanation that her falsifications were inadvertent or unintentional. Apparently, her comments to one of more of her coworkers that she was receiving unauthorized health care benefits was not well received and resulted in her being reported.

Applicant admitted her falsifications in a somewhat qualified manner. Considering the evidence as a whole, I do not believe that she forgot, inadvertently overlooked, misunderstood, or genuinely thought such information did not need to be reported. Had Applicant's information been relied upon without verification, she would have continued to receive authorized health care benefits.

Regardless of the reason, Applicant chose not to be forthcoming or her motive for improperly claiming her dependents for health care program benefits. Her deception demonstrated her willingness to repeatedly lie over a period of time, a behavior trait that is incompatible for those entrusted with a security clearance. I find that none of the mitigating conditions fully apply.

To conclude, Applicant presented insufficient evidence to explain, extenuate, or mitigate the personal conduct security concerns. Applicant did not meet her ultimate burden of persuasion to obtain a favorable clearance concerns.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my careful consideration of the whole-person factors and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's case. For the reasons stated, I conclude she is not eligible for access to classified information.

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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.b:	Against Applicant

Decision

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

ROBERT J. TUIDER
Administrative Judge