



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



In the matter of:)	
-----)	
)	ISCR Case No. 11-05528
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

January 22, 2013

Decision

MOGUL, Martin H., Administrative Judge:

On June 1, 2012, the Department of Defense issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E for Applicant. 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), effective within the Department of Defense for SORs issued after September 1, 2006.

On June 13, 2012, Applicant replied to the SOR (RSOR) in writing, and she requested a hearing before an Administrative Judge. I received the case assignment on August 7, 2012. DOHA issued a notice of hearing on August 20, 2012, and I convened the hearing as scheduled on September 10, 2012. The Government offered Exhibits 1 through 4, which were received without objection. Applicant testified on her own behalf and submitted Exhibits A and B at the time of hearing, which were also received without objection. DOHA received the transcript of the hearing (Tr) on September 20, 2012. I granted Applicant's request to keep the record open until September 27, 2012, to submit additional documents, and an additional document was received, identified as

Exhibit C, and entered into evidence without objection. Based upon a review of the exhibits, and the testimony of Applicant, eligibility for access to classified information is granted.

Findings of Fact

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 45 years old. She is married and has six children. She received a Bachelor's degree in Electrical Engineering in 1998. Applicant was formerly employed by a defense contractor, and she seeks a DoD security clearance in connection with her employment in the defense sector. She is currently being sponsored by another defense contractor.

Guideline E, Personal Conduct

The Government alleges that Applicant is ineligible for clearance because she exhibited conduct involving questionable judgement, lack of candor, dishonesty or unwillingness to comply with rules and regulations.

1.a. It is alleged in the SOR that Applicant was terminated from her excepted appointment as a contract specialist with the United States Navy on about April 9, 2008, after she had been investigated for two ethics violations occurring in February and March 2008. Applicant's privately owned company was found to have received a purchase order and a blanket purchase request to provide service to the United States Navy while she was a contract specialist.

Applicant testified that she started business in 2000, and she was the a sole proprietor. Initially, the company built equipment for gyms. In 2005, the company purchased a company to manufacture powder coating, and in 2007, the company began performing powder coating. On January 29, 2008, the company submitted an invoice to perform a powder coating for the Federal Government. Applicant began employment for the Federal Government on February 4, 2008. On February 13, 2008, Applicant's company received payment for the powder coating in the amount of \$2,900. (Tr at 36-42.)

Applicant received ethics training on February 29, 2008, after she began her employment. It was then that she learned of the restriction that if she was a Government contractor employee she could not do private work for the Government. However, she believed there may have been an exception under DoD Directive 5500.7-R, which states, "Contracts for the procurement of goods and services between the Federal Government and its employees are prohibited unless the needs of the Federal Government cannot be met otherwise." Since Applicant's company was the only powder coating facility for over 100 miles, she thought it would come within the exception. (Exhibit B.)

Applicant testified that she asked her supervisor what course of action she should take based on this information, and she was advised to write a letter to the legal department inquiring what she should do. Applicant's letter, dated March 6, 2008, is included as part of her RSOR. In March 2008, Applicant on behalf of the company completed a Blanket Purchase Agreement, but based on what Applicant learned, her company stopped any attempt to do business with the Government, which caused the company to lose approximately \$3,000. On December 19, 2008, Applicant's business closed. (Tr at 41-44.)

Applicant did not hear anything for several months after her letter, and then she was questioned by the NCIS. After informing the investigator of the entire situation, she was informed that the case was being concluded because it was not a criminal matter. On April 2, 2009, Applicant met with an individual, who indicated that a decision about the matter would be rendered shortly. One week later, Applicant again met with this individual, and she was informed that she was being terminated from her employment. She was informed that signing a Blanket Purchase Agreement for her company while she was a Government employee was an ethics violation for which her employment was ended. (Tr at 44-46.)

Exhibit 4, which includes all of the documentation involved in this matter confirms that Applicant's company entered into the powder coating contract with the Government before she was a Government employee. Applicant began Government employment on February 4, 2008, and the contract was completed and payment was made to Applicant's company on February 13, 2008, within two weeks of her beginning Government employment. Applicant received ethics training on February 29, 2008, and immediately conferred with her supervisor and wrote a letter to her legal department requesting guidance. Applicant believed that her company situation may have been an exception under DoD Directive 5500.7-R, since Applicant's company was the only powder coating facility for over 100 miles. In March 2008, before she had received any ethics advisement, Applicant signed a Blanket Purchase Agreement on behalf of her company. However, the Blanket Purchase Agreement was never used, and the company stopped any attempt to do business with the Government, which caused the company to lose approximately \$3,000. On December 19, 2008, Applicant's business closed.

Mitigation

Applicant submitted a positive character letter from her current employer, in which she is described as an "outstanding person, [who] is not a security risk, and will be an asset to this company." (Exhibit A.)

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 are useful 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 over-arching 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 "[any] 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 as to 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline E, Personal Conduct

With respect to Guideline E, the evidence establishes that Applicant completed a Government contract and received payment for her privately owned company after she

became a Government employee. Applicant also signed a Blanket Purchase Agreement on behalf of her company after she became a Government employee.

However, after reviewing all of the documentation and listening to Applicant's credible testimony, I am not convinced that Applicant knew or should have known that her conduct constituted ethics violations. The powder coating contract work done by Applicant's company for the Government was initiated before she became a Government employee. The work ended and payment was made less than two weeks after her employment began, and before she received the Government's ethics training.

After Applicant received the ethics training, she showed significant concern by immediately attempting to ascertain what was proper conduct, through her consultation with her supervisor, and her subsequent inquiry to the legal department. While she did sign a Blanket Purchase Agreement on behalf of her company shortly after she received her ethics training, she did have a reasonable question as to whether this conduct was permissible since her company was the only company in close proximity to the Government site. However, Applicant never attempted to have her company do additional business with the Government or in any other way attempted to skirt ethics considerations.

Therefore, I conclude that no disqualifying conditions are applicable under Guideline E. I do not find that Applicant's conduct, considered as a whole, exhibits questionable judgement, unreliability, or a lack of candor. I resolve Guideline E for Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Based on all of the reasons cited

above as to why no Disqualifying Conditions apply, I find that the record evidence leaves me with no significant questions or doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has mitigated the 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 E:

FOR APPLICANT

Subparagraphs 1.a.:

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 eligibility for a security clearance. Eligibility for access to classified information is granted.

Martin H. Mogul
Administrative Judge