



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



In the matter of:

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ISCR Case No. 12-03470

Applicant for Security Clearance

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel
For Applicant: Charles C. Maddox, Esq.

12/20/2013

Decision

LYNCH, Noreen, A., Administrative Judge:

The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) alleging security concerns arising under J (Criminal Conduct), and Guideline E (Personal Conduct). The SOR was dated August 22, 2013. 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 before an administrative judge. The case was assigned to me on October 11, 2013. DOHA issued a notice of hearing on October 22, 2013, scheduling the hearing for November 19, 2013. Government Exhibits (GX) 1-2 were admitted into evidence, without objection. Applicant testified, presented the testimony of two witnesses and submitted Applicant Exhibits (AX) A-F, which were admitted without objection. I received the transcript (Tr.) on November 26, 2013. Based on a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

In her answer to the SOR, Applicant admitted the sole factual allegation under Guideline J (Criminal Conduct), and Guideline E (Personal Conduct) with explanation.

Applicant is a 49-year-old employee of a defense contractor who works as an accountant. She received a bachelor's degree in 1987. In 1985, Applicant obtained her professional license as a certified public accountant (CPA). She is married and has three children. Applicant has worked for her current employer since October 2011. However, she worked as an auditor in public service for more than 25 years. She has held a security clearance since 1989. (GX 1)

Criminal Conduct

On March 18, 2011, Applicant pled guilty to two counts: count 2 making false statements and aiding and abetting, and count 3, a fraud in the second degree. She was sentenced to 12 months of probation, a \$1,000 fine, and 100 hours of community service. (GX 2) In August 2012, she completed her probation.

As a result of the conviction, Applicant surrendered her CPA license and in 2009, she resigned her position of employment. Her security clearance was revoked.

Personal Conduct

In 2008, Applicant worked for a government entity as an auditor in a supervisory capacity. She advised a friend that she would need to be a resident of the city to apply for an administrative position in her agency. Applicant's friend applied for and obtained the position. The friend used an address, other than her own, to claim residency preference. Applicant created a fake rental lease so that her friend could prove residency. (GX 2) Applicant admitted that she influenced her friend to use the city address. (Tr. 97)

At the same time, Applicant, who was the treasurer, for a professional association, had access to a bank account that was intended for the association. Applicant created an account in the name of the association. The account address was her own. The account was used to launder funds in an attempt to show that her friend was paying rent in the city and had an income. The account was used to pay personal bills and make loans to her friend. Applicant put her own money into the account, and her friend wrote rent checks, but Applicant withdrew funds from the account and gave them to her friend. Applicant also put her own money into the account for her daughter's college fund. As part of her plea, Applicant admitted that she improperly used money from the association while she served as treasurer. An investigation revealed that none of the money in the account was from the association. (AX C)

In January 2009, Applicant resigned from her position. An investigation revealed that Applicant's friend did not live in the city and was not entitled to invoke the residency

preference. The investigation led to questions about Applicant's behavior and actions connected with her friend.

In 2010, an investigation about Applicant and her role in the above situation was completed. She worked cooperatively with the U.S. Attorney's office. Upon advice of counsel, she pled guilty to two misdemeanor offenses in connection with her knowledge and involvement in the false statement and fraudulent scheme.

Applicant submitted letters of recommendation from friends and former colleagues who recommend her for a security clearance. (AX A-F) Each attests to her excellent skills and ability to perform her job functions. She is described as honest with a hard working ethic. Applicant is also described as a solid citizen who works diligently. (AX E) A former supervisor noted that Applicant is an exceptionally good worker and talented auditor. She was one of the most effective employees in the organization. (AX D)

Applicant's spiritual mentor describes Applicant as a good person who loves to help others. She completed her community service, but also volunteers in the community. She likes to use her time and talent to benefit others less fortunate than she. (AX F) Applicant has completed training in professional ethics.

A former colleague of Applicant testified that she is an extremely hard worker. According to the witness, Applicant had a tremendous energy level and out-performed most of her colleagues. (Tr. 18) He knew her from 2001 until 2010. The witness had no hesitation in recommending Applicant for a clearance. (Tr. 20)

Applicant's current supervisor testified that he hired Applicant for her current position. During the hiring interview, Applicant disclosed her March 2011 conviction. Applicant's supervisor described her as an exemplary worker who is dependable and reliable.

Applicant expressed remorse about her activity in 2008, and she accepted responsibility for her unethical actions. She believes this was an isolated incident that occurred under unique circumstances. She believes she made an impulsive decision which showed an uncharacteristic lack of judgment. (Tr. 69)

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.

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.*

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to 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 ¶ 31 describes conditions that could raise a security concern and may be disqualifying:

- (a) a single serious crime or multiple lesser offenses;
- (b) discharge or dismissal from the Armed Forces under dishonorable conditions;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;
- (d) individual is currently on parole or probation; and
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

As discussed, in March 2011, Applicant pled guilty to one count of making false statements, and aiding and abetting, and one count of fraud in the second degree. She completed her twelve month probation, and community service. She paid \$1,000 in fines. Disqualifying condition AG 31(a) applies.

AG ¶ 32 describes conditions that could mitigate security concerns under this guideline:

AG ¶ 32 (a) states, that “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.” Applicant has no other criminal conduct or record and an exemplary employment history. The actual behavior occurred about five years ago. It is an isolated incident in a long career of service. Applicant pled guilty in March 2011. She has completed her probation. Applicant completed her community service and paid a fine. She was motivated by a desire, albeit misplaced, to help a friend. This condition partially applies.

After reviewing the mitigating conditions, I find that AG ¶ 31(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) partially applies.

Applicant's former and current employers praise her work ethic and good work. She is remorseful and has a spiritual mentor to help guide her life choices. She completed more than 40 hours of continuing professional education training in ethics.

Guideline E, Personal Conduct

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

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.

As discussed above, Applicant engaged in improper behavior in 2008. She advised a friend to use an incorrect address to gain a residency preference for a job. She also used a bank account in the name of a professional association for her own purposes and to facilitate her friend's fraud. She did not disclose this information until a later investigation. AG ¶¶ 16(b), 16(d), 16(e), and 16(g) apply. Her conduct shows poor judgment.

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.

Applicant did not disclose her role in the false statement and fraudulent scheme until she was investigated in 2010. She cooperated with authorities at that point. She did not deny her role in the plan, and she pled guilty to charges in 2011. She acknowledged unethical and criminal conduct. However, the offenses are not minor. She completed probation in 2012. I have some doubts about her judgment, trustworthiness, and reliability. After considering the mitigating conditions outlined in AG ¶ 17, I conclude Applicant has not mitigated the security concern under personal conduct.

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 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 is a 49-year-old professional who works as an auditor. She has held a security clearance for many years. She has good references from her employers. Applicant has worked in public service for more than 25 years. She is married and has three children. However, she devised a complicated, fraudulent plan to aid a friend to obtain a position in her agency. Applicant intentionally advised the friend to use an incorrect address to obtain a residency preference. She also created a fake lease to establish the residency. As treasurer of a professional organization, she used an account to launder money for her friend. Applicant put her own funds into the account and used her home address. She rationalized this behavior as helping a friend.

Applicant did not disclose this plan until she was investigated and questioned, in 2010. Upon advice of counsel, she pled guilty. She admits that she was wrong and that she falsified documents. She also used the association account as she had access to it. She was not authorized to write checks to herself.

Applicant's conviction in 2011 is an isolated event in a 25 year work history. She admits that she used poor judgment. The criminal behavior is not mitigated by the circumstances in the case. The behavior occurred in 2007. Her conviction was in 2011. She completed her probation in 2012 and completed community service. It is too soon to find that Applicant has mitigated the security concerns under criminal conduct.

As to her personal and criminal conduct, I do not find that Applicant has mitigated the security concerns at this time. I have doubts about her reliability, good judgment, and trustworthiness. Any doubts must be resolved in favor of the Government. Applicant has not met her burden in this case. She has not mitigated the security concerns under the criminal conduct and personal conduct guidelines. Clearance is denied.

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:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

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

NOREEN A. LYNCH.
Administrative Judge