



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-02919

Appearances

For Government: Douglas Velvel, Esq., Department Counsel
For Applicant: *Pro se*

01/26/2017

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline E (personal conduct). Eligibility for access to classified information is denied.

Statement of the Case

On June 16, 2014, Applicant submitted a Questionnaire for National Security Positions. On November 23, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E (personal conduct). 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 after September 1, 2006.

Subsequently, Applicant answered the SOR in an undated response. On January 28, 2016, Department Counsel was prepared to proceed. On April 15, 2016, the case was assigned to me. On May 19, 2016, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing scheduling the hearing for June 9, 2016. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 3, which were received without objection. Applicant did not offer any exhibits, testified on her own behalf, and called one witness. DOHA received the hearing transcript (Tr.) on June 16, 2016.

Findings of Fact

Applicant admitted SOR ¶ 1.b, and denied SOR ¶¶ 1.a, 1.c and 1.d. Her admission and denials were accompanied with explanations. Her admission is accepted as a finding of fact.

Background Information

Applicant is a 36-year-old training assistant employed by a defense contractor since July 2011. (GE 1; Tr. 15) She seeks a secret security clearance to enhance her position within her company. (Tr. 15-16)

Applicant graduated from high school in June 1998. She attended a community college from 1998 to 1999, but did not graduate. (Tr. 17) Applicant married in 2012, and has no dependents. (Tr. 17-18) She did not serve in the U.S. armed forces. (Tr. 19)

Personal Conduct

The origin of this concern stems from Applicant's June 2009 shoplifting offense and was subsequently compounded by her cover-up attempts.¹ She falsely claimed on her June 2014 SF-86 that she was arrested for petit theft in June 2009 because she was the victim of identity theft. She repeated the same false story in July 2014, during an Office of Personnel Management Personal Subject Interview (OPM PSI) and in a subsequent December 2014 OPM PSI. However, it was during the December 2014 OPM PSI, after being confronted by the investigator with specific information, that Applicant admitted that she fabricated being the victim of identity theft and that she actually was the person who shoplifted in June 2009. (SOR ¶¶ 1.a – 1.d; GE 1-3; Tr. 8-11, 19-28)

Applicant testified that in June 2009, she was with her pregnant girlfriend looking for baby items. She stated that they did not have the \$34 to purchase the items and decided to place them in her purse and attempt to walk out of the store without paying for them. She stated that she lied because she "was incredibly embarrassed." (Tr. 12-13, 19-20) In August 2009, Applicant was placed in a pre-trial diversion program and ordered to stay away from the store where the shoplifting occurred. In March 2010, after successfully completing her diversion program, the misdemeanor petit theft charge was nolle prossed. (GE 2; Tr. 20)

¹ Applicant contends that she was not "arrested" as alleged in the SOR, but rather was detained. She testified that after store security personnel observed her shoplifting, they escorted her to the security office and summoned local law enforcement personnel, who issued her a summons to appear. (Tr. 21, 26)

Applicant informed her husband as well as her immediate supervisor at the time of her shoplifting offense. Applicant's husband testified that his wife is a "good person, good-hearted person, (and) she works hard." Applicant's former supervisor encouraged her to request a hearing. (Tr. 29-33)

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

AG ¶ 15 articulates 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. 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 ¶ 16 describes four 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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(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 . . . ;

(3) a pattern of dishonesty or rule violations; and

(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

Applicant shoplifted in June 2009 and attempted to cover it up on three subsequent occasions when she completed her June 2014 SF-86 and during her July 2014 and December 2014 OPM PSIs. It was only after being confronted by the investigator during her December 2014 OPM PSI with specific information that Applicant acknowledged her falsification. The Government established disqualifying conditions in AG ¶¶ 16(a), 16(b), 16(d), and 16(e).²

AG ¶ 17 provides seven conditions that could potentially mitigate security concerns about his personal conduct:

(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;

² Deliberate and materially false answers on a security clearance application violate 18 U.S.C. § 1001. The Supreme Court defined "materiality" in *United States v. Gaudin*, 515 U.S. 506, 512 (1995): as a statement having a "natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed." See also *United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004). Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony (the maximum potential sentence includes confinement for five years and a \$10,000 fine).

(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.

When applicants lie as Applicant repeatedly did during her background investigation and in her SOR answers, they seriously undermine the process as Applicant did in this case. None of the mitigating conditions fully apply.³

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 relevant 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.

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. AG ¶ 2(c).

The comments in the Analysis section of this decision are incorporated in the whole-person concept analysis. Applicant has been a defense contractor employee since July 2011. Her husband testified that she is a good person and hard worker.

³ The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

However, her deliberate falsifications, if relied upon, could have affected or influenced the security clearance adjudication process to the detriment of the Government.

Applicant's deliberate failure to disclose information on her security clearance application is serious, recent, and not mitigated. As such, I have concerns about her current ability or willingness to comply with laws, rules, and regulations. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude she has not mitigated security concerns pertaining to personal conduct 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.d: Against Applicant

Conclusion

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 Applicant's eligibility for a security clearance. Eligibility for a security clearance is denied.

Robert J. Tuidor
Administrative Judge