



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



In the matter of:

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) ISCR Case No. 15-04739
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Applicant for Security Clearance

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

February 16, 2017

Decision

MOGUL, Martin H., Administrative Judge:

On March 25, 2016, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines E and K 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) (Directive); and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

On June 6, 2016, Applicant replied to the SOR (RSOR) in writing, and she requested a hearing in this case. The case was assigned to this Administrative Judge on August 8, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on that date, and I convened the hearing as scheduled on August 30, 2016. At the hearing, the Government offered Exhibits 1 through 8, which were received without objection. Applicant testified on her own behalf and submitted Exhibits A through K, which were attached to her RSOR and also were admitted without objection.

Based upon a review of the pleadings, 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 discussed above, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 39 years old. She is unmarried and she has no children. She received a Bachelor of Arts degree in History in 2010. Applicant served in the United States Army from 1996 to 2006, and she received an Honorable Discharge. Applicant is employed by a defense contractor, and she seeks a DoD security clearance in connection with her employment in the defense sector.

Guideline E - Personal Conduct

The Government alleges in this paragraph that Applicant is ineligible for clearance because she engaged in conduct that exhibited questionable judgement, unreliability, unwillingness to comply with rules and regulations, and untrustworthiness. The following allegations are cited in the SOR as tending to show that:

1.a. It is alleged in the SOR that in approximately 2002, Applicant unintentionally took classified training course material home, and she returned the material the next day, but did not report the incident.

At the hearing, Applicant testified that she was in a foreign language refresher course, and she inadvertently put a piece of paper that was part of her exercise material with her own papers, which she did not realize until she got home. She stated that she slept with the paper under her pillow, and as soon as she appeared at her employment the next day, she placed the document into a "burn bag." During her testimony, Applicant conceded that she realized about 8:30 or 9:00 at night and she should have returned the classified document as soon as she was aware she had taken it home, but she was afraid that she may have been in trouble if she revealed that she had removed the document. The information about this allegation was first revealed by Applicant in 2006, during the time she was administered a polygraph examination, and she did concede that, if not for her taking the polygraph, this information would not have been revealed. (Tr at 31-34, 51-55.)

1.b. It is alleged in the SOR that on June 6, 2009, Applicant received a reprimand for Practice Dangerous to Security, after she failed to lock a secure area.

At the hearing, Applicant explained that she was working in a secured room (SCIF), in which she did not have a lot of experience. When she left the SCIF, she set the alarm, but did not properly secure the cipher lock as she did not hear it click when she left. The fault was discovered the next day when the next person to enter the SCIF saw that the cipher lock had not been secured. (Tr at 34-34.)

1.c. It is alleged in the SOR that on August 20, 2012, Applicant received a formal official reprimand for Poor Judgment and Conduct Unbecoming a Federal Employee for the following incidents:

i. On November 10, 2011, during the time period Applicant was traveling on government business, while she was on temporary duty, she transported several bottles of wine in the Government vehicle. On November 11, 2011, Applicant received a speeding ticket while driving a Government vehicle. On December 12, 2011, Applicant receive a verbal reprimand for Inappropriate Usage of a Government Vehicle for Non-Official Business and Speeding.

Applicant admitted that she had used a government vehicle to transport alcohol, but she testified that she has never been aware of a prohibition against using a government vehicle to transport alcohol. She did concede that she was driving above the speed limit in a government vehicle when she received her speeding citation. Applicant explained that she had not consumed the alcohol, as it was unopened in her trunk, and the speeding citation was in no way related to having alcohol in her vehicle. (Tr at 35-38.)

Exhibit 7 is a Memorandum For Record, dated December 7, 2011, titled "Performance Counseling" and written by a lieutenant colonel of Special Forces in the Army, which concerned this SOR allegation. The report cited Applicant for transporting both alcohol for a co-worker and sensitive items for a project in the trunk of her government car while driving carelessly. Also, she was ticketed for driving at a rate of 83 miles per hour (MPH) in a 55 MPH zone. The results of this report included Applicant's use of a Government vehicle being suspended until further notice.

ii. On March 17, 2012, Applicant attended a military function which was also attended by senior ranking officials from Applicant's organization and the Department of the Army. During the function, Applicant became extremely intoxicated and became so disruptive that it was necessary to escort her out of the event.

Applicant conceded that she "undoubtedly drank way too much" on the night in question. She also explained that because of allergies she had been given some Mucinex D before she began drinking, and she believed that this may have influenced the alcohol consumption. (Tr at 38-44.) She admitted that on the night in question, she grabbed the crotch of her boss, and she also exposed herself, actions she claimed she had never done before this night. She admitted that she does not have a clear memory of everything that happened during the night. (Tr at 66.)

Exhibit 6 includes a Memorandum For Record, dated April 18, 2012, titled "Report of Actions at [an event]" and written by a colonel and Division Chief in the Army, which concerned this SOR allegation. The report through interviews with other individuals at this event confirmed that Applicant's conduct was completely

inappropriate as described above, and including Applicant being “overheard making inappropriate and derogatory comments about [her employment office] and her colleagues to other guests at the event.”

iii. On April 10, 2012, Applicant was found responsible for a security infraction because, on April 4, 2012, she released classified information to an individual who was not cleared for access to that information.

In her RSOR, Applicant wrote that the document that she transmitted was unmarked by the originating authority, and she believed that the individual to whom she transmitted the document was cleared to receive the document. While at the hearing, Applicant testified that the information, which she gave to an analyst who sat next to her at her employment as they shared a cubicle wall, was not classified, and it was found to be an inadvertent violation by Applicant. (Tr at 44-45.)

Exhibit 6 also includes a Memorandum For Applicant, dated August 16, 2012, titled “Official Reprimand - Three Years.” This Memorandum, written by the Director of the Equal Employment Opportunity cites the three incidents listed above as 1.c.i, 1.c.ii., and 1.c.iii., above, as the grounds for the Official Reprimand for three years “for poor judgment and conduct unbecoming a federal employee.”

Guideline K - Handling Protected Information

The Government alleges in this paragraph that Applicant is ineligible for clearance because she engaged in conduct that shows deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information which raises doubt about an individual’s trustworthiness, judgement, reliability, or willingness and ability to safeguard such information.

2.a. The SOR alleges that Applicant’s conduct, as set forth in subparagraphs 1.a., 1.b., and 1.c.iii., above, constitutes a violation of Guideline K.

Mitigation

Applicant submitted a number of documents in mitigation. These include but were not limited to the following: five extremely positive character letters written on Applicant’s behalf. The individuals, who wrote the letters on Applicant’s behalf, have indicated that Applicant’s behavior, especially that involved in 1.c.ii., which appears to be Applicant’s most egregious conduct, was an aberration and not typical of her general behavior. (Exhibit A); Applicant’s biography (Exhibit B); a letter from a therapist, dated June 4, 2016, who, at the time of the letter, had been treating Applicant for several months. The therapist wrote that in the process of treating the Applicant she believes that Applicant “does not suffer from alcohol or substance abuse and that the issues for which she seeks counseling are very much within range of health and within clinical norms.” The therapist also wrote that Applicant “has demonstrated a high level of acceptance of responsibility for her actions. This, combined with [Applicant’s] growth in therapy indicates to me that the likelihood of reoccurrence is negligible at most.” (Exhibit

D); Applicant's DD Form 214, which showed that Applicant received a number of awards and medals, including but not limited to: the Army Commendation Medal, the Army Good Conduct Medal (3rd award), the National Defense Service Medal, and the Non Commissioned Officer Professional Development Ribbon (Exhibit F); employee evaluations for years 2013 through 2015 (Exhibit H); and three awards Applicant received from the United States military. (Exhibit K.)

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 AG ¶ 2 describing 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 "[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.

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 the applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision.

A person who applies for access to classified information seeks to enter 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 adverse 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

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgement, 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.

The Government alleges in this paragraph that Applicant is ineligible for clearance because she engaged in conduct that exhibited questionable judgement, lack of candor, dishonesty, unreliability, and untrustworthiness.

The guideline notes several conditions that could raise security concerns and could potentially apply in this case. Because Applicant was involved in several incidents that do raise an issue about her judgment and reliability, I find that Applicant’s conduct supports disqualifying conditions ¶ 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 judgement, 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.” ¶ 16(d) is also applicable, “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 judgments . . . or other characteristics indicating that the person may not properly safeguard protected information.” Finally, I find that ¶ 16(e) (1) applies “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.”

However, I also considered the extremely laudatory letters written on Applicant’s behalf, that Applicant has been receiving counseling and received an excellent prognostication from her therapist, that the last incident happened more than four years ago, and Applicant has expressed credible and sincere remorse for her previous conduct. I find that mitigating condition ¶ 17(c) is applicable “so much time has passed [and] the behavior is so infrequent . . . that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.” ¶ 17(d) also applies

because “the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances or other factors that caused untrustworthy behavior . . . and such behavior is unlikely to recur.” I, therefore, resolve Guideline E for Applicant.

Guideline K - Handling Protected Information

The security concern relating to the guideline for Handling Protected Information is set out in AG ¶ 33:

Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual’s trustworthiness, judgement, reliability, or willingness and ability to safeguard such information.

The guideline notes several conditions that could raise security concerns. Based on Applicant’s conduct as a whole, disqualifying condition ¶ 34(g), “any failure to comply with rules for the protection of classified or other sensitive information” is applicable. The evidence of Appellant failing to properly handle sensitive documents is sufficient to raise these disqualifying conditions, requiring a closer examination.

AG ¶ 35 provides conditions that could mitigate security concerns arising from improperly handling protected information. Based on the factors that were considered and discussed in mitigation under Guideline E, above, I find that mitigating condition ¶ 35(a) “so much time has elapsed since the behavior, or it happened so infrequently . . . that it is unlikely to recur and does not cast on the individual’s current reliability, trustworthiness, or good judgment” is applicable. ¶ 35(b) “the individual responded favorably to counselling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities” also applies to this case. Therefore, I conclude that Appellant has mitigated the Handling Protected Information concerns.

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 the mitigating conditions apply and are controlling under Guidelines E and K, I find that the record evidence leaves me no with 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 under the whole-person concept.

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. - 1.c.:	For Applicant
Paragraph 2, Guideline K:	FOR APPLICANT
Subparagraph 2.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