



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



In the matter of:

Applicant for Security Clearance

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)
) ISCR Case No. 15-05058
)
)

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel

For Applicant: *Pro se*

03/30/2017

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the personal conduct and criminal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On February 6, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (personal conduct) and J (criminal conduct). The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on February 12, 2016, and requested a hearing before an administrative judge. The case was assigned to me on August 9, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on August 19, 2016, scheduling the hearing for October 5, 2016. The hearing was postponed and convened as rescheduled on November 16, 2016. Government Exhibits (GE) 1 through

9 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AE) A through E, which were admitted without objection. DOHA received the hearing transcript (Tr.) on November 30, 2016.

Findings of Fact

Applicant is a 31-year-old employee of a defense contractor. She has worked for her current employer since September 2014. She is applying for a security clearance for the first time. She attended college for a period without earning a degree. She has never married, and she has no children.¹

Applicant was arrested in June 2011 and charged with theft by deception for issuing checks on a closed account in August 2009. She pleaded guilty, and she paid a \$100 fine, fees, and \$159 in restitution. In December 2012, the judgment was set aside and the charge dismissed.²

In October 2010, a citation in lieu of arrest was issued against Applicant, and she was charged with issuing a bad check – less than \$200 – in July 2010. She paid the check and fees, and the charge was dismissed in November 2010.³

Applicant testified that she did not intentionally write bad checks. She stated that she moved from Location 1 to Location 2, closed her bank account in Location 1, and did not realize that there were still checks from Location 1 to be cleared. However, two of the checks were issued in 2009, and her Questionnaire for National Security Positions (SF 86) shows that she did not move from Location 1 until 2010. Applicant stated that while she did not “officially” move to Location 2 until 2010, she frequently stayed with her sister in Location 2 and helped her sister care for her sister's children. Additionally, two checks were written on a closed account from a different bank that was located in a state where Applicant had not lived since 2007. Applicant also stated that she was unaware that she wrote bad checks, and that she paid them the same day she was notified. The receiver of a December 2009 check informed the police in May 2010 that he had contacted Applicant “some time ago,” and she stated that she would take care of it. She had not by the time he filed a police report in May 2010.⁴

Applicant was arrested in December 2012 and charged with driving under the influence (DUI). She completed the court-imposed requirements, and the charge was reduced to reckless driving.⁵

¹ Tr. at 23, 41-42, 45; GE 1.

² Tr. at 23-24, 27; Applicant's response to SOR; GE 7; AE A.

³ Applicant's response to SOR; GE 2, 7; AE B.

⁴ Tr. at 18-19, 24-30, 42-43; Applicant's response to SOR; GE 1, 2, 7.

⁵ Tr. at 25, 44; Applicant's response to SOR; GE 2; AE C.

Applicant has a history of employment-related issues. She was terminated from a job in October 2012 after she missed several afternoons of work due to emergency appointments. She worked for another company from about November 2012 through March 2014. She signed an agreement not to compete with the company (“non-compete agreement”). She was released from her employment, but not for performance-related issues. There is insufficient evidence for a determination that she later violated the non-compete agreement. In August 2014, she was terminated from a job that she had held for about a month for what the company described as insubordination. Applicant admitted that she was terminated, but she denied that she was insubordinate.⁶

Applicant worked for a company (Company A) from April 2014 through July 2014. She signed an employment contract and a separate confidentiality agreement, with non-disclosure clauses. A few months earlier, her boyfriend established a company (Company B) that was in competition with Company A. Applicant was terminated just before her 90-day probationary period ended for what Company A described as “poor work performance.”⁷

In September 2014, Company A filed a lawsuit against Applicant, her boyfriend, and Company B. Company A alleged that Applicant “purposely infiltrated [Company A] and conspired with [boyfriend] in order to steal and misappropriate [Company A’s] confidential and valuable business information and trade secrets for use in their new, competing business, [Company B].”⁸

In March 2016, the judge in the case sanctioned Applicant for not preserving evidence when she traded in her smart phone and laptop computer. The judge found that she provided inconsistent and contradictory testimony. The judge concluded:

The bottom line here is there’s sufficient proof in my mind to grant this adverse inference that [Applicant] sent things that belonged to [Company A] to [boyfriend] and [Company B] that were just not available for her to produce in discovery for the reason that she chose to turn her phone in after she filed a counterclaim and chose not to make any effort to preserve what was on the laptop.⁹

The parties settled the case in May 2016. The defendants agreed to pay \$100,000, over the course of 24 months, with Applicant paying half of that amount. Applicant denied providing Company A’s proprietary information to Company B.¹⁰ I did

⁶ Tr. at 30-35, 39-40; Applicant’s response to SOR; GE 1, 2, 4.

⁷ Tr. at 35; Applicant’s response to SOR; GE 1-6.

⁸ Tr. at 31; Applicant’s response to SOR; GE 1-6.

⁹ GE 5.

¹⁰ Tr. at 31; Applicant’s response to SOR; GE 4; AE D.

not find her testimony credible. After considering all the evidence, including the court records from the lawsuit, I find by substantial evidence¹¹ that Applicant provided Company A's proprietary information to her boyfriend and Company B in violation of her contract with Company A.¹²

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching 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."

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 to obtain 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

¹¹ Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." ISCR Case No. 10-09035 at 5 (App. Bd. Jun. 13, 2014) (citing Directive ¶¶ E3.1.14; E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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); ISCR Case No. 04-07187 at 5 (App. Bd. Nov. 17, 2006).

¹² Tr. at 20-22, 31-41, 51; Applicant's response to SOR.

the possible risk 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.

Section 7 of EO 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 for personal conduct is set out in AG ¶ 15, as follows:

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 conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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;

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing; and

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

Applicant provided Company A's proprietary information to her boyfriend and Company B in violation of her contract with Company A. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. It also created vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(d), 16(e), and 16(f) are applicable to SOR ¶ 1.b.

The remaining personal conduct allegations were unsubstantiated, did not raise a disqualifying condition, or were too minor to raise unmitigated security concerns.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant's denials of providing propriety information to her boyfriend and Company B were not credible. The judge in her lawsuit did not find her worthy of belief, and neither do I. There are no applicable mitigating conditions.

Guideline J, Criminal Conduct

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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. The following are potentially applicable:

(a) a single serious crime or multiple lesser offenses; and

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant's check charges and DUI establish AG ¶¶ 31(a) and 31(c) as disqualifying conditions.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

- (a) 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;
- (c) evidence that the person did not commit the offense; and
- (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.

Applicant testified that she did not intentionally write bad checks. She stated that she moved, closed an account, did not realize that there were still checks to be cleared, and covered the checks as soon as she learned they did not clear. However, checks were written on two closed accounts; two checks were from a bank that was located in a state where Applicant had not lived since 2007; two checks were written on a closed account the year before Applicant moved from Location 1; and the recipient of one of the checks was not paid even though he contacted Applicant well before he reported her to the police. Applicant's testimony about the returned checks was not credible. None of the mitigating conditions are applicable.

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.

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. I have incorporated my comments under Guidelines E and J in my whole-person analysis.

Applicant has a history of questionable conduct. She gave her company's secrets to a competitor. It would be unwise to trust her with our nation's secrets.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the personal conduct and criminal conduct 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:	Against Applicant
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraphs 1.c-1.e:	For Applicant
Paragraph 2, Guideline J:	Against Applicant
Subparagraphs 2.a-2.c:	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 eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge