



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



In the matter of:

ISCR Case No. 15-08678

Applicant for Security Clearance

Appearances

For Government: Aubrey De Angelis, Esq., Department Counsel

For Applicant: Ken L. Kambich, Esq.

01/22/2018

Decision

WHITE, David M., Administrative Judge:

Applicant was fired from a previous job due to personality conflicts with coworkers and her refusal to violate restrictions imposed by applicable financial regulations. Resulting security concerns were mitigated. Based upon a review of the testimony, pleadings and exhibits, national security eligibility is granted.

History of Case

On January 20, 2015, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On September 30, 2016, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline E (Personal 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 effective within the DoD after September 1, 2006.

Applicant answered the SOR in writing on October 27, 2016 (Answer), and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) assigned the case to me on February 13, 2017. DOHA issued a Notice of Hearing on April 27, 2017, setting the hearing for May 16, 2017. On that date, Department Counsel offered Government Exhibits (GE) 1 through 5 into evidence. Applicant testified and offered Exhibits (AE) A through F into evidence. I granted Applicant's request to leave the record open until May 30, 2017, to permit submission of additional evidence. Applicant timely submitted another exhibit, which was marked AE G and admitted without objection. DOHA received the hearing transcript (Tr.) on May 31, 2017.

The SOR in this case was issued under the adjudicative guidelines that came into effect within the DoD on September 1, 2006. Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines*, implemented new adjudicative guidelines that came into effect on June 8, 2017. All national security eligibility¹ determinations issued on or after June 8, 2017, are to be decided using the new *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), as promulgated in Appendix A of SEAD 4. I considered the previous adjudicative guidelines, as well as the new AG, in adjudicating Applicant's national security eligibility. This decision is issued pursuant to the new AG, but my decision would be the same under either set of guidelines.

Findings of Fact

Applicant is employed as an administrative assistant by a U.S. defense contractor, and is applying for a security clearance in connection with that work. She denied the allegation in SOR ¶ 1.a, concerning her May 2013 termination from previous employment as an accounting clerk by a different defense contractor. (GE 1; GE 2; Answer.)

Applicant is 60 years old. She is married and has four adult children. She graduated from high school in 1976, and earned an associate's degree in Business Finance in June 2011. She has no military service or Federal government employment, but her husband retired in 2014 after 30 years of active naval service. She has successfully held a security clearance for more than 15 years in connection with previous employment. (GE 1; GE 2; Tr. 23, 71-73.)

SOR ¶ 1.a alleged that Applicant's previous employment with a different defense contractor was terminated in May 2013 for misconduct, including failure to follow instructions, insubordination, misuse of government equipment, and conflict with a federal government customer after receiving written warnings/counseling from her

¹ SEAD 4 ¶ D.7 defines *National Security Eligibility* as eligibility for access to classified information or eligibility to hold a sensitive position, to include access to sensitive compartmented information, restricted data, and controlled or special access program information.

employer regarding her conduct and performance. This allegation accurately reflects the contents of documentation prepared by her prior employer in connection with her termination. That employer also submitted a JPAS Incident History report on May 23, 2013, reporting that she received counseling and was terminated for “poor attitude and work performance,” with no mention of misconduct. (SOR; GE 3; GE 4; GE 5.)

Applicant had worked in that financial analyst/accounting clerk position since July 2005 for three different companies that won successive support contracts for the Navy facility involved. The facility primarily performed work in support of U.S. Navy operational requirements, but was also substantially involved in Foreign Military Sales (FMS) programs. Applicant’s job description involved FMS financial management and accounting functions. Her position was paid through FMS funding, which is required under applicable fiscal regulations to be kept separate from general Operations and Maintenance (O&M) – Navy funded activities. Some five or ten years before Applicant started working there, the facility had failed an inspection and been reprimanded for comingling FMS funding and activities with their other O&M funded operations. As a result, the respective financial support offices were in separate locations and employed independent accounting practices. (GE1; GE 2; AE A; AE C; Tr. 48-50.)

In December 2012, Applicant’s work station was moved from the FMS office area to be collocated with two civil service employees who performed accounting functions for the Navy operational activities of the facility. They were longtime friends, and Applicant did not get along well with either of them. The facility management wanted to consolidate the accounting operations for the various Navy funds and the FMS funds, which Applicant resisted because she knew that it violated applicable fiscal regulations. The Deputy Customer Advocate for FMS at the facility, who is charged with administering FMS funds and managing FMS customer needs, stated in a sworn declaration that Applicant was keenly aware of the applicable financial regulations prohibiting misallocation of funding and assets between FMS and Navy operational projects, and appropriately raised her concerns about being asked to violate them as anyone in her position should be expected to do. He stated that she was an exemplary employee who performed her duties strictly by the applicable rules and regulations. He further expressed his respect and appreciation for her integrity and terrific work product. Applicant properly filed an Inspector General Action Request to the Navy Regional Commander reporting the ongoing attempts to improperly comeingle and misallocate funds at the facility. (GE 2; AE A; AE C; AE D; Tr. 50-51.)

Applicant’s former employer began documenting counseling sessions shortly after her move to collocate with the government employees and her resulting resistance to improperly performing non-FMS work at their request. Other than the facts that she did not get along with those employees, or follow her supervisor’s direction to violate applicable financial regulations if the government employees asked her to do so, the grounds asserted for her termination were largely pretextual. The alleged misuse of government equipment involved reading general news sites on the internet after her work was fully caught up and a few personal telephone calls on the government landline phone with family members concerning emergent circumstances. The two government

employees with whom Applicant had ongoing conflicts submitted complaints to their supervisor each time they detected such activity (despite the fact that they regularly engaged in similar conduct), which is not considered fraud, waste, or abuse as long as it is reasonable and does not interfere with job accomplishment. Although not alleged on the SOR, Applicant was also investigated after her termination for potential destruction of Government property and data. The investigation found that she had done nothing wrong, had properly disposed of hard-copy spread sheets she no longer needed in a shredding bin, and properly deleted her email files from her desktop computer. No data or government property was either lost or mishandled. (GE 2; GE 3; GE 4; GE 5; AE B; AE C; AE E; Tr. 42-46, 51-67.)

Applicant submitted copies of her performance evaluations from 2006 through 2011 at the facility where she performed FMS work, and from her current employer, all of which document her outstanding professional performance. She also submitted letters from current and former supervisors who highly praise her trustworthiness, reliability, integrity, dedication, and performance. (AE G.)

Policies

When evaluating an applicant's suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

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 overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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 national security eligibility will be resolved in favor of the 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 says that an "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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person applying for national security eligibility 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 national security eligibility. 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 or sensitive information.

Finally, as emphasized in Section 7 of Executive Order 10865, “[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concerns 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during the national security investigative or adjudicative processes.

AG ¶ 16 describes one condition that could raise a security concern and may be disqualifying in this case:

(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 individual may not properly safeguard classified or sensitive 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 government protected information;

- (2) any disruptive, violent, or other inappropriate behavior;
- (3) a pattern of dishonesty or rule violations; and
- (4) evidence of significant misuse of Government or other employer's time or resources.

Applicant's termination documentation could be interpreted to support security concerns under this disqualifying condition, but the full record presents a weak case, at best. She was terminated for declining to violate applicable Government financial regulations, and in order to assuage her supervisor and the civil service employees with whom she was reassigned to work. Her behavior did not constitute untrustworthy or unreliable conduct, but demonstrated her willingness to comply with applicable rules and regulations in the face of adverse personal consequences. The alleged misuse of Government property was minor, routine, and within the normal bounds of ethics regulations and office practices in most Federal settings. Overall, the evidence failed to establish substantial security concerns under AG ¶¶ 16(d).

AG ¶ 17 includes two conditions that would fully mitigate security concerns arising from Applicant's alleged personal conduct should the PSAB find such concerns are valid:

- (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; and
- (f) the information was unsubstantiated or from a source of questionable reliability.

This case arose from Applicant's determination not to violate regulations when asked to do so by her supervisor and civil service coworkers. They were determined to have her terminated, and created a sufficient record to support that action. Applicant's performance before and since these few months of conflict at her former workplace establish a consistent record of excellent performance, trustworthiness, and reliability. Any potential security concerns are either based on unfounded allegations or were fully mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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(d):

(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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant is a mature adult, who was terminated from her previous employment, after more than seven highly successful years, because she declined to comply with a reorganization plan that violated applicable regulations. There is substantial evidence of rehabilitation, should any be necessary, from her outstanding performance in her current position. Any potential for pressure, exploitation, or duress is eliminated by this change of environment. Overall, the evidence creates no doubt as to Applicant's judgment, eligibility, and suitability for a security clearance. She fully met her burden to mitigate the potential security concerns arising under the guideline for personal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E: FOR APPLICANT

Subparagraph 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 interests of national security to grant Applicant eligibility for a security clearance. National security eligibility for access to classified information is granted.

DAVID M. WHITE
Administrative Judge