



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



In the matter of:)
)
) ISCR Case No. 17-02414
)
)
Applicant for Security Clearance)

Appearances

For Government: Allison O’Connell, Esq., Department Counsel
For Applicant: Leon J. Schachter, Esq.

02/07/2019

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, I find that Applicant mitigated one, but not both, of the personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on March 6, 2015, to retain and upgrade a security clearance required for his duties with a defense contractor. The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns for personal conduct (Guideline E) on July 27, 2017. 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 in the DOD on June 8, 2017.

Applicant provided a detailed answer to the SOR on September 21, 2017. He admitted both allegations under Guideline E. Department Counsel was prepared to

proceed on October 19, 2017. I was assigned the case on April 13, 2018, the Defense Office of Hearings and Appeals sent a Notice of Hearing on September 10, 2018, for a hearing on October 10, 2018. I convened the case as scheduled. DOHA received the transcript of the hearing (Tr.) on October 19, 2018.

The Government introduced two exhibits I marked as Government Exhibits (GX) 1 and 2. Applicant objected to Government Exhibit 2, the report of a polygraph examination, as a report of investigation requiring an authenticating witness. I determined that the document was admissible and it was received as Government Exhibit 2. (Tr. 13-18) Applicant and two witnesses testified. Applicant introduced eight exhibits which I marked and admitted into the record without objection as Applicant Exhibits (AX) A through H.

Findings of Fact

After a thorough review of the pleadings, exhibits, and testimony, I make additional findings of fact. Applicant is 47 years old. He has a Bachelor's Degree in History awarded in 1995, and a Bachelor's Degree in information technology awarded in 1998. He is taking classes for a Master's degree in Information Systems Engineering. He has worked in the information technology field with defense contractors since November 1998. He has worked with the same defense contractor in information technology since May 2009. He was granted access to classified information in May 2009. Applicant married in June 1996 and has five children. (Tr. 43-47; GX 1, e-QIP, dated March 6, 2015)

The SOR alleges two personal conduct security concerns. SOR 1.a is based on Applicant's failure to return three laptop computers to his children's private school after he performed maintenance on them. He did not inform the school he had the computers until late 2014, after revealing the information to his Government agency employer during a security clearance interview. SOR 1.b is based on Applicant's submission of a fraudulent letter to his Government Agency employer claiming a debt had been settled. Applicant failed to timely inform the Government agency of the fraud after learning the letter was fraudulent.

Applicant's children attended a small private school. Since the school was small and private, the school administration enlisted parents to use their expertise to assist with needs in the school. Applicant volunteered to assist with information technology and computer repair because of his expertise. In early 2008, he started to fix laptop computers used by the students that were not working properly. By the time the school year was ending in the summer of 2008, he had repaired and returned to the school all but three of the computers. Since school was not in session, he could not return the three remaining computers. Applicant put them in a safe place in his house where the computers could not be accessed by any of his five children with the intent of returning them to the school in September. They were out of sight and out of mind and he lost track of them. (Tr. 47-48)

Applicant's family moved in 2009. Someone, not Applicant, packed up the items in the basement for the move. In the winter of 2011, he was helping to unpack some moving boxes and discovered the laptops. He was very busy at the time with his job and traveling so he did not have time to contact the school to let them know he had the computers. He finally contacted the school headmaster in 2014 after the issue was raised during a polygraph examination for his security clearance. Based on guidance from the headmaster, Applicant disposed of the computers. During the entire time he possessed the computers, Applicant did not have an intent to appropriate or use the computers for his or his family's purposes. During the time he had the computers, the school never made any inquiry concerning the computers. (Tr. 48-51, 82-85)

Applicant stated at the hearing that the computers had never been used while in his possession. However, the polygraph report states that Applicant told the polygraph examiner that he used the laptops for his personal use. Applicant stated that the polygraph examiner was aggressive at that point in the interview and he thought by admitting he used the computers, he could stop the examiner from being aggressive and he could relieve his stress. (Tr. 51-62; GX 2, Polygraph Report, dated June 20, 2017) At the hearing, he denied actually using the laptops. He admitted the computers were in his house but that they were out of sight, out of mind. (Tr. 63-64)

Applicant knew in early 2011 that he had a tax lien issue with his 2009 tax return. He asked his wife to deal with and resolve the issue since she usually managed the family finances. She provided Applicant with documents in 2011 to establish that the issue had been dealt with and resolved. By the fall of 2012, Applicant realized that the documents his wife provided him concerning the tax lien were false. The tax lien was resolved. (Tr. 64-66)

Applicant started processing his paperwork for a top level security clearance in November 2011. In January 2013, the security investigators for the first time requested that he provide documents concerning a debt in collection that was reduced to a judgment by Capital Account for a dentist. (See, Response to SOR, RE: Email Confirmation, dated January 28, 2013) He asked his wife for the status of the debt. His wife provided him with a document from the dentist that the debt has been resolved. (AX H, Letter, dated May 22, 2012) Applicant's wife prepared the letter in an attempt to convince Applicant that she resolved the debt. Even though his wife had previously provided him with a false tax document, he only reviewed the letter from the dentist for content and not for authenticity. His wife stated that she was under emotional pressure at the time she prepared the false letter. She admitted that the letter was false and that Applicant had no role in preparing the letter. (Tr. 66-68; AX A, Receipt, dated March 10, 2015)

Applicant believed the letter to be genuine, and he had no reason to believe his wife would again provide him with a false document. However, the debt had not been settled at that time. Since Applicant believed the letter to be genuine, he submitted it to the security investigator. In late 2013, he decided for some reason to more closely scrutinize the letter. By early 2014, it was obvious to Appellant that the letter was

fraudulent. He did not confront his wife with the idea that the letter was fraudulent because he thought she would deny the letter was fraudulent and the accusation would lead to conflicts within their household and marriage. At the time, he also did not present the letter as fraudulent to his command or to the security investigators. The debt was not settled until March 10, 2015. (Tr.68-73, 76-80; AX B, Affidavit, dated April 10, 2018)

Applicant took no action on the fraudulent letter from January 2014 until October 2014. He did not inquire into the status of the account or receive any correspondence from the creditor from the time he determined the letter was fraudulent and his polygraph examination in October 2014. He did not tell his command or security investigators of the fraudulent payment letter until the October 2014 polygraph examination. He knew the letter had been submitted as part of the security clearance process and could have negative ramifications for his wife and his family. Instead of doing what he should have done, he kept it to himself until he was to undergo the polygraph examination. During the polygraph examination, he initiated the discussion about the fraudulent letter with the polygraph examiner. Applicant admitted his wife created the letter but he made the mistake of not reporting it. (Tr. 80-82)

A coworker testified that he has known Applicant since at least 2011 when they worked together for their present employer. From 2011 until 2014, he saw Applicant daily and served for a time as his supervisor. Since 2014, he sees him at least monthly at work and occasionally at social occasions. The witness stated that their employer has procedures for an employee to report any mistakes they make. Applicant makes mistakes as any employee but he has a reputation as a person who acknowledges and timely reports his mistakes. The witness understands the security concerns of the Government, and he recommends Applicant be granted a security clearance. The witness also provided an affidavit in support of granting Applicant a security clearance (Tr. 27-32; AX C, Affidavit)

A project manager for Applicant's employer testified that Applicant has worked for her since July 2016. She also provided an affidavit in support of granting him a security clearance. She has a good friendly working relationship with Applicant. Applicant is a good technical employee who delivers his work requirements on time or ahead of schedule. She testified about an incident where data was copied to the wrong media, and Applicant immediately reported the breach and assisted in securing the data. She also selected Applicant to work on a special security project. She opined that Applicant is trustworthy, hard-working, and technically competent. She has high regard for Applicant's honesty and ability to understand and adhere to security rules. (Tr. 34-42; AX E, Affidavit)

Applicant also introduced three letters of recommendation. The authors of the letters were aware of the Government security concerns. They have known Applicant for a few years and worked with or supervise him. They wrote that Applicant is trustworthy, honest, reliable, and demonstrates good judgment. He demonstrates good character, patriotism, and a willingness to properly manage classified information. They

all recommend that he be granted eligibility for access to classified information. (AX D, F, and G)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the Administrative Guidelines. 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 the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense 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 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. 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 applicant or proven by department counsel. . ." The applicant has the burden of persuasion to obtaining 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 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.

Analysis

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 and sensitive information. Personal conduct is always a security concern because it asks whether the person's past conduct justifies confidence the person can be trusted to properly safeguard classified or sensitive information. (AG ¶ 15).

Applicant's failure to timely return computers to his children's school after repair does not raise a security clearance concern. The incident did not raise an issue of questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, or question his reliability, trustworthiness or his ability to protect classified and sensitive information. The evidence clearly shows that Applicant merely forgot about the computers since they were clearly out of sight and out of mind. The computers were not used while they were under Applicant's control. As soon as he learned that he had the computers in his possession, Applicant requested guidance from the school how to dispose of the computers. I find that SOR allegation 1.a was not established as a security concern and that allegation is found for Applicant.

Applicant's failure, however, to timely report that a document he submitted during his security clearance process was false raises the following disqualifying conditions under AG ¶16 (b) (deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.)

I considered the following Personal Conduct Mitigating Conditions under AG ¶17:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes 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; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressor, circumstances, or factors that contributed to untrustworthy, unreliable, or other appropriate behavior, and such behavior is unlikely to recur.

The mitigating conditions do not apply. Applicant's wife drafted an erroneous receipt for dental services for him to show during an update on his security clearance to establish that the debt had been paid and resolved. Applicant had no role in drafting the erroneous receipt and did not know at the time he submitted it that it was a false document. Later, he became suspicious that the document was false because his wife had previously provided him a false tax document. His wife's actions placed Applicant in a dilemma. He had to choose between revealing his wife's action and the potential resulting consequences for her, and the requirement to be honest and truthful during the security clearance process. He chose not to report the false document to his employer or the security officials until he knew the truth would surface during a polygraph examination. He did not make a prompt good-faith effort to correct the concealment before he knew he would be confronted with the facts.

I take note that Applicant had a difficult decision to make. He either had to reveal his wife's role in creating a false document or not report that he provided the security officials with a false document. He chose not to walk on the side of protecting classified information but to hide his wife's role in creating the false document. In his requirement to protect classified or sensitive information, Applicant can very well face a similar dilemma. He must always resolve any issue on the side of protecting classified information. His decision not to reveal the false document raises questions about his judgment, lack of candor, dishonesty, reliability, trustworthiness, and ability to protect classified or sensitive information. He failed to mitigate the personal conduct security concern for not timely revealing that he used a false document.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for access to classified information 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for access to classified information must be an overall common-sense 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 considered Applicant's over 20 years of working for defense contractors while having access to classified information. Applicant's failure to timely report that he provided a false document during the security clearance process shows questionable judgement, untrustworthiness, unreliability, unwillingness to comply with rules and regulations, and other characteristics to indicate that he may not properly safeguard classified or sensitive information. Applicant was faced with a dilemma and had to choose between his family obligations and his role to protect classified information. He did not chose the path to protecting classified information. The facts in evidence do not mitigate any questions and doubts about Applicant's judgment and his suitability for access to classified information. I conclude that Applicant did not mitigate personal conduct security concerns. Eligibility for access to classified information is granted.

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

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.

THOMAS M. CREAN
Administrative Judge