



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [REDACTED]) ISCR Case No. 17-04230
)
 Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: *Pro se*
09/12/2019

Decision

MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 23, 2015. On January 24, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline E. The DOD CAF acted 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 June 8, 2017.

Applicant answered the SOR on February 14, 2019, and requested a decision on the record without a hearing. On May 31, 2019, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM) including documents identified as Items 1 through 6. He was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government's evidence. He received the FORM on June 11, 2019, and timely submitted two responses, dated July 12, 2019 (FORM Response 1) and July 17, 2019 (FORM

Response 2), to which the Government did not object. Item 1 contains the pleadings in the case. Items 2 through 6 are admitted into evidence. I admitted the attachments to Applicant's SOR answer and FORM responses as Applicant Exhibits (AE) A through F. The case was assigned to me on August 7, 2019.

Procedural Matter

Item 4 is a counterintelligence screening questionnaire that was not authenticated as required by Directive ¶ E3.1.20. However, I conclude that Applicant waived any objection to Item 4. In a section entitled "**NOTICE TO APPLICANT**," the Government notified Applicant of his right to object to the admissibility of Item 4 on the ground that it was not authenticated. In that section, Applicant was also notified that if he did not raise any objection to Item 4 in his response to the FORM, he could be considered to have waived any such objection, and that Item 4 could be considered as evidence in his case. Neither of Applicant's responses to the FORM raised any objection to Item 4.

Findings of Fact

Unless otherwise indicated by citation to another part of the record, I have extracted these findings of fact from Applicant's SOR answer (Item 1) and his SCA (Item 2).

Applicant, age 50, is unmarried without children. He immigrated to the United States in 1999 and became a naturalized U.S. citizen in 2010. He completed an air conditioning technical training program in Iraq in 1991. He attended a U.S. college from 2001 through 2004, but did not earn a degree. (Item 3 at 5)

The record does not establish when or if Applicant was previously granted a security clearance, or for how long he has worked for his current security clearance sponsor. Applicant's background was investigated twice: by DOD in 2015; and by another government agency in 2008. However, the results of those investigations were not specified in the record. (Item 2; Item 4)

The record does not specify Applicant's employment history after he completed his 2015 SCA. When he completed his SCA, he was sponsored by a defense contractor for a linguist position. However, he never worked for the defense contractor because the employment contract that he signed "had too many errors on the form." After completing his SCA, he was fired from a security guard job by another employer for failing to perform his assigned duties. He refused to perform janitorial services that he believed were not part of his job description. (Item 3 at 6 and 15)

The SOR alleged that Applicant was involuntarily terminated three times between 2009 and 2015, and his subsequent lack of candor about those terminations in his SCA and during two security clearance interviews. In his SOR answer, Applicant admitted each termination, but denied any deliberate intent to omit, conceal, or falsify information during the security clearance investigations process.

Applicant was terminated by Employer A in 2009, by Employer B in 2014, and by Employer C in 2015. Neither Employer A nor Employer B specified the reason for the termination in the record. However, Employer A did verify that Applicant was involuntarily terminated. Employer C's reason was that, during his probationary period, Applicant instigated a heated verbal argument and refused to cooperate with his supervisor's inquiries about the incident. (Item 3 at 7, 12-15; Item 5; Item 6)

When reporting facts concerning his employment with Employers A through C in his SCA, Applicant provided benign reasons for leaving: "looking for work in a different field" (Employer A) and "looking for better paying job" (Employers B and C). He answered "No" to specific questions about whether he had been: fired, quit after being told he would be fired, or left by mutual agreement following either charges or allegations of misconduct or notice of unsatisfactory performance. He also answered "No" to specific questions about whether he had received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace.

Applicant was interviewed by a DOD authorized investigator twice in connection with his security clearance application: in July 2015 (Interview 1); and in February 2016 (Interview 2). During Interview 1, he initially denied any employment problems. He reiterated that he left his job with Employer A to look for work in a different field. He was employed by Employer A as a linguist supporting troops in Iraq. Eventually he disclosed that a confrontation he had with a military member led to his separation from Employer A. He did not report the termination on his SCA because he believed that he had been "more or less laid off." He denied any wrongdoing in the confrontation and asserted that the confrontation was not the real reason that Employer A could not "keep him," but rather the result of a reduction of troops in Iraq. (Item 3 at 7)

After the discussion about Employer A, Applicant was asked on multiple occasions during Interview 1 if he had any other employment problems to include personality conflicts, which he denied each time. He reiterated that he left his job with Employer B to look for a better paying job. He also explained that his job with Employer C was only a temporary assignment that lasted approximately two to three weeks. (Item 3 at 7)

Interview 2 was conducted to discuss Applicant's previously unadmitted employment problems. During Interview 2, when asked why he left his job with Employer A, Applicant acknowledged that he had been fired by Employer A for refusing to accept a shift change. He denied ever being reprimanded by Employer A for several incidents with which the investigator confronted him. There was no discussion reported about the confrontation he described during Interview 1. (Item 3 at 12, 14-15)

Applicant was employed as a full-time armed security officer by Employers B and C. During Interview 2, when asked why he left his jobs with Employers B and C, he initially reiterated that he left to look for a better paying jobs and maintained that he had never had any problems to include receiving verbal or written reprimands or being terminated. After the investigator confronted him with specific facts, he admitted that he was fired by Employer B after being accused of abandoning his post without authorization, and by Employer C after being accused of having a verbal altercation with another employee. In

both instances, he denied any wrongdoing and claimed that the employers had misconstrued events. During Interview 2, he repeated the same rationale for not reporting the three terminations on his SCA: that he did not feel he was required to disclose what he believed were minor issues. (Item 3 at 12-15)

In his SOR answer, Applicant admitted the facts as alleged in the SOR about his terminations by Employers A through C. However, he denied that he had “in [his] mind” a previous planned intention to “deliberately” fail to disclose or falsify that information on his SCA or during his security clearance interviews. He asserted that the terminations were “very private in nature” and that he was “uncertain” whether he was required to reveal “very private matters.”

In support of his claim that he is trustworthy, loyal, and reliable, Applicant attached to his SOR answer four recommendation letters, dated between April 2008 and March 2009, from members of the U.S. Army battalions that he served as a linguist while in Iraq. The undersigned uniformly praised his exceptional work performance and trustworthiness. Applicant risked his personal safety to assist coalition forces combat and defeat enemy insurgents within the region. (AE A through D)

Applicant asserted favorable facts concerning his character and financial stability in FORM Response 1. He also included a reference from the facility security officer of his current sponsor. She stated that Applicant “has a long history” with the company and has been a “valuable asset.” Applicant’s father, who received numerous accolades for his own service as a linguist, provided a favorable character reference in FORM Response 2. He described Applicant as a “trustworthy, reliable, dependable, [and] loyal son.” (AE E and F)

Policies

“[N]o one has a ‘right’ to a security clearance.” (*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)). As Commander in Chief, the President 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.” (*Egan* at 527). The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” (EO 10865 § 2).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

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 about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” (EO 10865 § 7). Thus, a decision to deny a security clearance is merely an indication the applicant 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. (*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 therein and an applicant’s security suitability. (ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993)). 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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005)).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” (ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002)). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” (*Egan*, 484 U.S. at 531; AG ¶ 2(b)).

Analysis

Guideline E: Personal Conduct

The concern under this guideline is set out in AG ¶ 15:

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 national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

Appellant's three involuntary terminations, his failure to report them on his SCA, and his lack of candor about them during two security clearance interviews establish the general concerns involving questionable judgment and unwillingness to comply with rules and regulations, and the following specific disqualifying conditions:

AG ¶ 16(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 national security eligibility or trustworthiness, or award fiduciary responsibilities; and

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.

When a falsification allegation is controverted, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an Appellant's state of mind at the time of the omission. An applicant's level of education and experience are relevant to determining whether a failure to disclose relevant information on a security clearance application was deliberate.

I did not find credible Applicant's explanations and excuses for his lack of candor about his three involuntary terminations. Regardless of whether he agreed with the underlying rationales or motives, at the time he completed his SCA and during the interviews, Applicant knew that he had been terminated by Employers A through C and chose not to report them. Accordingly, I find substantial evidence of an intent on the part of Applicant to omit and conceal that information at multiple stages of the security clearance investigations process. Therefore, AG ¶ 16(a) is established.

Neither of the following potentially relevant mitigating conditions under this guideline are established:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

AG ¶ 17(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.

An applicant's completion of a security questionnaire is the initial step in requesting a security clearance and the investigative process is contingent upon the honesty of the applicant. Beginning with an applicant's responses in the application,

The security clearance investigation is not a forum for an applicant to split hairs or parse the truth narrowly. The Federal Government has a compelling interest in protecting and safeguarding classified information. That compelling interest includes the government's legitimate interest in being able to make sound decisions (based on complete and accurate information) about who will be granted access to classified information. An applicant who deliberately fails to give full, frank, and candid answers to the government in connection with a security clearance investigation or adjudication interferes with the integrity of the industrial security program. ISCR Case No. 01-03132 at 3 (App. Bd. Aug. 8, 2002).

Applicant's termination history, both before and after he completed the SCA, raises concerns about his judgment and willingness to comply with rules. But, the security significance of the terminations lies predominantly with Applicant's lack of candor about them during the investigations process. The belated admission about his termination by Employer A during Interview 1 was troublesome. However, even more egregious, was the fact that he only acknowledged the terminations by Employers B and C after much prodding over the course of two separate interviews. I have serious doubts about Applicant's reliability, trustworthiness, and good judgment.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether the granting or continuing of national security eligibility is clearly consistent with the interests of national security must be an overall common sense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole person. In evaluating the relevance of an individual's conduct, an 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.

I have incorporated my comments under Guideline E in my whole-person analysis, and I have considered the factors AG ¶ 2(d). I considered his favorable character references and the risks to personal safety that he endured while commendably serving U.S. troops in Iraq. However, after weighing the disqualifying and mitigating conditions under Guideline E, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated the security concerns raised by his deliberate lack of candor during the security clearance investigations process. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline E: AGAINST APPLICANT

Subparagraphs 1.a – 1.f: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge