



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 04-08547
SSN:)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: *Pro Se*

August 28, 2008

Decision on Remand

HOWE, Philip S., Administrative Judge:

On February 26, 2003, Applicant submitted his Security Clearance Application (SF 86). On June 2, 2005, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline F (Financial Considerations). 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). The previous adjudicative guidelines, effective until September 1, 2006, applied to that SOR. This case has taken three years to arrive at its current status, and the **Procedural History** section of this **Decision** sets forth that chronology. The guideline at issue in this part of the case is Guideline E (Personal Conduct). Because the amended SOR containing this guideline was issued on August 8, 2006, I apply the previous Guideline E to this case also.

This part of the case occurred because the original administrative judge assigned the case denied the Government's motion to amend the SOR to include two Guideline E

allegations. The Government appealed the case to the DOHA Appeal Board, which upheld the favorable decision on the Guideline F allegations, but ordered the Guideline E allegations to be considered by another administrative judge. Therefore, this case is a remand by the Appeals Board. On January 16, 2008, another administrative judge entered an Order granting the Government's Motion to Amend the SOR to add the Guideline E allegations. Applicant was given 30 days from January 16th to answer the amended SOR. (Item 9)

Applicant's receipt for the current SOR is dated February 9, 2008. He answered the SOR in writing on that date. He denied the allegations and requested a hearing. Then, on March 30, 2008, Applicant withdrew the hearing request, and instead, asked that his case be decided on the written record in lieu of a hearing. (Items 10-12)

On May 13, 2008, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) was provided to the Applicant. He was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the file on June 19, 2007. Applicant filed a response to the FORM on July 5, 2008. I received the case assignment on July 14, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural History

1. SOR issued June 2, 2005.
2. Applicant acknowledged receipt of SOR on June 9, 2005. He filed his Answer on June 24, 2005. He requested a hearing.
3. On May 5, 2006, and on May 11, 2006, the Department Counsel sent Applicant the Government's discovery package.
4. On May 15, 2006, Applicant withdrew his hearing request and asked for a determination on the written record (FORM). (Item 6)
5. On August 8, 2006, the Government filed its initial FORM in this case.
6. In the FORM, the Government moved to amend the SOR to add Guideline E and two allegations under that guideline. These amendments were based upon documentary evidence the Government had forwarded to the Applicant in discovery in May 2006.
7. Applicant filed a Reply to the Government's Initial FORM on September 18, 2006. In his Reply, Applicant answered the new allegations the Government had moved to add to the SOR. He objected to the addition of the Guideline allegations. The Government argued that Applicant had been made aware of

these new security concerns for over a month and had the documents supporting these new allegations for over four months. (Item 7)

8. On October 31, 2006, the first administrative judge assigned to the case issued a decision wherein he denied the Government's Motion to Amend the SOR to include the Guideline E allegations. The administrative judge found for the Applicant on the Guideline F allegations. That decision is not included in this FORM and I have not read it elsewhere. The 2005 SOR is Item 1 in this FORM.

9. On August 30, 2007, the Appeal Board remanded the judge's decision to another administrative judge. On appeal the Government did not challenge the administrative judge's favorable finding for Applicant under Guideline F and, thus, that portion of the Judge's decision was affirmed. The Appeal Board remanded the decision to: (a) allow the Government to amend the SOR to add allegations under Guideline E; (b) provide Applicant the opportunity to answer the new allegations and request a hearing on those new allegations, and (c) recommended a second administrative judge be assigned to the case, because it appeared the first assigned administrative judge had already prejudged the Government's case under Guideline E.

10. On October 9, 2007, Applicant received a copy of the Appeal Board's Remand Decision. (Item 10)

11. On January 16, 2008, the second administrative judge assigned the case issued the current Order granting the Government's motion, and setting an Answer date. (Item 9)

12. On February 9, 2008, Applicant submitted his "Response to Amended Statement of Reasons". Applicant again denied the allegations and provided additional information, including a "copy of the results from a voluntary personality test". With his Response, Applicant requested a hearing to address the Guideline E concerns. (Items 10-12)

13. In light of Applicant's request for a hearing, the case was transferred to another Department Counsel responsible for the region in which the case was to be heard.

14. On March 30, 2008, Applicant sent a letter retracting his request for a hearing and once again wishing to proceed solely on the written record. (Item 12)

15. On April 14, 2008, the case was transferred back to the original Department Counsel for preparation of the Second FORM in this case.

16. The Amended SOR reads as follows:

“2. Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. Available information raising this concern shows that:

a. You falsified material facts in response to allegation 1.c. of the Statement of Reasons, dated June 2, 2005, which alleges that “You are indebted to VW Credit Inc. (account #803126881), in the approximate amount of \$23,404.00, the balance owed after resale of your automobile which had been repossessed for nonpayment in October 2000. As of November 21, 2003, this debt had not been satisfied,” when in your Answer, signed June 24, 2005, you stated that: “I deny the above statement. The account with VW Credit was filed with bankruptcy courts. I contacted VW Credit Recovery Department (866)623-8350 spoke with Ron and confirmed this information. Balance due after sale of automobile was estimated to be \$9,000.00 as reported by Ron at VW Credit Recovery Dept. According to the credit report dated 06-09-2005, this account has been closed.” You knew said response in your Answer was false at the time you made it, because you did not include this vehicle and the specific debt with VW Credit Inc., to wit: account #803126881, with your bankruptcy petition.

b. You were discharged from the United States military on March 8, 2000, because of concerns regarding your judgement (sic) or reliability with regards to safeguarding classified national security information or special nuclear information material.” (Item 9)

17. Applicant submitted his Answer to the Amended SOR on February 9, 2008. He denied the allegation of falsification contained in Paragraph 2.a. of the Amended SOR. He contends that he had no other information in his possession showing he owed any money on a debt for a Volkswagen automobile. He states his bankruptcy petition shows this vehicle being listed on it. He concludes the debt was discharged in bankruptcy. (Items 6 and 7)

18. Applicant denied the allegation in Paragraph 2.b. of the Amended SOR based on the contents of his DD 214 showing an “Honorable Discharge” for a “Personality Disorder.”

19. Applicant submitted a Response to the FORM on July 5, 2008. In that Response he requests a minimum of 12 months time within which “to get his financial affairs in order.” He further states his student loans are in “forbearance.” His other debts he has “started to make payments to those as well.” Applicant does not address or supply any information concerning the Guideline E allegations, only the Guideline F allegations which were the subject of the original SOR.

20. The administrative judge who rendered a decision in that FORM concluded the Guideline F allegations for Applicant, which decision was upheld by the DOHA Appeals Board. Those allegations are not at issue in this Remand Decision.

Remand Findings of Fact

In his Answer to the SOR, dated February 9, 2008, Applicant denied the factual allegations in ¶¶ 2.a, and 2.b, with explanations. In his Response to the FORM dated July 5, 2008, Applicant did not address the Guideline E allegations, but instead asked for at least 12 months “to get his financial affairs in order.” He also provided additional information to support his request for eligibility for a security clearance.

1. Applicant is 40 years old and divorced. According to his SF 86, he has no children. No evidence contained in the file shows he has remarried or has a family. His Response to the current FORM states a denial of his security clearance “will be placing (his) family literally homeless at this point.” He works for a defense contractor. In 2006 and 2008, he withdrew his requests for hearings and asked for the case to be decided on the written record because he was working outside the United States. (Items 5, 12, and 16)
2. Applicant purchased two Volkswagen (VW) automobiles in 1999. The first automobile he purchased in August 1999. It was the subject of loan #803126881 from VW Credit, Inc. This automobile was repossessed for non-payment under the loan in 2000. The balance due was \$23,404 as of March 7, 2003. In a credit report dated July 12, 2004, the balance on this repossessed automobile is shown as zero. The same amount is shown on the credit report of November 23, 2004. On August 4, 2006, the balance for this account is shown as zero. On two other credit reports in the file, including the last one dated April 18, 2008, this account is not shown. (Items 15, 18-23)
3. The second VW car was the subject of loan #803166657. Applicant bought the car in September 1999. Applicant’s credit reports show a balance due of \$12,677 on this loan. Applicant and his wife reaffirmed the debt on this car, and when they divorced, she received the car. Applicant and his wife had a written agreement incorporated into the divorce decree allocating the VW car to her. (Items 3 and 15)
4. Applicant’s filed a Chapter 13 Bankruptcy on May 1, 2001, which was later converted to a Chapter 7 Bankruptcy on May 22, 2001. Applicant listed \$220,196.78 in debt to be discharged in that bankruptcy action. Applicant listed the second VW car, loan #803166657, in the bankruptcy. It was listed on Schedule B as personal property. It was also listed on Schedule C as exempt property. Finally, he listed the car and loan on Schedule D because the VW Credit, Inc. was a creditor with a secured claim. Applicant did not list the first VW automobile, loan #803126881, for the repossessed car in the bankruptcy as a debt to be discharged. This loan was listed in Applicant’s Chapter 7 Bankruptcy

in the "Statement of Financial Affairs" section as a repossessed vehicle. This section of the bankruptcy petition is not a list of creditors sought to be discharged in the bankruptcy, but is a statement of current financial condition of the petitioners. The bankruptcy was discharged on September 12, 2001. (Items 3 and 15)

5. Applicant listed the repossession of his VW automobile on his SF 86 as occurring on October 31, 2000 (Question 35). The amount owed he listed as \$20,000. He did not list the outstanding balance due as a debt over 180 days delinquent in the past seven years (Question 38), nor as a debt on February 26, 2003, as currently over 90 days delinquent (Question 39) (Item 16)
6. Applicant gave a written statement to a Government investigator on November 21, 2003, in which he stated the VW automobile loan #803126881, was repossessed. He further stated that because the vehicle was sold by the dealership, "I have no intention in paying the outstanding balance as reflected on my CBR (credit bureau report)" His personal financial statement submitted with the statement did not show this debt as one which Applicant was paying on a monthly basis. (Item 17)
7. Applicant's Response to the original SOR stated, "The account with VW Credit was filed with bankruptcy courts. I contacted VW Credit Recovery Department (866)623-8350 spoke with Ron and confirmed this information. Balance due after sale of automobile was estimated to be \$9,000.00 as reported by Ron at VW Credit Recovery Dept. According to the credit report dated 06-09-2005, this account has been closed." This Response was notarized. Applicant represented thereby the information contained therein was accurate and true. (Item 6)
8. The U.S. Army administratively separated Applicant on March 8, 2000, with an Honorable Discharge on the grounds of a personality disorder. He served about seven years on active duty. During his active duty service in 1999, Applicant was referred to the base mental health clinic for an evaluation. The report of that evaluation, dated September 15, 2003, signed by a clinical psychologist, states Applicant was seen five times between July 28, 1999, and January 12, 2000, by the psychologist and administered psychological testing. The testing and consultations resulted in a report to Applicant's commander that he was experiencing a "Personality Disorder and recommended a Chapter 5-13 separation. His testing suggested feelings of being misunderstood, unappreciated, and demeaned by others. As a consequence of discontent and possible feelings of entrapment, he may act in a petulant, depressive, and passive aggressive manner, criticizing others for what he sees as their lack of support." Applicant's prognosis was "fair." The psychologist opined Applicant had a condition "that could impair his judgment or reliability, particularly in the context of safeguarding classified national security information or special nuclear information or material." Applicant disclosed this consultation on his SF 86 in Question 19. He admitted in his answer to that question that the consultation did

not relate only to marital, family or grief counseling. Applicant's Response to the Amended SOR, dated February 9, 2008, states the psychological evaluation was not a factor in his administrative discharge, but the reason "was all stimulated from personal and family issues. They were never a part of anything whatsoever to do with security concerns." (Items 10, 13, 14, 16, and 17)

9. Applicant submitted a personality test administered by his current employer on August 4, 2006, "to show how well (he is) doing overall." This personality test is not a psychological evaluation. The explanation at the beginning of the test results states, "This individual chose more socially desirable responses than average. This may reflect an accurate self-portrayal, an overly positive self-concept, or a deliberate presentation of a favorable image." The final two pages of the personality test list occupational fields for which Applicant might be compatible with his personality traits. Neither part of this personality test is a professionally administered psychological evaluation by a licensed clinical psychologist or psychiatrist. (Item 10) It is given little weight.

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 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 applicant or proven by Department Counsel, and has the ultimate burden of persuasion as 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.

Section 7 of Executive Order 10865 provides that 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).

Remand Analysis

Guideline E, Personal Conduct

The security concern relating to the guideline for personal conduct is set out in AG E2.A5.1.1:

Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

E2.A5.1.1.1 Refusal to undergo or cooperate with required security processing, including medical and psychological testing; or

E2.A5.1.1.2 Refusal to complete required security forms, releases, or 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.

Conditions that could raise a security concern and be disqualifying also include “reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances” (E2.A5.1.2.1) concerning an Applicant. Furthermore, “the deliberate omission, concealment, or falsification of relevant and material facts from any personal security questionnaire . . . used to conduct investigations, determine employment qualifications, . . . determine security clearance eligibility or trustworthiness” (E2.A5.1.2.2) may be applicable. Finally, “deliberately providing false or misleading information concerning relevant and material matters to an

investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination” (E2.A5.1.2.3) may be a concern in this case.

Applicant told the Government investigator in November 2003 that his VW automobile was repossessed and he had no intention of repaying the outstanding balance due on that car loan debt. In February 2003, Applicant disclosed the repossession, the amount (\$20,000) of the debt, but not that it was delinquent more than 90 and 180 days. Finally, in his Response to the original SOR, Applicant denied the debt owed on that his car. He stated, the debt was included in his 2001 Chapter 7 bankruptcy, and the amount owed according to the VW Credit, Inc. was \$9,000, with the additional statement that a credit report of June 9, 2005, showed the account was closed. The credit report in the FORM, Item 22, dated August 4, 2006, continues to show this debt as delinquent.

However, that car loan was not included in his Chapter 7 bankruptcy in 2001. It was merely mentioned as a historical item in the Statement of Financial Condition section, not on a schedule of debts to be discharged. The second VW car Applicant bought with his wife was included in the bankruptcy. The former wife got that car, and it continues to appear on Applicant’s credit record.

Applicant is the best person to know his debts, and their status. Until his Response to the FORM in 2005, Applicant consistently admitted the debt and that he was not going to repay it. Only on the Response does he start to claim, with no supporting documentation from VW Credit, Inc., that this first VW car debt was included in the 2001 bankruptcy. The burden is on Applicant to show the facts are true when he states them. While he could have merely denied the allegation in the SOR, he added language which is now shown to be untrue. Applicant has not supplied any objective evidence that the various credit reports are erroneous when they list the debt as owing in 2006 and earlier. Nor has he met his burden of proof to show VW Credit, Inc. was notified that the debt was included in the debts to be discharged. He makes statements with no supporting proof.

The Government also contends Applicant’s 2000 discharge from the Army, and the underlying reasons for it, is unfavorable information from his employer, which at that time was the U.S. Army. Applicant denies these allegations, claiming family and personal issues caused his discharge. But his disclosure in Question 19 on the SF 86 contradicts his answer and states that the psychological counseling was not due to family or marital issues. It is clear from the evidence Applicant was discharged in 2000 because of concerns about his judgment and reliability pertaining to the safeguarding of classified information.

I conclude the Government introduced sufficient evidence to support each of the three disqualifying conditions raised in this case. Now, the Applicant has the burden to provide evidence of the mitigating conditions under Guideline E.

There are seven potentially mitigating conditions which could apply. Because the unfavorable information was not unsubstantiated and was pertinent to a determination of judgment, trustworthiness, or reliability, E2.A5.1.3.1 does not apply. The falsification was not an isolated incident, was recent, and Applicant continues to contend in his subsequent Responses that his original SOR Response was accurate. Therefore, E2.A5.1.3.2 does not apply. Applicant has not made “prompt good-faith efforts to correct the falsification before being confronted with the facts,” so E2.A5.1.3.3 does not apply. The remaining four mitigating conditions, by their context and intent, do not apply to the facts and situation of this case.

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) 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 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. Applicant was an adult and a veteran with experience in filling out Government forms when he completed the SF 86 and answered the original SOR. There is a pattern of deception in the Responses he submitted. For example, he ignores the Guideline E issue in the latest Response, and instead focuses on the Guideline F issue, which was previously decided in his favor. He requests at least 12 months to get his finances in order so his family will not be homeless, but never submits any evidence he has family dependents. He admits in the SF 86 his counseling was not family or marital related, but now contends it was. He refuses to pay the delinquent debt for his 1999 VW car, but claims it was discharged in his 2001 bankruptcy when it was not a scheduled debt for discharge. His written statements are continuously false and misleading, designed to obfuscate and confuse, in his attempts to keep his security clearance. There is no rehabilitation or permanent behavioral change evident in his conduct.

Applicant chose not to have a hearing on his case, which was his option to do. However, I was not able to observe his demeanor, listen to his testimony, and judge his credibility because he did not present himself at a hearing where that process could occur. I could only evaluate the totality of the evidence as presented in writing in the FORM, and make a decision on that evidence alone.

Overall, the record evidence leaves me with substantial questions as to Applicant's eligibility and suitability for a security clearance. Any doubt about a security clearance is to be resolved in favor of the national security and not the individual (E2.2.2). For all these reasons, I conclude Applicant did not mitigate the security concerns arising from his personal conduct. I conclude the "whole person" concept against Applicant based on the continued pattern of mendacity and inconsistencies between his various Responses to the original SOR and amended SOR, the SF 86 answers, and the information he submitted in addition to these pieces of information.

Remand 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 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant

Remand Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

PHILIP S. HOWE
Administrative Judge