



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



In the matter of:)
)
-----) ISCR Case No. 06-19428
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Candace L. Le'i, Esquire, Department Counsel
For Applicant: *Pro Se*

June 3, 2008

Decision

HARVEY, Mark W., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline E (Personal Conduct). Clearance is denied.

Statement of the Case

On August 2, 2005, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) or Security Clearance Application (SF 86) (Item 4). On March 6, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him,¹ pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2,

¹Item 1 (Statement of Reasons (SOR), dated Mar. 6, 2008). Item 1 is the source for the facts in the remainder of this paragraph unless stated otherwise.

1992, as amended, modified and revised.² The SOR alleges security concerns under Guideline E (Personal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On March 27, 2008, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing (Item 2). A complete copy of the file of relevant material (FORM), dated April 21, 2008, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.³ Applicant responded to the FORM on May 27, 2008. The case was assigned to me on May 30, 2008.

Findings of Fact

Applicant admitted the sole SOR allegation. He knowingly carried a cell phone that included a camera feature into a sensitive federal facility, despite knowing it was in violation of physical security policies. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 27 years old.⁴ He graduated from high school in 1995. He attended a university from August 1999 to May 2004, and received a bachelor of science degree in criminal justice. He began working in security services for a federal contractor in January 2005, and in 2008 he was a shift supervisor (Item 5). He has never married. He has not served on active duty in the U.S. military. According to Sections 11 and 22 of his SF 86, his employment as a childcare supervisor in August 2004 ended under adverse circumstances. He explained, "I was regrettably asked to resign due to a poor decision during a particular situation." The file does not contain additional information about this employment resignation. In Section 24, he admitted that he used marijuana six times and cocaine twice while in college. On May 10, 2006, he told an Office of Personnel Management (OPM) investigator that he used cocaine five times to ten times in college, but he could not remember more than two occasions (Item 5 at 2-3). He also

²On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are applicable to Applicant's case.

³Defense Office of Hearings and Appeals (DOHA) transmittal letter, is dated Apr. 23, 2008; and Applicant's receipt is signed and dated Apr. 30, 2008. The DOHA transmittal letter informed Applicant that he had 30 days after Applicant's receipt to submit information.

⁴Item 4 (2005 security clearance application) is the source for the facts in this paragraph, unless stated otherwise.

admitted frequent, binge alcohol consumption in college, and driving while intoxicated on about 10 occasions in college (Item 5 at 3-4). He told an OPM investigator in 2006 that he drinks alcohol to intoxication about once a month, but does not drive while intoxicated (Item 5 at 4-6). The last time he was intoxicated by alcohol was August 4, 2007 (Item 5 at Interrogatory 9b). By 2008, he had reduced his alcohol consumption to twice a month, six beers per occasion. *Id.* He denied that he had ever been arrested, and did not provide any other information that reflected adversely on his judgment. Because he did not receive notice in the SOR concerning his illegal drug use, falsifying his SF 86 by understating his cocaine use, his 2004 employment resignation, and excessive alcohol consumption, such adverse information will not be used as part of this security clearance determination.

Personal Conduct

The SOR lists one allegation. Applicant knowingly carried a cell phone that included a camera feature into a sensitive federal facility, despite knowing it was in violation of physical security policies. An organizational instruction for physical security approved in May 2007 states, "Cell phones that include a camera feature are **prohibited** in all [organizational] facilities" (emphasis in original). (Item 6 at ¶ 7k(1)(a)). Appendix 3 reiterates:

2. Items not permitted in [organizational] facilities unless expressly permitted **in writing** for official reasons. These items may be approved **in writing** with restrictions.
 - a. Photography and imagery equipment and media such as cameras or cell phones with camera capability.

Emphasis in original.

An OPM investigator interviewed Applicant on May 10, 2006, August 23, 2007, and September 18, 2007.⁵ On May 10, 2006, he succinctly described the possession of a camera-cell phone:

When questioned as to the best telephone number to reach him, the subject gave his cell phone number. The subject volunteered that he has his cell phone on him at all times during the day, to include when he is working as a security guard at the [sensitive federal government site]. The subject also volunteered that his cell phone has a camera in it. He volunteers that he keeps the phone on his belt unless he is going into a [restricted building], when he puts the phone in his pocket. The subject volunteered that having a camera phone inside [the restricted building] is not allowed, but assumes that as long as no one sees the phone, no

⁵ On January 9, 2008, Applicant swore that the information in his three OPM interviews was accurate. Item 5 is the source for the facts in this paragraph unless stated otherwise.

consequences will be incurred. Subject plans to continue carrying his cell phone in his pocket whenever he is inside the [restricted building] unless otherwise directed.

Item 5 at 3.⁶ At his OPM interview on August 23, 2007, he elaborated that as part of his duties he provides security briefings, which include telling employees that they are not permitted to have their personal cell phones turned on while in [restricted buildings].

At his OPM interview on September 19, 2007, Applicant admitted he brings his camera-cell phone inside restricted buildings even though he knows such conduct is prohibited by official policy. He asserted there was an unofficial policy that permitted such conduct. He does not always turn-off his cell phone when inside restricted buildings because sometimes he forgets and enters a building without turning it off. The telephone feature on personal cell phones does not work because of the metals in the restricted building's walls. The policy on camera-cell phones is strictly enforced with visitors, but employees can retain a camera-cell phone as long as it is out of sight. He carries his camera-cell phone because the official policy is not enforced. Applicant does not have access to classified materials. He plans to continue to carry his camera-cell phone in restricted buildings. If his supervisors told him not to continue his practice of carrying his camera-cell phone into restricted buildings, he would comply with that directive.

In his response to the FORM, Applicant stated:

I have not carried my camera phone into the building since I was made aware that it was not allowed, even if the phone is turned off. The few times that it was carried into the building, it was turned off including during any time that I had to unexpectedly go into the building and did not have a chance to put the phone in my car beforehand. When the phone was brought into the building, it was without a doubt an oversight on my part and it has not happened nor will it ever happen again.⁷

Applicant is respected by his fellow security officers.⁸ His integrity and honesty have not been questioned or doubted. He is a responsible and trusted member of the security staff. He is a dedicated, highly-motivated professional. He has a positive, cheerful, helpful attitude. He takes pride in his work, and has shown firm and fair qualities when disciplining subordinates.

⁶ The agency policy concerning camera-cell phones in effect when Applicant made his 2006 admission is not part of the record. His subsequent admissions about on-going possession of his camera-cell phone occurred after the May 2007 policy that was included in the record became effective.

⁷ I specifically find that he knowingly and deliberately brought his camera-cell phone into sensitive buildings, and his statement that his violation was unintentional is disingenuous.

⁸ Applicant's FORM response includes three letters of support. One is from a peer and two are from security supervisors. These three letters are the sources for the facts in this paragraph.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised 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 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 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.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence,"⁹ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).¹⁰

⁹ See Directive ¶ E3.1.14. "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 record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ 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).

¹⁰ "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the

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* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the relevant security concern is under Guideline E (Personal Conduct). AG ¶ 15 articulates the security concern relating 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 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 provides two Personal Conduct Disqualifying Conditions that could raise a security concern and may be disqualifying in this case. AG ¶¶ 16(c), 16(d)(1) and 16(d)(3) provide:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse

Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

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 . . . ; [and] (3) a pattern of . . . rule violations.

Applicant's history of knowingly and deliberately violating a physical security rule concerning carrying a camera-cell phone into restricted buildings is documented in his OPM interview and his SOR response. His response to the FORM, in which he denied the violations were deliberate, is not credible. Because this is a rule violation, as opposed to violating several adjudicative guidelines, it does not qualify as "credible adverse information in **several** adjudicative issue areas . . ." (emphasis added) and AG ¶ 16(c) does not apply. However, his rule violations are clearly untrustworthy and unreliable behavior, as well as "a pattern of . . . rule violations," meeting the disqualifying condition in AG ¶¶ 16(d)(1) and 16(d)(3).

Seven Personal Conduct Mitigating Conditions under AG ¶¶ 17(a)-(g) are potentially applicable:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. 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;
- (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;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;
- (f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

AG ¶¶ 17(a) and 17(b) do not apply because the SOR does not allege that Applicant falsified a security document or failed to cooperate with a security investigation. AG ¶¶ 17(f) and 17(g) do not apply because his rule violations were substantiated, and his rule violations were not caused or related to association with criminals. Moreover, his rule violations do cast doubt on his “reliability, trustworthiness, judgment, or willingness to comply with rules.”

AG ¶¶ 17(c)-17(e) do not fully apply. His rule violations are serious, and continued up to about a year ago. He carried his camera-cell phone into restricted areas on many occasions from 2005 to 2007. His conduct shows a deliberate disregard for compliance with rules designed to protect security. These violations are particularly egregious in light of his responsibility as a shift supervisor on the security force to enforce security rules. His rule violations are likely to recur and do cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 17(d) partially applies because he has acknowledged his rule violations. Although he did not obtain counseling to change the behavior, his promise not to carry his camera-phone into restricted areas is a positive step toward alleviation of “the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior.” AG ¶ 17(e) partially applies because he has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress by admitting the rule violations.

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.

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. AG ¶ 2(c).

Applicant's record of good employment, aside from the rule violations at issue, weighs in his favor. Two supervisors and one peer lauded his hard work and professionalism as an employee. His youth and inexperience as an employee supports approval of his clearance. There is no evidence of any other security issues. Aside from his rule violations (which are not a criminal issue), he is a law-abiding citizen.¹¹ He completed his college education, and earned his bachelor of science degree. These factors show some responsibility, rehabilitation, and mitigation.

The evidence against mitigating Applicant's conduct is more substantial. Applicant was well aware of his security responsibilities. He knowingly chose not to comply with those security responsibilities. His decision to start abiding by security rules was too recent, when compared to the multiple, deliberate rule violations. Moreover, his claim in his FORM response that the violations were inadvertent is not a candid and full acceptance of responsibility.

After weighing the disqualifying and mitigating conditions, all the facts and circumstances, in the context of the whole person, and on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude personal conduct security concerns are not mitigated, and he is not eligible for access to classified information.

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:	Against Applicant

Conclusion

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

Mark W. Harvey
Administrative Judge

¹¹ As indicated in the Findings of Fact, *supra*, his drug use, falsification of his security clearance application, excessive alcohol consumption and driving while intoxicated by alcohol offenses are not factored into this whole person analysis because of lack of notice.