



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



In the matter of:)	
)	
)	ISCR Case No. 13-00454
)	
Applicant for Security Clearance)	

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: Reginald Jones, Personal Representative

01/22/2014

Decision

ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the record, I conclude that Applicant failed to mitigate security concerns under Guideline E, Personal Conduct. Applicant's eligibility for a security clearance is denied.

Statement of the Case

Applicant completed and certified an electronic questionnaire for investigations processing (e-QIP) on November 20, 2008. On May 8, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal Conduct. DOD acted under Executive Order 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) effective within DOD for SORs issued after September 1, 2006.

Applicant provided a notarized answer to the SOR, dated May 22, 2013.¹ In his answer, he provided additional information. On October 11, 2013, the case was assigned to me for a hearing. I convened a hearing at the Defense Office of Hearings and Appeals (DOHA) on November 8, 2013, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Soon after his hearing was convened, Applicant, who was represented by a personal representative, requested a continuance in order to obtain an attorney to represent him. Department Counsel objected to Applicant's request because Applicant had not informed the Government of his intention to request a continuance until a short time before the hearing began. After discussing the matter on the record with the parties, I granted Applicant a continuance for one week to obtain counsel. Applicant agreed to the one week continuance and stated that he would ask his personal representative to represent him when his hearing resumed if he was unable to secure the services of an attorney.

On November 15, 2013, I reconvened Applicant's hearing, as the parties had agreed. Applicant stated that he was unable to retain counsel but would be represented by his personal representative. The Government called no witnesses and introduced six exhibits, which were marked as Ex. 1 through 6. Government Ex. 1, Ex. 2, Ex. 5, and Ex. 6 were entered in the record without objection. Government Ex. 3 and Ex. 4 were entered in the record over Applicant's objection. Applicant testified and called one additional witness. He introduced four exhibits, which were identified and marked as Applicant's Ex. B² through Ex. E. After discussion with the parties, I admitted Ex. B and Ex. C, with the understanding that they were of limited probative value. Applicant's Ex. D and Ex. E were entered in the record without objection. DOHA received the transcript for the November 8 hearing on January 14, 2014 (Tr. 1). DOHA received the transcript for the November 15 hearing on November 22, 2013 (Tr. 2).

Findings of Fact

The SOR contains three allegations of disqualifying conduct under Guideline E, Personal Conduct (SOR ¶¶ 1.a. through 1.c.) In his Answer to the SOR, Applicant admitted the SOR allegations at ¶¶ 1.a. and 1.b. with explanation. He denied, with explanation, the allegation at SOR ¶ 1.c. Applicant's admissions are entered as findings of fact. (SOR; Answer to SOR.)

Applicant is 42 years old. He married for the first time in 1994, and he and his first wife divorced in 2004. He married for the second time in 2005, and he and his second wife divorced in 2007. Applicant is the father of three children, ages 21, 20, and 9. Applicant is obligated to pay child support for the youngest child, who resides with her mother. (Ex. 1; Tr. 2, 76-78.)

¹ With his answer, Applicant initially requested adjudication on the record. His request is identified as Hearing Exhibit (HE) 1. Later, Applicant requested a hearing. (Tr. 1, 9-10.)

² Applicant's Ex. A was attached to his answer to the SOR, and it was marked and entered in the record, without objection, at his hearing on November 8, 2013. (Tr. 1; Tr. 2, 30-31.)

In 1989, Applicant enlisted in a branch of the U.S. military, where he served on active duty and in the reserve force. He received an honorable discharge. In 1995, Applicant graduated from college, *summa cum laude*, after earning bachelor's degrees in business administration and computer science. In 1997, he attended officer candidate school and was commissioned as a lieutenant in another branch of the U.S. military. He was first awarded a security clearance in 2005. He was subsequently employed by government contractors from March 2008 until September 2012. He seeks reinstatement of his security clearance. (Answer to SOR; Ex. 1; Ex. A; Ex. D; Ex. E.)

In September 2012, while working as a government contractor, Applicant forged his second-level supervisor's signature on a work order form. When he initially presented the work order to a budget officer, he was told that the signature of a person with signing authority was required to authorize the work. Applicant knew he did not have signing authority, but he signed the supervisor's name to the work order. He testified that the work order was not for a critical matter, and it could have waited for the signature of the official authorized to sign it. (Tr. 2, 65-72, 92-93.)

The budget officer reported Applicant's action to his supervisor. After learning of Applicant's action, his supervisor suspended him from work that day and sent him home. The next day, Applicant was told not to report for work. He was laid off, and his security clearance was suspended. Applicant's forgery is alleged at SOR ¶ 1.a. (Ex. 2; Tr. 2, 86-94.)

Applicant denied any malicious intent in forging the supervisor's name, and he attributed his action to being forward thinking. He also stated that he had made a bad decision. (Tr. 2, 89-94.)

The SOR alleges at ¶ 1.b. that Applicant's personal conduct brought him before a military tribunal in July 2006. At that proceeding, Applicant was charged with three violations of the Uniform Code of Military Justice (UCMJ). Specifically, Applicant was charged with two violations of Article 107, False Official Statement, and one violation of Article 134, Pandering and Prostitution, for conduct which occurred in April 2006. Applicant received as non-judicial punishment a letter of reprimand and a fine of one half of a month's pay.

The facts that gave rise to the charges brought against Applicant are as follows: In the early morning hours of April 1, 2006, Applicant, who was having marital difficulties with his second wife, was driving in his automobile. He stopped a woman he saw walking on the street and invited her into his automobile. The woman agreed to have sexual intercourse with him, and Applicant drove the woman to a motel, where he registered and paid with a credit card. He and the woman had sex, Applicant gave her \$30, and then they left the motel in Applicant's automobile. Once back in his automobile with the woman, Applicant was driving erratically and he was stopped by a police officer. Other police officers also arrived at the scene. (Ex. 3; Tr. 94-104.)

The officers ran a check of Applicant's driver's license and determined that he was driving with a suspended license. He was given a citation and released.³ The officers recognized the woman with Applicant as a known prostitute and drug user, and after running a warrant check, they discovered a no-bail warrant for her arrest. A search of Applicant's automobile revealed hypodermic needles and a small bag of methamphetamine, which the woman admitted putting in Applicant's automobile. She was arrested and jailed. (Ex. 3; Tr. 104-108.)

Applicant's superior officer was notified of his detention by police. He obtained the police report of the incident, and the next day he called Applicant in for a discussion and drug test. In that interview, Applicant told his superior officer that he was detained by police when he was taking a young woman home from a party that he and she had attended. He said he had no idea she was a prostitute and drug user. He further stated that "nothing happened" between him and the woman and "he was just giving her a ride home." (Ex. 3.)

Two days later, Applicant met with his commanding officer. He told the commanding officer that he had given a young woman he did not know a ride home from a party. He told the commanding officer that inferences that he had engaged the woman as a prostitute were inaccurate. (Ex. 3.)

In their official statements in the investigative record, neither officer reported being told by Applicant that he had marital difficulties. Applicant was interviewed several days later by a special military investigative agent about the incident. Initially, he did not tell the agent about his liaison with the prostitute at the motel. When asked at his hearing why he did not discuss his relationship with the prostitute with the agent, Applicant twice replied, "Because I did not want to." (Ex. 3; Tr. 108-110.)

After the special agent confronted Applicant and told him his investigation revealed Applicant's liaison with the prostitute at the motel, Applicant provided an affidavit, in which he admitted a sexual encounter with the prostitute. In his affidavit, Applicant stated that he was in a difficult second marriage and could not resist the prostitute. (Ex. 3.)

When Applicant executed and signed his e-QIP on November 20, 2008, he was asked to respond to the following question in Section 23:

Your Police Record a. Have you ever been charged with or convicted of any felony offense? (include those under Uniform Code of Military Justice)

Applicant answered "Yes" to the question in Section 23a. The e-QIP instructions request explanations for "Yes" answers. Applicant provided the following explanation: "I was in the middle of an acrimonious divorce and started seeing someone else. The wife found

³ Applicant's license was suspended because he failed to pay a speeding ticket in another State. After receiving the citation, he paid the speeding ticket, and his license to drive was later restored. (Ex. 3.)

out about it and really pushed the issue to my Command.” He further stated that he was subject to a “non-judicial . . . [adjudication] due to having an extramarital affair.” (Ex. 1.)

Applicant’s service record was entered in evidence, without objection. His official record indicated he received an honorable discharge after his non-judicial punishment. The narrative reason for his separation from the military was listed as “unacceptable conduct.” (Ex. 1; Ex. D.)

The SOR alleges at ¶ 1.c. that when he made the explanatory statement in response to Section 23a, Applicant knew it to be false in view of the facts that led to the military adjudication and the facts alleged at SOR ¶ 1.b. In his Answer to the SOR, Applicant denied the allegation and stated that he did not intend to falsify material facts. (SOR; Answer to SOR.)

Applicant’s witness testified that he has known Applicant for nine years. They have worked together, and they are also friends. The witness stated that Applicant was professional at work, and, when he entertained people in his home, he was very sociable and easy-going. (Tr. 169-178.)

The senior official whose signature Applicant forged provided a letter of character reference. In her letter, she stated:

It is my belief that [Applicant] had no criminal or malicious intent [in forging her signature]; he was just trying to get the job done and in doing so made a life changing mistake. I continue to believe in him and his commitment to the protection and security of our nation. (Ex. B.)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, and it has emphasized that “no 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.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant an applicant’s eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

When evaluating an applicant’s suitability for a security clearance, an 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 used 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, the administrative judge applies these guidelines in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching 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.

Under Directive ¶ E3.1.14, the Government has the initial burden of proving controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, responsibility then shifts to the applicant to refute, extenuate, or mitigate the Government's case by presenting witnesses and other evidence. Because no one has a right to a security clearance, the applicant bears the burden of persuasion. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting the national interest.

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).

Analysis

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

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.

Applicant's personal conduct raises security concerns under AG ¶¶ 16(a), 16(b), and 16(d)(3). AG ¶ 16(a) reads: "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 security clearance eligibility or trustworthiness, or award fiduciary responsibilities." AG ¶ 16(b) reads: "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative." AG ¶ 16(d)(3) reads: "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of . . . (3) a pattern of dishonesty or rule violations."

Applicant admitted falsifying a superior official's signature on a work order in 2012, and he admitted he received a letter of reprimand and a fine of one-half of one month's pay as non-judicial punishment for two violations of UCMJ Article 107, False Official Statement, and one violation of UCMJ Article 134, Pandering and Prostitution. These allegations appear at SOR ¶¶ 1.a. and 1.b. He denied SOR ¶ 1.c., which alleged he made a deliberately false statement in response to Section 23a on his e-QIP.

When SOR allegations are controverted, the Government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the Government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the Government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

When he was interviewed by two superior officers about his detention by police in April 2006, Applicant was not truthful about the nature of his relationship with a woman who was a prostitute and a drug user. He misled both of his superiors when he told them that he was simply taking a young woman home from a party when he was

stopped by police who identified the woman as a prostitute and known drug user. In reality, Applicant had initiated contact with the woman and had engaged in a paid sexual liaison with her. This conduct was alleged as a violation of UCMJ Article 134. Additionally, Applicant's untruthful statements to his superiors about his relationship with the woman were alleged as violations of UCMJ Article 107 at Applicant's appearance before a military adjudication and his subsequent non-judicial punishment.

After he was confronted by the military investigator, Applicant prepared and signed an affidavit admitting the behavior he had misrepresented to his military superiors. In his answer to Section 23a on the e-QIP he executed and signed in November 2008, Applicant again provided misleading information when he characterized the action before the military tribunal and his non-judicial punishment as the result of an extramarital affair reported to his command by his angry wife.

The Government established the facts alleged at SOR ¶ 1.c. Additionally, Applicant, a former military officer and a security professional, had held security clearances since 2005, and he was aware of the importance of telling the truth to the Government. When he executed and signed his e-QIP in November 2008, Applicant responded "Yes" to Section 23a and then cited marital difficulties and infidelity for his non-judicial punishment. The facts that gave rise to the non-judicial punishment contradict Applicant's assertion. The record establishes that he gave false statements to his two superior officers and to the military special agent about the nature of his relationship with a prostitute who was also involved with drugs.

SOR ¶ 1.a. alleges that Applicant forged the signature of a superior official on a work order. These facts raise concerns about his ability to follow rules and regulations. Applicant acknowledged that the forgery was for work that was not critical and was undertaken simply because he wanted to get the job done on his timetable. This raises concerns about his judgment and reliability.

Several Guideline E mitigating conditions might apply to the facts of this case. Applicant's disqualifying personal conduct might be mitigated under AG ¶ 17(a) if "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." If "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 process" and "[u]pon being made aware of the requirement to cooperate or provide information, the individual cooperated fully and completely," then AG ¶ 17(b) might apply. If "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," then AG ¶ 17(c) might apply. If "the individual has acknowledged that 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," then AG ¶ 17(d) might apply.

Applicant failed to mitigate the SOR allegations, and they continue to raise security concerns about his truthfulness and candor. By responding “Yes” to Section 23a and then giving an explanation that was not truthful in light of other allegations he had already admitted, Applicant falsified material facts on his e-QIP. Applicant did not make prompt, good-faith efforts to correct his falsifications before being confronted with the facts. The falsifications were not made pursuant to improper or inadequate advice from authorized personnel or legal counsel, nor were they minor, so remote in time, or carried out under circumstances that they were unlikely to recur. Applicant’s lack of candor about his contacts, as a military officer, with a drug-abusing prostitute, as alleged under SOR ¶¶ 1.b. and 1.c., raises concerns about his trustworthiness, reliability, and judgment. Additionally, Applicant’s forgery of his superior’s signature on a work order suggests an unwillingness to comply with rules and regulations, and raises concerns about his ability to properly safeguard protected information.

As a military officer and as a security professional, Applicant had reason to know that his lack of candor about his relationship with a prostitute, the punishment he received for that conduct, and his failure to follow rules and regulations related to military discipline and his civilian chain of command could raise security concerns. I conclude that none of the Guideline E mitigating conditions fully applies to the facts of Applicant’s case.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of an applicant’s conduct and all relevant 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) 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 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 in this case. Applicant, a mature adult, was first awarded a security clearance in 2005. When he executed a security clearance application in November 2008, Applicant was not candid about the circumstances of his non-judicial punishment when he was a military officer. At his hearing, he stated he did not tell a

military investigator about his relationship with a prostitute “because [he] did not want to.” Applicant’s lack of candor impacts his credibility and raises serious security concerns about his reliability, trustworthiness, and judgment. Applicant failed to meet his burden of persuasion in mitigating allegations under the personal conduct adjudicative guideline. Overall, the evidence in this case leaves me with questions and doubts about Applicant’s eligibility and suitability for a security clearance.

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

Subparagraphs 1.a. - 1.c.: 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.

Joan Caton Anthony
Administrative Judge