



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-00038

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: *Pro se*

12/04/2014

Decision

HARVEY, Mark, Administrative Judge:

Applicant was working in Afghanistan as a senior cultural advisor and linguist. In June 2010, he left Afghanistan without telling his employer in order to attend his sister’s graduation in the United States. He presented a false timecard to his employer to cover up his absence. When he returned to Afghanistan, he lied to his employer about leaving Afghanistan. He tore the pages out of his passport to conceal his unauthorized departure from Afghanistan. Personal conduct concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On December 27, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of security clearance application (SF 86). (GE 1) On April 24, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) as revised by the Under Secretary of Defense for Intelligence on August 30, 2006, which became effective on September 1, 2006. The SOR alleged security concerns under Guideline E (personal conduct). The SOR recommended referral to an

administrative judge to determine whether Applicant's access to classified information should be granted, continued, denied, or revoked. (HE 2)

Applicant provided an undated response to the SOR and asked for a hearing. (HE 3) On October 10, 2014, Department Counsel issued an amended SOR, and on October 17, 2014, Applicant responded to the amended SOR. (HE 5) Department Counsel was ready to proceed on October 10, 2014. On October 20, 2014, the case was assigned to me to conduct a hearing and determine whether or not it is clearly consistent with the national interest to grant or reinstate a security clearance to Applicant. On November 13, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, scheduling Applicant's hearing for November 17, 2014. Applicant's hearing was held as scheduled using video teleconference. Department Counsel offered four exhibits into evidence, which were admitted without objection. (Tr. 25-26; GE 1-4) Applicant did not offer any exhibits into evidence. (Tr. 15) Applicant made a statement on his own behalf. The transcript was received on November 25, 2014.

Procedural Rulings

Applicant waived his right to 15 days of notice of the date, time, and location of his hearing. (Tr. 11-12, 62-64) He consulted with an attorney before his hearing, but decided to represent himself. (Tr. 62-64)

Findings of Fact¹

Applicant admitted all of the SOR allegations, and he provided explanations and mitigating information. (HE 3) 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 a 32-year-old linguist, who served as a linguist in Afghanistan for about four years from 2005 to 2010. (Tr. 6-9; GE 1) He was born and raised in the United States. (Tr. 54; GE 1) He learned Pashto from his family at home. (Tr. 54) In 2000, he graduated from high school. (Tr. 6) In 2003, he received a bachelor of science degree in finance, and in 2004, he was awarded a master's degree in business administration. (Tr. 7) He has never been married, and he does not have any children. (Tr. 7-8) He has never served in the U.S. military. (Tr. 9) Applicant needed a security clearance so that he could return to Afghanistan and work as a linguist. (Tr. 46) In 2010, Applicant was being paid about \$170,000 annually as a linguist and cultural advisor. (Tr. 56)

The linguists at Applicant's location were allowed to go on leave every six months. (Tr. 36-37) Applicant wanted to go on leave in December 2009 and June 2010. (Tr. 36-37) He requested leave from his employer around December 2009 because he

¹The facts in this decision do not specifically describe employment, names of witnesses, names of other groups, or locations in order to protect Applicant and his family's privacy. The cited sources contain more specific information.

wanted to attend his sister's graduation from high school in June 2010. (Tr. 35-36, 51) Instead, he went on leave in February or March 2010, and his leave was not approved for June 2010. (Tr. 38) There were three assigned linguists, and his employer wanted to ensure contractor services were available to the command. (Tr. 35-37) Applicant believed his presence in Afghanistan was not essential because he primarily assisted a vice admiral, who was also on leave in the United States at the same time as Applicant was in the United States. (Tr. 39, 43, 47-48, 69, 73) Applicant was absent from his place of duty in Afghanistan for 20 days in June 2010. (SOR response for ¶ 1.a)

Applicant filled out and submitted a timecard for the time he was in the United States because he wanted to conceal from his employer that he was absent from Afghanistan. (Tr. 40-41; SOR response for ¶ 1.a) He was not paid based on the false timecard. (Tr. 56) When he returned to Afghanistan, he "wanted to come back and just go to work, and act like nothing happened." (Tr. 41) Within a day or so of his return to Afghanistan, the contractor's employees interviewed Applicant about his absence from Afghanistan earlier in June 2010. (Tr. 39) He lied about his absence from Afghanistan in sworn statements to his employer on June 23 and 24, 2010. (Tr. 42; GE 3; SOR response for ¶¶ 1.c and 1.d) He sent a false email indicating he was traveling in Afghanistan in early June 2010 and that he had permission from the vice admiral to do so. (GE 3; SOR response for ¶ 1.e)

Applicant did not believe that lying to his employer was a serious matter because he could just change jobs and have a different employer; however, now he realizes dishonesty to an employer is important. (Tr. 51) He was always honest with the U.S. military. (Tr. 51-52) His sister also worked for Applicant's employer; she filed a lawsuit against his employer; and Applicant wondered whether his employer was biased against Applicant because of the lawsuit. (Tr. 53) When U.S. Government investigators questioned him about being absent from Afghanistan, he was honest and admitted what he had done. (Tr. 55, 71)

Applicant went on numerous missions where he risked his life on behalf of the U.S. Government. (Tr. 33-34, 45) He was sorry about what he had done; apologized for his conduct; and his remorse at the hearing was evident and sincere. (Tr. 54, 60-62) He loves America and promised not to commit misconduct in the future. (Tr. 61)

Character Evidence²

On March 18, 2009, an Army colonel described Applicant as the best linguist and cultural advisor he had served with during multiple tours in Iraq and Afghanistan. Applicant is "intelligent, cheerful, professionally curious, willing to accept personal risk to accomplish the mission, and most importantly thoroughly dedicated to the task of rebuilding Afghanistan." He has magnificent potential.

On April 30, 2010, a vice admiral wrote commending Applicant's superior performance as a senior cultural advisor and linguist. He described Applicant as "my

² The sources for the facts in this section, unless stated otherwise, are Applicant's responses to interrogatories (GE 2) and the SOR.

trusted and valued personal advisor.” Applicant interacted with “high-level U.S. and Afghan government officials, members of U.S. Congress, and senior U.S. military officials.” He provided calming, positive, and invaluable contributions to the task force. The vice admiral lauded Applicant’s work ethic, initiative, and commitment in the strongest possible terms. After the allegations against Applicant surfaced, Applicant emailed the vice admiral to ask for his help; however, the vice admiral did not reply to his email. (Tr. 58-59) Applicant provided photographic evidence of his work in Afghanistan with a variety of U.S. Government and Afghanistan Government officials.

On May 8, 2011, the president of a company wrote about Applicant’s work as part of a training faculty providing services to State and Defense Department personnel being deployed overseas. He praised Applicant’s experience, background, professionalism, and performance. He provided his highest recommendation for Applicant.

A former DOHA administrative judge wrote Applicant’s congressman indicating Applicant’s contributions to national security and other evidence of his service in Afghanistan mitigated the concern raised by his “one-time mistake in judgment four years ago.”

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “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 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, 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 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 “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It 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. See *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. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 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). 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). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Personal Conduct

AG ¶ 15 expresses the security concern pertaining 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 describes three conditions that could raise a security concern and may be disqualifying in this case:

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(d) 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; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing. . . .

AG ¶ 16(b) applies. The Government produced substantial evidence that Applicant intentionally lied in two sworn statements on July 23 and 24, 2010 about his absence from his place of duty in Afghanistan. He sent in a false timecard and a false email, and removed pages from his passport to conceal or cover up his absence from his place of duty in Afghanistan.

AG ¶¶ 16(d) and 16(e) apply. Applicant violated rules when he intentionally submitted a false timecard, removed pages from his passport, and made false sworn statements to his employer. This conduct adversely affects his personal, professional, and community standing. Further analysis concerning applicability of mitigating conditions is required.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

(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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

None of the mitigating conditions apply to Applicant's intentional false statements and efforts to conceal his absence from Afghanistan. He failed to meet his burden of mitigating this conduct. More time must pass without Applicant's involvement in conduct of security concern before he will be eligible for access to classified information.

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) 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 have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under Guideline E, but some warrant additional comment.

Applicant presented some important evidence weighing towards approval of his access to classified information. Applicant provided letters from a vice admiral, colonel, president of a company and former DOHA judge attesting to his dedication, loyalty, responsibility, contributions to mission accomplishment, and trustworthiness supporting our forces as a linguist in Afghanistan. He is willing to continue to risk his life as part of his duties on behalf of the U.S. forces in Afghanistan. The Appeal Board has emphasized the importance of heroism on behalf of the United States in a combat environment stating:

[E]vidence of significant contributions to U.S. national security in dangerous, high risk circumstances is entitled to greater probative weight than evidence of mere compliance with security rules and regulations. . . . An applicant who has risked his own safety on behalf of the U.S. has demonstrated a willingness to subordinate his personal interests to those of national security, and this is entitled to significant weight in evaluating whether he will resolve conflicts of interest in favor of national security.

ISCR Case No. 13-00142 at 4 (App. Bd. Oct. 15, 2014) (citations omitted). However, the Appeal Board has noted that “evidence of a virtue like physical courage, that is not specifically related to truthfulness, may be insufficient to persuade a Judge of an applicant’s intention to self-report future security incidents, which is part of the Guideline E concern.” *Id.* at 4-5.

Applicant’s contributions to national security during his service in Afghanistan provide important information supporting approval of his security clearance; however, that information does not outweigh the series of dishonest actions and statements made to his employer in that same combat zone. I am particularly impressed by the statement of the vice admiral and colonel about his service in Afghanistan. Applicant clearly has the potential to eventually receive access to classified information and to contribute to the national defense.

The evidence against approval of Applicant’s clearance is more substantial than the evidence supporting approval of his security clearance at this time. When Applicant was working in Afghanistan as a senior cultural advisor and linguist, he had access to the highest levels of our military. In June 2010, he left Afghanistan without telling his employer in order to attend his sister’s graduation in the United States. He presented a false timecard to his employer to cover up his absence. When he returned to

Afghanistan, he lied to his employer about leaving Afghanistan. He tore the pages out of his passport to conceal his unauthorized departure from Afghanistan. He sent an email containing a false statement indicating the vice admiral had approved his travel elsewhere in Afghanistan. This is serious misconduct that reflects upon Applicant's integrity. He showed poor judgment, dishonesty, and an unwillingness to comply with rules and regulations. His misconduct raises questions about his reliability, trustworthiness and ability to protect classified information.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated personal conduct concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary to justify the award of a security clearance in the future. With the passage of more time without his engaging in conduct of security concern, he may well be able to demonstrate persuasive evidence of his security clearance worthiness.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude personal conduct concerns are not mitigated. Eligibility for access to classified information is denied.

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.e:	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.

Mark Harvey
Administrative Judge