



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



In the matter of:)
)
) ISCR Case No. 14-01056
)
)
Applicant for Security Clearance)

Appearances

For Government: Julie Mendez, Esq., Department Counsel
For Applicant: Brian M. Barke, Esq.

05/29/2015

Decision

LYNCH, Noreen, A., Administrative Judge:

On May 29, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns arising under Guideline E (Personal Conduct). DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AG) implemented in September 2006.

Applicant timely answered the SOR and requested a hearing before an administrative judge. The case was assigned to me on March 4, 2015. A notice of hearing was issued on March 17, 2015, scheduling the case for May 8, 2015. The case was postponed for good cause and rescheduled for May 15, 2015, with appropriate notice. Government Exhibits (GX) 1-5 were admitted into evidence without objection. Applicant testified and presented eight documents for the record (AX A-H). The transcript was received on May 21, 2015. Based on a review of the case file, eligibility for access to classified information is denied.

Findings of Fact

In his answer to the SOR, Applicant denied the majority of the factual allegations under Guideline E (Personal Conduct) with explanations.

Applicant is a 58-year-old engineering manager for a defense contractor. He served in the military from 1974 until 1994, receiving an honorable discharge.¹ Applicant obtained his undergraduate degree in 2005. He is divorced and has one son and one daughter. (AX E and F). Applicant has worked for his current employer for approximately a year and a half, but he has worked in the area of defense contracting for many years. He submitted an application for a security clearance on December 13, 2011. He has held a security clearance since 1975 and has gone through various security clearance reviews. (GX).

In 2008, Applicant underwent a series of three polygraphs for another agency. During the polygraphs he discussed various matters ranging from work situations to personal matters, such as inappropriate touching of his daughter in 1985. In a letter dated June 5, 2009, Applicant was “disapproved for access to classified information.” The letter detailed the reasons why his security clearance was denied to include the following: admitting to taking items and tools from 1997 to the present; inappropriately touching his daughter in 1985; withholding information during a 1997 security processing; and collecting benefits from the military on his son, who was not his biological son.² (GX 3)

The 2009 decision letter states that Applicant admitted that from 1997 through current security processing, he took the various tools and items listed in SOR 1.a. In Applicant’s appeal letter, he noted that “during my first Life-Style Polygraph in 1997 I told the personnel what I have done that (sic) and was very truthful about it. This appears to be inconsistent with a denial.” (GX 30)

Applicant appealed the 2009 decision to grant him access to sensitive compartmented information (SCI). In his appeal letter he denied taking any tools or equipment from employers. He stated that it was standard procedure to ask the customer if they wanted the various items described in SOR. If the customer said, “No”, the contractor could keep the parts and materials. (Tr. 37) He explained that they were unique tools (crimping tools, punch tools, fiber optic tools) and the company did not want them. (GX 3) Applicant was adamant that he never took anything that belonged to any government agency while he was working in the military or as a contractor. (Answer to SOR)

¹Applicant acknowledged that he received a disciplinary action in 1991 concerning wrongful appropriation of government property, but he explained he had receipts for the tool kits. (GX 4 and 5)

²Applicant produced the birth certificate for his son and explained that he was legally authorized to get benefits for him. His ex-wife told him during the divorce that the son might not be his.

In that same 2009 appeal letter, Applicant stated that the incident with his daughter is very disturbing. He said that he did not remember it in his 1997 interview and that he had been drunk and pushed it out of his mind until he was going through the 2008 polygraphs. He wrote in his appeal letter that his comment to the tester was taken out of context. Applicant stated that if he remembered it he might not have said something because it was embarrassing enough to tell a man and the person giving the lifestyle polygraph was a woman. (GX 3)

In January 2012, Applicant was interviewed by an investigator from OPM. He lied to the investigator in that he stated that he did not know the reasons why he was denied a full-scope polygraph clearance.³ He acknowledged that he did not have the 2009 denial letter with him but it is not plausible that he could not remember the reasons why he was denied, especially given the fact that he appealed the decision and addressed each issue.

As to the issue of the inappropriate touching of Applicant's daughter in 1985, Applicant neither admitted nor denied the allegation. He stated that this was a memory that came back to him when taking the polygraph. He said that he did not know if it was true; it came back to him one night after sleeping; and that he was drunk at the time of the possible incident. He added that to his knowledge there was no investigator from any agency who contacted his daughter to learn more about the allegation. At the hearing, Applicant denied the allegation as to his daughter. (Tr. 70)

At the hearing, Applicant stated that his daughter (4 years old) was in his bed; he got into the bed; and he took her underwear off and touched her. He still believes that it was a dream. (Tr. 58) Applicant reiterated that he told the investigator that he "did not remember" whether or not he inappropriately touched her.

Applicant submitted six letters of recommendation from people who have known him for many years. Each letter attests to Applicant's trustworthiness and ability to safeguard classified information. He is described by his employers as a gentleman who is honest. His current employer describes him as a hardworking, loyal, and trustworthy person. (AX A)

Policies

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. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision.

³Applicant disclosed the fact on his SF 86 that he was denied by the CIA in 2009.

Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” An 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.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”⁴ The burden of proof is something less than a preponderance of evidence.⁵ The ultimate burden of persuasion is on the applicant.⁶

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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.”⁷ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁸ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁹ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is

⁴ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

⁵ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁶ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁷ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁸ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁹ *Id.*

merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

Analysis

Guideline E, 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

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

(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;

(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:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information,

unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources;

(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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

Applicant received a disciplinary action in 1991 for wrongful appropriation of government property while in the military. A 2009 decision letter bases its denial of a security clearance on the fact that Applicant reported that he stole tools and equipment from various employers. Another reason for denial listed in the letter cites Applicant's admission that he had inappropriately touched his daughter in 1985, and that he withheld that information in a 1997 security clearance processing about inappropriately touching his daughter in 1985. In Applicant's 2009 appeal letter, he admitted during a series of polygraphs in 2008 that in 1997, he told the personnel what he had done and was truthful concerning taking tools and equipment from various employers. He denied taking anything after another life-style polygraph. In his appeal letter of 2009 to another government agency, he did not deny inappropriately touching his daughter, but claimed that he thought it was a dream.

In January 2012, when interviewed by an investigator for DOD, Applicant lied to the investigator when he denied that he knew the reasons why he was denied a full scope polygraph security clearance in 2008. He acknowledged that he received a letter of denial but did not have it with him. In his appeal of the 2008 denial of his security clearance, he discussed each of the allegations in detail. Thus, it is not reasonable to accept his claim that he forgot the reasons why his clearance was denied, especially the allegation relating to his daughter. He now denies the allegations and presents an inconsistent explanation. AG ¶ 16(b), (c) and (e) apply.

AG ¶ 17 provides conditions that could mitigate security concerns:

(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.

As to the 1991 disciplinary action, Applicant has mitigated the allegation that he accepted army benefits on behalf of his son to which he was not entitled due to the fact that it occurred so long ago. Also, Applicant presented documentation that he has the birth certificate for his son who received benefits from the military. This allegation has not been substantiated. As to mitigation for the 1985 inappropriate touching, there is no corroboration. As to the taking of government tools from 1997, Applicant admitted to this during his polygraph. Applicant deliberately misled the government during his 2012 interview when he did not provide the reasons why his security clearance was denied in 2008. None of the mitigating factors apply to his falsification under 1.c. As to SOR 1.b, there is unsubstantiated information, and I find for Applicant as to 1.d. I have doubts about his judgment and reliability. After considering the mitigating conditions outlined in AG ¶ 17, I conclude Applicant has not mitigated the security concern under personal conduct for SOR 1.c.

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 an 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the whole-person factors. Applicant served in the military for 20 years and received an honorable discharge. He presented six letters of recommendation. He has worked in the defense field and has held a security clearance for a long time.

As to the personal conduct concerns, Applicant deliberately falsified his 2012 security clearance interview with respect to the deliberate omission of the reasons why he was denied the security clearance in 2008. I am not persuaded by latest explanation about why he did not falsely deny knowing the reasons the other government agency refused to grant him a security clearance during his interview in 2012.

I have doubts about his judgment and reliability. Any doubts must be resolved in favor of the Government. Applicant has not met his burden in this case. He has not mitigated the security concerns under the personal conduct guideline.

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:	For Applicant

Subparagraph 1.b:
Subparagraph 1.c:
Subparagraph 1.d;

For Applicant
Against Applicant
For 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 a security clearance. Clearance is denied.

NOREEN A. LYNCH.
Administrative Judge